Learning Task 1: The Law Assignment - Question 2 - The Slide

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A grade two student named Dakota was injured at Western Canadian Elementary School in Cowtown, Alberta while playing a game called “grounders,” a game of tag that requires the person who is “it” to remain on the ground while trying to tag students on the playground. If the person who is “it” decides to go on the playground, they must keep their eyes closed. During the incident, Dakota was “it” and decided to climb on the playground with her eyes closed when she was pushed by Ellen, a fellow grade two student, who had previously been punished for bullying Dakota. We have assessed this case of Dakota v Ms. Morgan and Cowtown Board of Education for insurance purposes. We predict that the board of education will be held 95% liable, Dakota will be held liable for 5% for contributory negligence and Ms. Morgan will not be liable.This brief outlines our assessment that lead to this conclusion

For Ms. Morgan Liability

Ms. Morgan is a teacher and was responsible for supervision at the time that the incident occurred. By being a teacher Ms. Morgan is subjected to the ATA: Legal Liability and therefore is held to a higher standard of duty of care to the students in her school. It could be argued that there was a breach of duty of care (3A- Educators' Negligence and Liability, slide 18-23). Although Ms. Morgan could be held liable in this case since she owes the plaintiff a duty of care based on the duty of care, we think that the board will be vicariously liable instead because Ms. Morgan breached her duty of care while carrying out her duties of employment as assigned when the incident occurred (Read CowTown Board of Education section for further detail).

Against Ms. Morgan’s Liability

There are several reasons against Ms. Morgan being liable for negligence in this case. Ms. Morgan does owe a standard of care to the plaintiff. In the podcast “standard of care refers to: 'The attention and care a person should reasonably provide to another person under the

circumstances'" (3A- Educators' Negligence and Liability, slide 6). According to this explanation, Ms. Morgan's actions were reasonable and she did everything she was trained to do such as visually supervise, react and apply/call for first aid. The LT1 description of what happened states "Ms. Morgan immediately provided her with appropriate emergency medical care in full compliance with Western Canada Elementary School and Cowtown Board of Education policies" (p. 5). This is an important factor to consider with Ms. Morgan because she did provide emergency medical aid with no gross negligence which will protect her under the Emergency Medical Aid Act, RSA 2000, c E 7. Ms. Morgan did act as a careful prudent parent with all the information she was given and the situation would have resulted in the same outcome if a different teacher with the same information was supervising. Therefore the "but for test" is not applicable because Ms.Morgan was not the reason for causation in the situation. Ms. Morgan "was unfamiliar with the bullying issues from the year prior" (LT1 - Question 2 - The Slide) and it is ultimately the negligence of the school for not disclosing this information to her. In addition, supervisors at schools can never reasonably control all potential accidents from happening. In this case, Ms. Morgan had insufficient time to act quickly enough therefore there was no reasonable foreseeability. Comparing this situation to Deo v Vancouver School District No. 39, 2018 BCSC 133 ("Deo") it is not reasonable for supervisors to have to prevent every potential accident from happening and accidents do happen. The role of the prudent parent entailed in this case and the Deo case is further explained in Deo:

> "What is clear is that the "careful and prudent parent" standard does not require school authorities to remove all risks, no matter how small: *Thompson v. Corporation of the District of Saanich*, 2016 BCSC 1750 at para. 17-18. As the defendant put it, school authorities are not "automatically" liable in negligence just because a child is injured on

> school grounds. Fault can only be found if the school authorities failed to exercise the kind of care that could be expected of a reasonably careful and prudent parent in all the circumstances: *Parks v. Vancouver School District No. 39*, 2003 BCPC 3 at para. 44." (para. 121)

Therefore Ms. Morgan is not at fault because Dakota just happened to be injured while under her supervision.

For Cowtown Board of Education's Liability

The Cowtown Board of Education could likely be held liable for independent negligence because it owes every student a duty of care while they are in attendance at school as outlined by the Occupiers Liability Act. Cowtown breached their duty of care because they failed to prohibit the game "grounders" and failed to inform Ms. Morgan of the history of bullying between Ellen and Dakota. "Grounders" was prohibited in the Oiltown School District because it resulted in one serious injury. Therefore, the incident would not have occurred but for the failure to restrict students from performing an inherently dangerous activity, the game grounders as pre-established by the ruling in the MacCabe v. Westlock Roman Catholic Separate School, 2001 ABCA 25 ("MacCabe"). The administration of the school was aware of the history of bullying between Ellen and Dakota and a careful and prudent parent would not allow the two of them to play a high-risk game together. As a result, the incident would not have occurred but for the failure to inform Ms. Morgan of the history of verbal and physical bullying of Dakota by Ellen. This is similar to the failure to provide adequate mats in the Myers v. Peel County Board of Education (1981) as described in podcast 3B (Jones, 2021).

Against Cowtown Board of Education's Liability

Although there is some evidence to suggest the Cowtown Board of Education is liable for independent and vicarious negligence, there are also reasons against their liability. It has been suggested that Cowtown should have prohibited the game of grounders based on Oiltown's rule, however, as mentioned in the podcast, one incident does not indicate a trend (2021). Therefore a careful, prudent parent would not ban a game based on one incident. Additionally, the student handbook required students, in this case, Ellen, to refrain from bullying and assault. Since Ellen had been suspended the prior year, it would be reasonable to expect that she understands that rule since no other emotional or developmental needs are disclosed.

Ultimately, we think that the Cowtown School Board is independently liable because of the failure to disclose the history of bullying which prevented her from foreseeing the risk of further bullying of Dakota by Ellen and appropriately responding to mitigate the incident.

For Dakota's Liability

Dakota is an intelligent and respectful girl who would understand the danger and risk of falling presented by standing at the top of the slide with her eyes closed, only supported by one arm holding on to the bar. Although she claimed she had very strong familiarity and knowledge of the playground's layout, Dakota actively participated in the game of "grounders" where she closed her eyes on a part of the playground which posed a risk. To determine if Dakota could have reasonably foreseen that she might hurt herself or took steps to avoid possible harm would require a review of the scenario at the top of the slide. Dakota took an unnecessary risk by choosing to go on to the playground with her eyes closed. She reduced her safety by stabilizing herself with only one hand gripped on the bar at the top of the slide while her eyes remained closed. Comparable to MacCabe, when assessing Dakota's contribution to her accident, it is

reasonable to conclude that she is partially responsible for her injury through her actions that put her in a dangerous circumstance.

Against Dakota's Liability

In MacCabe, MacCabe, 16-years-old, was held liable for contributory negligence at 25% at the account that she "hesitated" acknowledging that she was aware of the "risk of harm" (para. 70, 72) in attempting a dangerous activity. In contrast, Dakota is only 7-year-old and has not acquired the maturity or ability to access risk as a young adult would. Dakota's actions are consistent with what could be expected from a reasonable 7-year-old of like intelligence and life experience as evident by her peers engaging in the "grounders" game as well. Section 1(1)(D) of the Education Act states that "'bullying' means repeated and hostile or demeaning behaviour by an individual in the school community where the behaviour is intended to cause harm, fear or distress to one or more other individuals in the school community, including psychological harm or harm to an individual's reputation" (ATA, 2020). Dakota could have not foreseen that Ellen would seize the opportunity and intentionally push her off the top of the slide. Dakota was in a vulnerable position with her eyes closed. She was also facing away from the playground. Although there was one account of physical bullying between Dakota and Ellen previously, where Ellen was suspended, and they had been placed in different classes to terminate Ellen's bullying, Dakota still participated in playing "grounders" with Ellen knowing she had bullied her. However, Ellen's act of intentionally pushing Dakota off the top of the slide falls under an act of bullying which is outlined in the handbook. Therefore, Dakota is a victim and was targeted. Ellen has a copy of the student handbook and should have been present at the beginning of the year assembly where rules were discussed; Dakota was hurt due to Ellen breaking school policy.

Conclusion

Based on the assessment above, we believe that Ms. Morgan has 0% liability in this case. In summarizing the previous points: Ms. Morgan's standard of care was sufficient, Ms. Morgan is protected under the Emergency Medical Act, Ms. Morgan was not notified about the conflict between Ellen and Dakota before the incident, Ms. Morgan did not have sufficient time to stop the injury and, that the prudent parent role does not obligate Ms. Morgan to prevent every possible accident./injury from happening. Ms. Morgan gave the best possible care she could with the information given to her therefore she is not in breach of negligence.

The plaintiff actively engaged in the inherently dangerous activity of “grounders” and took an unnecessary risk by abiding by the rules of when “it” eyes must remain closed (3B - Educators' Negligence and Liability, slide 13). In addition, it is reasonable to conclude that Dakota acted on any 7-year-old child alike. Dakota could have chosen to not participate knowing Ellen bullied her and may again if the opportunity presents itself. However, age is a crucial factor where Dakota has not gained comprehension of risk. She also could have not foreseen or prevented Ellen from pushing her off the slide without staying on the ground or not playing at all, as her eyes were closed and she was facing away from the playground, thus only contributing 5% to her accident as Dakota was targeted but took an inherent risk.

The Cowtown Board of Education failed to fulfill their duty of care by neglecting to inform Ms. Morgan of the history between Dakota and Ellen or implement a safety plan for when the two students might interact on school grounds. This incident would not have occurred if Ellen and Dakota were kept separate. Additionally, there was evidence of grounders being a dangerous game and the school board should have explicitly banned it. So we predict that the Cowtown Board of Education and their insurers will be liable for 95% of the injury.

References

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