LEGAL LIABILITY OF THE PHYSICAL EDUCATOR
IN CANADA

by

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Date DECEMBER 1975
The purpose of this study was to examine and interpret the legal decisions of the Canadian courts in litigation concerning tort liability on the part of the physical education teacher and coach in the gymnasium, on the playing field, in the community recreation classes and on athletic trips up to and including early 1975.

Basically, the answers to the following questions were sought:

1. What is negligence in law and how does this apply to the Physical Education teacher?
2. If a teacher is involved in a law suit what legal defenses are open to him or her?
3. What are some of the areas in the school system which a teacher should be particularly aware of in terms of potential legal problems?

The study aimed to stimulate: (1) an appreciation for protecting the student in the school environment and on athletic trips (2) an understanding of the basic precepts of liability that might have an adverse or constructive effect on the school program (3) a realization that loss of professional integrity and financial loss can be painful consequences of one's liability.

An attempt was made to clarify basic legal issues in the area of tort liability that concerns the physical
educator in Canada, and to point out issues that the Physical Education teacher should be aware of in evaluating activities in the light of possible repercussions. Also, where major problems were discovered concerning the P.E. teacher's legal status in Canada, recommendations were made as to solutions to these problems.

The research was carried out through an investigation of Canadian court cases relating to the topic of legal liability and the physical education teacher. From these cases it was possible to establish some basic legal principles concerning teacher liability in the classroom, in the gymnasium, on the playing field and on trips away from the school environment.
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CHAPTER I

INTRODUCTION TO THE PROBLEM

Statement of the Problem

The purpose of this study was to examine and interpret the legal decisions of the courts in litigation concerning tort liability on the part of the physical education teacher and coach in the gymnasium, on the playing field, in the community recreation classes, and on athletic trips, in the Canadian schools up to and including early 1975.

Basically, the answers to the following questions were sought:

1. What is negligence in law and how does this apply to the physical education teacher?
2. If a teacher is involved in a law suit, what legal defenses are open to him or her?
3. What are some of the areas in the school system, that a teacher should be particularly aware of in terms of potential legal problems?
4. In view of the above three problems, what impact does the teacher's legal position have on the profession of physical education?

The study aimed to stimulate an appreciation for protecting the student in the school environment and on athletic trips as well as an understanding of the basic precepts of liability that might have adverse or constructive effect on the school program.
Consideration was given to teacher-pupil relationships which arise out of the position of special responsibility that the teacher holds in relation to his pupils. The teacher has in many respects an intermediate position between School Board and pupil, inasmuch as a master-servant relationship exists between School Board and teacher and the "careful father" (in loco parentis) relationship between teacher and student.

Teachers may be called to account for alleged neglect of duties and responsibilities arising therefrom, due to their obligations to act as a "careful parent". On the other hand, the master-servant relationship with the School Board tends to protect the teacher from liability arising from the former condition. The task of the study of the physical educator and the law is to determine the nature of these two relationships and to assess the legal consequences that ensue when either one or both are dislocated. The major legal concept of concern here is that of negligence and liability resulting from it.

In addition to just helping physical education teachers and coaches to avoid liability, the knowledge of legal liability will make them more familiar with the care that must be used in their conduct to avoid injury to pupils and to devise and initiate ways to prevent such accidents or even possibly reduce their frequency. Thus, an attempt was made to evaluate and determine basic legal principles
in the area of tort liability that concern the physical educator in Canada, and to point out issues that the physical education teacher should be aware of in evaluating activities in the light of possible legal repercussions. Also, where major problems were discovered concerning the teachers' legal status in Canada, recommendations were made as to solutions to these problems.

Need for the Study

Compared to other types of professions or businesses, the physical educator in Canada is ignorant of his legal status. The professions of dentistry or banking make the law concerning that profession an essential subject. Similarly, medical jurisprudence is an important part of the study of the medical profession. Unfortunately, physical education teachers are allowed to remain ignorant of the legal aspects of their profession in their educational preparation in the majority of Canadian colleges and universities.

If a teacher wishes to engage in personal research in school liability he is faced with the problem of locating material pertaining to this facet of law. It appeared that in Canada, there has been very little research concerning the legal liability of the physical educator. There was a need to search out exhaustively the very recent and past cases in the Canadian courts pertaining to the physical educator and examine the litigations concerning this in the various provinces. Also, an investigation was carried
out to review each province's School Act and its position on legal liability. Correspondence with Teachers Federations across Canada indicated that in most provinces there was little or no effort on their part to inform the physical education teachers as to their legal liability. Thus, there appeared to be a need for a study in this area which would investigate legal principles and possibly lead to a publication in the form of a handbook which would set out the legal status of the physical educator in Canada.

This study should aid Canadian physical educators to clarify their position with respect to legal liability in the Canadian schools. The status and future growth of the physical education curriculum are, partially at least, dependent on the decisions of the Courts in cases involving liability for Torts. It was important, therefore, that the trend and direction of Tort liability, as it pertained to physical education, be studied carefully and reported.

Limitations

The study is limited by:

1. Inexperience of the writer with legal terminology and lack of extensive knowledge of the field of law in general. Possible erroneous conclusions which may be drawn from the materials covered and any apparent shortcomings of this study might be attributed to this limitation.
To minimize the limitation, the writer sought the aid of several lawyers, faculty members of the Faculty of Law at The University of British Columbia, and law students in reviewing the materials for the study.

2. The availability of Canadian cases in which to explain certain points of law. Reference was made to some American and English cases to provide additional information to further clarify the topics under discussion.

3. The conclusions that were drawn in the study were based on reported cases up to the end of February 1975. Because of possible cases pending and also in the process of being appealed at the time of writing the thesis, important changes in the law could result in rendering some of the conclusions inaccurate. This factor illustrates the importance of a constant appraisal of the entire legal situation concerning liability of the physical educator in the schools.

Definitions

1. **Common Law**

   Common law is often considered as unwritten law in the sense that it was not established by a legislature (ie) passed in parliament. It is often referred to as judgemade law because it arises from judgements and decrees of the courts.
2. **Negligence**
   The omission to do something which a reasonable man would do, or the doing of something which a reasonable and prudent man would not do under the circumstances in question.

3. **Liability**
   The state of being bound or obliged in law or justice to do, pay, or make good something.

4. **Respondeat Superior**
   A master is liable in certain cases for the wrongful acts of his servant.

5. **Tort Liability**
   A tort is a legal wrong. A tortious act consists of the omission or commission of an act which results in an injury to another, directly or indirectly, in person or property. A tort may arise out of the following:
   
   (a) commission of an act which is unlawful and intended to cause harm.
   
   (b) omission to perform a specific legal duty.
   
   (c) commission or omission of an act causing harm which was unintentional but which should have been foreseen and prevented.

6. **Plaintiff**
   The individual or individuals who bring a law suit against another for some type of damages suffered.
Defendant

The individual or individuals upon whom damage is charged.

Method of Procedure

The major method of research used in this study was a form of Historical and Legal research. Most of the pertinent data concerning the problem was sought through the resources of the Law Library at The University of British Columbia. However, where necessary, judges and lawyers, particularly knowledgeable in the area and correspondence with the above outside the province of British Columbia were consulted for additional information.

The method of research involved locating each individual case among the various volumes of reported cases. The major technique involved in analyzing the data was, in legal terms, "briefing a case". Generally, this is a condensed form of the actual case and includes the following items:

1. The name of the case and its citation.
3. The issues or questions of law that are involved.
4. The decision of the court.
5. The reasons for the decision in view of the evidence, the facts of the case as presented, the issues of law involved, and the rulings of previous courts in similar or parallel cases.
Presentation of the data was in the form of the rulings of the courts as they pertained to the text of the thesis.
CHAPTER II

REVIEW OF THE LITERATURE

Studies indicate (Dzenowagis, 1962; Seeley, 1962; Muniz, 1962) that more students are injured in physical education classes than in any other school activity. In the 1950's a number of physical educators pointed out the need for the teacher to become aware of the relationship between the physical education profession and the law.

Leibee (1952) stated:

"...it is of fundamental importance...that teachers be aware of their potential tort liability as established by the statutes and decided cases in the states where they teach".

Shaw (1955) stated:

"Every teacher, administrator and member of a board of education works as a parent pro tem under the legal doctrine of 'in loco parentis'. It is a sword of Democles, (working threateningly in school accident liability). In loco parentis should be thoroughly explained to every newcomer to education be he lay board member or professional pedagogue as a sobering and salutary concept of his relationship to his charges. This will help prevent action in school that may be actionable in court".

Carlson (1957) stated:

"...let us face the problem of tort liability realistically. We cannot claim ignorance of the


law as an excuse. Our duty is to know what the law is, remove every possibility for injury we can, and then exercise alert supervision".

1 Fahr (1958) stated:

"...one thing is certain; it is a trend of the times to expand both the area in which tort liability is likely to be found and the amount recoverable upon proof of such liability. No one engaged in physical education can ignore this trend, and thoughtful persons so engaged must see to it that personnel training and maintenance of facilities take full account of it".

2 Rice (1961) stated:

"...it is obvious that, as a group, teachers occupy a position in which there is considerable legal risk. It is important, therefore, that teachers and particularly the physical education teacher, understand the legal hazards of the profession to which they belong".

Baker (1972) emphasizes that the possibility of a school teacher being involved in a school-related injury is greater now than at any time in educational history.

McCurdy (1968), maintains that while teachers question their professional status and other aspects of their profession, they fail to concern themselves with their legal status. In discussing the legal status of the Canadian teacher, McCurdy makes the following comment:

"While both teachers and laymen have been debating the professional and social status of teachers, recent studies respecting the legal status of the school pupil and the school board have focused attention on yet another repository of status, the status which derives from the law of the land.

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Most teachers are aware that the law prescribes certain duties for them, that school boards have authority over them, and that their professional organizations are acquiring a measure of influence over their station in the educational world. It is doubtful, however, if teachers generally realize the extent to which the legislation determines their rights, duties, powers, privileges and responsibilities”.

(Mccurdy; 1968, p. 3)

Seeley (1962) identifies the areas of greatest potential to the school pupil—athletic fields, gymnasiums, school grounds and classrooms.

Concerning teacher negligence, McCurdy (1968) holds that the teacher should not be afraid of liability if he exercises care in carrying out his responsibilities for the safety of his pupils, because he is protected to some extent because of his master-servant relationship with the School Board.

Lamb (1959), in discussing legal defenses open to the teacher states:

"Besides the negative, but important, defence that the onus is on the plaintiff to show negligence, the most secure shelter for teachers is the maxim respondeat superior, literally let the superior answer, which assumes that a master is responsible for the actions committed by a servant during his course of employment if they are specifically or implicitly authorized. Thus, when an accident occurs which leads to a negligence suit the school board is automatically involved through respondeat superior although it would appear that the accident resulted wholly from teacher negligence. Therefore, in cases where teachers are at fault, they receive the protection afforded by the greater financial strength of the board".

(Lamb; 1959, p. 54)
Kigin (1964) feels that school law as it relates to teachers, is complex, but it does not constitute an insurmountable obstacle. Changes in the structure and interpretation of existing law, as well as the success attained by certain plaintiffs have all encouraged more aggrieved students and their parents to initiate litigation in an attempt to realize award for damages. An understanding of those factors which constitute liability will not only serve to protect the teacher, but will also make him more alert to potential hazards in the classroom, gymnasium and on the playing field.

Kigin goes on to state that under another legal doctrine called "in loco parentis" (in the place of the parent) school people assume some of the rights and duties of a child's parent. Among other things, this means that a teacher is entitled to receive the respect due his position and has the right to control the class for the good of the school. However, in the discharge of these rights, teachers are bound to act as reasonable and prudent parents would act under the same or similar circumstances.

Tener (1963) contends that:

"A coach has the legal stature of "loco parentis" (place of the parent) to his pupils, and should exercise the care and prudence of a parent in his coaching. There's no such thing as being too cautious. Every coach should learn the legal principles upon which negligence rests. If he can justify his behaviour and construct sound legal defenses, he can evade liability".

(Tener; 1963, p. 51)
Bird (1970) sets out the conditions that must exist in order for negligence to occur. A right must exist upon the part of the plaintiff, and a corresponding duty must exist on the part of the defendant towards the plaintiff's right. The defendant must fail to observe the duty toward the corresponding right of the plaintiff, and damages must be suffered by the plaintiff. A plaintiff will have grounds for a case if one or all of these conditions are violated.

He maintains that the important areas of concern should be adequate supervision and preparation, area and apparatus inspection, emergency care, and accident reports.

Leibee (1965) states:

"The relationship of teacher to pupil requires generally, that the teacher act as a reasonably prudent person would act under the same or similar circumstances, carrying out the duties of the teaching profession. That is, he is measured by the usual tort standard of conduct which, though stated simply, is often difficult to apply. If the circumstances existing at a given moment would cause the fictitious reasonably prudent person to take some action or refrain from conducting himself in some manner, and the teacher fails to act or fails to refrain, then he has been negligent.... has breached the legal duty he owes his students and is liable if injury results".  
(Leibee; 1965, p.12)

Trubitt (1966) feels that the key to prevention of school tragedies lies in the application of common sense, good judgement, and basic humanity. Each day, every teacher is in a position to incur legal liability, as he works in a situation that contains all the ingredients of
a damage action: supervisory responsibility, young students, and all types of physical activity. These ingredients are present in every school and are inherent in teaching.

He elaborates on supervision, by contending that the ability to supervise implies effective supervision, not mere presence. Teacher effectiveness may be limited by the number of students in the group, ability to observe the entire teaching area (important in areas with blocked visibility), necessity for the teacher to be absent for periods of time, and physical ability of the teacher to extend his supervision everywhere.

Concerning what is legally adequate supervision, Nolte, (1965), maintains that since the teacher stands in the place of the parent, the teacher in turn must exercise a degree of care and caution which the average parent of normal prudence and foresight would have exercised under the same circumstances. The duty of the court in each case is to view the circumstances and ascertain what the "average parent" would have done. However, the courts do not expect a superhuman awareness of danger.

Kigin (1964) states:

"Like parents, teachers and administrators assume a degree of responsibility for the health, safety and welfare of children in their charge. Since pupils are minors, they cannot be expected to make mature judgements and are more likely to get into potentially hazardous situations without full knowledge of the consequences. Teachers and administrators inherit from parents the duty of providing adequate direction and supervision to keep youngsters free from injury. Therefore, any deviation from the normally required supervision can result in a charge of negligence". (Kigin, 1964, p. 3)
Along the same line, Seeley (1962) states:

1. When parents surrender the custody of their children to school authorities, they are entitled to expect the school people to exercise judgement and common sense to prevent avoidable injuries.

2. Common sense dictates the necessity of supervision, particularly on playgrounds.

3. School Boards should, by regulation, adopt minimum standards which specify the types of activities requiring supervision by members of the school faculty.

(Seeley; 1962, p. 190)

According to Scott (1964), basically what governs whether or not a School Board and/or its employees can be found legally liable for damages as a result of any accident is the nature of the circumstances surrounding its cause. The question of whether negligence occurred is, in the final analysis, only determined by decision of a Court of Law. For practical purposes, however, the decision will rest upon whether or not, depending on all known circumstances as to the cause of the accident, it happened because something was done which a reasonable and prudent man, as a trustee or employee of a School Board (or the Board as a body), should not have done, or because something was not done which should have been done.
Rosenfield (1963), emphasizes that the law does not expect that one should have been able to foresee the specific accident that occurred. For a person to be held negligent, it is enough that reasonable prudence would have forewarned him that something untoward might or could happen under the circumstances. In short, if one could or should have anticipated trouble, his failure to take preventative action is imprudent - and therefore negligent.

Similarly, Muniz (1962), states that it is conceded by the courts that some accidents can happen no matter how close the supervision. The question to be answered is whether or not the supervision provided was adequate for the particular situation. This does not mean that a teacher must be stationed at each piece of equipment or over each child who is participating in an activity. What is required by law is the exercise of "due or reasonable care".

Koehler (1972) stresses the importance of the physical educator possessing knowledge and understanding of liability laws.

"It must be a knowledge that will enable them to perform their task of aiding the distressed or injured without needless jeopardy on their part. Generally, it is the motivation toward the humanitarian deed in situations of distress which lead to a litigation, for at the time of the act the legal ramifications are furthest from the actor's mind".

He proposes a number of points which the physical educator should be aware of:

1. Supervision - group size, nature of activity, and type of participants.
2. Ability Grouping - Age, size, health and skill ability level.

3. Equipment - Fit, quality, safety factors.

4. First Aid - Training, standardized procedure, report forms, follow-up and referrals.

5. Inspection - Equipment and facility defects, report forms, procedure and repair.

6. Safe Environment - Nature of activity, numbers participating, safety engineering (area design, location and hazard free).

(Koehler; 1972, p.30)

Jordan (1964) suggests a number of points that a coach should consider in administering a successful program:

1. Provide every athlete with safe equipment, and make speedy exchanges and repair when necessary.

2. Take necessary steps to condition the players prior to the start of scrimmages or games.

3. Be sure that complete physical examinations are given to all participants before they are allowed to begin practice.

4. Be aware of proper first aid techniques, and have the necessary supplies and equipment to handle any emergency.

5. Never allow an athlete to participate unless he has been given sound training in the fundamentals of the game.

6. Adapt all his activities to the abilities of the
participants.

7. Have a physician present at all contests.

8. Never return an injured player to the lineup without the physician's approval.


10. Remember that a moral as well as legal responsibility exists. A lawsuit successfully defended would provide rather hollow satisfaction if an athlete was left permanently injured.

(Jordan; 1964, p. 77)

Grieve (1967) holds that it is the teacher's responsibility to ensure that equipment and facilities are proper for the activity and provide the participants with the optimum of safety. The teacher should consider all of the possible facilities which might be utilized for athletic events including fields, tracks, gymnasiums, courts, and even locker rooms. He suggests that:

"With the numerous legal actions which have involved equipment and facilities, all those concerned with athletics in the school situation must give consideration to these factors. If there is the least possibility that existing equipment or facilities could result in legal action, it is an obligation of all personnel to rectify such situations".

(Grieve; 1967, p. 78)

Transportation is an area which potentially holds the possibility of serious problems should care not be taken in the transport of pupils. One of the most serious problems is involved in the use of teacher-owned automobiles.
Traufler (1965) recommends that in transporting school students, a common carrier should be used rather than private cars since drivers of common carriers are professionals and are trained to concentrate on operating the vehicle. When parents or other students drive cars, they often become involved in conversation and forget to concentrate on their driving. The common carriers are more protected in the amount of insurance coverage they are required to carry.

Garber (1964) contends that any administrator or teacher who gives a student an automobile ride - even when it's an emergency trip to the doctor - ought to make sure his automobile insurance coverage is adequate. If there is an accident and the youngster in his car is injured, the teacher could be held personally liable.

Nolte (1964) contends that Boards must exercise extraordinary care in all matters relating to pupil transportation. He suggests the following as being pertinent:

1. The pupil transportation should be completely under the guidance and control of a comprehensive set of written board policies. Where the budget permits, the program should be under the administration of a specially trained bus dispatcher.

2. Only the highest quality of equipment should be used. Safety rather than economy should be the deciding factor.

3. Only the highest quality bus drivers should be employed. Drivers should be given physical
examinations at frequent intervals, including eye
tests, and close checks should be made of any change
in the physical condition of each driver.

4. Periodic, exhaustive examinations of moving equipment
should be included in the board's plan.
Accidents arising from mechanical failure may
occasionally exonerate the board.

5. Bus routes should be laid out with top priority to
the safety of pupils transported.

6. Ample insurance coverage of the liability type should
be carried at all times. Consultations between the
insurance representatives, school lawyer, and top
administrators plus a representative from the board
should arrive at what constitutes ample coverage
under present conditions.

(Nolte, 1964, p. 32)

Even though it is up to the school board to procure
an insurance policy to protect itself and its employees,
the teacher should be familiar with some basic principles
of insurance. The teacher must be aware of the areas of
liability in which the school board policy does not offer
protection. The reporting of accidents to the insurance
company is an important issue that must not be overlooked.

Levensohn (1965) suggests that no matter how trivial
an accident may appear, it should be immediately reported
to the insurance company. A large liability claim may
result from a small accident although it may have been unsuspected at the time. All the facts of the accident should be reported honestly, including any evidence which may be interpreted as negligence. The report should include the names and addresses of all witnesses and a description of all actions (including first aid) which were taken as a result of the accident.

Shroyer (1964) recognizes the perplexing problem of what might be considered adequate first aid treatment. He outlines a number of general principles to follow:

"If immediate first aid seems indicated, the coach is obligated to do the best he can. If he has had some first aid training, he would be expected to act as a reasonably prudent trained person, leaving the injury in a better condition than he found it.

If the coach has not had first aid training, he'd be expected to act as a reasonably prudent layman. It would seem that a board of education which hired a coach without first-aid training would be placing itself in a precarious position because of the high frequency of injuries that occur in athletics". (Shroyer; 1964, p. 18)

Gold and Gold (1963) define some of the responsibilities and corresponding liabilities of the physical educator who renders first aid to an injured pupil:

"It may be set down as a general principle that when an emergency arises in which a pupil is seriously injured, and a school nurse, doctor, or other medically trained person is unavailable at the moment of the accident, there is a duty upon the physical education teacher to administer first aid to such pupil. Failure to do so could very well make the P.E. instructor liable for negligence in an ensuing lawsuit.

One of the reasons this legal duty is imposed upon physical educators is because our courts have consistently held that teachers stand 'in loco parentis' to a pupil, which means that they have a parent's duties and responsibilities". (Gold and Gold; 1963, p. 42)
Giles (1962) emphasizes that a coach is charged with the responsibility of prudence and care in his work. Consideration must be given to the risk involved in the particular game being played. When a student is injured, the teacher should not gamble on the youth's resiliency, but place the student immediately in the hands of a competent physician and notify the parents.

The review of literature indicates that the law is an extremely important part of the teaching profession. The physical education teacher and coach must make themselves familiar with the legal pitfalls of their profession in the areas in which they teach, in order to avoid lawsuits.
REFERENCES


22. Garber, L.O., "Teacher's Autos and Student Passengers", *Education Digest*, vol. 29, p. 34.


CHAPTER III

TORT LIABILITY

1 Woods et al (1973), define the scope of the teachers liability:

"The term "tort" as it pertains to tort law and education is a very difficult term to define. It is questionable whether or not any textbook has ever successfully introduced all of the definitions of this term. Physical education teachers, intramural directors, and athletic coaches have been involved in court cases related to tort liability for years. Teachers may be liable "in tort" for several different reasons, but teachers and coaches are usually liable for damages when negligence is established. If the teacher is judged negligent, it usually implies that the teacher has failed to act as a 'reasonably prudent and careful' parent would act under the circumstances to avoid exposing others to unreasonable danger or risk of injury or harm. Negligence may also consist of the omission to act as well as in acting positively".

This chapter is not concerned with the whole of Tort law. Even if it were feasible, a complete consideration of this subject would be outside the scope of this study. However, it is necessary to give a general definition of torts as the law of negligence forms an important part of the law of torts. Broadly speaking, a tort is a wrongful act for which a civil suit may be brought for the recovery of damages. A tort may be either a negligent act or a failure to act. It can also be an

intentional act which causes injury to another person. A wrong is called a tort only if the harm which has resulted, or is about to result from it, is capable of being compensated in an action at law for damages, although other remedies may be also available. In general, a tort consists of some harm done to the plaintiff by the defendant without just cause or excuse. The law of torts acts as a shield to prevent individuals from hurting one another, whether in respect of their property, their person, their reputation, or anything else which is theirs. The fundamental principle is to hurt no one by word or deed. An action of tort, therefore, is usually a claim for pecuniary compensation in respect of damage suffered as the result of the invasion of a legally protected interest.

For a plaintiff to recover for tort he must show that he was not in the wrong, nor had given consent; also, that the defendant was legally responsible.

Further, the plaintiff must show a legal duty of the defendant to the plaintiff; and the plaintiff must show damage conforming to the standard of the law as the proximate result, except where proof of violation infers damage.

There are numerous causes of torts, but by far the most common, as far as the teacher is concerned, arises out of negligence. However, this does not preclude the possibility of tort arising from causes other than negligence.
Negligence

What is negligence? When is a person negligent? In order to find an answer to these questions, let us take a look at a few points of law referring to this. Generally speaking, negligence refers to conduct of the actor which involves unreasonable risk for another or failure to act in a manner which is necessary for the assistance or protection of another; i.e., the failure to act as a reasonably prudent person would act under the specific circumstances involved. In other words, negligence is conduct which falls below the standard established by law for the protection of others against unreasonably great risk of harm.

Lord Atkin, in *M'Alister v. Stevenson*, stated:

"Liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa'*, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure, cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be -

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* A civil law term meaning fault, neglect or negligence.
persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”.

In most instances, negligence is caused by heedlessness or carelessness, which makes the negligent party unaware of the results which may follow from his act. But it may also exist where he has considered the possible consequences carefully, and has exercised his own best judgement. In other words, a teacher can be negligent because he did not act reasonably or prudently, and he can be negligent for either action or inaction in which imminent hazards were not foreseen and should have been.

The case of Moddejonge et al v. Huron County Board of Education et al, illustrates the principle of foreseeability. In this case, the defendant teacher was employed by the School Board as co-ordinator of the outdoor educational programme of one of the Board's high schools. At the time in question, he was one of the supervisors of a “field trip” organized by the school and sponsored by the Board. The School Board was found liable for the negligence of its employee, the teacher, in permitting a 15 year-old school girl to drown while participating on a field trip sponsored by the School Board. In an attempt to rescue the first girl, another 15 year-old

1. Ibid. p. 149.

girl drowned. The teacher was liable in negligence for the deaths of the two girls because it was within the scope of his duty to guard against the foreseeable risks the girls were exposed to. The swimming area created a real risk to the girls. The teacher was unable to swim, no life-saving equipment was available, and he took no action when a breeze came up creating waves that caused one of the girls who could not swim, to be carried out into deep water. The teacher also had moved away from the students when they were close to the danger area. The defendant School Board was also liable because the teacher was acting within the scope of his employment.

The second girl who drowned, had swum out and rescued a fellow student. She then went out to rescue the other girl, but the final outcome was that both girls drowned. It was held by an Ontario court that the teacher was also liable for the death of the second girl.

Judge Pennell stated:

"When a person by his negligence exposes another to danger it is a foreseeable consequence that a third person will attempt to rescue the one in danger, and the attempted rescue is part of the chain of causation started by the negligent act. The act of (the girl who attempted rescue) was not unreasonable in the circumstances, as was evident from the fact that she successfully rescued one child". 1

"There is no general duty to assist anyone in peril. It is a great reproach to our legal institutions that rescuers for many years were denied recovery by a train of reasoning based on the concept of voluntary assumption of risk. Eventually justice comes to live with men rather than with books. It fell to Justice Cardozo to allow the claim of humanity. I borrow, with respectful gratitude, a passage from his

1. Ibid. p.438
judgement in Wagner v. International Railway Co., 232 N.Y. 176:

Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to the rescuer. The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrong doer may not have foreseen the coming of a deliverer. He is accountable if he had."

This principle established above has been followed ever since.

The standard for negligence is an external one imposed by society. It is not necessarily based upon any moral fault of the individual; and a failure to conform to it is negligence, even though it may be due to stupidity, forgetfulness, an excitable temperament, or even sheer ignorance.

Judge Dysart, in Carlson v. Chochinov, states:

"Negligence is a question of fact not of law. Negligence is the failure, in certain circumstances, to exercise that degree of foresight which a court, in its aftersight, thinks ought to have been exercised. The proper standard of foresight and care are those attributed by the court to a reasonably careful, skillful person. The ideal of that person exists only in the minds of men, and exists in different forms in the minds of different men. The standard is therefore

1. Ibid. p. 438.

far from fixed or stable. But it is the best all-around guide that the law can devise, and the degree of correctness with which it is applied in deciding cases depends on the ability, astuteness and wisdom of the court that makes use of that guide".

However, carelessness is not the real basis of negligence. The real basis is behaviour which should be recognized as involving unreasonable danger to others. When the mythical "reasonably prudent" person could have foreseen harm from either action or inaction in a particular circumstance, the consequent accident or injury is negligence because it resulted from a disregard of what could have been foreseen or anticipated.

Negligence involves the concept of risk. It is negligence when one acts unreasonably in failing to guard against a risk which he should have appreciated. The concept of risk involves a recognizable danger, based upon some knowledge of the existing facts, and some reasonable belief that harm may follow. A risk is a danger which is apparent, or should be apparent, to one in the position of the actor. The culpability of the actor's conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward "with the wisdom born of the event".

Before allowing a student to participate in any activity, the teacher should assess the degree of risk involved. In Murray v. Board of Education of Belleville, a grade eight pupil was injured while erecting a pyramid in a physical education class and fell and broke his wrist. He claimed damages on the ground of negligence, alleging that he was obliged to take part in the exercises which were intrinsically dangerous, and which were directed by a servant of the defendant Board who had not the necessary knowledge or skill for such duties; that the Board had been negligent in employing such an instructor, in prescribing such exercises, and in failing to take adequate precautions against accident.

The case was dismissed because of the following reasons:

1. Adequate instruction was given.
2. The instructor took all care necessary in conduct and supervision.
3. The exercise was prescribed in the curriculum and was not unreasonably hazardous.
4. Children not physically fit for them were not compelled to participate.
5. It was not unreasonable.
6. It was suited to the age, mental abilities and physical condition of the plaintiff.

7. The plaintiff was mentally alert and physically fit to take part. He did so of his own free will.

Concerning the case, Justice Chevrier stated:

"It was true that the principal of the school had said that pyramid forming and breaking was inherently dangerous, but this must be understood in the light of everyday experience and common sense, and the Court, sitting as a jury, could take notice that there was an element of danger in all sports, even the less dangerous ones, but that at the same time that element of danger could be reduced to a minimum when the participants observed the rules of the game, and played with reasonable prudence and care after having, in proper cases, been progressively trained and coached. His lordship found as a fact that the infant plaintiff had been reasonably trained and coached in the performance of this exercise".

In determining negligence, the standard is one of conduct, rather than of consequences. It is not sufficient that after the event one could see that there was a great risk involved if this risk was not apparent when the conduct occurred. The law does not expect that one should have foreseen the specific accident that occurred. In other words, the critical legal question is whether in the ordinary exercise of prudence and foresight, one should have anticipated danger under the circumstances. If the answer is "yes" to this criterion, then negligence will have occurred, since one could have anticipated trouble but failed to take preventative action.

To determine the nature of the risk, the court must put itself in the actor's place. However, the standard
imposed is determined by what society demands of the individual, and thus is an external one. The individual cannot base this standard upon his own notions of what is proper. He may be absolved from moral blame due to an honest blunder, or a mistaken belief that no danger will result, but the harm to others is still as great, and the actor's individual standards must give way to those of the society.

The conduct, to be negligent, in the light of recognizable risk, must be unreasonable. Of course, nearly all human acts, carry some recognizable but remote possibility of harm to another. However, those risks against which the actor is required to take precautions are those which society in general, considers sufficiently great to demand them.

The standard of conduct which is the fundamental basis of the law of negligence is determined by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect. As a result, it is difficult to reduce negligence to any definite rules; it is "relative to the need and the occasion". Consequently, conduct which would be proper under some circumstances becomes negligence under others. Whether a person is or is not negligent depends upon the specific facts of the case in question.
Not every accident can or will result in a lawsuit.

**Elements of Cause of Action**

For a cause of action to exist founded upon negligence, from which liability will follow, more than conduct is examined. The elements necessary for a successful action for negligence have been summarized by Prosser as follows:

1. There must exist a legal duty for a person to maintain a standard of conduct for the protection of others against hazardous risks. The duty must be directly to the plaintiff involved. The prevailing view is that there can be no duty towards someone for whom no duty can be reasonably foreseen.

   As Judge Haultain stated in *Smith v. C.P.R.*:

   "Negligence consists in omitting to do something which ought to be done. If there is no duty to take care, there is no negligence in the legal sense of that word".

These duties are imposed upon a person by both statute and common law. For example, statute law requires that School Boards keep buildings and equipment in good repair and common law requires that Boards and teachers as occupiers of property take certain precautions for the safety of the persons who use that property.

2. The defendant must fail to conform to the standard of conduct required and a failure to exercise due care.
These two elements make up what the courts have usually called negligence; but the term negligence is quite frequently applied to the second element alone. Thus it could be said that the defendant was negligent, but was not liable because he was under no duty to the plaintiff.

3. There must be a direct relationship between the actions of the defendant and the harm suffered by the plaintiff. In legal terminology this is known as "legal cause" or "proximate cause".

4. Actual loss or damage resulting to the interests of another.

From the analysis of these factors, it can be seen that negligence in the law is not necessarily based on mere carelessness, but on conduct or behaviour which should be recognized by the person acting as involving unreasonable risk or danger to others. A negligent action may involve ignorance, forgetfulness or stupidity, but it may also be found where the person acting has taken careful consideration of the consequences of his intended act and has acted in conformity with his best judgement, if that judgement is not in accord with the judgement a reasonably prudent person in the same position would have exercised.

But what is involved in the concept of duty? Perhaps it can be best described as an obligation which the courts will recognize and enforce, arising out of the relationship between the parties involved in the lawsuit in question.
The duty, if owed, must be owed to this plaintiff, it must be personal; in a sense directly to the injured party. In the opinion of Lord Esher:

"The question of liability for negligence cannot arise at all until it has been established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence.... A man is entitled to be as negligent as he pleases to the whole world if he owes no duty to them".

To determine whether there was a breach of duty, the defendant's actual conduct is measured against the legal standard of the reasonable person to determine whether the defendant, by his conduct exposed the plaintiff to an unreasonable risk of harm.

The teacher, automatically in law, owes a duty of care to his pupils. This is due to the fact that children are bound by law to go to school and in being so bound, they look to the teacher for their protection in place of the parents. Thus, the teacher is charged with being a prudent or careful parent of a very large family.

The definition of a reasonably prudent person is not that of an average man, but rather an ideal, imaginary man. However, there is no convenient person to whom one could point to as the "reasonable man". In actuality, as described tongue-in-cheek, by A.P. Herbert, he is considerably more than the reasonably prudent man:

"The Reasonable Man is an ideal, a standard, the

embodiment of all those qualities which we demand of the good citizen....The Reasonable Man is always thinking of others; prudence is his guide and "Safety First" is his rule of life....He is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or bound; who neither star-gazes nor is lost in meditation when approaching trap-doors on the margin of a dock; and will inform himself of the history and habits of a dog before administering a caress....who never from one year's end to another makes an excessive demand upon his wife, his neighbours, his servants, his ox, or his ass; who never swears, gambles, or loses his temper;...who uses nothing except in moderation, and even while he flogs his child is meditating only on the golden mean. Devoid in short of any human weakness, with not one single saving vice....as careful for his own safety as he is for that of others, this excellent character....is fed and kept alive by...the common jury. He has gained in power with every case in which he has figured".

The abstract and hypothetical character of this mythical person has been highly emphasized by the courts. He is a prudent and careful man, who is always up to standard and should not be identified with any ordinary individual who might occasionally do unreasonable things.

The reasonably prudent person's characteristics are exactly the same as the actor - same sex, eyesight, hearing etc.. For example, a blind man's conduct is only expected to meet the standard of reasonable conduct of a blind person. Similarly, if he is deaf or has only one leg, his conduct is judged with these disabilities in mind. In the case of children and old aged persons a special standard of mental capacity is applied based upon what is reasonable to expect from an individual of similar age, intelligence
It is imperative for the physical education teacher or coach to assess the competency of the student to partake in a specific activity. The student must have adequate knowledge of the rules and mechanics of the sport before he should be allowed to participate. A teacher or coach may be liable for injuries whenever he permits a pupil to venture into an activity beyond his physical capabilities.

Thus, from this it follows that if one is not qualified to act within a specific area, one should not attempt to do so. If the teacher cannot meet the standard of care required for teaching gymnastics, then he should not teach gymnastics; he should not coach a sport if he cannot meet the standard of care for coaching; he should not accept a playground supervisory position if he cannot meet that standard of care.

Due to one's professional experience or education, a somewhat higher standard of conduct may be required. Such a person not only must exercise reasonable care in what he does, but he is also assumed to have special knowledge and ability. For example, the physical educator is held to possess special knowledge and skill in administering his class.

When setting up a physical education program, the teacher should give consideration to the general character of the proposed activity. At this stage the "careful parent"
rule might be formulated in the following terms: "Would a careful parent, aware of the reasonably foreseeable hazards, willingly permit his child's participation?"

The physical education teacher should not forget, however, that the "careful parent" is an artificial concept in law. A judge or jury will sometimes tend to favour a decision which will benefit the injured student, because of sympathy. Thus, it would be safe to presume that the standard for the "careful parent" in law is somewhat higher than the standard of the average parent with which one might be acquainted. There is probably no great element of risk, if the general character of the activity is not too different from those in which children habitually participate. The teacher must take into account factors such as age, capabilities, etc., if the activities are unusual, and by analogy to more usual activities, decide whether the activity falls within the range which the careful parent would sanction.

Standing in the place of a parent and acting like a careful father is indeed a very heavy responsibility. Halsbury's collection of English common law states:

"The practice of a profession, art or calling which from its nature demands some special skill, ability or experience, carries with it a duty to exercise to a reasonable extent, the amount of skill, ability, and experience which it demands."

Judge Woods, in the appeal case of McKay et al v. Board of Govan School Trustees (Saskatchewan), stated that the above general statement was subject to some qualification and limitations. He emphasized that there is in the law, a standard governing those who are carrying out duties requiring special skill, ability and experience. However, "a physical training instructor should bring to his task and responsibility skill, ability and experience reasonable under the circumstances BUT not necessarily equivalent to that possessed by experts".

How then, does one decide whether he has met the standards of the mythical "reasonably prudent person"? The standard which the law has evolved is easier to state than to apply. One is considered negligent if one could anticipate the occurrence of an accident, and then failed to act in terms of such anticipation. The important point is not that one should have anticipated the specific injury or accident that did occur, so long as some accident might have been foreseen under the circumstances. Thus, it is negligent not to take action to avoid such foreseeable dangers, where under the circumstances it would be reasonable to anticipate such difficulties. Normally the problem is that the individual failed to exercise sufficient foresight to expect danger, rather than ignored a danger of which he was aware of. The issue

is not: Did he foresee it? But, should he have foreseen it?

Negligence, being defined as the failure to act as a reasonably prudent person would under the circumstances, involves another essential concept: "under the circumstances". Under one set of circumstances it may be reasonably prudent for a person to act in one way, but under a different set of circumstances his actions might be considered negligent. For example, if a student has a hidden or latent illness, and the teacher has no means of suspecting it, then failure to act in accordance with it is not negligence. In a free-play game, ordinary prudence might not require strict refereeing, but in a competitive game it may be negligent not to.

A case related to the above, concerning refereeing, was that of Gard v. Board of School Trustees of Duncan, in which a young boy was injured in a grasshockey game while the teacher was absent at a staff meeting. The boys had practically no instruction in the game. The plaintiff was injured by another boy, whose breach of the rules of the game caused his stick to inflict injury. It was found that had the teacher been present, she could have stopped the play before the damage was done. As a result, the trial judge held the teacher negligent.

On appeal, it was held that the mere absence of the

supervisor was not necessarily negligence unless it could be shown that supervision would have prevented the injury. In this case, the action was dismissed because the injuries sustained were due to the normal hazards of the game. It was held by Judge Robertson that:

"Absence of a supervisor is not necessarily negligent behaviour and stated that, 'In my opinion to hold otherwise would be to lay down a standard of conduct which must be pronounced much too exacting'."

It must also be remembered that under the circumstances, there must be a duty toward a person that is disregarded. For example, if a teacher were to see a stranger attempting to jump, or in the act of jumping off a bridge, there would be no obligation for the teacher to prevent the jump, nor would the teacher be negligent for not intervening. However, the situation is different if a school pupil were to attempt such a jump during school hours, and the teacher failed to prevent it. In this case, the teacher owes a duty to the pupil. The teacher is in loco parentis in relation to the pupil. This means that the teacher stands in the position of a parent as unofficial guardian. This common law principle was laid down by Lord Esher in Williams v. Eady (1893) 10 TLR 41 p. 42 where he said:

"As to the law on the subject there can be no doubt; and it was correctly laid down by the learned judge, that the schoolmaster was bound to take such care of his boys, as a careful father would take care of his boys, and there could not be a better definition of the duty of a schoolmaster".
The teacher's duties and rights may be even greater than those of the parent, as a result of this relationship.

Leibee states:

"One is not under a legal duty to go to the aid of another unless there is some definite relationship between the parties that is regarded as imposing a duty to act, or unless he is at some way at fault in causing the other's injury".

Relationships that require the rendering of assistance are those such as father or mother to child, husband or wife to spouse, doctor to patient etc.. It is obvious that there is a relationship between student and teacher. If a person begins or attempts to render aid he can be held liable for his negligence. If he prevents or interferes, directly or indirectly, with someone rendering aid, he can also be held negligent.

Examples of Acts Which May be Considered Negligence on the Part of the Teacher:

1. Does not exercise reasonable degree of care.
2. Performs an act improperly.
3. Does not provide supervision that is adequate in quality and quantity.
4. Does not make sufficient preparation to prevent harm to pupils prior to their entering into certain

2. Ibid. p. 17.
activities which require this preparation.

5. Permits pupils to use defective equipment.

(Manitoba has a Statute protecting the teacher in this area: the teacher and/or School Board must know of the defect before they can be held liable.)

6. Fails to inspect and repair or have repaired, equipment.

7. Conducts an activity in an unsafe and/or dangerous area.

8. Permits pupils to engage in highly competitive and/or rough activities without adequate knowledge of the health status of each pupil.

9. Permits pupils who are not competent to use dangerous instrumentalities or to participate in activities requiring a high level of skill.

10. Permits pupils to participate in an activity - generally authorized - but one in which they have not been properly instructed.

11. Knowingly assigns an individual to perform in an area in which the assignee's incompetence is known by the assignor.

12. Neglects a duty to look out for pupils who by reason of incapacity or abnormality (known) might cause harm to others.

13. Neglects a duty to look out for pupils who may be in a danger area and/or fails to give adequate warning in such danger.
14. Fails to perform proper act in case of injury, or, diagnoses and/or treats an injury.

Leibee has also elaborated on what might be considered a reasonably prudent and careful physical educator:

1. If he has his students engage in highly competitive and/or rough activities, he should find out the health status of his students or players.

2. After a student has had a serious illness or injury, participation should be prohibited until medical approval has been obtained.

3. Regular checking of all class and personal equipment should become a habit.

4. No defective equipment should be used at any time.

5. Activities should be conducted in a safe area.

6. The teacher should foresee possible injury in certain activities and take steps to prevent it.

7. He should analyze his teaching and coaching methods for the safety of the students and players.

8. Only qualified personnel should conduct or supervise an activity.

9. The activity should be kept within the ability of the students.

10. In the case of an injury, the proper steps should be performed.

   (1) renders first aid.

   (2) summons medical attention. (However, a

1. Ibid. p. 76.
responsible student should be sent if the teacher is unable to leave the scene entirely in order to summon a doctor. In this case, the student should be given very specific instructions as to what to do.)

(3) Removes the injured to medical attention.

( Depending on the circumstances one or all of the above may be required to render sufficient aid.)

11. The teacher should not diagnose or treat an injury that needs medical attention. (At no time should he try to act in the capacity of a doctor).

12. Before a student is to engage in an activity he should be adequately instructed.

13. In activities that require protective equipment, no student should participate without it.

14. A record should be kept of all accidents that occur and what steps the teacher took in handling the situation.

The importance of supervision and control cannot be stressed too much. Dunbar, has drawn up ten points which should be kept in mind to assist teachers and administrators in planning a trip away from school:

1. Plan all phases of the activity thoroughly.

2. Request approval of the trip from proper authorities in writing, and keep written approval on file.

3. Notify a parent in a written statement, of the destination, planned activities, time (departure and return), mode of transportation, necessary expenditures, and reasonable foreseeable risks involved.

4. Secure parental permission slips.

5. Make a personal previsit to inspect the facilities, if possible.

6. Determine what adult-student ratio would best provide adequate supervision and safety.

7. Provide each student with a set of rules for safety and conduct, and discuss them thoroughly.

8. If the students are young (elementary school or kindergarten), assign a partner to each.

9. Check students at each boarding and departure, and periodically during the activity.

10. Enlist the co-operation of one or several parents whom the teacher in charge can notify in event of any delay enroute. Parents should be notified of this service and encouraged to phone if enquiries are deemed necessary.

The content of the physical education program and its demands on the student's physical abilities have been the issue in a number of court cases. The courts have allowed a finding of negligence in their classification of certain
physical education requirements as being dangerous to pupils. The consequences of such court decisions have great impact on the physical education teacher. Teachers and coaches who do not provide adequate instruction to their pupils and permit them to engage in activities that are beyond their ability to perform safely may be committing an act of negligence. As Remmlein states:

"It is readily understood that no physical education teacher or coach would intentionally injure a pupil. But the physical education teacher who does not instruct a pupil as to the proper method of using a dangerous apparatus in the gymnasium has omitted a specific legal duty, and if harm ensues, is liable for tort through negligence".

Coaches and teachers often mismatch students of unequal stature, maturity, knowledge and strength, in their desire to stimulate competition. These combined characteristics are sometimes difficult to appraise. However, conspicuous disparities should be readily determined by the competent coach or teacher. If injury is produced by an improper degree of disparity, negligence will be chargeable on the basis of poor discretion. Theoretically, because of the assumed training of the coach or teacher, he is expected to reasonably anticipate the dangers of mismatching.

**Negligence in Supervision**

Since the teacher assumes the responsibility of a reasonable and prudent parent, a concern that comes to

mind is - what is considered adequate supervision? Judicially stated, "it involves at least some keeping of order, some stopping of fights, some general protection of the child against damages that are to be apprehended". Generally, sufficient supervision has been accepted by the courts as consisting of the following:

1. Discipline was good.
2. Pupils were carrying on in an orderly fashion.
3. Rules had been formulated for the guidance of pupils.
4. The teacher was competent.
5. The teacher was present.
6. Practices had been adopted generally.
7. Practices had been followed successfully in the past.

However, the courts recognize that accidents will happen even during properly conducted physical education activities.

In order to get a better understanding of what is considered negligence by the courts concerning the omission or commission of acts by teachers, unsuccessful actions on the part of the plaintiffs will be dealt with first.

Unsuccessful Actions

In Hall et al v. Thompson et al, a young boy was injured


in a wrestling contest. The boys were not compelled to
wrestle and the teacher merely agreed to supervise. It
was held that the action of the boys was supervised, that
the wrestling was not compulsory, and that it was not
sufficiently dangerous to warrant previous instruction
in the sport. Concerning the danger involved in the activity,
Judge Treleaven stated:

"No evidence of any kind was submitted to support
the claim that wrestling is inherently dangerous
and no authorities were submitted to me, nor can
I find any, to support the proposition. It may,
of course, be true that in all games or contests
of skill involving the testing and development
of physical strength accidents will happen, but
it does not follow in my opinion that they should
therefore be classed as inherently dangerous".

The case of Levine v. Toronto Board of Education,
involved a young boy who was injured in an athletic meet,
but did not report the injury or seek help. An action for
damages was brought against the Board five years later,
on the grounds that the Board was not authorized to hold
athletic meets. However, the Public Authorities Act
protected the Board in that the Act stipulated that action
must be brought within six months after the injury. The
authority of the Board to conduct athletic meets was
emphasized by the court in stating:

"It is the duty of the Board of Education to,

1. Hall et al v. Thompson et al (Ontario), (1952) 4 D.L.R.
   139 (C.A.); O.W.N. 478.
2. Levine v. Toronto Board of Education (Ontario), (1933)
   O.W.N. 152; O.W.N. 238 (C.A.).
Maintain schools for the education of children. Education includes exercise of the body as well as of the mind...If a Board is of the opinion that in the interests of the children games should be arranged, it would be the duty of the Board to arrange such games".

The issue of lack of supervision was defeated in Scoffeld et al v. Public School Board of North York. In this case, a young schoolgirl was injured while tobogganing on a hill owned by the defendant School Board and used by the children as a playground. The hill sloped towards a river and the child was injured when the toboggan struck the ice. The principal had required the children using the hill as a slide to have their parents' consent. There was supervision at all times during recesses, but apparently not at the time of the accident, at 8:45 a.m. when by the Regulations all teachers were required to be in their classrooms. It was established that supervision would not have prevented the accident. Also, there had not been an accident on the slide in twelve years.

Another case that involved the school hours in which supervision must be given was that of Koch v. Stone Farm School District (Saskatchewan). A pupil janitor was injured when he jumped off a woodshed. The accident occurred

in the morning before school had started. The court ruled that the injury was due to the plaintiff's own willful misconduct. Also, statutes did not impose a duty on the teachers to supervise the play of the older pupils before they report themselves to the teacher in the morning.

In *Boivin v. Glenavon School District* (Saskatchewan), on appeal, a decision that had previously been given against the School Board for damages was quashed. Shortly after arriving at school before 1 p.m. a girl was injured in a school basement playroom. The bell rang while she was swinging on a horizontal ladder and she broke her arm in a four foot fall to the floor which was not covered with mats. The Board stressed, in defense, that in twelve years there had been two injuries on the ladder and no claims. The evidence did not clearly establish that the absence of mats rendered the ladder dangerous, or that the plaintiff would not have been injured if mats had been provided.

To ensure that students are properly supervised, numerous regulations are put forth by Departments of Education. The regulations sometimes can prevent proper supervision. A case in point is that set out by the Manitoba School Act. Regulation 70 states that the principal is responsible during school hours for the

supervision of the accommodations and playgrounds. According to regulation 72, every teacher must be in his place in the school at least 10 minutes before the opening of the forenoon and 10 minutes before the opening of the afternoon, unless unusual circumstances prevent this. However, regulation 44 states that school hours shall be from nine o'clock in the forenoon until four o'clock in the afternoon. Thus, if this is applied to regulation 72, then it might be interpreted that no supervision is necessary before nine o'clock in the morning or after four o'clock in the afternoon.

This poses a real dilemma for a teacher concerning what is required for adequate supervision. The above indicates that there is a need for reassessment of the School Act to rid it of such ambiguities. Regardless of which province a physical educator teaches in, he or she should take the time to read the School Act in the province in order to be aware of such problems.

In summary, lack of supervision itself is not sufficient to support a charge against teachers and Boards. The crucial point is that it must be shown that lack of supervision was the cause of the injury before an action will be successful. Thus, a causal relationship must be shown to exist between the action of the defendant and the injury sustained by the plaintiff before liability for
negligence will attach.

Cases in which the Teacher Was Found Negligent

To indicate the circumstances in which the Courts have held a physical education teacher negligent, a review of such cases is in order. The situations involved in each case should further clarify practices that the Courts consider negligent.

Concerning supervision, Charlesworth on Negligence at p. 452 states:

"A schoolmaster is under a duty to exercise supervision over his pupils when they are on the school premises, either in the school room or the playground. The amount of supervision required depends on the age of the pupils and what they are doing at the material time. During the hours of instruction, a greater degree of supervision is required than during hours of recreation. When normal healthy children of school age are in the playground, it is not necessary that they should be under continuous supervision, even if some of the children are only six years old".

Judge Hilbery, in Rawsthorne v. Ottley (1937) states:

"In my view it is not the law, and never has been the law, that a schoolmaster should keep boys under supervision during every moment of their lives".

Judge Trucker in Ricketts v. Erith Borough Council, (1943) states:

"I find it impossible to hold that it was incumbent

to have a teacher even tender as were the years of these children and bearing in mind the locality of this school, continuously present in the yard throughout the whole of this break; and nothing short of that would suffice. Unless that is their duty, nothing less is any good because small children, or any child, can get up to mischief if the parent's or teacher's back is turned for a short period of time. I think the evidence in this case shows that the system which prevailed at this school, and that the degree of supervision that was exercised, was in fact reasonably sufficient and adequate, having regard to all the circumstances of the case".

Justice Goddard, in Camkin v. Bishop, (1941) states:

"If this means anything, it must mean that it is the duty of a headmaster to see that boys are always under supervision, not only while at work but also at play, or when they are free because at any time they may get into mischief. I should like to hear the views of the boys themselves on this proposition".

These statements would, however, have more impact if they were read in the light of the circumstances of the actual cases, but from the few sentences stated, one is able to grasp the underlying meaning. It is not necessary to have constant supervision for every minute that the child is at school. If such was the case, it would seriously curtail a child's freedom to explore and experience on his own. The responsibility for supervision must not be permitted to become too strict or severe, since it would lead to an unreasonable curtailment of physical education activities. A general or reasonable degree of supervision

is generally recognized by the Courts as sufficient. The adequacy of supervision then, depends on the circumstances of each case, governed by the general standards of reasonableness.

In *Brost v. Tilley School District* (Alberta), the original decision was reversed in the appeal and the Board and principal were found negligent. At recess, a six year old girl fell from a swing in the school grounds. No evidence was given of the provision of supervision. The teacher handbook was concerned with discipline supervision rather than safety supervision.

In the case of *Toronto Board of Education and Hunt v. Higgs* (Ontario), a boy was injured by another during school recess. The injury was aggravated by the teacher ordering the boy into line and into class. The court found liability in the failure to have sufficient teachers on duty.

During the school recess period the infant plaintiff was injured when another pupil lifted him off his feet and carried him over to a rink where he was dropped on the ice. None of the four teachers who were supervising the recess saw the incident. One of the teachers was called over to the injured pupil, but the boy refused help. Another teacher ordered him into line and into class

although he was limping and complaining. A nurse saw him and he was then sent home. The initial injury was found to have been a hip bone displacement which was aggravated when the boy tried to walk.

The action alleged negligence in: (1) failure to provide adequate supervision; (2) permitting rough play which the teacher knew or ought to have known would cause injury; and (3) failure to intervene when they saw or ought to have seen that the rough play was likely to cause serious injury. In the trial, liability for the initial injury was treated separately from liability for the aggravation. The jury found that the initial injury was the result of the failure of the defendants to supervise the activities of the pupils because there was not a sufficient number of teachers on duty, in view of the winter conditions, the number and ages of the children and the fact that ice being on such a large area would limit the access of the teachers to the scene of the accident. On the second issue of the case, the jury found the injury had been aggravated by the negligence of the teacher.

The case was appealed and the appeal was allowed in part by dismissing the claim for the initial injury. Concerning the initial injury, none of the failure found was concerned with inadequate supervision of the rough boy or failure to see him carry the injured boy over to the ice. The school principal alone, had the authority
to control the supervision of the pupils. The jury raised the question whether the system of supervision was adequate for the break period. The principal had employed the system in question for several years, and, in the absence of proof to the contrary, he had no reason to believe that considering the number and ages of the children and that the circumstances were not particularly unusual on that day, the system was not a reasonably safe one. The Judge stated:

"Even on the view that the jury's answers included a finding of 'inadequate supervision', it is not the duty of the school authorities to keep pupils under supervision every moment they are in attendance at school".

On the issue of aggravation of injury, the jury found negligence on the part of two teachers in regard to the requirements of "assiduous attention" as stated in the Public School Act of Ontario, section 180 (g). This section of the act imposes a duty of every teacher "to give assiduous attention to the health and comfort of the pupils". The jury concluded that the School Board must bear the responsibility for the teacher's actions.

In a 1968 Supreme Court of Canada case, McKay et al v. Board of Govan School Unit, the judgement of the trial court was allowed and the award of damages of $183,900 was restored.

The principal and staff of the high school decided

1. McKay et al v. Board of Govan School Unit No. 29 et al (Saskatchewan), (1968), 64 W.W.R. 513.
that the school should put on a variety night which was to include a gymnastics display. The physical education teacher was delegated or undertook to be the organizer of the display. On one of the practice days prior to the performance, the plaintiff was working on the parallel bars. He suddenly slipped from the bars and suffered a vertebra dislocation, becoming a paraplegic.

The jury found the School Unit negligent on the following counts:

1. Lack of a competent teacher.
2. Insufficient spotters.
3. Insufficient demonstration.
4. Insufficient safety precautions.
5. Progression was too rushed.

Originally the action was brought against both the School Board and the teacher but the action against the teacher was dismissed not because he was protected by the maxim "respondeat superior" but because he was protected by a statutory provision. Section 242 of the Saskatchewan School Act states:

"242. (1) Where the board, the principal or the teacher approves or sponsors activities during the school hours or at other times, the teacher responsible for the conduct of the pupils shall not be liable for damage caused by pupils to property or for personal injury suffered by pupils during such activities".
In a number of cases in Saskatchewan, this section of the School Act has provided the basis for having teachers withdrawn as a defendant in action initiated by a parent or someone else on the plaintiff's behalf.

In the McKay case, it was contended that the physical education teacher could not be the source of vicarious liability to his employer if he was relieved of liability. The section of the School Act refers to the Board, the principal and the teacher, but exempts only the teacher. The Saskatchewan teacher is given a wide degree of immunity from personal financial responsibility for school accidents. Section 242 of *The School Act* does not relieve a teacher from being found negligent or responsible for an accident. It does, however, prevent a court from levying damages against him. If a pupil is injured as the result of a teacher's negligence, the immunity of the teacher does not necessarily mean that a pupil has no remedy at law. The School Board, as employer of the teacher, may be held liable for the damages.

A recent case that tested this section of the Saskatchewan School Act was that of Wiebe v. The Board of Education of the Saskatoon School District #13 of

* An employer is liable to compensate persons for harm caused by his employee in the course of his employment.
Saskatchewan and Marjorie Cattell (Teacher) of the City of Saskatoon (1973), (Appendix C). In this case, as in the McKay case, the action against the teacher was dismissed as per Section 242 of The School Act, and the Board of Education became the sole defendant. No appeal was launched on this dismissal. The provision of Section 242 (1) of The School Act is considered law in the province of Saskatchewan in such matters.

The lawyers for the School Board stated:

"We feel that it is very important news to the teacher that they cannot be sued any more or in any event that there is a judicial pronouncement that as long as they act in the course of their employment an application for negligence and similar torts will be dismissed by the Courts unless it is taken to a higher Court and reversed".

The teachers in the previous Saskatchewan cases were protected by a statutory shield. However, do teachers in other provinces have any such shields for protection?

In Manitoba, three sections of the Public Schools Act relate to this question.


2. Ibid.

1. "Neither the School District of Winnipeg No. 1 nor its trustees, servants, or agents, nor any of them shall be deemed to be guilty of negligence solely by reason of the fact that a pupil who is required to wear eye-glasses is permitted to take part in physical training, physical culture, gymnastic exercises, or drill, or to participate in any play or game carried on in connection with school activities".

No negligence can be held under this section if injury results solely because the pupil wears eye glasses. The teacher is not shielded from all liability, but the above section does offer protection to a teacher should an accident result from the wearing of eye-glasses. This is significant for the physical education teacher, since the wearing of eye-glasses in certain activities could increase the possibility of accident from falls, bumping into other students such as in contact sports, being hit by equipment or being hit by fellow students.

2. 277. (1) "Where injury or death is caused to a pupil enrolled in or attending a public school, 
   (a) during, or as a result of, a course of instruction carried on within the school; or 
   (b) during or as a result of physical training, physical culture, gymnastic exercises, or
drill, carried on in connection with the school activities;
or
(c) before or after school hours, or during recess upon the school grounds or in the school house of the school district;
no cause of action shall accrue to the pupil or to any other person for any loss or damage suffered by reason of the bodily injury or death, against the school district or any servant or agent thereof or any trustee or the district unless it is shown that the injury or death was caused by the negligence of the school district or any of its servants or agents or any one or more of the trustees".

Defective apparatus must be known to the school district before liability attaches in any case:

277. (2) "Where the bodily injury or death of a pupil referred to in subsection (1) is caused by defective and dangerous apparatus supplied by the school district for the use of the pupil, the district and its servants and agents and the trustees shall be deemed not to have been guilty of negligence or misconduct unless it is shown that the district or one or more of its servants or agents thereof or the trustees had actual knowledge of the defect in, or the
dangerous nature of, the apparatus and failed to remedy or replace the apparatus within a reasonable time after acquiring the knowledge).

Subsection 277 (1) indicates that before an action arising out of negligence can be successful, there must be proof that the negligent action was the cause of the injury. Subsection 277 (2) prohibits actions arising out of injuries resulting from defective or dangerous apparatus. This section has not yet been tested in the courts as there has to date been no actions for damages arising out of an injury caused by defective or dangerous equipment.

A very limited measure of protection is offered by the statutes. The master-servant relationship does not offer total protection for the teacher for his negligent acts. It is true that the master is responsible for the acts of his servant performed within the scope of his employment, but the courts have found both teacher and Board guilty of negligence and cost of damages were apportioned. Salmond on the Law of Torts states:

"It would seem clear on principle that in all cases of true vicarious liability the person held vicariously liable for the tort of another should have a right of indemnity as against that other. Thus, a master who has paid for the negligence of his servant should

be able to sue the servant for indemnity".  

The case of **Bisson v. Corporation of Powell River**, does not concern the school environment per se, but it does have implications for the physical education teacher. A number of schools have added swimming pools to their facilities, and as a result swimming programs have been incorporated into the physical education classes. Also, community recreation programs often include hiking or camping. Undoubtedly, swimming could be involved here.

In the case in question, the plaintiff suffered severe neck injuries when he dove from a five-metre diving platform owned and maintained by the defendant corporation. There were no danger signs to warn the swimmers of the depth of the water under the raft.

The plaintiff, a 22 year-old lifeguard and swimming instructor had experience in swimming and diving in salt water on previous occasions, but had never visited the defendant's recreational area before. As a result of neck injuries sustained in diving from the raft, the plaintiff was paralyzed from his neck down.

The award, in the sum of $286,000 was particularly significant in that up to 1967 this was the largest award for damages for personal injuries ever given in a Canadian

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or English court. On appeal, the award was reduced to $230,698 plus special damages. It was held that the appeal must not be dismissed on the issue of liability, but that the general damages must be reduced by $90,000.

This case points out how serious the courts view an injury of this type due to negligence. If a physical education teacher administers a swimming program, he should exert extreme care for the safety of the students involved. In the school setting, supervision should not pose too much of a problem if safety rules are established for the students to follow. The area that could lead to legal problems is in community recreation settings. Here, the teacher must be particularly cautious of the activities he allows the students to participate in. Above all, if the teacher is not capable of administering life saving techniques, then swimming should not be allowed on field trips or outings. Where swimming is allowed, the teacher personally should check out the swimming area for submerged logs, rocks or debris as well as the depth of the water.

Many schools are building swimming pools and swimming programs are becoming more and more popular. In this setting in particular, the physical education teacher should be qualified to teach swimming and be able to carry out lifesaving techniques. If not, this should be left out of the program. The more satisfactory solution would be to invite a competent individual to come to the school to
teach the course.

When the students are using the pool facilities, the teacher must provide the proper supervision, especially in regard to horseplay or running on the pool deck.

An article of interest related to negligence in swimming, "The $150,000 Question", is included in the Appendix D. It indicates the type of questions which might be asked in a court case concerning a swimming accident.

The 1975 case of Thornton v. Board of School Trustees of School District No. 57 (Prince George), broke all records as the highest personal award ever made in the British Commonwealth. An award of $1.5 million was made to a student whose neck was broken in gymnastics. As a result, the boy was rendered a quadraplegic.

The physical education teacher offered three choices of activity to the students - floor hockey, gymnastics or weight lifting. While these activities were taking place, the teacher was occupied with filling out the students' marks for report cards.

The plaintiff and other boys were doing somersaults off a springboard onto foam chunks but were having problems doing the manoeuvre so as to land on their feet. In order to get enough lift from the springboard to complete the

somersault, the boys got permission from the teacher to place a vaulting box at the low end of the springboard.

The boys arranged a "configuration" consisting of a vaulting box, springboard, and foam rubber high jump pits. They proceeded to jump from the vaulting box to the springboard, and then somersault into the foam pit.

In the process of the activity, one student jumped off the springboard and injured his wrist. Shortly afterwards, a second student, Thornton, sprang from the springboard, shot over the foam and hit his head, rendering himself a quadraplegic.

In finding for the plaintiff, Justice Andrews stated:

"The whole of the evidence leads me to find that these boys, possessing such limited expertise in gymnastics, had undoubtedly not progressed to the point where they could be trusted to somersault from this unpredictable, dangerous configuration. I do not suggest that each piece of equipment was "per se" dangerous; I am concerned with the "configuration". I think that Edamura should have taken care to instruct these boys on the use of the configuration. They had never used it before. He should have given them some advice, some instruction, a word of caution, at least imposed some limits on what they could or could not do in the circumstances. His attention to them was, in my opinion, casual".

The preceding has serious implications for the physical education teacher. Supervision of all activities must be adequate at all times. However, another consideration here is that of allowing students to set up their own equipment, which is a fundamental part of

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Movement Education. Movement Education has grown in popularity over the last few years. Often students are encouraged to set up their own equipment, explore and be creative with various activities that can be improvised on different types of configurations. In view of the preceding case, teachers should try to be aware of potentially dangerous configurations in their movement education classes.

Concerning the case, David Todd, Prince George School District Superintendent stated:

"I think this is going to make quite an impact on the teaching of P.E. in the province. P.E. programs and any possible hazards in the program will have teachers taking a very cautious approach".

A significant factor in the case was that the School Board's insurance policy covered only $1 million which was in line with policies held in other school districts. The case is apparently going to appeal, and if the judgement is not decreased, then $500,000 must be obtained somewhere. The School Board Secretary-Treasurer Mac Carpenter suggested that:

"The half million dollars would either come out of the school districts' $25 million annual operating budget or possibly from the provincial government. There is a provision in the Public Schools Act for a special appeal to the Minister of Education in extreme cases".

2. Ibid. p. 1.
A number of legal actions involving physical education or athletics have been the direct result of inadequate or faulty equipment and facilities. Thus, it is the direct responsibility of the teacher concerned, to be certain that the equipment and facilities are proper for the activity and provide the participants with the optimum of safety.

Many manufacturers of sports equipment and facilities emphasize the safety of their products, since they realize that coaches and teachers will be concerned (or should be) about safety features. These suppliers often spend considerable money and effort on research in order to provide the maximum in protection. As a result, there should be no excuse for a lack of safe equipment or facilities. The teacher should purchase with safety in mind rather than economy.

Numerous accidents can occur due to the nature of the facilities. Because of the equipment and facilities required, certain areas are more prone to accidents. In dealing with this problem, consideration must be made of the facilities which might be utilized for athletic events including the field, track, gymnasium, tennis court and even the locker room. Other sources of injury are defective slides, swings and other playground apparatus. Their maintenance or construction may be faulty or they may have been placed in an unsafe location in the school yard. A
further serious possibility is the collapse of defective bleachers or grandstands. This is especially true when admissions have been charged, since this factor may increase the liability of the school district. Failure to provide mats in places where their need is clearly apparent, is another frequent cause of injury. These should be placed around the base of gymnastic equipment on the floor area used for tumbling, and in areas where it appears that a student needs to be protected from a hard surface or obstacle.

A number of cases have resulted from failure to use mats or inadequate use of them. Concerning this, a physical education teacher should keep in mind the test of reasonableness in providing protection in this regard. There is no need to go to excesses in the use of mats as a safety precaution, but reasonable protection is usually sufficient. For example, in Jones v. London County Council (England), one Judge stated:

"It had been stressed on behalf of the respondents that the game had been played on a wooden floor and that there was no matting; if there had been a matting it would have been said that there ought to have been a mattress, and if there had been a mattress it would have been said that there ought to have been a feather bed; and if there had been a feather bed it would have been said that the boys ought to have been wrapped in cotton wool or rubber".

Innumerable cases emphasize the use of equipment that

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is in known improper condition, and the avoidance of using inherently dangerous equipment altogether. In Clerk & Lindsell on Torts, it is stated:

"It is the duty of those in charge of a school to keep it in proper repair; and a pupil injured by the defective condition of...may therefore recover damages for his injuries".

Perhaps, a physical education teacher may question, by what criteria could one define a 'safe environment'? The case of Brost v. Tilley School District (Alberta), could provide some guidelines. The case established that a safe school environment was one in which the local School Board kept the school premises and equipment in good repair, and where equipment was used that might be dangerous, even when in good repair, suitable instruction on proper use of it should be sufficient to overcome the danger.

A great variety of causes, due to improper care of facilities and faulty equipment, could ignite trouble in school athletics or physical education classes. For example, a basketball coach may be charged with negligence if he permits activity on an extremely slippery gym floor or does not provide sufficient padding around the basket supports, or allows a smoothly finished balance beam to be

used without the protection of mats. Even allowing students to play baseball using a bat without a knobbed end so that injury resulted when the bat slipped and hit another student, has been found negligent.

Rosenfield (1963), cites a case involving a slippery gymnasium floor. A physical education class of girls were playing baseball in the school gym. The base marker (an ordinary burlap sack placed on the slippery floor) slipped from under the feet of one of the girls as she rushed to first base. She sustained serious injuries when she fell. Negligence was determined by the court because considering the circumstances, reasonable care would have required that the base be securely fastened.

The football coach may overlook the quality of his teams equipment or may fail to insist on the use of the mouthpiece - which is now mandatory under most High School and College Football Associations in Canada.

An inadequately sized playground or field that produces over crowded conditions is another vulnerable area. This problem can also occur in football, baseball, track and field or basketball. Injuries have occurred through missiles (shot, discus, hammer, javelin) striking participants or spectators. Serious collisions on basketball courts,

between two players, or with obstacles on the sidelines have resulted in injuries.

An American case in point is that of Bauer v. Board of Education of the City of New York. "Where eight contiguous or over-lapping basketball courts in a school gymnasium were used by forty-eight players, the court held that the situation created a condition of danger; hence a liability charge was upheld when a pupil was injured". Frequently, physical education teachers are faced with greater student numbers than facilities can accommodate adequately. In order to keep students active, teachers try to include all students in the activity at the same time. In some cases students are allowed to do what they wish on equipment without any direction or supervision while the teacher devotes time to a small group of students. However, this could lead to injury, as in the case previously cited, and could result in a legal suit. Thus, the teacher is faced with a difficult problem. He must either organize the class in groups and exercise more regimentation than he or the students may wish, or alternatively, some of the students would just have to sit out and wait for a turn. Ultimately, the teacher must use some imagination in providing his own solution to the problem, given the circumstances he is required to work under. The principle of 'the reasonable man' should always be a guideline to follow in this respect.

In the provinces of Canada, School Boards have the duty by statute of making the school grounds, buildings and equipment reasonably safe and free of danger. The physical education teacher, as an agent of the Board, should look for sources of danger and report these directly to the principal (in writing) or should pass the information on to the School Board (in writing). Many potential dangers can be cared for immediately by the teacher. However, it is important for a teacher to inform the proper authority about a situation which needs to be corrected; this constitutes the required exercise of "due care" on his part.

Certain standards of care are required of different equipment. Once some fault is found in any equipment, its use should be prohibited until the fault is remedied. All equipment to be used for a physical education class should be inspected by the teacher on the day that it is to be used. Weekly inspection of all equipment and facilities should become a standard procedure. Inspection should cover facility surfaces and structures, apparatus and equipment. Visual inspection will often be all that is required to verify that a piece of equipment is in good working order. However, a much closer inspection is required for apparatus that requires some assembly (gymnastic boxes, trampoline, weight lifting apparatus, etc.). Particular notice should be made of bolts, fittings,
or wires that take particular stress. Rungs on climbing apparatus should be checked for cracks, or ropes checked for weaknesses or wear. If the procedure or equipment requires special safety instruction, these rules should be posted and explained.

Above all, the students should be taught to respect the apparatus and check for its safety also, when they are using apparatus or helping the teacher to assemble it. They should be encouraged to report to the teacher anything that appears to be a potential danger.

In general, if an accident could have been prevented by careful inspection of the facilities or equipment, it will be considered negligence by the courts.

The courts will usually decide that negligence exists where an injury occurs as a result of defects in athletic facilities or equipment and the teacher was aware or notified about the dangerous situation.

A number of Canadian cases have arisen concerning equipment or facilities. In Schultz v. Grosswold School Trustees (Alberta), the School Board was found liable due to faulty construction and disrepair of a teeter-totter. In Pook et al v. Ernesttown School Trustees (Ontario), a young boy fell on the school ground which had been

littered with stones and brickbats for some time. The student was "lawfully and properly playing in the school grounds" and as a result, the School Board was found liable for not maintaining the grounds safely.

School children are not merely permitted or invited to come to school, but are required to do so, and, as members of the public, if they are injured by neglect of a statutory duty with regard to a place where they are expected to play, they are entitled to make those upon whom the statute has imposed the duty, responsible for injuries sustained by them through breach of such duty.

This principle was the issue in *Lamarche et al v. Board of Trustees of the Roman Catholic Separate Schools for the village of L'Orignal (Ontario)*, where an eleven year old boy was injured while swinging on a swing installed on sloping ground. The boy was partially paralyzed and mentally impaired when he was injured due to other children upsetting the swing. The Judge for the case, noted that the swing had been upset on previous occasions and that the Board was required by statute to provide adequate accommodation for children. Concerning adequate accommodation, he stated:

"In my opinion (that) includes the school for purposes of teaching and the school yard or playground for the purposes of exercise and recreation".

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Although contributory negligence was found on the part of the injured boy, it was, however, less than the negligence of the School Board.

A facility with which very few physical education teachers concern themselves is the locker areas. These should be checked on a regular basis for potential dangers. A significant example, is a case which occurred in California. A loosened locker attachment gave way and seriously injured a student. The court summarized that the condition must have existed for some time in order for the accident to occur and it was the responsibility of those in charge of such facilities to guarantee their safety. The school was found liable.

Another aspect of liability that the physical educator should be aware of is that of "attractive nuisance". This term has been established by the courts as indicating that it is the responsibility of those in supervisory capacities to eliminate as much as possible, situations that may attract youngsters and lead to injury. Youngsters are not held responsible for their thoughtless actions and it is not assumed that they will realize dangers which might exist in certain situations. As a result, all equipment should be put away at the end of each class. Nothing

should be left out that children could play with in the absence of a teacher's supervision. One area concerning this should be clarified, however. Some items of playground equipment on the school grounds are indeed a potential attractive nuisance. To date, there have been only a few Canadian court cases involving the above.

A Canadian case that concerned attractive nuisance, though not specifically concerned with the school, involved two young trespassers who were drowned when swimming in an excavation filled with water on a town parkland which was not yet open to the public. The town was not liable in damages for the deaths of the two trespassers because a water-filled excavation was not a trap. Thus, one of the criteria for attractive nuisance to be established is that a trap must exist which caused the injury.

In New Brunswick, four plaintiffs suffered vertebra fractures on a toboggan slide in a public park which was in a very dangerous condition. The owner and occupier of the land, a horticultural association, was liable for these injuries as it was bound not to create a trap or allow a concealed danger to exist.

In the United States there has been a number of noteworthy cases that may serve to illustrate the type of circumstances in which attractive nuisance may be found.

In New York, the courts have not completely accepted the doctrine of attractive nuisance. In the case of Streickler v. New York (1962), the court decided that a school district was not expected to supervise playground facilities when school was not in session. Another case in New York, Longo v. New York City Board of Education, resulted in a finding of negligence against the school district because a teacher failed to lock a gymnasium door during an unsupervised period. A young child was injured when he wandered into the gymnasium. The court felt that a situation of attractive nuisance was created because the youngster was able to gain admittance to the gymnasium, even though he was not supposed to be in the area.

These examples serve to illustrate the nature of attractive nuisance. A physical education teacher should appreciate the fact that there are numerous possibilities for attractive nuisance to occur if care is not taken to prevent them.


CHAPTER IV

LEGAL DEFENSES AGAINST A LIABILITY SUIT

The physical education teacher, as a servant of the School Board, enjoys the protection of the legal aid secured by the Board, unless the Board can successfully deny the existence of the master-servant relationship for the actions involved.

The School Act (British Columbia) states:

"The Board of School Trustees may, by an affirmative vote of not less than two-thirds of all its members, pay any sum required for the protection, defense, or indemnification of a trustee, an officer or an employee of the school district where an action or prosecution is brought against him in connection with the performance of his school district duties, or where an inquiry under the Public Inquiries Act or other proceeding involves the administration or the conduct of any part of the business of the school district, and costs necessarily incurred and damages recovered, but the Board of School Trustees shall not pay any fine imposed on a trustee, an officer or employee as a result of his conviction for a criminal offense.

The teacher will be required to pay full damages if he is proven by the courts as solely guilty of negligence outside the scope of his duties as a teacher. If the teacher and the Board are found jointly guilty, the teacher will most likely have to share the cost of the damages awarded, although he will not have to pay the costs personally.

1. The School Act (British Columbia), 1973, ch. 319, sec. 104(5).
Even if the teacher is found not guilty, financial loss will likely come from some legal costs and days lost from school. Also, the School Board is not required to compensate for the days lost, except in the province of Ontario.

Teachers and other school officials are involved in more pupil-injury lawsuits today than ever before in history. Due to the increasing number and variety of activities in which pupils engage, it is likely that there will be a rise in legal actions due to injuries sustained in such activity. Indications are that because the public is becoming more and more damage-conscious, the number of such cases will increase in the future. As a result, the physical educator must have a clear understanding of the obligations to his students under the law and the legal defenses which may avert liability.

Lamb, summarizes the legal position of teachers with regard to school accidents and responsibilities owed to pupils:

1. Boards and teachers in Canada have no general immunity in common law from tort actions.

2. School Boards are responsible for the tortious acts of their servants if the latter act within

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1. The Schools Administration Act (Ontario), 1954, S.O., 1954, c. 86, s. 17(6).

the scope of their authority.
If the teacher acts in ways approved by the School Board, he would generally be considered to be acting within his authority. The School Board is not liable where the teacher acts outside the scope of his employment.

3. Teachers are liable for their own negligence in school accidents, but they have some protection through the general practice of plaintiffs suing the board, as master and servant relationship, as well as the teacher".

The teacher and the School Board can be found jointly guilty of negligence. In such cases, the cost of the damages awarded would be shared in part by the teacher. In teaching, it is rare to find claims by an employer to recover from an employee, damages which the employer has been required to pay as a result of being held vicariously liable, even though this common law principle applies in other fields. The employee has, generally speaking, a good defense against such a claim if his negligent action occurred only within the scope of his duties. Also, no negligence should attach if he presented himself as being qualified and competent to perform. However, the employer might be able to recover from the employee, if the employee went beyond the scope of his duties.
No Direct Relationship Between Teacher's Actions and Resultant Injury

It must be shown by the plaintiff that the resultant injury was due directly to the teacher's negligence before the alleged negligent person can be held liable. The negligence, in law, must first be a proximate cause or substantial factor, in bringing about the injury. Unless the physical education teacher's negligence is shown to be the proximate cause of the injury, there can be no action for suit. Pearson v. North Vancouver Board of School Trustees (British Columbia), is a case in point. A young girl was riding a bicycle along a street and struck a seven-year-old boy who had just left the school grounds. The School Board was not held responsible for the negligence of the girl as the accident took place just outside the school's boundary. It was found that the seven-year-old should have been looking out for his own safety.

No Duty of Care Involved

No duty of care is involved for accidents which occur outside school property and after school hours. This was upheld in the case of Patterson v. North Vancouver Board.

of School Trustees and also v. Canadian Robert Dollar Company (British Columbia), in which an eight-year-old pupil had left home for school and was struck by an old decayed tree just opposite the school property. The tree was growing on property owned by the Robert Dollar Company, one of the defendants in the suit. The condition of the tree had been mentioned by the school trustees to the municipal board, and as a result the Board was not held liable.

The court dismissed the case against the Robert Dollar Company because the tree was growing naturally on the land.

Judge Macdonald stated:

"I have been unable to find any case, and we have been referred to none which would impose upon the school board the duty of protecting the plaintiff from injury on the highway after he had left the school premises".

The Injured Student's Actions Contributes to His Own Negligence

If an individual fails to act as a reasonably prudent individual would under the circumstances, for his own protection, then his own actions may have contributed to his injury and as a result may cancel a proportion of any actionable negligence on the part of another. The legal term for this is 'Contributory Negligence': The defense of Contributory Negligence consists of two elements:

(a) failure of the injured person to take reasonable

cared of himself for his own interest.
(b) the fact that his lack of care contributed
to his own injury.

Contributory negligence on the part of a plaintiff
will not dismiss a suit, but may result in the plaintiff
and defendant sharing the damages.

"When contributory negligence is set up as a defense,
its existence does not depend on any duty owed by
the injured party sued; all that is necessary to
establish such a defense is to prove to the
satisfaction of the jury that the injured party
did not in his own interest take reasonable care
of himself and is set up as a shield against the
obligation to satisfy the whole of plaintiff's
claim the principle involved is that, where a man
is part author of his own injury, he cannot call
on the other party to compensate him in full". 1

The standard of conduct to which the pupil must conform
depends upon the age of the pupil, the nature of the act
connected with the injury, and other attendant circumstances.
In other words, the injured pupil's conduct may have been
below the standard of care to which he should conform for
his own protection which was, therefore, a contributing
factor in causing the injury. The degree of care to
which the great mass of pupils of the same age, intelligence,
and experience would ordinarily exercise under similar
circumstances is considered the standard of care which a
pupil is required to exercise for his own safety. If a
child is unable to understand the nature and consequences
of his acts, the law considers him equally unable to be

1. Johnson v. Kwon Poo Wong (British Columbia), (1957),
22 W.W.R. 565.
guilty of negligence.

This was the basis of an Ontario case in 1972, 

1. Helsler et al v. Moke et al, in which the test in determining contributory negligence in the case of children was to find out whether the child, having regard to his age, intelligence, experience, general knowledge, and alertness, was capable of being found negligent. The next question was whether the child was negligent at all and, if so, to what degree. Judge Addy stated:

"All the qualities and defects of the particular child and all the opportunities or lack of them which he might have had to become aware of any particular peril must be considered. When it has been determined that the child is capable of negligence it is a question for the jury in each case whether the infant exercised the care to be expected from a child of like age, intelligence and experience". 2

Whether or not contributory negligence can be determined, is dependent to a large degree upon the age of the pupil. Although negligent actions are civil wrongs, the Criminal Code of Canada, to some extent, offers some guidelines as to how a court might view the negligent acts of children.

1. Between the ages of 1 and 7 years, there is no capacity for negligence. The Criminal Code of Canada states that no child younger than seven years of age may be convicted of an offense. It is presumed that a child younger than seven is

2. Ibid. p. 446.
incapable of forming the required intent to commit any crime (in Britain the age is ten).

2. Between 7 and 14 years of age, there is usually no capacity for negligence. However, evidence can sometimes overcome this. The Criminal Code of Canada states that a seven-to-fourteen year old will be convicted of an offense only if he is considered capable of having known the nature and consequences of his conduct and of having understood that it was wrong.

3. Between 14 and 21 years of age, a child is presumed to be capable of being negligent. However, depending on the circumstances, this can be refuted. A child who is 14 years or older does not have the advantage of presumed incapacity to commit a wrongful act, and may be treated the same as an adult offender. The law presumes, then, that he understood the nature and consequences of his act and was capable of forming the intention to commit a wrongful act.

Age, however, is not the single criterion used to determine if contributory negligence has occurred.

As Judge Ford stated in Placatka v. Thompson (Alberta),

"The question whether a child is of sufficient age and intelligence to realize and appreciate the risk he runs so as to be capable of being guilty of contributory negligence is a question of fact".

Other factors such as intelligence, experience, mental capacity, judgement, or discretion, are considered along with the age of the child.

**Student Voluntarily Assumes the Risk Involved**

Because of the nature of the activity, many sports tend to involve an element of danger; especially those involving body contact, such as football or wrestling. Injuries resulting from contact in the normal course of the activity are usually part of the risk athletes take by playing the game. The legal term to describe this concept is 'Assumption of Risk'.

A court action for damage could result from injuries due to an unusual accident such as excessively rough or deliberate play between two competitors. When another player is involved, the argument of consent is generally put forward as a defense against charges, the theory being that players voluntarily assume and consent to the risk of injury. This is the same as saying that some school activities are much more dangerous than others, and that the teachers should not assume all the risk in activities of more than ordinary danger. However, a difficult question for the courts to determine is the dividing point between what may be considered normal game skirmishes and what becomes assault.
The case of Agar v. Canning (Manitoba), clarifies to some extent, the limits of immunity under 'assumption of risk'.

In this case, one ice-hockey player body-checked his opponent, took the puck, and skated off with it. The opponent attempted to hook the other with his stick and in so doing, hit a painful blow on the back of the neck. The player with the puck turned and grasping the stick with two hands, forcefully hit the opponent with the blade of the stick between the nose and right eye.

The Judge felt the player who struck the other across the face acted on provocation and assessed damages accordingly. Concerning 'assumption of risk' he stated:

"A blow struck in the course of a lawful sport is not normally actionable since those who take part in sports are presumed in law to assume willingly the risk of harm. Injuries suffered by players of a game, such as hockey, involving violent bodily contacts, will not give rise to an action based on negligence even though such injuries may have resulted from an infraction of the rules of the game. But a retaliatory blow, struck in anger, even though provoked, may go beyond the immunity conferred by this principle and amount to actionable negligence".

While it is true that the courts have found there is some assumption of risk on the part of the athlete, this assumption is true only if the athlete has been carefully trained, properly equipped, intelligently coached, provided with adequate facilities, and competently treated in case

of injury. If any of these items are omitted, negligence may be found.

If the physical education teacher can show that the accident which a student sustained was a part of the normal risk inherent in the activity, then, that to which an individual consents may not be considered negligence. To illustrate this point, the case of Hall et al v. Thompson et al (Ontario), should be examined. In this case, a nine-year-old boy was injured in a wrestling contest conducted on a grassy spot on the school grounds. The wrestling was not compulsory, but was supervised by the teacher. The court found the teacher not liable because he was acting within the scope of his employment in giving physical training to the pupils and the activity was not dangerous enough to warrant previous instruction in wrestling. Thus, in engaging in the activity, the students assumed the risk.

The case of Butterworth et al v. Collegiate Institute Board of Ottawa (Ontario), is significant in that assumption of risk by the pupil was an issue in the case.

Two senior boys in grade twelve were placed in charge of the gymnastic exercises. The physical education instructors were preoccupied with other duties. Two activities were taking place on the day of the accident in

question. Some of the students played basketball, while a few went to the vaulting horse, one of whom was the infant plaintiff. He injured his elbow, causing permanent fixation of the joint.

In reviewing the evidence of the infant plaintiff, the Judge stated that it was conclusively established that the cause of the accident was not known.

"When negligence is alleged as the cause of the injury, it must be proved that, had the negligence not occurred, the injury would not have been sustained. (Corby v. Foster (1913), 29 O.L.R. 83)". 1

Concerning the assumption of risk by the pupil, the Judge stated:

"The evidence clearly shows that the infant plaintiff was conscious of the fact that on previous occasions boys had been posted at the vaulting horse to help the user over, yet on the occasion of the accident, knowing he had been clumsy, knowing the horse, and knowing that there were no boys posted, he attempted the exercise. This goes far beyond the mere knowledge of the danger. There was a clear perception of the existence of danger, and also a clear comprehension of the risk involved: Gibbs v. Barking Corporation, (1936) 1 All E.R. 115, distinguished". 2

The Judge went on to say:

"The use of gymnastic apparatus, such as a vaulting horse, involves the risk of injury. Boys of 14 years of age are capable of and indeed should be held to exercise reasonable intelligence and care for their own safety. With great respect, paternalism in respect of boys of teenage in collegiate institutes should not be extended to a degree which would virtually deprive them of that exercise of intelligence demanded of young people of that age in other walks of life". 3

1. Ibid. p. 332.
2. Ibid. p. 332.
3. Ibid. p. 332.
The action was dismissed with costs.

An aspect involved in assumption of risk, concerns the situation where a student is advised by his teacher or coach not to perform an activity or play a game, but the student insists that he is going to perform it regardless of the warning. Here, is the teacher negligent in allowing the student to carry out his wishes? A case that serves to illustrate how the American courts may view this issue, and likely a Canadian court would take a similar stand, is found in a New Jersey case in which a fourteen year old was injured when he made a leapfrog jump over a gymnastics horse and fell and broke his arm. The instructor and a student volunteer had supervised the jumps and evidence indicated that there had been sufficient number of mats to ensure adequate safety. However, the instructor had warned the student that this stunt was dangerous but the warnings were disregarded. The court found no negligence on the part of the teacher because in spite of the warnings, the student had made the jump anyway, thus assuming the risk of injury himself.

A significant Canadian case also illustrates this principle. In the case of Schade v. Winnipeg School District (Manitoba), a fourteen year old was playing

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'scrub' baseball and tripped over a stake in an area that all students had been warned to keep clear of. It was held that the accident was caused by the boy's own negligence under circumstances which placed a responsibility on him to have regard to his safety. He had failed to take the necessary care, bearing in mind his age, intelligence and knowledge of the circumstances.

Injury From A Natural Cause

A loss that results immediately from a natural cause without the intervention of man and could not have been prevented by the exercise of prudence, diligence and care, in law is termed 'Vis Major'. Thus, direct assignable cause is absent when an injury results from an uncontrollable act of the elements. No amount of foresight would have prevented the occurrence, and as a result, the defendant would be innocent of causality. For example, such mishaps as being struck by a bolt of lightning on a playing field or perhaps a drowning on a cross-country race due to a flash flood would be examples of this legal concept.

Delegation of Authority or Duty

School Boards and teachers are generally held responsible for the negligent acts of independent contractors or hired employees to whom they have delegated their duties, if the actions performed fall within the scope

of their legal duties, except where decisions requiring highly technical or professional skills are required (provided also that the latter are competent). For example, in the case of Davis v. London County Council (England), the court found that, where a medical officer was hired under the statutes to perform operations on children, "the education authority are not liable for the negligence (if any) of the persons performing the operation, provided that they engage competent professional persons to perform it". In the case where a School Board is under a duty to transport a student to school, it is liable for the negligence of the driver of the bus. An important decision made by the Saskatchewan Court of Appeal states:

"A School Board owes a duty to its pupils to see to it that they are properly supervised while on the school grounds during school hours and cannot delegate that responsibility to a contractor, whether independent or not".

The physical education teacher should not delegate authority to any of his students, unless he is confident that the student who assumes the responsibility is very knowledgeable and skilled, or possesses special abilities to carry out the duties.

Teacher aides and student teachers often supplement the staff of certified teachers throughout the year. Basically, there are two questions of concern here:

2. Ellis and Ellis v. Board of Trustees of Moose Jaw Public School District and Blondin Roofing Products Ltd. (Saskatchewan), (1946), 2 D.L.R. 697.
(1) Should a teacher leave uncertified personnel in charge of supervising the class?
(2) What are some of the legal limits on the use of uncertified personnel?

As to the first question, generally, it would not be negligence per se under normal circumstances for the teacher to leave students under the supervision of uncertified personnel. It would seem permissible to leave the student-teacher in control of a class since this serves the educational purpose of training a future teacher.

However, there are some limitations which must be pointed out. In those activities in which there is a high risk of injury, the regular teacher must exercise supervision. Supervision cannot be delegated to non-teachers. Another important point is where the teacher delegates authority, the person selected must be qualified to handle the job. For example, it is not adequate to ask the janitor to supervise the class, while you leave for a few minutes. It must be kept in mind that he is not hired for his ability to supervise children. If the teacher is aware of the unruliness of the class or perhaps the student aide or student teacher's inability to exercise control, it would be negligent to leave him in care of the students.

No Breach of Duty

There will be no Breach of Duty, if the physical
education teacher can prove that the duty owed has been fulfilled. As Judge Laidlaw states:

"A person is not entitled in law to judgment for damages claimed by him on the ground of alleged negligence of another person, merely because it appears that there was a careless act or omission on the part of that other person. Actionable negligence is a breach of a duty owed by one party to another in the particular circumstances, which causes, or contributes to the cause of, the loss or damage claimed".

**Liability Protection Through The School Board**

Children are required by law to attend school. They (and their parents) have no individual control over the buildings in which they must attend, the facilities available to them, the safety of the school premises, or the quality of supervision over them. Thus, the teacher and in some cases, the School Board, are responsible to act as a "prudent father" or in the capacity of "respondeat superior".

This maxim means that a master is liable in certain cases for the wrongful acts of his servant, or in other words, "let the master answer". This doctrine assumes that a master is responsible for the actions committed by a servant during the course of employment if they are specifically or implicitly authorized, because the servant

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is subject to the control and directions of his employer in respect of the manner in which work is to be done. When an accident occurs, even though the teacher may appear to be completely negligent, through the principle of respondeat superior, the School Board becomes automatically involved. As a result, the teacher is able to rely somewhat on the financial strength of the School Board.

"A school board is liable in law for injuries to a pupil due to a teacher's negligence if in a matter which may reasonably be regarded as falling within the scope of his employment". 1

However, the teacher will not be protected by the School Board if he acts in excess of authority. In the case of Beauparlant v. Appleby Separate School Board of Trustees (Ontario), although there was negligence on the part of the teachers, the board of trustees were not liable for the injuries suffered by one of the pupils during the trip. The principal, without any express or implied authority from the board of trustees, granted a holiday to the students which involved a trip to a neighbouring town. The parents were not informed as to whether the trip was part of the regular schooling of any or all pupils, although the parents were free in consenting or refusing consent to the trip. The court held, that in organizing

this trip and in allowing the children their freedom from their regular studies, the teachers were exceeding their authority and were not acting within the scope of their authority, express or implied.

**Immunity**

Canadian School Boards are no longer considered by the courts as a part of the Crown, or political subdivision thereof and they no longer have immunity from their tortious acts. By contrast, in some of the states in the United States, the school district is considered an agency of the state and cannot be held liable for any negligent acts of its employees committed while carrying out their school duties. However, a teacher whose negligence caused injury, does not enjoy this immunity from being sued in a liability suit. Many states have realized that this places teachers in an extremely vulnerable position. As a result, some states have enacted 'save harmless' statutes which either authorize or require school districts to defend suit brought against their teachers as a result of alleged negligence. Payment of any judgements and costs are also included in this defense. Authority has been given to school districts by some states to provide insurance to cover the teacher should a negligence suit occur.

The Canadian physical educator is fortunate in that he is protected somewhat by the School Board in his district.
Common law offers an additional protection to Boards and teachers. After a reasonable length of time has elapsed since the accident was committed, a legal suit cannot be brought against them. In British Columbia, this limitation is provided for directly in the School Act. An action must be brought against the School Board or teacher within six months after the act was committed, and upon four months previous notice thereof in writing. The Public Officer's Protection Act specifies the time limit in other provinces. The School Act of Saskatchewan states a six month time period in which an action must be brought against the school district. However, application made to a judge of the Court of Queen's Bench made not later than one year and after seven days notice to the school district can bring action for suit. A clause in The Public Officer's Protection Act of Saskatchewan allows even more leeway in that actions may be commenced "within such further time as the court or judge may allow".


2. The Public Authorities Protection Act. (Alberta), c. 138, s. 2(2).

The Public Officers' Protection Act. (Saskatchewan), c. 17, s. 2(1).

The Public Officers' Act. (Manitoba), c. 213, s. 21(1).

The Public Authorities Protection Act. (Ontario), c. 303, s. 11.

3. The School Act. Royal Statutes Saskatchewan, c. 169, s. 263.

4. The Public Officer's Protection Act. (Saskatchewan), c. 17, s. 2 (lb).
In Nova Scotia, there appears to be no protection given to public officers beyond the two years stipulated in The Statute of Limitations.

This chapter indicates that in the event of a law suit, a teacher has a number of possible defenses to take. However, in general, as a servant of the School Board, the teacher is entitled to the protection of the legal aid obtained by the Board. If the Board can prove that the teacher acted outside the scope of his duty as a teacher, then it can successfully deny the existence of the master-servant relationship for the actions in question.

It is well to note that in a law suit, neither party really wins. The teacher may win the court case, but in the course of the trial may lose his job and professional reputation. On the other side, the injured student may be awarded a large sum of money, but this will never compensate for the loss of a leg, eye, or complete loss of function of the limbs.

1. The Statute of Limitations. Royal Statutes of Nova Scotia, c. 153, s. 2 (1b).
CHAPTER V

LIABILITY PROTECTION

Insurance

Perhaps insurance might be defined succinctly as a method of hedging one's bet against foreseeable but uncertain occurrences involving financial loss. More conventionally defined, insurance is a contract in which one person, the insurer, undertakes, for a consideration called the "premium", to indemnify the other person, the insured, upon the happening of a specified event.

The knowledge that adequate insurance is carried, permits a degree of flexibility and confidence in planning and executing the physical education classes as well as outdoor environmental education activities. By the very nature of activities, accidents are bound to happen, but insurance coverage cannot be viewed as a satisfactory substitute for care and foresight. The pain, embarrassment or grief of an accident can never be wiped away by insurance. Its purpose, however, in some circumstances, is to shift the financial losses arising out of an accident from the shoulders of the School Board or teacher to an insurance

2. Ibid. p. 1.
company which is prepared to take the risk.

Liability insurance, however, has its limitations. The concept of legal fault on the part of the School Board or teacher, is the basis for liability insurance. But, whether someone has been negligent or not, for a student who has lost an eye in an accident, is not necessarily the most important thing to him. What is most important is whether he will be given a monetary award to help offset the effects of the handicap. Just think of the case of a previously healthy young man in a court room - now a complete permanent cripple requiring twenty-four hour care, being kept alive by a system of tubes and machines. He is asking a nebulous group of taxpayers and an insurance company for compensation. The only finding that a jury could possibly give, on the basis of compassion, is guilty of negligence. The obvious solution to the dilemma the jury faces is provision of adequate insurance on the part of the defendant in the first place.

In common with most other reasonable and prudent men, School Boards purchase liability insurance in order to pay possible future costs of damages for which they may be held legally liable. What is liability insurance and how does it protect the School Board and ultimately the physical education teacher?

Scott (1964) states:

"Liability insurance, in common with all other classes

of insurance is provided under an insurance policy contract. This sets out the terms and conditions under which, in return for an agreed premium consideration the insuring company agrees to defend the school board against suits for damages which may be brought against it and to pay the assessed costs of any such damages. These terms and conditions also include an agreement by the insuring company to pay the cost of investigation of the circumstances of any accident where these indicate the possible existence of negligence on the part of the school district or its employees, which in turn might result in a successful defense being impossible to sustain.

There are two basic terms entitled "Insuring Agreements" which form the basis of liability insurance policy contracts. These are:

A. **Liability for Bodily Injury**;
   The insurance company pays on behalf of the insured all costs which the insured becomes obligated to pay due to liability imposed by law for damages due to bodily injury.

B. **Liability for Property Damage**;
   To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed by law because of damage to or destruction of property, caused by accident occurring during the policy period.

In order to obtain insurance, one must demonstrate an insurable interest. A necessary relationship between the person seeking insurance and the subject matter of the insurance, is an insurable interest; such that the insured
would be prejudiced by an event which would give rise to a claim under the policy or would benefit if such an event did not occur. Under a liability insurance policy there must exist a potential liability which may devolve on the insured; this liability must be the subject matter of the insurance; and the insured must bear some relation to this subject matter which is recognized by law in consequence of which he stands to benefit by the absence of liability or be prejudiced by the creation of liability.

There are three main areas that the School Board and teachers should be concerned about in ensuring the physical safety of the students, and ultimately to keep the frequency of liability insurance claims to a minimum:

1. It is the duty of the School Board to maintain the school buildings and premises in a safe condition. Factors which might contribute to an accident such as condition of the floors, lighting of the stairs, safety of doors, provision of hand rails and condition of the school furniture, should be maintained to prevent the possibility of accident. Even though it is the duty of the School Board to maintain school equipment, the physical education teacher should make a point of checking facilities and reporting any problems (in writing) to the School Board or to the school principal who would pass the information on to the Board.

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2. The physical education teacher should ensure that his students are supervised and controlled properly. This is extremely important whenever any athletic or extra-curricular activities are being carried on with the approval of the School Board and under the supervision of staff members acting in their capacity as such. Of course, accidents are bound to happen due to the nature of the activities involved in physical education, but if the provision could be shown to be adequate, no liability will attach.

3. The teacher and School Board's attitude towards acceptance of responsibility for medical or other expenses incurred by third parties (the injured student's parents, or any member of the public) is important regarding accidents. The responsibilities of School Boards and their staff under the present law, and the financing of these responsibilities, do not include the payment of medical and other expenses resulting from an accident in school activities or on school property. However, if the victim can prove that negligence on the part of the School Board or teacher was the cause of his injury, then liability may exist.

If a teacher is not negligent, he is not liable, no matter how serious the injury nor how bad the consequences for the injured student. A physical education teacher may feel a moral obligation to a student because of extreme
suffering, hardship, or loss of bodily functions. But moral obligation is separate from a legal obligation, and it cannot be litigated in the courts, nor can it be insured against or a figure placed upon it in terms of dollars and cents. Thus, the attitude of the School Board and teachers with regards to accidents should be one strictly in accordance with their legal position.

The parents of the students should be made aware of the position of the Board and teacher with regard to legal liability. An effective way to inform them would be to send home to the parents of each student, a letter in this regard (Appendix A).

Levensohn (1965) states that:

"Parents can be claimants as well as taxpayers, and a delicate situation occurs whenever it is necessary to reject a liability claim, especially for an accident to a child. The situation can best be averted by offering pupil-accident insurance. If the medical expense is taken care of, parents tend to be less interested in making a liability claim or suing the district. But making that coverage mandatory and requiring parents to pay the premiums can lead to another sort of difficulty in community relations".

Liability Protection In Manitoba

Members of the Manitoba Teachers' Society have enjoyed liability protection as additional named insured agents of the School Boards since September, 1964. The policy provides coverage up to $250,000 per member for most conceivable areas of exposure including contractual liability, property damage, and bodily injury. The teachers

are protected for any school or school-sponsored activity except where liability arises from the operation of a self-owned automobile.

1. **Bodily Injury:**

   As far as a physical education teacher is concerned, this is the most important area of coverage because personal injuries are a frequent hazard. As a result of the following, the physical education teacher could be involved in a liability suit:

   (a) acts in an imprudent and negligent manner;
   (b) his supervision of a school-sponsored activity either inside or outside the classroom, was imprudent and negligent; and
   (c) he was aware of defective equipment and did not advise school authorities in writing.

2. **Contractual Liability:**

   In some circumstances a written "hold harmless" agreement may be made by a teacher with another party. The teacher assumes responsibility within the terms of such an agreement. For example, when equipment of a dangerous nature such as oxygen bottles are delivered to the school, the teacher may sign an agreement releasing the supplier from liability. The teacher could be held liable in this case if an accident happens as a result of a defect in the equipment. The Manitoba Teacher's
Society policy covers the teacher in these circumstances and pays not only the damages which may be awarded but also the costs of investigations and legal services, provided the teacher has filed with the insurer a copy of the "hold harmless" agreement prior to signing the same.

3. **Property Damage**

This clause in the insurance relates to damage involving other's property which is neither in the care of or control of the teacher. This could affect the physical education teacher more than any other teacher in that there is considerably more opportunity for property damage to occur as a result of the activities engaged in. For example, if the physical education teacher was supervising a school baseball game, the baseball could easily be hit outside the school grounds and break the window of a parked car. An inexperienced javelin, hammer or discus thrower could also cause the same type of damage. Since the damage occurred to property not owned or in the care of the teacher, the insurance policy would cover all liability claims and costs. It is interesting to note the cost involved in obtaining this type of insurance. For an individual teacher taking out a policy of this type, the premium would be about $1.00 per year,
but the coverage would not be as extensive. However, the Manitoba Teachers' Society pays the policy premium out of the general revenue and the insurance protection averages less than 20¢ per member.

In summary, the insuring agreements of the policy protecting the teacher, provides for the payment of all sums (up to $250,000) resulting from liability imposed by law upon the insured for claims arising out of bodily injury, illness or death of any person or persons, and damage or destruction of property of others caused directly by an accident. Providing the teacher acts within the scope of his duties these sums are covered by the Insurance policy.

Saskatchewan

In Saskatchewan, the teacher appears to have adequate protection as a result of Section 242 of The School Act, with respect to injuries to students, during school activities not involving transportation.

An unusual aspect of liability coverage which needs some mention is injury to a teacher. To cover claims by its employees for damages suffered as a result of the negligence of the School Board, most Boards carry employers' liability insurance to cover claims by its employees for damages.

1. As cited by the Manitoba Teachers' Society, November 11, 1972.
Where facilities provided by the school were defective the Board's liability insurance would cover it. If a teacher is injured by another teacher's negligence, the normal rule that an employer is liable for the torts of his employee does not necessarily apply. Under the doctrine of common employment, if the person causing and the person suffering an injury are fellow employees engaged in a common employment for the same employer, the employer, provided he has taken reasonable care in the selection of his employees, is not liable for the consequences of the injury. To protect himself in the event of a claim by another teacher, a teacher could purchase a personal liability policy. Since this is such an unusual occurrence, comparatively few insurance policies of this type are purchased. However, in outdoor educational activities, where a number of teachers are involved, the risk may be more substantial.

Manitoba, compared to Saskatchewan, has made a special provision in their insurance coverage which contains a clause providing for cross liability which means a teacher is covered under the terms of the policy for any action brought against him by another teacher in the same manner as if separate policies were held by both teachers.

In Saskatchewan, if a third party, other than a pupil, is injured during school activities by a negligent teacher, the School Board's comprehensive general liability policy

normally would give the teacher protection against financial responsibility except that involving a teacher-owned vehicle.

Many School Boards provide and pay for school accident insurance for their pupils in the event of death or injury in the form of accident and disability insurance. The question of negligence is immaterial and these are paid on a "no fault" basis; i.e., it does not matter who is to blame for the injury. The benefits paid are usually not very high, but if the loss is suffered, the benefit is paid.

In summary, nearly all School Boards in Saskatchewan now carry about $1,000,000 general comprehensive liability coverage, $500,000-$1,000,000 liability coverage on school bus operations and various coverages with respect to pupil injuries.

However, it should be noted that the Research Branch of the Saskatchewan School Trustees Association has recently commissioned a comprehensive study of all School Board insurance. As a result of this study, major changes may result in the method of protecting School Boards and pupils against the financial results of a legal case.

Newfoundland

The Newfoundland Schools Act requires School Boards to obtain insurance indemnifying the Boards against liability in respect of any claim for damages or personal injury. The teachers are not presently included under this insurance.

1. Stated in a letter from Bill O'Driscoll, Executive Secretary, Newfoundland Teachers' Association, November 7, 1974.
The School Board Federation is presently considering the possibility of a liability policy to cover all individual School Boards, but to date (1975), no action has been taken in this regard.

The level of insurance carried by the School Board varies somewhat depending on the number of pupils and employees of the Board. As a general rule, however, the liability insurance protects the Board up to an amount of one million dollars in any one incident with an umbrella clause providing protection up to five million.

At this time, the Newfoundland Teachers' Association is examining the possibility of taking out a liability policy on its teachers. They have received cost quotations, but as of early 1975, they had not yet decided to purchase this type of insurance. This is indeed an unfortunate position for the teachers to be in. There have to date been no legal cases in the province concerning teacher negligence which resulted in injury to children. Unfortunately, in order to stimulate teachers to protect themselves against a legal suit, perhaps they will be prodded into action when some teacher is actually sued. Hopefully, the School Boards will remedy this before such a situation results, and provide coverage for the teachers.

**Nova Scotia & Alberta**

In the province of Nova Scotia, the Nova Scotia Teachers' Union has a liability policy for its teachers. In Alberta, School Boards hold liability policies for teachers.
British Columbia

In the province of British Columbia, authority for School Boards to enter into contracts for insurance is found in Section 178 of the Public Schools Act. There is no separate insurance for individual teachers, as the teacher performs his or her duties for the School Board and can look to the School Board's policy for coverage.

The B.C. Teachers' Federation also provides legal advice and legal aid to its members in specific cases arising from a teaching situation:

"A member is entitled to legal advice on any problem that arises from his/her job as a teacher, and is automatically entitled to free legal service in any case in which he/she is the defendant, provided that the President and General Secretary consider the case arose from a teaching situation. If they rule that a case is not related to a teaching situation, the member may appeal their decision to the Executive Committee.

If a member initiates a case, without reference to the B.C.T.F., he/she will not be supported in the courts at B.C.T.F. expense, unless the Executive Committee has authorized support.

The B.C.T.F. will not pay the costs of a legal action in appeal against a court decision, unless the appeal is entered or opposed with the approval of the Executive Committee".

As a result of the Thornton v. Edamura and Prince George School District (1975) judgement of $1.5 million, the School Boards in British Columbia have raised their insurance policies to range between $1 million and $3 million. In

view of this, it is anticipated that many of the other Canadian provinces will increase their insurance coverage to this range as well, if they are not already adequately covered.

Ontario

The Ontario Teachers' Federation does not become involved in aiding teachers in the event of a legal suit. It is the responsibility of each affiliate body. There are five main affiliate bodies: (1) Ontario Secondary School Teacher's Federation (2) Federation of Women Teacher's Associations of Ontario (3) Ontario Public School Men teachers' Federation (4) L'Association Des Enseignants Franco-Ontariens and (5) Ontario English Catholic Teachers' Association.

The Ontario Public School Men Teachers' Federation was instrumental in having the School Boards of the province compelled to provide insurance.

Recommendations Regarding Liability Insurance

1. When a somewhat hazardous activity is planned, and pupils are not covered under a general accident benefit policy, it might be advisable to take out a special short term group accident policy effective for the

1. Stated in a letter from W.A. Jones, Secretary-Treasurer, Ontario Teachers' Federation, November 8, 1974.

2. Stated in a letter from R.L. Lamb, Secretary-Treasurer, Ontario Public School Men Teachers' Federation, November 12, 1974.
duration of the activity only.

2. When a teacher is planning to invite a guest teacher, student teacher, or a specialist in a certain area, to come to the school to instruct the students, he should phone the local School Board and inquire about the Board's liability in this regard. Although no legal decisions are on record with regard to injuries arising out of the guest instructor's negligence, it is likely that the School Board would be held to have the same liability as for the negligence of an employee.

3. Although teachers are usually provided coverage by making them additional insured under the school's liability policy, if they are not working on behalf of the school at the relevant time (e.g., giving coaching or attending a summer course for their private benefit), the school's policy would not apply and this may be an area where liability coverage should be obtained.

CHAPTER VI

TRANSPORTATION

Transportation of students constitutes another area of potential danger that is of concern to the physical education teacher. When transport is provided by the local School Board buses, the teacher's liability is lessened in the sense that in the event of an accident, if the bus driver is found negligent, then any law suit would likely be directed to the driver and the School Board. However, if the teacher's conduct contributed to the damage, then he too, could be named in the case. In any event, the teacher would be required to act as a witness to the events (if he was present), and thus would suffer some loss from days away from school. With regard to transportation, the teacher should try to use the school district's buses as the safest measure against any ensuing liability.

1 Nolte (1964) lists a number of policies which should be followed in the transport of pupils:

1. The pupil transportation program should be completely under the guidance and control of a comprehensive set of written Board policies. Where the budget permits, the program should be under the administration of a specially trained bus dispatcher.

2. Only the highest quality of equipment should be used. Safety rather than economy should be the deciding factor.

3. Only the highest quality bus drivers should be employed. Drivers should be required to take physical examinations at frequent intervals, including eye tests, and close checks should be made of any change in the physical condition of each driver.

4. Periodic exhaustive examinations of moving equipment should be included in the Board's plan. While accidents arising from mechanical failure may occasionally exonerate the Board from liability, periodic checks will often uncover potential failures before they have a chance to happen.

5. Bus routes should be laid out with top priority given to the safety of pupils transported.

6. Ample insurance coverage of the liability type should be carried at all times. Consultations between the insurance representatives, school attorneys, and top administrators plus a representative from the board should arrive at what constitutes ample coverage under present conditions.

7. A complete program of pupil safety education should be provided, and each child should be required to become "safety conscious".

Perhaps the most significant liability issue is where the local School Board buses are not available for transporting
students, or perhaps the number of students involved is small. In this case, some P.E. teachers resort to transporting the students in their own cars. The potential for serious legal problems is considerably increased.

In general, there is no duty imposed on teachers to transport students in their own cars unless this is a condition in the teacher's contract with the School Board.

The School Board's duty is to provide vehicles for the conveyance of students in school related activities. The School Board is also particularly concerned with the school district budget and often seeks to reduce costs. In small school districts, many excursions cannot be undertaken because of the limited finances of the Board for transportation. As a result, alternative transportation is often sought.

One of the solutions is for the teacher to use his own automobile for transporting students. In this case, it is important that the teacher be familiar with his liability.

As an example of liability in this area, let us investigate this concern in the province of British Columbia.

Teachers have been consistently discouraged by the B.C. Teachers' Federation from using their own automobiles. However, teachers still continue to do so.

If an accident occurs and the teacher is involved with criminal charges or civil claims arising from his driving, then what is his position?

1 Grady (1975), states:

"Because the transportation of pupils, is not a

duty of the teacher, it is unlikely that legal aid will be provided by the B.C.T.F. for any criminal proceedings. As to civil claims, the teacher will have to look to his/her own auto insurance policy. Regulations passed pursuant to the Automobile Insurance Act, appear to make the teacher's position more predictable.

Sufficient protection against a liability suit can only be provided by adequate insurance coverage. The teacher's position at present is fairly well defined through the establishment of Autoplan and the Regulations passed pursuant to the Automobile Insurance Act of British Columbia.

It is likely that most teachers have insured their autos for pleasure driving only or possibly for driving to and from work.

Autoplan regulations define the proper use or purpose of a vehicle without jeopardizing the insurance policy. An exemption which particularly affects teachers is provided in Regulation 6.29 (1) which states:

"The occasional and infrequent use by the insured of his motor vehicle for the transportation of children to or from school or school activities conducted within the educational program".

Thus, the standard insurance policy held by the teacher protects him in transporting students if certain conditions are met. The regulations are as follows:

1. The teacher must not transport students more than four times per month and less than 1,000 miles per year. This is defined as "occasional use" in the Regulations. It must be noted, however, that the teacher will contravene his policy if he exceeds
this stipulation. For example, the teacher cannot miss a few months and then in any given month make up for the lost trips by exceeding four trips. This violation would make the insurance policy invalid.

However, a criticism of this Insurance Corporation of B.C. stipulation is that there are no limits or guidelines set as to how many miles can be travelled per trip with complete coverage in effect. Does the coverage on four trips of five miles apply equally to four trips of two hundred miles? Unfortunately, there have been no guidelines set in this regard.

In order to get around the above regulation, the teacher should purchase additional coverage and rate his automobile for business rather than pleasure. This will allow the teacher to transport pupils more than four times per month.

When a vehicle is to be used for more than 1,000 miles per year, it should be rated for business use. Although this is not found in any specific regulation, it is advised by the Insurance Corporation of B.C. Should the teacher expect to transport students more than 1,000 miles per year, then the vehicle should definitely be listed for business use. The 1,000 mile maximum per year appears to be a rather limited amount of allowable mileage when considering some school districts. Where students in isolated areas must be transported considerable distances for competition, the yearly allowable maximum may be reached in only two trips or so. Thus, additional insurance coverage must be obtained for the protection of the teacher, and ultimately to allow
a more extensive school athletic program.

2. The School Board must be aware of and give approval to the school activities so they are considered as part of the educational program.

Another concern is whether a teacher should accept money from his passengers for transportation, and whether volunteer drivers should be paid.  

Grady (1975) suggests:

"Payment by the employer to the driver for the occasional use by the passengers will not contravene the declaration that the vehicle is operated for pleasure purposes only".

However, if payment is made on a regular basis, then this practice may indeed contravene the category of a pleasure vehicle. An occasional payment, apparently is all right.

Where the teacher is using his own automobile to transport students, then consent of the School Board should be obtained. They are in a position to accept or reject this as a means to transport students. If they accept, then should a suit be filed later, regarding transportation, the Board could be automatically involved. Also, where the teacher uses his own vehicle, the parents of the students should all be informed.

The basic Autoplan policy provides for third party legal liability of only $50,000. If a teacher does resort to transporting students, then he should automatically increase his insurance coverage to $1 million. The additional premium cost really amounts to very little in the face of a possible legal suit in the millions of dollars.

1. Ibid. p.8.
Consider the possibility of four or five students rendered quadraplegic because of the teacher's negligence. Considering a recent 1975 case, where the quadraplegic student was awarded $1.5 million for his disabilities, the previous example could possibly result in a judgement in the figure of $5 million. Unless the teacher's auto insurance is sufficient, such a judgement could be totally devastating.

The School Board in the Prince George School District where the previously mentioned award was made, has now taken steps to cover the teacher in the use of his own auto for pupil transport. They pay the additional premiums for raising the basic insurance coverage from $50,000 to $1,000,000.

What are the teacher's liabilities when another student drives his own or his parent's car? The teacher must keep in mind that he is still 'in loco parentis' and as a result must be quite careful of which students he would delegate to assume such a responsibility. The teacher should be familiar with the student and feel confident that he is capable and mature enough to carry out his duties responsibly. If the teacher does not have this knowledge, he should make inquiries of other teachers in this regard. It is well to remember that the student will likely have considerably less number of years of driving experience compared to the teacher.

The safest route to the destination should be selected, even if this means travelling a few extra miles. Any

student the teacher is aware of as being rowdy or irresponsible should be required to ride with the teacher. Most definitely, the parents of the students should be informed that another student is driving. If the parents are not informed this could lead to serious consequences in the event of a legal suit.

In Manitoba, the Manitoba Teachers' Society policy protects teachers for any school or school-sponsored activity except where liability arises from the operation of a self-owned automobile. In this case, the automobile insurance carried by the operator will provide the protection. However, if a teacher receives renumeration from students or other teachers, he is advised to have his automobile insurance policy adjusted to cover against liability which may arise from an accident.

In general, the insuring agreements of the Manitoba Teachers' Society policy most generally applicable to teachers, provide for the payment of all sums (up to $250,000) resulting from liability imposed by law upon the insured for claims arising out of bodily injury, illness or death of any person or persons, and damage or destruction of property of others caused solely and directly by an accident. If the teacher is not acting within the scope of his duties, the policy will not be applicable. An endorsement to the policy provides for payment up to $250,000 resulting from liability imposed by law upon the insured for claims arising from the use of any non-owned
automobile provided that the teacher is acting within the scope of his duties.

In Saskatchewan, "there appears to be no reason to believe that the immunity granted to teachers under Section 242 of The School Act would not extend to injuries occurring out of accidents where the teacher was the driver of the vehicle". General liability insurance is carried by every School Board in the province. Provided the teacher is acting within the scope of his duty, then the School Board is jointly liable with the teacher for torts, including that of negligence. If the teacher was found legally liable in the operation of a vehicle, the Board's general liability insurance would offer protection. Therefore, an injured passenger's claim would likely be made against the teacher and School Board jointly, if a teacher's driving was found negligent. Normally, the claim would be settled by the School Board's Insurance company.

There is one situation in which the general liability insurance of the School Board may not offer teacher protection. Under The School Act, there is a special limitation period within which actions against a School Board must be initiated - that being within six months from the time of the accident, with a possible extension to one year. However, The Vehicles Act limits the period for automobile claims to one year, but it may be extended longer under The Fatal Accidents Act. This discrepancy in the two

acts indicates that in situations where there has been a delay in the plaintiff initiating a suit, the plaintiff may not be able to claim against the School Board as employer of the teacher. Thus, the teacher may become the sole defendant in a law suit.

In Saskatchewan, what protection is offered to individuals (spouse or student) who may be driver of the teacher's car and not protected by section 242 of The School Act? Non-owned auto insurance can be purchased to cover not only teachers, but students and parents as well as anyone else, regardless of whose vehicle is being used. This coverage is only applicable for authorized school activities. Dunbar states that:

"Because this is such a new type of insurance coverage, it is not known how many school boards carry it and again there is the problem that some activity may, in the future, be ruled not to be an authorized school activity. Many school boards as employers, carry standard non-owned automobile coverage which, in effect, puts a floor, frequently $500,000, on the protection against third party liability, which an employee has while driving someone else's vehicle on business. Again there is the difficulty that the accident may occur on what is held not to be a school activity or when someone other than the teacher is operating the vehicle and it has no effect if the teacher's own car is involved".

Dunbar suggests that the teacher should carry a "package policy" on his vehicle. The third party liability coverage for death or injury is only $30,000 under the compulsory "license plate" insurance. However, the limitation here, is that this type of insurance does not

1. Ibid. p. 29.
give any "passenger hazard" coverage such that in the event of liability for injuries to a passenger, the teacher would have no protection. Thus, a teacher would be foolish to rely only on compulsory coverage. Without additional coverage the teacher could face a tremendous risk of financial loss.

It does not matter in which province a teacher teaches, additional insurance coverage should be purchased. The basic auto coverage is not enough. Teachers are advised to familiarize themselves with the insurance coverages available from their own insurance company as well as any additional coverage which may be provided by the local School Board.
CHAPTER VII

MISCELLANEOUS CONSIDERATIONS FOR THE PROTECTION
OF THE TEACHER AND THE SCHOOL SYSTEM

Reporting Accidents

When a student is injured, the coach or physical education teacher must attend to the injury in a reasonably prudent manner. Only first aid should be rendered, and if the injury warrants it, a physician should be called. The teacher must use his judgement in determining the seriousness of the injury. He is obligated to do the best he can if immediate first aid is warranted. He may be charged with negligence either because of lack of action or because of unwise action. Most physical education teachers have been required, at some time in their training, to take a first aid course. As a result of this training, it is expected that he would possess the knowledge to act as a reasonably prudent trained person, able to provide relief to the injured student.

However, if the teacher acts in an imprudent manner and worsens the condition of the injured, then his actions could be held to be negligent. Having taken action, one must answer for it.
The problem that arises is the question of how far one should go in providing first aid. There is, unfortunately, no set rule. The teacher must have full confidence in his knowledge regarding the injury and be able to trust his own judgement. Perhaps, the only solid guideline to follow would be to adhere to the St. John's Ambulance First Aid Manual, and bear in mind that the teacher can be negligent for acting as well as not acting. By following the manual closely, the teacher should generally not be concerned about negligent procedures. The physical educator should administer first aid which is basically preserving life and limb, alleviating pain, and making the victim comfortable. If he performs the functions of diagnosis, prescription or treatment he is acting in the scope of a physician.

It should also be noted that if the teachers calls in a doctor 'unnecessarily' and the student is not covered by insurance, the teacher could end up paying the charges. Klafs and Arnheim (1969), elaborate on procedures to follow when an accident occurs and no physician is present:

1. Make an immediate preliminary examination to ascertain the seriousness, type, and extent of the injury.

2. If the injury is recognized as being beyond the scope of your ability, send for the physician immediately.

3. Give first aid if it is indicated.

4. Should the condition of the player be such that he requires removal from the area, determine whether he is in a condition that would warrant medical sanction before attempting to move him. If the player is unconscious or is unable to move under his own power with assistance, use a stretcher.

When an accident, either minor or major occurs, it is wise for the physical education teacher to keep a record of it. If, at a later date, questions are asked regarding emergency procedures followed, a report which was filled out on the spot provides the specific information required. Such information as the following is important:

1. name, sex, age and grade of the victim.
2. place of accident, time and date.
3. activity in which the victim was engaged.
4. description of how the accident happened and the part of the body injured.
5. emergency procedures followed and the condition of the injured athlete.
6. names and signatures of at least two witnesses.
7. a letter should be sent home clarifying the circumstances of the accident. This prevents misinformation to the parent by the injured student or perhaps others. (Appendix A, B)
Parental Consent Forms

The physical education teacher obviously cannot be as familiar with the individual limitations of a child as is its parents. The teacher, however, should put himself in the place of a parent, or in other words, in the place of what he would consider as a prudent parent. A parent should be advised in writing of the general nature of an activity that might be viewed as out of the ordinary. The reasonably foreseeable risks should be emphasized. The parent should be asked to show consent for the child's participation, by signing a parental consent form. However, such a consent does not amount to a waiver of claim to relieve anyone of legal liability. The teacher has assumed a legal duty to protect the health, safety, and welfare of the student standing "in loco parentis" and the consent of the parent cannot alter or abrogate this duty.

In addition to its possible contribution to good public relations, the only value the permission slip serves is that the parents are made aware of the activity and are willing or not to allow the child to participate.

The parental consent form also serves the purpose of providing the parents the opportunity of making the teacher aware of any individual limitations of the child, which the teacher might not otherwise have been notified about.
The growth of athletics for women in the last ten years has been phenomenal. Along with this, coaches, parents, and women's liberation groups have protested that the schools were not providing the opportunities for intercollegiate and interscholastic competition for women. Many high school athletic associations in the United States have been sued for discriminatory regulations against women's participation in sports. In Canada, there has been a number of related court cases.

The United States Education Amendments Act of 1972 includes an adjunct labeled Title IX which forbids sex discrimination in all institutions using federal funds. In Canada, in 1975, a 'sex' resolution was proposed by the B.C. Teacher's Federation which stated "that in accordance with the B.C. Human Rights Code, all courses, programs, activities and clubs sponsored by schools shall be open to all students regardless of sex". It should be noted, though, that this resolution is still only at the proposal stage.

There are a number of legal issues of concern here, regarding the above policies. Problems arise, however,

if for economy, school administrators decide to open all teams to both sexes to meet the legality requirements. In this case, only the exceptional athlete would have the opportunity to compete and this would inhibit rather than promote the development of sport programs for women. Ultimately, it could entirely eliminate the female school teams if the basis of team selection continued to be on skill level. Another fear is that the better female athletes will be drawn to sex-integrated teams and thus impair the development of quality sports programs for girls.

The American physical education teacher is indeed faced with a dilemma. The Canadian teacher in the future, could be also, if a similar stand as their neighbours is adopted in the schools. One of the problems is to determine which activities would be suitable for the curriculum in view of the co-ed requirements.

One of the major concerns is the issue of contact versus non-contact sports. It may, in fact, be unconstitutional to deny a male or female the right to seek team membership on the basis that the majority of one's sex do not typically engage in that type of activity. Is the potential for injury in contact sports a sex-related factor? In 1972, the Minnesota Law Review rejected this on the basis that the only valid objection to female participation with males is that intimate body contact between opposite sexes at the adolescent age might offend some participants and/or

spectators. Since there have been no court cases in Canada or the United States concerning injuries sustained on a co-ed team, as a result of mismatched abilities or strength, it would be difficult to predict the direction school teams will take. Likely the trend towards co-ed participation is here to stay, but it will likely be modified and some sort of restrictions placed upon it.

In November 1974, the first Delegate Assembly of the Association for Intercollegiate Athletics for Women in the United States expressed concern as to the implications that Title IX would have on the development of women's sports. The Assembly made the following resolutions:

WHEREAS

A single team for which men and women compete to become members strongly discriminates against women due to sex-determined physiological disadvantages in strength and speed.

WHEREAS

A mixed (co-ed) team for which participants compete against members of their own sex for membership on the team, and for which an equal number of males and females compete on opposing teams, is not discriminatory to either sex.

BE IT RESOLVED

There SHALL BE separate teams for men and women. No male student may participate on a women's intercollegiate team. No female student may participate on a men's intercollegiate team. In addition to separate teams for men and women, intercollegiate mixed (co-ed) teams composed of an equal number of males and females competing on opposing teams are DESIRABLE in these sports in which such teams are appropriate.

It appears that the issue is far from being resolved.
Many physical educators and coaches will be involved in court cases concerning discriminatory practices and right to participate on certain teams. This could result in a complete change in emphasis regarding school curriculum. Sex-integrated teams are not objects of the future, but are real, here and now. It is an issue that the physical educator and coach will be required to deal with. It will require careful consideration in order to prevent problems going to the courts for solution.
SUMMARY AND CONCLUSIONS

In summary, whether or not a defendant has been negligent is a question for a judge or jury to decide—a jury of laymen, not teachers or professional educators. The decisions of laymen will determine the question of negligence in a given case, and this may vitally affect the curriculum and its administration.

Therefore, if a teacher is aware of his common law position, he will always be thinking about ways and means of carrying out his teaching duties. Good discipline, good organization and previous instruction appear to be a solid basis for a program which will decrease the chances of liability. These three components can be enhanced by the teacher's knowledge of his potential tort liability as established by the statutes and common law in the area in which he teaches.

This study of the cases involving the physical education teacher would seem to justify the following principles as being applicable to the Canadian scene, in regard to the tort of negligence:

1. By statute and common law, the teacher stands "in loco parentis" to his students. As a result, the teacher is charged with the duty to exercise the same degree of care that a "careful parent" would for his own children.

2. If a teacher is acting within the scope of his duty at the time of the alleged negligence, then, in
most cases he can look to the School Board's insurance policy for protection.

3. It is the duty of the local School Board to take care of equipment and facilities.

4. The teacher cannot delegate his responsibility for supervision. He may allow another person, equally qualified and knowledgeable, to assume the duty, but that person does not assume the responsibility.

6. To protect against serious legal consequences, a physical education teacher should be sure that he is protected at least up to $1 million for general liability and the same amount of coverage if he uses his own automobile for transporting students.

This study has investigated the physical education teacher's position with regard to legal liability. The knowledge derived from the topics covered is valuable in the sense that the teacher may be made more aware of the areas of potential danger and attempt to conduct his or her classes with these issues in mind. The ultimate result of this knowledge should be safer and more satisfying programmes for the students and greater confidence on the part of the teacher that he or she may be able to take measures to avoid a law suit during his or her teaching career.
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Ricketts v. Erith Borough Council (1943), 2 All E.R. 629.


Thornton v. Board of School Trustees of School District No. 57 (Prince George), Supreme Court of British Columbia, January 23, 1975.

APPENDIX A

The contents of the following letter were drafted by J.M. Scott (1964). The author of this thesis has made slight modifications in the original wording.

At the beginning of each school year, each parent should be sent one of these forms.

LIABILITY OF SCHOOL BOARDS FOR INJURY TO STUDENTS

Dear Parents:

In order to avoid any future misunderstanding, your School Board and Physical Education teacher ............... wish to take this opportunity to advise you of the degree of duty owed by the School Board and teacher to pupils and/or their parents, in regard to the protection of pupils from accidental injury when going to, attending, or returning from, any school or school sponsored function.

While the School Board investigates all accidents occurring on school premises involving injury to pupils and obtains a full report of the circumstances, the majority of accidents result from actions of the students themselves. Children, whether attending school or not, tend to be accident prone and frequently get hurt, either in the course of overly boisterous play, or merely as a result of their own or other pupils' thoughtlessness or carelessness.

The School Board and the Physical Education teacher is often no more able to prevent the occurrence of accidents

of this type than you are as parents. Therefore, the School Board and Physical Education teacher cannot and does not accept, nor can it be legally forced to accept responsibility for payment of any medical expenses which may arise from accidents of this type.

However, if the School Board or one of its teachers are negligent and this results in an injury to one of the pupils, then the situation with respect to responsibility for actual out of pocket medical expenses may be changed. Under these circumstances, the matter would be governed strictly by law.

Yours truly,

________________________
(Physical Education teacher)

________________________
(School District Secretary-Treasurer)
Scott (1964) proposed the following letter be sent to the parents of a student injured in an accident causing bodily harm. Slight modifications have been made by the author of this thesis.

A copy of this should be retained by the teacher in the event that parents pursue a legal suit.

Dear ____________,

I regret that your son/daughter ____________ was hurt in an accident which occurred at the ____________ School at _______ a.m./p.m. on the _____ day of ____, 19__.  

From my understanding, the accident was caused by _____________.

Children, whether attending school or not, tend to be accident prone and frequently get hurt, either in the course of boisterous play or merely as a result of their own or other pupils' thoughtlessness or carelessness. You will appreciate, therefore, that the School Board or the Physical Education teacher cannot accept responsibility for medical expenses resulting from any injuries sustained in such accidents, unless, of course liability is found on the part of the School Board or teacher.

Should any expenses be involved, we trust you will be

1. Ibid. p. 23.
able to recover these under whatever form of personal prepaid medical expense coverage you may carry.

Yours truly,

____________________________
(Physical Education teacher)

Witnesses to the Accident

____________________________

____________________________

____________________________

(Signatures)
Court Rules on Teacher Liability

A teacher acting in the course of his employment is not liable on allegations of negligence if a student in his charge is injured, according to a judgment handed down July 19 by Mr. Justice E. N. Hughes of the Court of Queen’s Bench. The judgment was made in the case of Saskatoon teacher Marjorie Cattell who, with the Saskatoon public board of education, was being sued for negligence as a result of an incident in which a student was injured during a gym class.

In dismissing the action against Mrs. Cattell, Judge Hughes ruled that section 242 of the School Act was a good and complete defence for her. That section reads: “Where the board, the principal or the teacher approves or sponsors activities during the school hours or at other times the teacher shall not be liable for damage caused by pupils to property or for personal injury suffered by pupils during such activities.”

Commenting on the judgment, Harry Dahlem, counsel for the STF, said it is the first time a court has ruled a teacher is not liable if the allegations are that he is guilty of negligence. The ruling, he said, means if there is liability it should fall on the school board and not on the teacher.

Also, Mr. Dahlem said, the ruling sets a precedent which may be used in any future cases in which a teacher is alleged to be negligent while acting in the course of his employment as a teacher.

While the ruling cannot prevent action being brought against a teacher, the precedent can be used in obtaining a dismissal of such an action, he said.

The action against the Saskatoon public school board is continuing.
APPENDIX D

THE CANADIAN RED CROSS SOCIETY
WATER SAFETY SERVICE
B.C.-YUKON DIVISION

(This article by Karl Miller was published by the Journal of Physical Education)

THE $150,000 QUESTION

Want to face up to a real jolt -- and look at the responsibilities of a professional nature, in a coldly realistic manner? If you do, then just get yourself, as I have, mixed up in a $150,000 law suit for damages for alleged negligence in the operation of a swimming pool. This was incident to a drowning we had in our pool more than four years ago.

The parents of the deceased young man, aged 19, were suing the pool management for that amount. Our insurance company was fighting the case and our lifeguard and I were the principal witnesses. Both of us were on the witness stand for the better part of two days, before a solemn judge and an equally solemn jury. The opposing attorney tore into us in a traditional way and gave us more than casual concern about not only the outcome, but the whole problem of operating a swimming pool correctly.

The fact that the jury brought back the verdict of 11 to 1 in favour of our insurance company fails to lessen the impact of this experience upon me -- and all others involved. I wish that all professional pool operators could have a similar experience.

I wish this because the situation is a little like guarding a pool. Ever done it? The hours drag. Finally the hours turn into days, then weeks, and months and often years, without anything happening. The senses become dull, the attentiveness cloudy, the reactions blurred -- but the danger is still always there. Then, suddenly it happens and the person on duty is supposed to have the same degree of alertness, sensitivity, reaction and efficiency that he had during the first hour on the job, days or months ago. It's like being a fireman. You sit around for days and weeks at a time and nothing happens. But when the bell rings, you had better be ready with all the efficiency and alertness needed for maximum performance.

An experience such as I have just been through will for a long time alert the guard, staff and pool operators and those responsible for the administration of pools to the constant necessity of vigilance in relation to staff attitudes, habits, and methods.

Perhaps a review of some of the questions asked me by the prosecuting attorney will help to indicate what you might be asked and what would be expected of you if such an experience ever took place in your city, with you as the guy on the witness stand. It could happen to you, you know. If it does, you had better have the right answers. Here are a few that were shot at me:
- 2 -

- What was the condition of the lights at the time of the accident?
- What was the degree of turbidity of the water?
- Where were the guards?
- Who got the body out of the pool?
- How old was the guard?
- What were his qualifications?
- How many hours had he been working without relief?
- What were his duties other than the protection of human life?
- What was the guard doing at the time of the accident?
- Can you adequately guard a pool of this size and give swimming help to an individual? (The guard in this case was helping to correct the stroke of a weak swimmer along the shallow end of the pool.)
- How often does the guard circle the pool?
- What causes the pool to be cloudy?
- Where is the guard stationed?
- How many lights are in the pool area?
- What wattage are they?
- Could you see the bottom of the pool clearly?
- What are your qualifications as a supervisor to the guards?
- Have you ever guarded a pool?
- Do you know the state laws regarding the working conditions of a person under twenty-one years old?
- How long does it take for a person to drown?
- Does he always make an outcry or thrash around in the water?
- What did the guard do upon seeing the body?
- Did he give artificial respiration?
- What type did he use?
- How long did he apply it?
- Did he call for help? When?
- What did the witnesses say and do?

Well, I could go on, but this gives you a rough idea. This experience pointed out to me that one cannot possibly be too careful or diligent about such a dangerous thing as a swimming pool. One minute of laxity on the part of a careless or poorly oriented guard may undo the good work of years in teaching swimming and lifesaving. Seldom does the good deed in the aquatic program ever make the front page of the newspaper, but just wait until you have the first drowning -- you are right there in bold black print. I know from experience that it isn't funny.

Of course I am assuming that you have 100 percent adequate coverage in your pool. I would not work for a pool that was so narrow-minded as to not insist upon total coverage. However, I will wager that half the pools in this country are without adequate coverage. This is a shocking thing. If we have no legal responsibility because of a technicality in terminology at least we can surely have a moral obligation which cannot be ignored.
Most associations that do not have total coverage plead lack of funds. That is a lot of hogwash. No organization should carry on a physical education program unless they can do it within the bounds of at least average safety. Less than total coverage in your pool is a long, long way below average safety. Yes, the $150,000 question is whether you have the right to be left responsible for administering a swimming pool, with its ever present danger to human life. This is not joke -- nothing that you can turn over to an aid or a casual volunteer. Many pools have been just plain lucky. But some day their luck may run out. The guy who is responsible will be sworn in and will step heavily to the witness stand. There he will be, all alone with his conscience. For legal reasons, as I have said in the outset, he had just better have the right answers. But whatever the jury decides, he still has to go on living with himself. Perhaps no one but he will ever know just what the real thing was that went wrong and caused a human being to drown. But he'll know. And God help him if it is his fault.

Peace of mind is worth a lot more than $150,000.