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CEPI Education Law Newsletter

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MAY 2009: Vol. 7-9

NEGLIGENT TORT LIABILITY AND STUDENT EXTRA-CURRICULAR ACTIVITIES

Overview

Student extra-curricular activities always have been and remain a source of potential liability issues. Suffice it to say, today's public school officials, administrators, and staff members are keenly aware of their duties and responsibilities to protect students from potential injury—especially in such high risk extra-curricular settings as field trips, cheer leading, and athletics. Ironically, however, not a school year passes that does not include reported incidents where a student or students suffered serious injury while participating in a school sponsored or sanctioned extra-curricular activity. And, when such incidents occur, questions must be asked to determine how and why they happened.

Parent Expectations and Due Care. When parents send their children to school and give permission to allow their child to participate in an extra-curricular activity, they expect that the activity will be safely conducted. In effect, parents want their children to be protected from injury. At the same time, however, this expectation must be balanced with the fact that in today's public schools administrators and staff members cannot ensure the safety and security of every student in their charge. The courts have held that school officials, administrators, and staff can be expected only to take reasonable steps (i.e., *exercise due care*) to establish and maintain a safe and hazard-free environment for their students. Vacca and Bosher (2008)

While parents and school officials may differ on the degree and scope of protection due to each child, there is one thing on which they fully agree. No child shall be exposed to risk of harm and injury caused by the *negligence* of a staff member. To put it another way, *negligence* has no place in the school house—especially in high risk settings and activities. The reader is reminded, however, that negligence cases are fact-based. To judge whether or not *negligence* has occurred the researcher must know the facts of the particular situation. *Negligence* (i.e., failure to act as a reasonable and prudent person) established in one situation may not be established in another situation—even where the resulting injury was the same in both situations. And, it must be emphasized that liability does not attach where "sudden and unforeseen events" were the proximate cause of injury. Mei Kay Chan v. City of Yonkers (N.Y.A.D. 2Dept. 2006)

Clay City Consolidated School Corporation v. Timberman and Pipes (2008)

Recently, I came across a 2008 Indiana case on point while doing research in the law library. In addition to the case specifically involving student extra-curricular activities, the value of the case lies in what the court says regarding four critical elements associated with a duty/risk analysis to apply in search of *proximate cause*. The elements discussed in the court's rationale are: (1) student contributory negligence, (2) potential parental negligence, (3) specific language in a signed parental release from liability form, and (4) duty of care owed by staff to students. Both *assumption of risk* and *foreseeability* are integrated into the court's rationale.

Facts: On Monday, November 17, 2003, thirteen-year-old Kodi Pipes (Kodi) blacked out and fell to the floor at the beginning of eighth grade basketball practice. He stood back up and walked to the side of the court. Seeing this happen, the head coach walked over to Kodi and asked him what was wrong. Kodi said that he felt dizzy. The head coach then asked an assistant coach to check Kodi. Because the assistant knew that Kodi had asthma he asked him if he had used his inhaler. Kodi answered that he had used it, but that he did not believe that his asthma caused his dizziness. He also told the assistant coach that he had not eaten that day. Subsequently, when the head coach heard this he did not let Kodi continue practicing, but he did allow him to shoot free throws.

After practice the head coach accompanied Kodi out to Kodi's mother's car where he reported the incident to the mom. Kodi's mother told the coach that she would get Kodi something to eat and that she would make an appointment with a doctor to have Kodi checked. She also told the coach that she did not want Kodi to practice with the team until a doctor had checked Kodi. However, after Kodi complained to her that he did not want to fall behind with the team, she later modified that statement saying that Kodi could walk through plays but was not to participate in running or in other strenuous activity. The head coach later testified that no conversation took place regarding Kodi's level of physical activity during practice.

On Tuesday, November 18, 2003, Kodi's mom made telephone calls to a general practitioner and a neurologist. On both Tuesday (November 18, 2003) and Wednesday (November 19, 2003) Kodi attended school without incident. And, there was no further communication between Kodi's mom, the coach, and the school nurse. On that same Wednesday afternoon Kodi attended some after school activities, and he went with his grandfather to get something to eat. He then went home and returned to school for a 7:00 p.m. basketball practice. Kodi was aware of his practice restrictions and he had not yet been checked by a doctor.

At the beginning of practice the head coach asked Kodi if he had eaten. He said that he had eaten. Assuming that Kodi was okay to practice, the coach let him practice with no restrictions. Toward the end of practice the coach had the team do running drills. Early in the drills Kodi collapsed. On immediate examination the head coach determined that Kodi was not breathing and had no pulse. The head coach and two others than performed CPR on Kodi until EMT's arrived on the scene. Efforts to revive Kodi were unsuccessful. It was later determined that Kodi died from a malignant type of heart rhythm known as ventricular fibrulation.

Lower Court Action: In August 2006, Kodi's parents filed a complaint in state court. In their complaint they relied on Indian's *Child Wrongful Death Statute* (Ind. Code 34-23-2-1) and alleged that the school system was liable for Kodi's death. School system officials filed answers and asserted that the school system was not the *proximate cause* of Kodi's death. Following a jury trial a verdict was entered in favor of the parents (mother awarded $250,000, and father awarded $175, 000). Subsequently, the trial court reduced the awards to $176, 470.57 for the mom and $123, 529.43 for the dad. The school system appealed challenging the appropriateness of the trial judge's instructions to the jury.

Court of Appeals Decision: Even though the Court of Appeals of Indiana dealt with the narrow issues associated with jury instruction, its discussion and rationale regarding negligence liability are both informative

and generalizable. In effect the Court focused on the concept of *contributory negligence* and in doing so relied on the traditional "reasonable man" doctrine. First, the Court asked: Had the decedent student (Kodi) exercised the care of a child of like age, knowledge, and experience in this situation? Following a detailed discussion of Indiana case law on point, the appellate court made it clear that in that State "it is rebuttably presumed that children between the ages of seven and fourteen may be liable for their negligent acts."

At this point in my commentary allow me to step back from the Clay City case and add a note. In Virginia there is a similar presumption regarding children and contributory negligence. As Kaminski and her colleagues tell us, "The law recognizes that children do not possess the judgment and discretion usually exercised by adults….The measure of a child's duty to exercise reasonable care for his own safety is determined by the capacity to exercise care ordinarily possessed and exercised by children of the age and development of the group of children to which the plaintiff belongs….Children between the seven and fourteen years of age enjoy a rebuttable presumption that they cannot be guilty of contributory negligence…." Kaminski, et al. (2008)

The Release Form. Returning to the Clay City case, the Court next focused on the possible presence of parental *contributory negligence* as a *proximate cause* of Kodi's death? Related to this question the Court probed the nature of a parental release form signed by Kodi's parents when granting permission for their son to participate in athletics at school. In that form was the following language: "I know of the risks involved in athletic participation, understand that serious injury, and even death is possible in such participation, and choose to accept such risks. I voluntarily accept any and all responsibility for my own safety and welfare while participating in athletics, with full understanding of the risks involved." That same statement (acknowledging and accepting the risks involved) was signed by Kodi.

While the importance of the parental release form was stressed, the Court pointed out that the form did not "specifically and explicitly" refer to "negligent acts of the Clay City Schools proven by the Mother and Father." Thus, said the Court, the trial judge was correct in saying that the release form signed by parents and Kodi did not release the school system from any negligent acts as the *proximate cause* of injury to students.

Standard of Care. Regarding the standard of care owed students by school system personnel the Court opined that school personnel have a duty to exercise "ordinary and reasonable care" for the safety of children under their authority. More specifically, and citing controlling Indiana law, the Court emphasized that school officials are neither an insurer of safety nor immune from liability." However, said the Court, "[i]t is not a harsh burden to require school authorities in some instances to anticipate and guard against conduct of children by which they may harm themselves or others."

Again, allow me to step away from the Clay City case and add another note. The importance of prior knowledge cannot be overemphasized. *Foreseeability* is a critical element to factor into the duty/risk analysis. Legal experts remind us that, "Negligence in schools occurs often when the conduct of school personnel unintentionally fails to meet an acceptable standard of care. Oftentimes, negligence in schools focuses on whether a reasonable person in the school official's position could have anticipated the harm, but failed to protect the student." Eckes and Gibbs (2005) And, as Alexander and Alexander tell us, "[t]he courts generally hold that no legal duty exists where the defendant could not have reasonably foreseen the danger of the risk involved. Alexander and Alexander (1995)

The decision was reversed and the case remanded back to the court below for a new trial.

Policy Implications

Recognizing that the Clay City (2008) case is but one state law decision where the narrow issues dealt with a trial judge's jury instructions, the rationale regarding negligence liability offered by the Court of Appeals of Indiana is nonetheless instructive. In my opinion the Court's discussion of negligent tort law will prove valuable to public school officials and administrators—especially as applied to policy analysis regarding extra-curricular activities. Briefly summarized below are six suggestions for policy as gleaned from the Clay City (2008) decision.

School system policies regarding extra-curricular activities must make it clear that:

- Providing student safety and security are major goals and objectives in all school-sponsored and school-sanctioned extra-curricular activities.
- All staff members (e.g., coaches, sponsors, etc.) directly involved with students in extra-curricular activities are responsible for establishing and maintaining safe and hazard-free environments, and for instilling the importance of and individual responsibility for safety in each student participant.
- All staff members will be provided with professional development training, including up-dates, by certified trainers in basic first aide and CPR.
- Prior to their child participating in a school sponsored or sanctioned extra-curricular activity, parents will be fully informed of any dangers, risks and possible injuries associated with the activity.
- All parents must sign a parental permission form as a precondition of their child's participation in an extra-curricular activity.
- Prior to their child participating in the extra-curricular activity, parents are encouraged to inform and report to staff members (e.g., coach, sponsor, etc.) any medical issues (including prescription medications and/or physical limitations) effecting their child.

Two final notes are in order. First, the reader is reminded that this commentary does not treat possible defenses available to school officials, administrators, and staff. This is a matter to be taken up with legal counsel. Also, it behooves school officials to routinely submit all extra-curricular activity parental permission forms to legal counsel for review. As the Clay City (2008) case demonstrates, the specific language contained in a parent release form is very important.

Resources Cited

Alexander, Kern, and Alexander, M. David, THE LAW OF SCHOOLS, STUDENTS, AND TEACHERS, Second Edition (West Group, 1995)

Clay City Consolidated School Corporation v. Timberman and Pipes, 896 N.E.2d 1229 (Ind.Ct.App. 2008)

Eckes, Suzanne, and Gibbs, Jesulon, *Student Injury*. In Lane, Kenneth R., *et al*., THE PRINCIPAL'S LEGAL HANDBOOK, Third Edition (ELA 2005)

Kaminski, Kate R., et al., VIRGINIA SCHOOL LAW DESKBOOK: 2007-2008 School Year Edition (LexisNexis 2008)

Mei Kay Chan v. City of Yonkers, 824 N.Y.S. 2d 380 (N.Y.A.D. 2Dept. 2006)

Vacca, Richard S., and Bosher, William C., Jr. LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS, Seventh Edition (LexisNexis 2008)

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Note: The views expressed in this commentary are those of the author.