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Education Law Newsletter

— September 2011 —

IN THIS ISSUE —

Transportation for students may be "service" for parents under the Human Rights Code

In *Contini v. Rainbow District School Board*, (2011 HRTO 1340), the Human Rights Tribunal of Ontario issued an interim decision permitting the application to proceed. The applicant was a parent who alleged that she had been discriminated against on the basis of disability in respect of goods and services when the Board refused to provide bussing services to her children.

The issue before the Tribunal was whether the application was outside the Tribunal's jurisdiction on the ground that the Board was not providing services to the applicant, a parent.

The parent lived close to the School, however, due to her disability was unable to take her children to school. For a number of years, the Board acquiesced to her special request to provide transportation for the children to the School. However, in 2009, the Board rejected her request based on the Board's transportation policies, whereby older students were deemed capable of independently travelling greater distances to school. As a result, the applicant's husband, a teacher at the School, drove the children to school daily.

The applicant argued that she wanted to prepare the children for school and watch them get on and off the bus, and that this was a meaningful contribution for her to her family. Being denied this opportunity, she argued, was an attack on her self-worth and dignity. The Board's denial of transportation services did not take her special needs into account. She further submitted that the Board offered bussing services not to children, but to their parents, the taxpayers.

The Board submitted that it did not provide any services to parents, including bussing services. The Board further submitted that there was no legal obligation for it to provide bussing services that benefit a parent, and that in any case the applicant's husband was equally responsible for the children's transport to school.

The Board had a joint transportation policy with other area school boards, as well as its own transportation policy. The Tribunal focussed on the wording of the segment of the Board's transportation policy outlining the handling of "parental requests for special transportation agreements".

Employing principles of statutory interpretation, the Tribunal found that "*it was clearly the Legislature's intent to ensure that all those with whom the respondent necessarily interacts in providing those services – including parents and students – are treated equally and without discrimination*" (para. 26). The Board was found to be in a "service relationship" with the applicant based on the reference to "parent" in the Board's policy. The applicant was also deemed to be deriving a benefit from the transportation of her children to school.

The Tribunal permitted the application to continue, noting that the applicant was still required to establish discrimination.

Given the Tribunal's analysis and the low threshold to establish a "service relationship", specifically a reference to a parent in a policy, as grounds for extending the social area of services to parents, it is conceivable that parents could bring applications with respect to other services that school boards offer to students where policies include reference to parental involvement.

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Charter challenge by Board against Government

In *Conseil Scolaire Fransaskois v. Government of Saskatchewan*, [2011] S.J. No. 423 (Q.B.), the Saskatchewan Court of Queen's Bench awarded the Conseil Scolaire Fransaskois ("CSF") an interlocutory mandatory injunction

ordering the Government of Saskatchewan (the "Government") to provide funding to CSF to meet its budgetary shortfall and to establish a reserve to cover unforeseen expenses for the following year.

The CSF had commenced a civil action seeking permanent injunctive relief and declaratory orders requiring the Government to provide sufficient funding to the school system. The CSF alleged that the Government had failed to meet its obligations under section 23 of the *Charter of Rights and Freedoms* (the "*Charter*"), which provides for French minority language educational rights, by chronically under-funding the system. The parties disagreed with respect to the Government's obligations pursuant to section 23. The CSF submitted that the Government had a triple mandate, to provide French language educational instruction, and programs and activities to transmit and reinforce the French culture and francophone identity. The Government submitted that it met its obligation by providing funding for elementary and secondary schooling equivalent to that of the Anglophone system. This larger issue would be determined at a full hearing of the issues.

The CSF had a budgetary shortfall of 2.3 million dollars in order to maintain its status quo. It also sought $700,000 to implement a new Local Implementation and Negotiation Committees (LINC) contract that was to come into force that September, $435,000 to cover the cost of hiring additional teachers in the case of a probable increase in enrolment, as well as $500,000 to replenish its reserves that had been expended in covering previous budgetary shortfalls.

The test to be applied for an interlocutory injunction was a three-pronged one: whether there was a serious question to be tried; whether the applicant would suffer irreparable harm if the application were denied; and which party would suffer more harm by the granting or refusal of the remedy pending a decision on the merits.

In applying the test for granting an interlocutory injunction, the Court held that there was a serious question to be tried, and that there was significant disagreement between the parties with respect to the issues. Secondly, the Court held that the applicants would suffer irreparable harm if they were required to make the budgetary cuts that would result from the budgetary shortfall. The cuts would have a significant impact on the delivery of services to the schools and students, and could result in the permanent loss of students from the CSF and/or failure to attract new students. The latter would be especially critical given the "numbers warrant" criteria of section 23, whereby a francophone school only exists in a region where the demand of francophone students warrant it. Finally, the Court held that the CSF would suffer greater harm if the remedy were not granted. The budgetary cuts would amount to 10% of the CSF's budget, while the Government would be capable of providing the additional funding. The Court also noted that both parties were serving the public interest, and both were furthering the purposes of section 23 of the *Charter*.

The Government was ordered to cover the budgetary shortfall of 2.3 million dollars and to replenish the CSF's reserves of $500,000. The other grounds of relief, for

the LINC agreement and hiring new staff were not granted. The Government had already undertaken to review the finding requests for LINC for all school divisions, and the hiring of new staff was deemed to be too speculative. The order was intended to cover the 2011-2012 fiscal year.

In Ontario, School Boards have been struggling with the issue of whether there might be grounds for similar challenges against the Province of Ontario, particularly with respect to under-funding in special education. Indeed, a number of Boards have considered the possibility of adding the Province of Ontario in special education human rights cases given the budgetary implications. However, School Boards are concerned about the impact on the relationship with the Province. It is not clear whether the principles enunciated in this decision would go beyond section 23 of the *Charter*, but it does raise some interesting issues for Boards and for the Province.

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Tribunal finds accommodation of special-needs student reasonable

In *L.C. v. Toronto District School Board*, (2011 HRTO 1336), the issue before the Human Rights Tribunal was whether the Board had violated the right of a student with Autism Spectrum Disorder ("ASD") to equal treatment in respect of educational services on the ground of disability. The Human Rights Commission was a party to the hearings and supported the applicant throughout.

The issues before the Tribunal were whether the Board had failed to accommodate the applicant's disability by (1) failing to provide a competent and continuous full-time Special Needs Assistant; (2) delaying the provision of computer equipment and failing to provide adequate training to teachers using the equipment; (3) failing to provide proper toileting support; and (4) depriving the applicant of a full day of school due to time spent outside of the classroom.

The Tribunal considered the proof necessary to establish a claim for discrimination and the duty to accommodate:

"In a case such as the one before me, it seems to me that where a child has been identified as an 'exceptional pupil' entitled to special education services, the parties have accepted that the Board has a duty to accommodate the pupil by removing barriers to equal participation in education. Considering the statutory scheme for special education, which entrenches the right of exceptional pupils to accommodation in education, the decision that a child is an 'exceptional pupil' would appear to represent an acknowledgement that without those services, that child would be denied equal treatment in education. As a general matter therefore, as stated in Schafer, it would be fair to say that in such circumstances it is 'self-evident' that an 'exceptional pupil' is unable to access the education system equally without accommodations.

Having said this, it is still up to a complainant who has been identified as an exceptional pupil, and who alleges discrimination arising out of specific events, to establish on a balance of probabilities that those events constitute prima facie discrimination". (para. 20-21)

The alleged discrimination took place when the student was an elementary student, the application originally having been filed in 2004. At that time, the Board through its Identification Placement and Review Committee ("IPRC") process had recommended that the student be placed in a special education class, but, due to parental wishes, had placed the student in a regular classroom with an Individual Education Plan ("IEP") and supports, pending the outcome of the parents' appeal of the IPRC decision to the Special Education Tribunal.

With respect to the first allegation, the student had been assigned a full-time Special Needs Assistant ("SNA") during elementary school. The SNA had multiple duties with respect to the student, though towards the end of the period in question, a large part of the day was focussed on toilet training. The SNA support was at times provided by a single full-time SNA, and at other times by two SNA's, one in the morning and the other in the afternoon. There were a number of different SNA's assigned to the applicant over the years, and in his last year there were some problems in finding an SNA to assign to him. At that stage, the applicant was twelve (12) years old and was, at the request of his parent, in a toilet training program designed by an external agency. Much of the day was pre-occupied with the toilet training, as there were not infrequent accidents that required the SNA to clean and change the applicant, the program required frequent trips to the toilet, and the toilet available to the applicant was on a different floor from the classroom.

The applicants alleged that the student had trouble with transitions and that not having consistent SNA support was difficult for him. The IEP, however, did not indicate that a single SNA was required for the whole day. Further, there was evidence that transitions from inside to outside and in changes to routines were more difficult for the applicant than transitions between people. In addition, the teacher was consistent throughout the day and the school year.

With respect to expertise, the Board had many professionals with expertise in ASD on staff who were available to the applicant, the SNA's and classroom teachers. In addition, while not all SNA's had previous experience working with students with ASD, they all received training on the job and some attended Board workshops.

The Tribunal found that the applicant had not established that the Board did not provide continuous and competent SNA support or that failing to assign a single SNA for the whole day amounted to discrimination, differential treatment in access to educational services, or a failure to accommodate. **The Tribunal noted that while it may have been preferable for the student to have a single, full time SNA, the issue was not whether the accommodation was ideal or what the parents may have preferred, but rather whether the accommodation was reasonable**. With respect to the lack of consistency of SNA's due to high turnover, the Tribunal noted there was little the Board could do to prevent this, but that it did provide consistent training to new SNA's as they began to work with the applicant. Further, the SNA's were found to be competent: none lacked the necessary qualifications and all received on the job training with respect to ASD.

The applicant's second allegation was that the delay in obtaining a dedicated computer was discriminatory and that the staff were inadequately trained on the computer when

it did arrive. An outside private agency, COTA, made the recommendation that the applicant would benefit from a dedicated computer. The staff at the Board did not believe that the applicant required a dedicated computer due to his level of functioning, as he was learning to make choices using hand-over-hand support and a picture system. In addition, computers were available to him in the classroom and school library. In order to access funding from the Ministry of Education for a dedicated computer, the respondent would have to establish that the student was not able to access the curriculum without the equipment requested. However, some time after the initial request, the respondent did request funding for a dedicated computer due to the repeated requests from the applicant's parent. A computer was placed in the complainant's sensory room. Evidence indicated that the applicant required hand-over-hand support to press a red button (replacement for mouse and keyboard) which resulted in the computer producing sounds and visuals. The classroom teacher and the SNA were trained by the supplier in the use of the computer.

The Tribunal found that a dedicated computer was not essential to the student's ability to access his educational programming. The delay did not result in unequal access to educational services or failure to provide necessary accommodations.

The third allegation was that the Board failed to provide proper toilet training support. The applicant had worn a diaper through much of his elementary schooling and during that time had participated in a toileting programming. In spring of 2005 his parent requested that the School implement a habit training program designed by an external consultant in which the applicant would no longer wear a diaper. The program was challenging due to frequency of bathroom trips, frequency of accidents and the required clean-up and dressing, and because the designated toilet was on a different floor of the School. The Tribunal found that the respondent made considerable efforts to assist in the program and incorporated it into the IEP. Although the records were lacking for some periods of time, there was no evidence that the School failed to provide the necessary accommodations in this area.

The final allegation related to time spent out of the classroom resulting in deprivation of the academic program. The Tribunal found that one of the main activities keeping the applicant out of the classroom was the habit training toileting program the parent had requested. In addition, the applicant sometimes needed to leave the classroom when he was over stimulated. The Tribunal concluded that the time spent out of the classroom did not amount to a failure to accommodate.

Much of the time span covered by the complaint was when the respondent was awaiting the decision of the Special Education Tribunal with respect to whether the student ought to be placed in a special needs classroom; which he ultimately was. In the interim, the respondent attempted to provide the necessary accommodations for the student to access the educational services in the regular classroom setting. The Tribunal concluded that the measures taken by the Board to accommodate the student were in all the circumstances responsive and reasonable, and dismissed the application.

This Decision confirms that the duty to accommodate does not require either an ideal accommodation or an accommodation based on the preference of the parents, but,

rather reasonable accommodation based on the circumstances.

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Ontario Superior Court refuses to dismiss parents' action to recover damages from school board for son's suicide

In *Gallant v. Thames Valley District School Board*, [2011] O.J. No. 494, the Ontario Superior Court rejected the School Board's motion to dismiss the action of a deceased student's parents claiming damages for the suicide of their son. For this motion, the Board relied primarily on the public policy rule that survivors of a person who commits suicide are not entitled to benefit from the suicide.

Jordan Gallant was a 17-year-old student in Jennifer Gilbert's grade 12 English class at West Elgin Secondary School located in West Lorne, Ontario and Ms. Gilbert was employed by Thames Valley District School Board ("the Board"). In April, 2008, Ms. Gilbert requested that the class prepare drafts for four separate short stories. A few days later, she met with Jordan and they discussed the assignment which was then submitted by Jordan to Ms. Gilbert via e-mail.

The essay began with the phrase "*I just want to kill myself; I want it to be painless...*" and went on to express strong feelings that Jordan was experiencing as a result of rejection by a girl who was four years older than him.

On May 13, 2008, Jordan's mother, Sonia Gallant, discovered a handwritten draft of the essay, though it did not contain the same level of detail and lacked specific references as set out in the typed version submitted by her son to Ms. Gilbert. Upon discussing the draft with her son, she accepted his explanation that it was for a school project and resolved to revisit the matter the next day.

Unfortunately, the next day Jordan committed suicide by hanging himself. Mrs. Gallant later asserted that if she had been made aware of the final essay, both she and her husband would have engaged their son in a serious discussion regarding the essay and that their intervention would have prevented the suicide.

Ironically, on the same day as Jordan's suicide, the Director of Education for the Board advised the Trustees via a memorandum that West Elgin Secondary School had a special sensitivity to the issue of suicide and that both the Board and the community had been involved together in suicide awareness seminars held at the school.

The Board's website contained information for employees on prevention of suicides. In a bulletin called "Helping a Suicide Student" it particularly stated that "*[i]t is important for every teacher and counsellor to be able to a) recognize warning signs b) make a tentative assessment of risk; and c) know where to refer the student for help*". The bulletin further included expressions of suicidal thoughts or hints of destructive thinking as warning signs of suicidal risk. Furthermore, under the heading "Intervention Do's and Don'ts", the bulletin included the following statement: *"[c]ontact the student's parents if the student is seen at any level of risk. Parents are an integral part of the safety plan*".

Jordan's parents alleged that upon reading the short story, Ms. Gilbert should have complied with the bulletin by notifying either them or anyone else of its contents. In response, the Board argued that the short story that Jordan submitted to Ms. Gilbert was simply a work of fiction and that there was nothing in the contents of the story that would have alerted her to the possibility that Jordan was contemplating suicide. The Board also took the position that it was a rule of public policy that survivors of a person who commits a suicide are not entitled to benefit from the suicide.

In order to succeed on their motion for summary judgment, the Board had to meet the test that there was no genuine issue of material fact requiring trial. After considering the facts, however, the Court held that the Board had not met this burden as neither any of the Board's representatives, nor Ms. Gilbert had filed an affidavit in support of the motion thus failing to put 'their best foot forward".

In finding that a teacher owes a duty of care to her students and that there was no evidence with regards to how Ms. Gilbert discharged this duty "*to take care for the safety of Jordan Gallant*" upon reading his essay, the Court held that the issue of whether she had or had not discharged her duty of care owed to Jordan must be determined on a complete evidentiary record.

With regards to the Board's argument that the parent's claim could not proceed due to the public policy rule that survivors of a person who commits suicide are not entitled to benefit from the suicide, the Court held that the scope and application of the rule would also be best determined on a complete evidentiary record as opposed to a summary judgment motion, and indicated that the public policy behind the rule may have evolved, just as community views on suicides have evolved, in the 25 years since the rule was first invoked.

The issue of whether Ms. Gilbert knew or ought to have known that Jordan was contemplating suicide will be determined on a full consideration of all the evidence. Should the matter proceed to trial, it is possible that the Board may be found liable for Ms. Gilbert's actions.

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School Board held not liable to high school student in sexual battery case

In *A.B. v. C.D.*, [2011] B.C.J. No. 1087, the British Columbia Supreme Court considered the liability of a school board to a high school student who was sexually touched by her high school teacher. While the Court found the teacher to be liable, the student's claims against the school board were unsuccessful as the Court reasoned that the school board, referred to as Board EF ("the Board") did not authorize the sexual touching nor did the Board create the opportunity for the sexual touching to occur. Furthermore, even if the Board had investigated the sexual touching incidents earlier the Board would probably not have discovered the conduct.

The student, referred to only as AB, began spending more time with the high school teacher, referred to only as CD, as she considered him to be her favourite teacher. She signed up as a peer tutor (a senior high school student who assisted a teacher in teaching more junior high school students) with CD and began to spend more time with him during her spare periods. During the

period of November through to March of AB's grade 12 year, seven incidents of sexual touching occurred between CD and AB, most of which were during class hours while others occurred close to class times. Shortly after the seventh incident, AB grew disenchanted with CD and decided to withdraw from any special relationship with him.

In the summer between high school and university, AB became aware of similar relations between CD and another student. AB made the decision to inform her mother of the incidents that took place between herself and CD and reported to the police that CD had touched her sexually. As a result CD was suspended from his teaching duties and charged with touching AB, a young person for a sexual purpose, while he was a person in a position of trust or authority towards AB. In the criminal case, CD eventually entered a plea of guilty and was convicted.

AB alleged that during her early university years, she suffered psychological injury as a result of her relationship with CD. Upon hearing expert psychological evidence, the Court did in fact accept that AB was suffering from psychological symptoms of chronic post-traumatic stress disorder as a result of the abuse and related events by CD. The Court also found that AB had substantial difficulties in personal relationships, particularly as she would tend to sexualize male relationships and was likely to continue such difficulties which would impact her employment.

In claiming that CD was liable to her for sexual battery, AB asked the Court to award general damages, aggravated damages, damages for lost future earning capacity, damages for cost of future care, and special damages. On the issue of CD's liability, the Court held that since CD had already been convicted on the criminal charge of touching a young person sexually, he must also be held liable for any damages she suffered as a consequence of the sexual battery in a related civil action, such as this case.

Of special interest in this case are the issues surrounding the possible liability of the Board to AB. The first issue was whether the Board breached the duty of confidentiality to AB when they called her home, and told her aunt that they wanted to speak to AB about charges relating to CD when she answered the phone. The Court found that the Board did not breach its duty because the evidence revealed that AB had chosen to disclose details of the charges and her involvement with CD to the aunt even before she knew what the aunt had been told by the Board on the phone.

The second issue was whether the Board was negligent in failing to stop CD from sexual battery of AB. A school board owes a duty of care to its students to protect them from unreasonable risk of harm at the hands of other members of the school community. The standard of care to be exercised in providing this supervision and protection is that of the careful and prudent parent, as confirmed by the Supreme Court of Canada. Upon examining the evidence, the Court found that while the relationship was underway AB had been determined to keep it secret from her parents and people in authority and that it was probable that even if the Board had investigated the issue, both AB and CD would probably not have revealed any details about the relationship. Therefore the evidence did not establish that any omission by the Board caused the sexual battery.

In addition, AB had to establish that the injury would not have occurred but for the

negligence of the Board on a balance of probabilities. The Court reasoned that even if the Board had failed to meet the standard of a careful and prudent parent by making inquiries, doing so would not have had any effect on whether CD would have sexually touched AB and, taking this into consideration, the Court dismissed the negligence claim against the Board.

Employers are sometimes held vicariously liable for the acts of their employees even when the employer did not act negligently, AB claimed that based on this principle, the Board was vicariously liable for CD's sexual battery. The Supreme Court's test for vicarious liability provides that employers are vicariously liable for a) employee acts authorized by the employer; or b) unauthorized acts so connected with authorized acts that "*they may be regarded as modes (albeit improper modes) of doing authorized acts*". In answering the first part of the test, the Court found that the Board did not authorize CD's sexual touching of AB.

In determining whether an unauthorized act can be considered a mode of doing an authorized act, the Supreme Court has provided a further two-step approach. The first step required the Court to consider any precedents and in this case the Court applied the principle that a school board should not be held vicariously liable for the sexual battery by a high school teacher who does not have intimate contact with the student in the course of the teacher's employment. The second step of the process required the Court to consider whether vicarious liability should be imposed in light of broader policy rationales. To do so, the Court was required to consider the following factors: whether there was opportunity afforded to CD to abuse his power of authority; whether the act would have furthered any of the Board's aims; the extent to which the sexual touching was related to intimacy inherent in the employer's enterprise; the extent of power conferred on CD in relation to AB; and, the vulnerability of AB.

In applying these factors to the case at hand, the Court found that the opportunity provided by the Board was modest at best, that the act did not further any aims of the Board, that the relationship between an English teacher and a student is not inherently intimate, that the power conferred by the Board was merely to provide grades and provide classroom discipline, and finally, that AB's vulnerability was limited given the availability of teachers and administration. Therefore the test for vicariously liability was not met and the Board was not vicariously liable for CD's sexual touching of AB.

Although AB was unsuccessful in her claims against the Board, she was however awarded an order for total damages of $110,045.00 against CD for liability to her for sexual battery. The Board would likely have been found liable if the Court had made a determination that inquiries should have been made by the Board and School based on the information available to the Board and School. The difficulty in these cases is determining what information would have been available during what time period. For example, in this particular case, it is likely that any inquiries to AB or CD would have resulted in a denial. It is quite often difficult to pinpoint what information other teachers might have had. In some cases, it might only be a suspicion and colleagues are not prepared to come forward with just suspicions. The issue becomes whether the Administration of the School had any reliable information from a reliable source, such as a friend of the student, which would then trigger an appropriate inquiry.

This case reiterates and applies the principles for such cases and provides a helpful analysis for Boards.

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B.C. Court of Appeal upholds lower Court's decision to hold school board liable for gym teacher's negligence, but reduces damages

In *Hussack v. Chilliwack School District No. 33*, [2011] B.C.J. No. 1023, the British Columbia Court of Appeal allowed in part an appeal by the Defendant, the Chilliwack School District ("the District"), of a Trial judgment awarding the Plaintiff, Devon Hussack, for damages for negligence, but refused to overturn the District's liability to Devon.

When Devon was 13, his gym teacher encouraged him to participate in a field hockey game during gym class even though he had missed all the classes in which the gym teacher had provided students with instructions on how to play the game. During the game, Devon attempted to check another player on a breakaway from behind and was struck by the player's stick as she raised it to shoot and got hit in the face. The Trial Judge found that the gym teacher breached his duty of care by allowing Devon to play field hockey without having progressively attained the necessary skills or knowledge of the safety rules discussed in prior classes.

Shortly after the game, Devon suffered a concussion that subsequently developed into an ongoing somatoform disorder (a psychiatric illness in which individuals complain of physical symptoms that have no underlying physiological basis and which are presumed to arise from psychological factors).

At Trial, the District submitted that the somatoform disorder was caused by Devon's father's bizarre and pathological behaviour toward his son. The Judge, however, found that although Devon had an unhealthy relationship with his father, prior to the hockey accident he was a pleasant, bright boy with no major problems other than his chronic absenteeism from school. As such, the Judge concluded that Devon's disorder was caused by the accident and awarded total damages of $1.365 million.

In appealing the lower court's decision, the District argued that the Trial Judge erred in finding the gym teacher negligent, erred on the issue of causation, erred in failing to find that the father's conduct amounted to a new intervening act which broke the chain of causation between the gym teacher's negligent conduct and Devon's injuries, and erred in the assessment of damages.

In reviewing the evidence and law presented before the Trial Judge, the Court of Appeal held that the Trial Judge did not err in finding the gym teacher negligent as the expert opinion evidence supported the Judge's conclusion that the gym teacher had failed to meet the standard of care of a reasonable teacher in allowing Devon to participate without attending any of the previous classes in which the progressive

building blocks of skill and safety were taught.

The Court also found that there was no error in the Judge's interpretation of the medical evidence in concluding that Devon's somatoform disorder would not have developed but for the gym class accident. Furthermore, the Trial Judge was also correct in finding that the somatoform disorder was consequential to the post-concussion syndrome and as such Devon had established that the gym teacher's negligence was the proximate cause of Devon's injury, and further that the Trial Judge was correct in concluding that the father's behaviour did not relieve the Board of its liability.

The Court did however allow the appeal on the issue of damages. At Trial, the Judge had reduced the original calculated damages for future loss of income-earning by 4% to account for the "*positive and negative contingencies*". However, the Court of Appeal felt that this reduction was not sufficient. In particular, the Court felt that when the Trial Judge concluded that there was a 25% chance that Devon would not finish high school, the same evidence should have led the Trial Judge to reduce both the past wages loss and the loss of future income-earning capacity awards to account for the specific contingency that Devon might not have been able to hold a job regardless of the accident thus reducing the amount of wages that he would earn. In applying only a contingency amount of 4%, the Trial Judge may have placed Devon "*in a better position than he would have been in but for the ..... accident*".

Therefore, the award for past wage loss award was reduced from $200,000.00 to $150,000.00 and the loss of future earning capacity award from $1,000,000 (down 4% from the original amount) to $785,000.00.

This case is a reminder to School Boards of the importance of teachers and staff providing complete and proper instructions to students prior to commencing activities which may result in foreseeable injuries.

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Board's refusal to disclose name of author of emails upheld by IPC

A school board's decision to deny access to the names of the authors of four emails and a letter was the subject of a recent appeal to Ontario's Information and Privacy Commissioner (IPC) in ORDER MO-2649; *London District Catholic School Board*, [2011] O.I.P.C. No. 117.

The London District Catholic School Board (the "Board") received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) for access to "*all of the responses that [an identified school principal at a specified school] said he had about me following [a specified sports event at an identified school]"* in February 2009 (para.1).

The Board located four emails and one letter that was responsive to the request and provided access to the requester without disclosing the personal identifiers of the authors. The Board denied access on the basis that the information was exempt under the mandatory personal privacy exemption

in section 14(1) of *MFIPPA*. The requester appealed the Board's decision to the IPC.

At mediation, the appellant alleged that the Board inappropriately applied the personal privacy exemption when it withheld the names of the individuals who authored the emails and letter.

The Adjudicator confirmed that the letter and emails at issue contained the personal information of both the appellant and the authors: "*These records express the authors' views and opinions about the appellant, thereby qualifying as the appellant's personal information…the records also contain the personal information of the authors of the emails and the letter as they include these individual's names, along with other personal information about them.*" (para.13)

Finding the information qualified as personal information of both the appellant and the authors, the Adjudicator considered whether any exemptions to the right to access personal information applied in the circumstances. In particular, the Adjudicator considered section 38(b) of *MFIPPA* which provides that: "*where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an 'unjustified invasion' of the other individual's personal privacy, the institution may refuse to disclose that information to the requester*." Notwithstanding Section 38(b) of *MFIPPA*, the institution may exercise its discretion, weighing the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy, to determine whether to disclose the information to the requester.

The appellant argued that he required the names of the authors of the letter and emails, which he alleged were false and sent to the Board for malicious purposes, in order to defend his reputation and possibly institute legal action against the individuals. The appellant also sought to enforce the notification procedures set out in the Thames Valley Regional Athletic Association (TVRAA) Constitution and bylaws which the Board allegedly failed to properly apply.

The Board argued that the authors submitted the emails and letter with a reasonably-held expectation that their communications would be treated confidentially; that disclosure of the personal information could reasonably be expected to result in unfair damage to the reputations of the authors, and that the authors would be exposed unfairly to pecuniary or other harm if the information was disclosed.

Following a review of the records in their undisclosed form, the arguments raised by both parties and the discretion exercised by the Board in deciding to deny access, the Adjudicator upheld the Board's decision concluding that although the disclosure of the personal information was relevant to a fair determination of the appellant's rights, the Board provided sufficient evidence that it exercised its discretion in an appropriate manner.

Professional Development Corner

October 21, 2011 - KC LLP Professional Development Session
Special Education / Student Discipline
at Dufferin-Peel Catholic District School Board

Keel Cottrelle LLP provides Negotiation and
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For information on the above, contact Bob Keel:
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