CIVIL LIABILITY IN SCHOOL

AND THE PREVENTION OF ACCIDENTS

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INTRODUCTION

The basic principles of civil liability have not been disrupted as a result of the coming into force of the Civil Code of Québec on January 1st, 1994. Nevertheless, certain concepts were indeed altered and the new Code did introduce certain jurisprudential rules. This session is aimed at informing School Board administrators of any changes that have occurred and also at making those who tackle this question for the first time aware of how important it is to prevent accidents in schools.

In your capacity either as participants in the administration of the School Board and of its schools or as professionals in that very board, you are called upon daily to manage situations that could possibly bring about liability at any level whatsoever.

The notions of liability that are set out in the following pages are intended to help you understand the fundamental workings of the civil liability system that comes into play in Québec whenever any damage is either suffered or caused by any member of the School Board, teacher, pupil or by any third party.

This document is aimed at spelling out the legal notion of liability. It was not intended to be a comprehensive study of thereof but rather to serve as a background paper for this day of training. In it, we attempt to give educators a better understanding of the situation whenever they are called upon to exercise their judgment in the ordinary or extraordinary situations they are confronted with in the performance of their duties.

Hence, this session is supposed to be preventative. While it may not enable educators not to remember at all costs every concept of liability they are about to study, it should make it possible for them to recall that, under certain circumstances, it would be as well either to take precautions or to act with due care.

In this lecture, you will be taught theoretical concepts of liability. You will find the contents thereof in texts and synoptic tables that will enable you to swiftly visualise the mechanics of any given situation.

Following this session, some of you might have diametrically opposed reactions. Indeed, some will want to reduce school or extracurricular activities for fear of financial repercussions or of legal proceedings possibly derived therefrom. Others, on the contrary, will feel that there is no reason to worry because 99% of the time, their personal fortune will suffer no loss and because, after all, the School Board or its insurers will be the ones to pay

Both attitudes are reprehensible. On the one hand, the former will neglect their duty as educators and, on the other hand, the latter will show a thoughtless "I don't give a damn" attitude that fails to take into account the fact that they are socially responsible to pupils and to their staff. Where both are concerned, we will show that the "reasonable man" concept is more than legal terminology.

In order to find a happy medium, shouldn't school principals ask themselves the following question: "If my son or my daughter were attending my school, what precautions would I deem it reasonable to take in order to keep him or her from getting into an accident?". Appropriate supervision, well supervised activities, equipment that is safe and in good working order, all of these are essential to ensure the security of all who attend school and the smooth running of educational activities. Needless to say it is impossible to have everything in hand, but precautions must be taken to limit the potential for accidents. This is an emergency because people's lives and physical well-being are at stake here.

Finally, we sincerely hope that this session will raise many a question and bring about many a discussion among you. Please fell free to inform your colleagues of your real-life experiences so that we may analyse them together following our examination of the rules set forth. We believe that this session will be all the more profitable and interesting as it will better stick to your everyday life.

This session will be split up into two parts, the first of which will contain an explanation of the rules of civil liability, both contractual and extra-contractual, and of those defences that are available to persons being prosecuted. The second part, found in Chapter 8, will further deal with the prevention of accidents in school, thereby enabling us to delve more deeply into those situations of fact and of law which underlie this prevention.

Moreover, it should be mentioned that Chapter 8 is not aimed at setting standards, non-compliance with which would constitute a fault that would give rise to the liability of interveners in schools. Instead, that Chapter is intended to bring our thoughts to bear on the prevention of accidents in schools and on the measures interveners can take in order to ensure that all are safe.

CHAPTER 1

THE DIFFERENT TYPES OF LIABILITY

The legal notion of liability can be divided into the three following categories: criminal liability, extra-contractual civil liability and civil contractual liability. We can define them as follows:

Criminal liability:	liability resulting from an indictable offence or from an offence under the Criminal Code (that of assault, for example) or resulting from the breach of a federal or provincial statutory duty (examples: Highway Code, Youth Protection Act). More specifically, this liability lies in the duty each individual has to answer for his actions before the State and to suffer the penalties provided for by any statute prohibiting such actions.
Civil extra-contractual liability:	duty incumbent upon every person capable of discerning right from wrong to compensate for the damage caused to others either by his own fault or for that caused by the fault of persons dependent upon him, or finally that caused by things he has under his care. More specifically, every person is responsible for compensating for the damage caused to any other person, the word "person" including in this case artificial persons such as corporations.
civil contractual liability:	duty resulting from a breach of contract or from the improper performance of a contract.

The following is the translation of an excerpt from the Traité de droit pénal général, by J. Fortin and L. Viau[1] which clearly explains the distinction that exists between civil and criminal liability on pages 1 and 2:

Criminal law organizes the relations of citizens amongst themselves and with the State. Even where an offence affects private interests, the fact that it constitutes a public nuisance makes the State responsible for cracking down on it. A tort only consists of a personal injury, while an offence may certainly

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[1] Jacques Fortin and Louise Viau, Traité de droit pénal général, les Éditions Thémis Inc., Montreal, 1982, pages 1 and 2.

cause damage to a person and hence give rise to compensation. However it necessarily involves interference with public order, were it only for the fact that it is against the law. Compensation for a wrongful act makes it necessary for the aggrieved person to sue at law; on the contrary, a crack down on an offence is sought without any intervention by the aggrieved person. For example theft, which is essentially the unlawful taking of an object, aggrieves and inflicts damage upon the owner who is entitled, by means of a civil proceeding, to sue for the return of his property. But theft in other respects constitutes an interference with the right of ownership and owing to that fact, the State adopts the private interest of the aggrieved party, raises it to the level of public policy and considers theft to be detrimental to public order. Consequently, the State will crack down regardless of the victim's wishes [...]

Section 129 of the Criminal Code approves the public character of the criminal pursuit by prohibiting any self-interested compromise where an indictable offence is concerned. Furthermore, any one who, on reasonable grounds, believes that a person has committed an offence may lay an information and thus cause criminal proceedings to be launched while, under civil law, only an interested party may launch an action.

Besides, criminal law and civil law are administered by courts that are different and totally independent from one another and where the rules of evidence are not the same: in civil law, a balance of probabilities will suffice while in criminal law, one must convince beyond a reasonable doubt.

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CHAPTER 2

CIVIL LIABILITY IN SCHOOL

This document primarily deals with civil extra-contractual liability, formerly known as tort liability. It more particularly concerns that which educators are liable to incur in the performance of their duties with regard to pupils.

As regards contractual liability, we should point out that it was integrated into the new Civil Code in the chapter dealing with civil liability and that the rules governing it have been harmonized with those governing extra-contractual civil liability. Consequently, we will examine a few special points pertaining to this Chapter that differ from extra-contractual liability.

Hence, this paper has to do with the general principles of extra-contractual civil liability as applied to the school system, contractual civil liability, defences and grounds for exemption. Finally, in the last chapter we will be pointing out those preventative measures that should be favoured with respect to various real-life situations in school that could subsequently involve teacher liability. We will not be dealing with third party liability *vis-à-vis* the School Board or the pupils it is entrusted with.

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CHAPTER 3

THE SOURCE OF CIVIL LIABILITY

As far as the law is concerned, the whole question of civil liability is governed by both the Civil Code of Québec and case law.

3.1 THE CIVIL CODE OF QUÉBEC

The basic rules for determining the liability of persons are defined in articles 1457 and 1458 of the Civil Code of Québec. Article 1457 deals with extra-contractual liability, while article 1458 deals with contractual liability. They read as follows:

> **Art. 1457.** *Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.*
>
> *Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person and is liable to reparation for the injury, whether it be bodily, moral or material in nature.*
>
> *He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.*
>
> **Art. 1458.** *Every person has a duty to honour his contractual undertakings.*
>
> *Where he fails in this duty, he is liable for any bodily, moral or material injury he causes to the other contracting party and is liable to reparation for the injury; neither he nor the other party may in such a case avoid the rules governing contractual liability by opting for rules that would be more favourable to them.*

Articles 1459 to 1481 inclusively, codify the jurisprudential rules or replace certain provisions that were found in articles 1054 to 1056d) of the Civil Code of Lower Canada. As we progress through this paper, we will be referring to the relevant articles.

3.2 CASE LAW

The rules enacted by the provisions of the Civil Code of Lower Canada were general rules and, through time, the courts have been called upon to interpret and to apply these rules to the specific facts that were submitted to them.

The set of rules recognized in the judgments delivered by various courts (Court of Québec, Superior Court, Court of Appeal, Supreme Court) makes up what is called case law.

The case law that developed under the Civil Code of Lower Canada will not cease to apply with the coming of the Civil Code of Québec in the sense that the latter does not vary the basic rules of liability. Moreover, all future court decisions will obviously contribute towards interpreting legal positions for the future in matters of extra-contractual liability.

Consequently, this case law, both the old and the new, is a significant source of information when it comes to interpreting the rules governing liability and specifically applying to the circumstances of a given case.

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CHAPTER 4

GENERAL RULES GOVERNING EXTRA-CONTRACTUAL CIVIL LIABILITY

In the Civil Code of Lower Canada, article 1053 recognized that four elements were necessary in order to establish a person's civil liability. These four elements are still recognized by article 1457 of the Civil Code of Québec and we will examine them first.

Furthermore, we will also examine in this chapter how and subject to what conditions a victim can apply to a court. Thirdly, we will look into certain special cases of personal liability and more particularly the liability incurred by persons having parental authority, by teachers and by other persons entrusted with the custody, supervision and education of minors.

Besides, we will glance through the liability of pupils. A special section will also be devoted to the liability of School Boards.

4.1 THE FOUR ELEMENTS OF THIS LIABILITY

The four elements of civil liability contained in article 1457 of the Civil Code of Québec can be defined as follows:

***The ability to discern*:**

The ability to discern right from wrong.

The fault:

The breach of a duty to abide by rules of conduct, which constitutes a fault with regard to the circumstances, to usage or to the law. This fault can be defined as follows:

> Every person endowed with reason is at fault where, whether by positive act or by omission, he commits a wrongful and injurious act or where he acts with imprudence, neglect or want of skill, thereby causing injury to another person.

The damage:

The injury actually suffered by the victim.

It should be noted that we will not deal with the exemplary or punitive damages provided for under the Charters of rights and freedoms.

The causal connection between fault and damage:

The fault is the proximate, necessary and direct cause of the damage.

4.1.1 *THE ABILITY TO DISCERN*

The Civil Code of Québec uses the words "person endowed with reason". Case law dealt with the ability to reason. We believe that a person endowed with reason is a person who is able to discern right from wrong and that there is no reason to distinguish between these two concepts.

Consequently, a person's ability to reason or mental capacity to realize the consequences of his actions must be established before that person can be held liable for any fault.

At what age does a child acquire this ability to discern right from wrong? Criminal law decrees immunity from liability until the age of twelve years[2]. However, the civil courts do not systematically accept this standard. They would rather maintain a more flexible attitude and leave it up to the judge to compare a given child's behaviour to that of other children of like age in order to determine whether the child was, under the circumstances of the case, capable of understanding the consequences of his actions. A review of the case law on the subject allows us to note that it is around the age of 7 that children are recognized as having an ability to discern and are accordingly recognized as having the capacity to commit a civil fault.

A young 6 year and 9 month old boy was held to be liable as he threw stones when school came out. The judge was hesitant about holding such a young child liable for the injury caused to a young girl who was hit in the face by a stone. The judge spoke thus:(*translation*) "Early liability is the price one has to pay for having a precocious mind"[3]

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2 Criminal Code, c. C-46, section 13.

3 Ginn v. Sisson (1969) S.C. 585.

On the other hand, an 8 year old child who disobeys after having been forbidden to go into a factory is in no way responsible for any damage he suffers as a result. It was established that the child did not know the consequences of his actions.[4]

The courts have also ruled that a 9 year old child has the capacity to appreciate the dangers involved in getting into a moving vehicle and traffic dangers generally. He assumed 50% liability for the damages he suffered as a result of trying to get into a moving school bus.[5]

Likewise, a person who is either momentarily or permanently deprived of reason and who is therefore incapable of appreciating the consequences of his actions cannot be held liable for a fault committed by him. Obviously, each case is nonetheless an individual case and whether or not the individual in question is capable of discernment remains an issue of fact. However, where a person does something while under the influence of alcohol or drugs, despite his being momentarily deprived of his capability to discern, that person may be held to incur civil liability for any damage caused by him since he is legally presumed to have sought the consequence of his state of intoxication by alcohol or by drugs.

Furthermore, one must necessarily be endowed with a legal personality. Individuals have it, but groups of persons operating under corporate names do not unless they are legal persons, that is to say incorporated or constituting partnerships within the meaning of the Code of Civil Procedure. As schools, contrary to School Boards, are not recognized under the Education Act as having a legal personality, they can neither be sued nor held liable. School boards, in their capacity as legal persons, is called upon to answer for faults committed by the school's principal's office, employees and pupils, the whole nevertheless being subject to the exceptions we will be examining in the following chapters. Likewise, individuals may be held liable simultaneously with the School Board for damages caused by their fault.

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4 Delage v. Delisle (1901) 10 K.B. 481.

5 Boucher v. Dame Henderson (1965) Q.B. 681.

4.1.2 *THE FAULT*

As we have seen, for there to be fault, the person committing it must be endowed with reason. Once this fact has been established and goes unchallenged, let's see how the wrongdoing at the root of the damage is characterized.
First of all, please note that the concept of fault evolves through time and depending on communities. Thus, depending on the time and place, any given act will or will not be considered as wrongful depending on whether or not it runs counter to those standards of conduct which are commonly held in the community. There is reason to refer to legislative enactment and to case law in order to assess the possible wrongness of an act.

Fault is defined in article 1457 of the Civil Code of Québec as being a person's failure to abide by the rules of conduct that lie upon him, according to the circumstances, *usage* or law.

Thus a School Board was held to be at fault when a participant was left locked up all night inside a sports complex after the holding of a recreational physical activity in its pool on the eve of the Christmas holidays. The Board was held to be responsible for having failed to inspect the premises before closing and also because the said premises did not comply with the *Loi sur la sécurité des édifices publics* or with the *Code du bâtiment* (Building Code) as the exits were not equipped with an anti-panic bar [6].

Such failure can therefore result either from an action or from an omission. In the former case, it consists in failing to abide by standards set by law or by custom and in having a behaviour the courts have held to be inadequate. In the latter case, the fault of omission consists in failing to act when one should have done so pursuant to these very standards.

Therefore, the fundamental question that one should ask oneself to determine whether there is fault is whether, under the circumstances, it was the perpetrator's duty to act or, on the contrary, to abstain as he did and whether, in either case, his behaviour was in accordance with the standard of the reasonably prudent and conscientious person.

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6 Bertrand v. Commission scolaire Ste-Croix, unreported judgment, Cour du Québec, Small Claims Division, 500-32-007533-948.

For example, a teacher giving out exam results asks three pupils to stand on their chairs in order to emphasize their excellent results. After having been cheered and congratulated by her colleagues, one of the three pupils attempts to climb down from her chair and in the process falls and injures her knee. In this case, the Court cited many cases in which the courts acknowledged that the law does not require individuals to foresee every possibility. One has to guard against hazards provided they are so likely as to fall into the category of normally foreseeable events. The Court therefore ruled that in this case, the teacher was neither negligent, nor careless when he asked the pupils to climb up onto their chairs.[7]

The way in which to determine whether a person has been reasonably prudent and conscientious depends on the external circumstances surrounding the act or omission alleged against him or her.

An act that would under normal circumstances be deemed wrongful might not be deemed wrongful where the circumstances surrounding its commission are out of the ordinary. The same holds true in respect of the degree of foresight expected from the accused. That degree may vary according to the circumstances.

For example, an act that could be deemed violent and wrongful when committed by a pupil in class, such as for example bumping someone with one's shoulder, will be deemed acceptable and innocent in a hockey game[8]. The same would hold true for a teacher who, in an effort to protect another teacher being physically threatened by a pupil, would use excessive force in attacking the pupil instead of using reasonable force to control him, as we will see further on. Likewise, the courts are more demanding with respect to persons who are responsible for young children than with respect to those who have to supervise teenagers who are better able to fend for themselves.

Civil liability is not determined according to whether the fault is intentional or unintentional. Conduct that is wrongful cannot be distinguished from that which is not wrongful by the presence or absence of any desire or intent to be prejudicial, even where the first may be perceived as being more serious from an ethical standpoint.

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7 Dubois v. Commission scolaire de la Pointe-de-l'Île, unreported judgment, Superior Court, 500-05-038094-973 (in appeal).

8 Canuel v. Sauvageau, J.E. 91-233.

Nor is the presence or absence of gross fault or of simple fault a test of whether or not there is any liability. Fault is assessed in terms of *whether or not there is* a breach of duty.

In short, when attempting to establish if a civil fault was committed by the perpetrator of an act, one should ask himself on the one hand whether his conduct was that of a normally prudent and conscientious person endowed with average reason and judgment and, on the other hand, whether it was possible for him to foresee or to avoid the wrongful act. One must also examine any circumstances indicating the type and the degree of care required in such a situation. For example, greater care is certainly called for when driving a car in the vicinity of a school or near a park than when cruising down a freeway.

Here are a few examples regarding the degree to which wrongful acts are foreseeable:

In the aforementioned case of Dubois and Guy v. Commission scolaire de la Pointe-de-l'Île[9], the Judge states that the foreseeable nature of the prejudice does not need to be absolute, but relative or reasonable, meaning that it is not a matter of requiring that a person foresee any possible type of accident but rather only those accidents that are reasonably likely under the circumstances. She specified that the concept of "reasonable man", of "honest citizen", of "prudent and diligent person" varies according to constraints of time and place.

In a schoolyard, a burly 6th grader leaves the playing surface to run after a volleyball. He shoves a 3rd grader, breaking her leg. The Court finds that the supervisors could not foresee the said accident happening, in the absence of any forewarning, and that he has at all times acted as a prudent person[10].

The court held a railroad company liable for 65% of the damages because the fences surrounding the scene of the accident on its property were in a very sorry state owing to lack of maintenance, which constituted fault.

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9 See footnote 7.

10 Renaud v. Commission scolaire Baldwin-Cartier, unreported judgment, Cour du Québec, 500-02-021809-954.

Moreover, that company and its employees were aware of the fact that pedestrians were frequently crossing the tracks there after passing through openings made in the fences. Hence, considering the fact that there was a school nearby, it was foreseeable that an accident would occur at that place. Furthermore, what emerges from that case law is that to prohibit admittance to a dangerous place is not enough and that one must protect others from normally foreseeable dangers.[11]

However, a person cannot automatically be held liable should a child drown in a pond located on his property. A pond does not constitute a hidden danger or a trap.

The child drowned not because there was a pond but rather because it had been left unsupervised by those who were responsible for it. Under the circumstances, the pond cannot be held to give rise to a foreseeable danger. It would be unreasonable to require from the proprietor of a farm on which there is such a pond, far away from housing and public roads, that he fence it in case a child he is unaware of should go bathing therein.

The person who caused the damage must have been able to anticipate that the damage that was caused could result from his action. A teacher hit a table with a cane to attract his pupils' attention. His was a detached gesture and it could not be expected that a pupil would suffer permanent hearing loss as a result.[12]

A victim was injured by a fragment from a glass ashtray left on the floor of a restaurant rest room. The Appeal Court ruled that anyone operating a public establishment has a duty to take reasonable care and must act in such a way as to prevent foreseeable accidents. The placing of a brittle ashtray on a toilet counter did not constitute a fault as it could not reasonably be foreseen that it would break and that there would be glass on the floor. Consequently, the claim was dismissed.[13]

The breach of any statutory or regulatory obligation constitutes a civil fault. Yet does it make the person responsible for it liable? Not necessarily. For that to be the case, the other elements of civil liability, to wit the ability to discern, the damage and the causal connection, must be present[14].

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11 Suissa v. Canadian Pacific Railway, (1984) S.C. 891.

12 Commission scolaire régionale de l'Estrie v. Lamoureux, Court of Appeal, J.E. 88-758.

13 Kollas v. Manolakas, Court of Appeal, J.E. 90-1001.

14 Dubeau v. Rule et al., (1943) R.L.n.s. 273.
Marchessault v. Lebel (1984) R.L. 1.

4.1.3 *THE DAMAGE*

The third element that is required in order to establish civil liability against a wrongdoer is the injury suffered by the alleged victim. It is therefore not enough that there be a fault or a breach of duty. It is indeed easy to imagine cases involving a civil fault wherein no injury is suffered as a result thereof and hence where no civil liability can be apportioned. For example, the breaching of a Highway Code provision does not necessarily lead to an injury or damage causing accident.

Likewise, in matters of libel and of defamation, it can be established that a fault was committed even where there has been no injury. Anyone who, during a private conversation behind closed doors, calls another person a thief thereby defames the person he is speaking to. Yet, the individual so defamed has no remedy against the defamer, since that statement remains unknown to anyone and seeing that no assessable monetary damages were caused thereby. Nevertheless, the situation would be different if that very statement were made in a letter sent to person in charge of the defamed individual and that following that letter, the latter had been fired by his employer.

The injury in respect of which compensation is sought by a victim must be one that the latter has actually suffered personally (and not, for instance, damage suffered by its next of kin) and one that directly follows from the alleged fault.

Needless to say, all direct losses, whether suffered as a result of damage to property or following personal injury or moral damage, are compensated for by the awarding of a sum of money. The money amount of that award is determined in consideration of any loss or missed opportunity suffered *as a result*, the whole being assessed according to the victim's particular means and circumstances. Failing any loss or missed opportunity, no compensation should be awarded on that account.

In assessing damages, some compensation should be awarded for any pain and suffering and for any problems or inconvenience resulting from the said physical injuries.

The cost of any injury suffered, whether or not it could be foreseen at the time of the accident, can be recovered provided the injury is directly related to the alleged fault and that it is definite. Merely possible or uncertain injuries cannot be used to warrant monetary compensation.

Article 1457 establishes a liability to reparation for personal injury, whether it be bodily, moral or material in nature. Any physical pain and suffering or inconvenience suffered by the victim can be included under the heading of moral damage. The courts had until now denied victims any monetary compensation for any moral distress or pain suffered by a person as a result of the demise of a loved one. On that score, the courts have ruled that hurt feelings, afflictions and moral wrongs and pain of that type could not be quantified and that it was *therefore* impossible to determine the compensation therefor[15].

The words "moral injury" as used in the Civil Code could possibly cover this type of claim. At this time, there is no case law to guide us on this subject. Yet it appears to me that should compensation be awarded in respect of such damages, it should be in a reasonable symbolic amount rather than represent actual compensation for the said loss. The scales *of compensation* should be close to those used as a basis for the assessment of damages awarded for pain and suffering, which are also hard to quantify.

4.1.4 *THE CAUSAL CONNECTION BETWEEN FAULT AND DAMAGE*

Not only must there be a wrongdoing and must an injury actually be suffered by the victim, the latter must, in order to obtain reparation from the wrongdoer, establish a direct causal connection between the alleged fault and the damage for which he is seeking to obtain compensation.

In their search for this causal connection, the courts will endeavour to find the determining cause of the damage and will only apportion liability where the accident is the direct, natural and proximate result of the fault.

For example, the victim's missing out on his holidays as a result of an accident do not constitute direct and proximate damages. Likewise, damages claimed to result from fear *and/or* nervous shock following an accident in which there was no physical contact or else *those resulting* from seeing a person injured in an accident is considered too remote. On the other hand, where caused by a fall, a miscarriage is a damage directly resulting therefrom.

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15 Robinson v. Canadian Pacific Railway, (1890) 19 S.C.R. 292.

Here are a few examples of judgments in which this causal connection is defined.

A pupil is injured while using a surface-planing machine during a woodworking class. The instrument he was using was equipped with its guard and just as the pupil was guiding the board with both hands, another pupil went by behind him and knocked his right arm, thereby injuring him. The teacher was criticized for his failure to supervise. The Court ruled that the other pupils' behaviour or unforeseen blow was the direct and immediate cause of the accident. It pointed out that even if the safety plate on the surface-planing machine had not worked properly at that moment, it would not have had any effect on the occurrence of the accident since the board held the device ajar to allow the knife to operate. Therefore, the accident was not due to the surface-planing machine moving on its own. Therefore, Defendant could not reasonably foresee such behaviour. A teacher cannot be compelled to keep a constant watch over his pupils. Nor is he or the School Board held to ensure the safety of pupils.[16]

In a schoolyard, a snow bank allows pupils to touch the branches of a tree and to slide down a hill. One pupil wants to clutch that branch like the others before him. He slides, falls and fractures his arm. The Court again ruled that the School Board was not an insurer and that it was therefore under no obligation to indemnify as regards every accident that can possibly occur in a schoolyard. The presence of a snow bank does not in and by itself constitute a danger in a schoolyard. Besides, this accident was not caused by the snow bank, but rather by the child's foolhardy behaviour and by the presence of ice on the tree branches.[17]

For instance, here is a case in which the court found a causal connection which we feel is a bit remote. A teacher leaves his classroom for some fifteen minutes after asking a fellow teacher supervising a group of pupils in an adjacent room to also keep an eye on his group. So the substitute stands between the curtains separating the two rooms in order to supervise both groups. Thereupon a pupil, ignoring the prohibition to that effect, raises his hockey stick to make a slap-shot and hits another pupil on the mouth, thereby injuring him. The court ruled that the first teacher had committed a fault when failing to inform his pupils that someone else was taking over for him. The judge ruled that the teacher should have realized that players who were not mature pupils playing hockey in their living-room could be tempted

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16 Lepage et al v. Jean-Baptiste et al, (1993) R.R.A., 9, Court of Appeal, (1997) R.R.A. 65

17 Wood v. Commission scolaire des Manoirs et Les Autobus Masouche Inc., unreported judgment, Cour du Québec, 700-02-003200-855.

to do violent and dangerous things if they believed they were not being supervised. According to this judgement, it is important not only for the supervisor to be at the scene but for the pupils to be conscious of the fact that he is there and that he is always supervising their every move. The other supervisor was also held to be at fault because he had failed to make himself conspicuous to the players.[18]

To us, these faults seem all the more remote as, even if the teacher in charge would have had the time to prevent the wrongful act, the pupil would still have been able to raise his stick.

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[18] Poulin v. Commission scolaire des Milles-Iles, Cour du Québec, J.E. 84-715.

THE FOUR ELEMENTS OF TORT LIABILITY

CAPACITY FOR DISCERN-MENT	**Issue of fact left up to the discretion of the court**	**Child**	**Criteria:** • level of development • behaviour of others
		Insane Person	• temporarily • permanently
FAULT	**Evolutionary concept** • time • community	**Can derive from**	• Action • Omission • Imprudence • Negligence • Want of skill
		Wrongful act	**Contrary to:** • law • standards of conduct which are commonly held in the community (case law)
		Intentional or non-intentional	**Not a relevant element to establish civil liability**
		Test to assess the fault	**Conduct of a prudent and conscientious person endowed with average reason and judgment (conduct of a reasonable man)**

THE FOUR ELEMENTS OF TORT LIABILITY (continued)

DAMAGE	**Conditions**	• **Definite injury i.e. actually suffered personally by the victim and assessable in money** • **Direct injury i.e. following directly from the alleged injury**
	Compensation	**Objective:** • **Awarding the victim:** **- the amount of any loss and/or missed opportunity suffered**
	Damages compensated for	• **Foreseeable** • **Unforeseeable** **-if they are definite and directly related to the fault**
	Damages not compensated for	• **Possible** • **Uncertain** • **Moral**
CAUSAL CONNECTION	**Between fault and damage**	**Standards:** • **The damage is the** **- direct** **- natural** **- proximate** **- result of the fault** **Purpose:** **To search for the determining cause of the damage (fault)**

4.2 *PRESUMPTIONS*

The following statement is often heard, wrongly: "He is automatically liable". This statement is mistaken. When it comes to liability, there is no such thing as automatism. As we have pointed out above, the existence of all of the elements of liability with respect to a wrongdoer must be established before the court.

The Civil Code nevertheless establishes a presumption that results in the plaintiff being exempted from presenting some of the evidence that is usually required: the burden of proof is said to be reversed.

So, as we will see below, some articles in the Civil Code provide that a person will be held liable, unless he produces evidence that exonerates him. More particularly, such is the case for article 1459, which provides that a person having parental authority is presumed to be liable for (*any injury caused by*) the act of a minor child, and for article 1460, which applies to persons entrusted, by delegation or otherwise, with the custody, supervision or education of a minor. We will be making a more detailed examination of these two provisions further on.

So it can happen that while no fault is established against him, the person who caused the damage can be held liable through presumptive proof alone. This is what happened in a case where a School Board was held liable for the damage caused by a fire even though its employees were not proven to have committed any fault. The case involved a tenant of a building whose son perished in that fire and who lost all of his property therein. Nevertheless, the Court of Appeal dismissed the action, holding that article 1054 did not apply to a case involving premises that had been loaned for use. Hence, this was a case involving contractual, rather than extra-contractual, liability[19].

Under article 1460 of the Civil Code of Québec, should a victim show that a pupil was under the control and supervision of the School Board or of a teacher when he was subjected to the said pupil's wrongful act, he will not be held to establish fault on the part of the said School Board or teacher. The said victim will of course have to establish the other elements of liability, to wit the damage, the fault and the causal connection between the two. Once this has been done, the teacher and the School Board will be presumed responsible.

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19 Commission scolaire de Roberval v. Brassard, Court of Appeal, J.E. 80-447.

In order to be released from his liability, the teacher will have to prove either that he was unable to prevent the occurrence that caused the damage or the existence of a fortuitous event beyond his control. The School Board can also be released from its liability by proving that the teacher was not acting in the performance of his duties or, finally, by proving that the pupil was not actually under the teacher's effective control.

In the previously cited case of Lepage v. Jean-Baptiste wherein a student was injured by a surface-planing machine, the Court took into account the fact that the teacher had explained the working of the machines to the students. That no one was able to prove that the surface-planing machine was not working well at the time of the accident, that the teacher was qualified and that he had acted as a prudent man under the circumstances of the accident. The Court pointed out that where a teacher explains to his pupils how such machines work, the rules and safety maintenance procedures for the latter, notices that his pupils operate them well and are well behaved, he cannot be reproached and where he brings forth evidence of such facts, he can be exonerated from liability.[20]

A pupil broke two teeth while playing volleyball with his friends. The Court acknowledged that the School Board and its teachers are under a presumption of liability due to a fault committed by someone under their supervision. Having examined the facts of the case, the Court concluded that the School Board and its employees had not committed any fault, having shown that supervision was appropriate and that it was impossible to prevent the wrongful act. It has also been established that it is prohibited to play dangerous games and also to throw the volleyball in the opponents' face. It was also shown that to play volleyball was in keeping with the child's age.[21]

It is obviously more difficult to be released from one's liability under article 1460 than it is under previously discussed article 1457. Here, the onus is transferred from the victim to the person against whom the presumption lies.

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20 Lepage v. Jean-Baptiste, see note 15.

21 Salova v. Commission scolaire du Sault-St-Louis, (1995) R.R.A. 555.

4.2.1 LIABILITY OF PERSONS HAVING PARENTAL AUTHORITY

Articles 547 and following of the Civil Code of Québec give parents authority over their minor children. They are thereby at the same time entrusted with a duty of care and supervision. As they maintain control over their children, parents are presumed to be at fault if the latter do something or commit a fault thereby causing injury to another.

Article 1459 enacts the liability of persons having parental authority as follows:

> **Art. 1459.** *A person having parental authority is liable to reparation for injury caused to another by the act or fault of the minor under his authority, unless he proves that he himself did not commit any fault with regard to the custody, supervision or education of the minor.*
>
> *A person deprived of parental authority is liable in the same manner, if the act or fault of the minor is related to the education he has given to him.*

Needless to say, the persons having parental authority are first and foremost the father and the mother. They may also be those who are entrusted therewith by judgment of a court of law, for example a judgment of tutorship or an adoption order.

Hence, the actual cause of the damage presumably lies either in the child's receiving a poor education or in its being subjected to inadequate supervision. The parents' liability is based on a presumed fault on their part which is founded on the poor education or inadequate supervision *they have provided.*

Where instituted by the victim, proceedings may be commenced against both a minor child and his parents.

Evidence to be adduced against the parents will be based on their relationship of parentage with the child, the fact that the child is a minor, his fault and of course the damage and the causal connection.

Article 1459 of the Civil Code of Québec will also form the basis for one of the grounds that the parents can raise in order to be released from the presumption of fault that lies against them, meaning that they will have to prove that they have not committed any fault with regard to the custody, supervision or education of the minor.

The courts will not be satisfied with mere evidence of physical and immediate impossibility to prevent the accident and of the fact that they were absent from the scene of the accident. The parents are required to establish that their conduct in no way immediately or remotely furthered or lead to the occurrence of the prejudice, *by adducing evidence* either that there was absence of fault in the supervision and education of the child or that their child has received a good general upbringing.

The parents' duty to supervise may be influenced by factors such as the child's age, the environment in which he is developing and his difficult and aggressive nature. The courts can also be influenced by other elements which further relate to the parents themselves, such as the fact that they set a bad example for their child or give him bad advice, that they tolerate the use of dangerous objects, that they know of their child's adopting any dangerous behaviour or habit towards others or the foreseeable nature of the child's action.

Should the child commit a fault while he is in school, any victim he injures is entitled to proceed at one and the same time against the *child's* parents, School Board and teacher. Likewise, should only the School Board and the teacher be proceeded against and be held liable, the School Board would be entitled to proceed against the parents to claim from them the amount of the compensation, provided shared liability with the parents was possible(sic).

Parental liability also applies to a child's tutor, foster home as well as to any person acting in the parents' stead.

Here are a few examples of cases in which parents were held to be liable:

> A child of tender years not yet endowed with the ability to discern has gotten used to throwing stones. His parents who are aware of this behaviour do nothing to stop him. They tolerate this evil penchant without checking whether or not their warnings are being heeded. Parents are obligated to prevent their children from acquiring such habits as are liable to cause injury; by tolerating them, they assume liability therefor pursuant to article 1457 (former Code 1053) of the Quebec Civil Code and also pursuant to article 1459 thereof (former Code 1054).[22]

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[22] Dame Latouche et vir v. Bourgoin et uxor, (1958) S.C. 417. The articles mentioned here refer to the Civil Code of Lower Canada. They have been replaced by articles 1457 and 1459 of the Civil Code of Québec.

A man is injured when hit in the eye by a piece of lead shot while waiting for the bus. The lead shot comes from the defendants' home basement where their children played at shooting at cans with a bee-bee gun. Plaintiff pleads that the children were poorly educated and left unsupervised. The evidence shows that their father is a strict but fair man. However, he did not attempt to establish that he had put into place a system allowing him to appropriately control and supervise his children. No evidence was adduced as to what these children were allowed and forbidden to do, or as to what they were left free to do on their own. The Court therefore ruled that the parents had failed to rebut the presumption of liability they had to discharge.[23]

Two minors take part in a hunting expedition and one of them wounds his friend. The wrongdoer's parents are sued seeing that it was shown that the father was involved in his son's education and well-being. He had a rather liberal approach to *the problem of* teenagers using firearms. The Court nonetheless has no doubt that his conscience is clear and his intentions are good. However, the father's behaviour is to be assessed in connection with the possession and handling of firearms.[24]

In the case of Carty v. The Board of Protestant School Commissioners of the City of Sherbrooke et al.[25], the court stated the rule whereby parents have a duty not only to provide their children with a sound moral and religious upbringing, but also to prevent them from acquiring habits or using objects liable to cause injury to others. Furthermore parents cannot plead, in order to be released from their own liability, that it was physically impossible to immediately prevent the actions of their children where the said actions followed some fault on their part, without which the contingency would not have happened.

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23 Henry v. Soucy et al., (1996) R.R.A. 207.

24 Ouellette v. Gagnon, (1980) C.A. 606.

25 Carty v. The Board of Protestant School Commissioners of the City of Sherbrooke et al., (1926) 32 R.J. 157.

The second paragraph of article 1459 of the Civil Code of Québec deals specifically with the case of a person who is deprived of parental authority. It may indeed happen that either a father or a mother or both be deprived of their parental authority by a decision of the court. Any such forfeiture must be expressly pronounced in a judgment.

Seeing that the said individual no longer exerts any influence over his child, the presumption of liability provided for in the first paragraph should not apply to him. Nevertheless, in so far as the victim establishes that there is some connection between the commission of the said fault by the minor and the latter's upbringing by the deprived parent, the said presumption will apply to the latter.

LIABILITY OF PERSONS HAVING PARENTAL AUTHORITY

ORIGIN	**- Duty of custody and of supervision (in the beginning) of their minor children (art.599 C.C.Q.)** **- Presumption of fault for any damage caused by the act or fault of a minor child under their authority (Art. 1460 C.C.Q.)**
EVIDENCE REQUIRED FROM THE VICTIM	**- Parent and child relationship** **- The fact that the child is a minor** **- Child under the authority of the defendant**
PARENTS' GROUNDS OF EXEMPTION	**- Impossibility to prevent the wrongful act** **- Absence of fault in the supervision and education of the child (their conduct in no way immediately or remotely furthered or lead to the occurrence of the prejudice)**
PARENT DEPRIVED OF PARENTAL AUTHORITY	**- The victim establishes that there is some connection between the commission of the said fault by the minor and the latter's upbringing by the deprived parent** **- Yet a parent can escape liability under the same circumstances as the other parents**

4.2.2 LIABILITY OF TEACHERS AND OF THOSE ENTRUSTED WITH THE CUSTODY AND SUPERVISION OF MINORS

This liability is governed more specifically by article 1460 of the Civil Code of Québec. This provision establishes a presumption of liability affecting those who. while not having parental authority, are entrusted with the custody, supervision or education of a minor in the following words:

> **Art. 1460.** *A person who, without having parental authority, is entrusted, by delegation or otherwise, with the custody, supervision or education of a minor is liable, in the same manner as the person having parental authority, to reparation for injury caused by the act or fault of the minor.*
>
> *Where he is acting gratuitously or for reward, however, he is not liable unless it is proved that he has committed a fault.*

We see that any person who is neither father nor mother to but who, by delegation or otherwise, has the custody, supervision or education of a minor, is deemed liable, in the same manner as the person having parental authority, for the fault or act of a minor.

There is no doubt that teachers are individuals who must be deemed to have received from the parents some delegation in the matter. The same would hold true in respect of any person employed or not by the School Board as a wage earner or volunteer, although a distinction must be made in the latter case, considering the last paragraph of article 1460. Indeed, this last paragraph provides that a person is not presumed liable *to reparation* for an accident where he is acting gratuitously or for reward, that is to say gratification that is decidedly below the wages paid to persons performing the same duties. In such a case, the victim will have to establish that the volunteer has committed a fault with regard to the custody, supervision or education of the minor. Where there is no evidence that a volunteer is guilty of a personal wrongdoing, he is exonerated from any such liability.

Getting back to teachers, they may be held liable with regard to pupils should the latter either inflict damage on third parties or suffer some personal injury through the act of another pupil also under their supervision.

In the first of these cases, in which the pupils, as a result of their wrongdoing, inflict damage on another person, namely another pupil, a teacher, a volunteer or a mere stranger in school, their teacher is presumed to have personally wronged the said person. *To rebut this presumption*, he must establish that he did not commit any fault in the performance of his duty to ensure the custody and supervision of his pupil, the person who caused the damage.

In the second aforementioned case, in which the pupils themselves suffer some injury while under a teacher's custody or supervision, a different principle of liability applies. The aforementioned teacher will therefore be sued in liability, not pursuant to the presumption, which applies only where the injury is caused by the child to others and not to himself, but as a result of his own fault. What applies here is the basic rule provided for in article 1457 of the Civil Code of Québec, whereby every person is liable to reparation for injury caused to another as a consequence of his act.

Also, here are a few other cases in which teachers may be held liable to reparation for their personal wrongdoing without applying the presumption of liability :

- A teacher asks an 8 year old girl to shut a window, thereby forcing her to climb up on a chair, then onto a radiator and to step onto the window ledge[26].

- A teacher leaves a 6 year old child outdoors in the cold for 90 minutes[27].

- Where a teacher sexually abuses a pupil, the said abuse taking place at the teacher's home, away from his job and not during school hours, he alone is liable for his actions. As his status as a teacher helped bring the pupil under his influence, his employer incurs no liability. Even though acts of paedophilia had previously been brought to the School Board's attention, the latter could not be held to have been negligent by failing to dismiss the said teacher.

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26 Simard v. Les Commissaires d'écoles de la municipalité de la ville de St-Joseph d'Alma, (1959) S.C. 222.

27 Dupré v. Les Commissaires d'écoles pour la municipalité de St-Bernard de Lacolle, (1966) S.C.R. 642.

- In other respects, a teacher was sued for damages by a pupil whose work he had refused to correct, stating before the other pupils in the class that she had breached the rules of university ethics. The similarity between the papers handed in by the pupils was due to the fact that they often worked as a group. Faced with this situation, the teacher should have asked for an explanation rather than immediately conclude that there had been plagiarism. The teacher's reaction had been both rash and careless and constituted a fault. However, due to the absence of evidence showing that the said libel had been intentional, no exemplary damages were awarded. The Court granted only the damages actually suffered[28].

Besides, the presumption of fault against the teacher, which is provided for in article 1460, stems from the latter's duty of custody, supervision and education. Article 1460 adds that teachers are liable in the same manner as parents. Still, we have seen that parents may be held liable even though their child is not under their immediate supervision.

To begin with, it follows from the preceding that a teacher is presumed liable whenever a child is under his immediate supervision, that is to say during school hours.

For that matter, the courts have been very careful in condemning any teacher who has provided appropriate supervision while a pupil was in his custody or under his supervision. In our view, there is no reason to apprehend any case law trend changes in this matter.

A teacher can disclaim liability by establishing that it was impossible for him to prevent the act (the pupil's wrongdoing) that is at the root of the damage suffered by the victim. Does he have to establish that there was absolute impossibility? No. The court cannot be more severe with regard to him than with regard to the pupil's parents. All the teacher has to establish is that he acted as a reasonably prudent and diligent person.

- There is an explosion in a cabin wherein a pupil is experimenting with a magneto when another pupil enters the said cabin and brings a dynamite detonator next to the magneto, thus causing an explosion. The pupil carrying out the experiment is injured and sues the *Procureur général du Québec* administering the school by alleging the teacher's

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28 De Varennes v. Aviles, Cour du Québec, J.E. 85-891.

> wrongdoing and the statutory presumption working against him. The Supreme Court ruled that the presumption in respect of teachers applied in this case. It emphasized that teachers are held to discharge their duty of supervision and give any instructions required to prevent any foolish behaviour. The Judge pointed out that the standard a teacher must meet must not be exaggerated and that it would suffice for him to show that he did what he was reasonably be expected to do. After considering the evidence, the Judge concluded that the pupil who entered the cabin took advantage of the fact that the teacher was absent for a brief moment to give him the slip and to violate the instructions he had been given. Therefore, the teacher cannot reasonably be criticized for having failed to foresee or to suspect that the pupil was engaging in this experiment. What is at issue in this case is an act that is spontaneous and unforeseeable.[29]

Once the teacher has succeeded in establishing that he has provided the child with adequate supervision and that he could not, at all events, prevent the said wrongdoing, he is exonerated from liability. More particularly, the following defences are open to him:

- the pupil's wrongdoing was committed after his duties of custody and supervision had ended, that is to say it was not committed during the time set aside for classroom, custody or extracurricular activities;

- he gave the child adequate supervision;

- the child's wrongdoing was so unforeseeable that not even the closest supervision could have prevented it;

- someone else's fault;

- a fortuitous event;

- the pupil accepted the risk, as in the case of risks inherent to games and sporting endeavours;

- contributory negligence on the part of the pupil.

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[29] O'Brien v. Procureur général du Québec, (1961) S.C.R. 184.

Here are more examples.

During recess, a child was wounded in the eye by another child as they were fencing with wooden swords in the schoolyard. The supervisor was held to be liable because he had neglected his duty to supervise and also because the accident was foreseeable. Although the children were prohibited from playing this game, the required measures had not been taken to enforce the said prohibition[30].

Here is another case of inadequate supervision by a teacher: a child violently pushed one of his mates as they were climbing down the steps on their way out of school. The incident might have been prevented had there been closer supervision. Also, there was additional fault due to the defective condition of the steps (no ramp)[31].

Then again, the courts have ruled that it was impossible for teachers to prevent children playing their usual games in a schoolyard from hurting themselves. It was impossible to find that the lack of supervision had contributed towards the accident or that improved supervision would have prevented it[32].

However, as pointed out earlier, a teacher could also, not during classroom hours, be held liable for a fault or act which ensues from a pupil's poor education. This results from the fact that article 1460 places teachers on the same footing as parents. However, in our view, the victim has to clearly establish a direct relationship between the injury suffered and the poor education provided by the teacher. This relationship will not necessarily be easy to establish and there possibly may not be any spectacular shift in legal precedent in matters of civil liability in schools. However, it appears important to tell teachers that they must be very careful in their interactions with pupils. Thus, if it were shown that a teacher failed to advise his pupils to use a circular saw equipped with a guard and that one pupil injured another by using the said saw without the guard, that fact could be alleged against the teacher and render him civilly liable although he did not have direct control over that pupil at the time of the accident.

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30 Germain v. Commissaires d'école de la Municipalité de Terrasse Vaudreuil and Guérin, (1960) S.C. 476.

31 Sweet v. Drummondville School Trustees, (1947) S.C. 444.

32 Dame Goyette v. Les Commissaires d'écoles pour la Municipalité de Pointe-aux-Trembles, (1957) S.C. 276.

4.2.3 LIABILITY INCURRED BY THE SCHOOL BOARD

The School Board can be held liable for:

- any wrong committed by its employees, to wit those persons enabling it to fulfil its corporate mandate;

- things in its custody, either because it is the owner thereof (buildings, land, furniture, equipment, etc.), or because it accepted that such merely be placed within its premises.

4.2.3.1 In its capacity as an employer

It is made liable as an employer by article 1463 of the Civil Code of Québec which reads as follows:

> **Art. 1463.** *The principal is liable to reparation for injury caused by the fault of his agents and servants in the performance of their duties; nevertheless, he retains his recourses against them.*

As you can see, this establishes a presumption of liability and the victim is not held to establish that the School Board is directly at fault. This presumption is established by the legislator because, in its capacity as an employer, the School Board is deemed to have initiated the fault by selecting its employees. Had it selected a more proficient or efficient employee, the accident would probably not have occurred.

Also, article 1463 specifies that the employee, agent or servant must be in the performance of his duties. Hence, it follows from this provision that two requirements must be m if the employer is to be held liable, to wit:

- there must be a principal-agent relationship between the employer and the employee; and

- the fault must have been committed by the employee in the performance of his duties.

i) Principal-agent relationship

In order for a principal-agent relationship to exist, it is necessary for the employer, on the one hand, to have authority and control over the manner in which tasks assigned the employee have to be performed and, on the other hand, for the employee to be subject to orders given to him by the employer.

Case law has applied four tests by which to establish the existence of an employer-employee relationship, to wit : Who owns the tools? Is there any control being exerted or relationship of subordination? Who stands to lose or to gain therefrom? Is the work integrated into the business? So, as far as the employee is concerned, the relationship of subordination must carry more weight than the factors of independence or autonomy on which the independent contractor status is usually based. A relationship of subordination can be defined as a personal duty to be at one's post and to personally provide a steady, satisfactory and verifiable output, according to very specific requirements as to personal output under supervision.[33]

In this connection, the employer is liable for any faults committed by his employees since it is presumed that he has already exercised some control over the latter's actions. On the contrary, where a School Board has no control over the people performing a specific contract on its behalf, there is no principal-agent relationship between them. Such would, for example, be the case where a building contractor would, during the performance of a contract awarded to it by the School Board, damage a property neighbouring a school.

Volunteers acting with a School Board's tacit or explicit consent will be deemed to be its agents as they as a rule follow orders given to them by the school principal or by any teacher who has enlisted their services for a given activity.

ii) Performance of duties

Not only must a fault have been committed by an employee *who is an* "officer" of the School Board for the latter to possibly be liable, but the said employee must have committed it while in the performance of his duties. What does being "in the performance of one's duties" mean?

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33 Les Amusements Wiltron Inc. v. Mainville, (1991) R.J.Q. 1930.

The employee must have committed a fault while carrying out work the School Board (the school) had specifically asked him to do, as opposed to a fault committed on "the occasion" of the performance of his duties as an employee.

Where, for example, one pupil injures another pupil in a jostle during recess, a court may accept a charge of fault against the teacher and the School Board. Indeed, should the supervising teacher have failed to fulfil his duties with reasonable care, his employer is liable for his actions. In fact, a teacher's work specifically includes, amongst other things, the task of supervising pupils.

Then again, where a teacher physically and violently assaults a pupil whom he wishes to reprimand, the School Board cannot be held liable for his actions since that wrongful act was not committed in the performance of his duties as a teacher. Indeed, the School Board did not hire this teacher to assault pupils. The same holds true where a teacher sends one of his pupils to run a personal errand for him at a convenience store near the school. If that child was injured while running this errand for him, the teacher could be held to be solely liable since the damage was caused on the occasion of the performance of his duties.

Should an employee *who is an* "officer" be held liable for a fault committed in the performance of his duties, the School Board will defend the action against him and will indemnify the aggrieved party since, under the collective agreement pursuant to which it is bound to its employees, it undertakes to defend them, save in the event of gross fault. The same holds true for school principals and administrators under the rules, which govern them. Hence, it follows that although article 1463 retains an employer's recourses against its agents, the board cannot invoke its provisions to obtain a refund from its employees.

What is a gross fault? Article 1474 of the Civil Code of Québec defines gross fault as follows:

> **Art. 1474.** *... a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence.*

We believe that it could be more accurately defined as being an exceptionally serious fault, which shows either intent to prejudice or total recklessness with regard to the security of others. As we have

> already seen, case law has it that there emerges from case law that any employee who commits a gross fault usually commits his wrongdoing *on the occasion of* the performance of his duties and not *in the performance* thereof, which rules out any presumption of liability on the part of his employer.
>
> As each case is of course an individual case, it is up to the court to decide whether or not there is gross fault on the part of the teacher and, in the affirmative, the School Board will not defend the action against him as it would have done normally.
>
> In order to escape the presumption of liability provided for in article 1463, it is necessary for the School Board to establish either that the wrongdoer is not its agent or that the latter did not act in the performance of his duties. As for it, the victim has to establish that the agent has committed a fault. Should the latter fail to do so, the School Board may be absolved. Furthermore, should the presumption provided for in article 1460 apply to the School Board's agent, it cannot escape liability unless the said agent either establishes that he could not do anything to prevent the damage or *raises* the other defences that are open to him.

As to the pupils, we must not forget that when pupils are in the custody of the School Board, the latter may incur liability for any damage they cause to other children, to people outside the School Board or to their property. Pupils are in the custody of the School Board during school hours, morning and noontime custody hours and extracurricular activities. Hence, in most cases the School Board is not liable for an accident suffered by a child while on the way from home to school. Nor is it liable for an accident occurring before the time set for the school to greet the children[34].

Here is an example: During recess, a pupil breaks a window on a neighbouring house. The owner *of that house* is entitled to hold the School Board liable for this wrongdoing not only because by throwing a stone, the pupil committed a fault but also because the School Board failed to properly supervise that pupil. Furthermore, if a pupil were to do the same thing while

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[34] Duchesne v. Le Patronnage de Roc-Amadour, (1956) S.C. 147 (*schoolbreak*)
Rousseau v. Les Commissaires d'écoles pour la municipalité de Black Lake, (1959) S.C. 214 (*unsupervised noontime*).
Fleury v. Commissaires d'écoles pour la municipalité de St-David, (1950) S.C. 33 (*morning arrival before scheduled time*).
Bisson v. Commissaires d'écoles de la Corporation de la Commission de la municipalité scolaire catholique de la Ville d'East Angus, (1961) S.C. 695 (*the road from home to school*).

on the way home for lunch, the owner of that house could not sue the School Board in liability since that pupil was not in its custody *at the time*.

The courts have relieved a School Board from any liability following acts of vandalism committed inside a chalet by pupils and teachers belonging to a School Board. The Court ruled that there was no evidence of any damage occurring during schoolhours or schooldays. No reprehensible act had taken place which could be ascribed to the headship of the school and the latter was being subjected to stern disciplinary requirements and had a reputation to that effect[35].

4.2.3.2 In its capacity as the owner or custodian of property

The law also establishes a presumption of liability with respect to School Boards as regards the property in its custody pursuant to article 1465 of the Civil Code of Québec, which reads as follows:

> **Art.1465.** *A person entrusted with the custody of a thing is liable to reparation for injury resulting from the autonomous act of the thing, unless he proves that he is not at fault.*

This presumption cannot be overturned unless the School Board proves it is not at fault in the custody of this thing. A School Board can also be sued on account of any damage resulting from lack of repair or defect of any property under its custody either as its owner or under any other title such as, for example, a lease.

Where a pupil is injured as a result of the collapse of a piece of equipment or because of a defect in the floor of a gymnasium, the School Board will be liable. In the first case, its liability will be due to the defective equipment it put at its pupils' disposal and in the second case, due to a lack of repair. The same holds true where a pupil is injured in a laboratory or workshop due to the bad condition or lack of repair of the equipment. The School Board can even be held liable where, for example, it supplies a spinning top in good condition but fails to teach its pupils how to use it safely. A School Board was also held liable for allowing arms drills by pupils who were too young even though the said arms were in perfect condition.

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35 Desloges v. Commission scolaire St-Jérôme, Superior Court, J.E.80-300.

Furthermore, School Boards are not liable for the injuries suffered by a child who stumbles over the braces propping up the boards surrounding an ice rink[36].

Neither would a School Board be liable for an accident wherein a child falls while playing on an ice path leading to a skating rink[37].

A School Board is responsible for an accident suffered by a child on a sidewalk leading to school because that spot was not intended for play and because the School Board and its teachers failed to see to it that pupils comply after they had been forbidden to play there[38].

The owner of a water slide is presumed responsible when someone using the slide has an accident. The Court stressed that the said presumption leads it to make a finding, either of fault by the owner or by the latter's employees, or of defective slide design. Defendant failed to discharge the presumption of liability it had to discharge.[39]

The Civil Code of Québec, pursuant to article 1467, also establishes a presumption of liability against building owners in the following words:

> **Art. 1467.** *The owner of an immovable, without prejudice to his liability as custodian, is liable to reparation for injury caused by its ruin, even partial, where this has resulted from lack of repair or from a defect of construction.*

As we can see, this presumption only applies if a School Board owns the building. In addition, this must be a case wherein the immovable is in ruins, meaning the disintegration of its constituent parts which may imperil its solidity or structure and not damage caused by the loss of purely decorative elements. Where article 1467 is concerned, it is not possible for the School Board that owns the immovable to escape liability for damage caused as a result of the building's ruin either because it has failed to adequately maintain it or because of lack of repair. In the latter case, it could nevertheless make a third party claim against the contractor, the architect or the engineer responsible for the defect of construction, inasmuch as *such a claim is* provided for in the Civil Code of Québec.

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36 O'Brien v. les Commissaires d'écoles de la municipalité de Ste-Ursule, (1964) Q.B. 433.

37 L'Oeuvre des terrains de jeux du Québec v. Cannon, (1940) 69 K.B. 112.

38 Massicotte v. Les Commissaires d'écoles pour la municipalité de la cité d'Outremont, (1969) S.C.R. 521.

39 Gratton v. Les glissoires aquatiques Grand Splash Limitée, (1992) R.R.A. 828.

4.2.3.3 Liability of the School Board for damage caused to the property of third parties, pupils or School Board staff

Should property belonging to School Board employees or pupils be damaged, can the School Board be held liable for such damage? Suppose that pupils leave their classrooms in a hurry, gather together and, despite attempts by teachers and school headship members, go out and vandalize teachers' cars parked on School Board property. Although this damage is caused on its property, the School Board is not necessarily liable. Where it is established that its servants have done everything necessary to prevent the wrongdoing and that they have not committed any fault during their supervision, neither they nor the School Board can be held liable.

Likewise, where a School Board pupil's or employee's personal effects are damaged or stolen inside the school, the School Board can only be held liable if it is established that the School Board was negligent in its supervision of the premises. Without this evidence, the School Board will be exonerated. We should specify that courts will be less demanding with respect to the School Boards' duty to supervise these objects, since they are left in the school which for all that receives no monetary consideration.

LIABILITY INCURRED BY SCHOOL BOARDS

FOR DAMAGE OR INJURY CAUSED TO: -pupils -employees -third parties	TERMS UNDER WHICH THE PRESUMPTION OF SCHOOL BOARD LIABILITY FOR PUPILS' ACTIONS APPLIES (Art. 1460 C.C.Q.) - Fault or wrongdoing committed by: - a pupil while: - the pupil was under the School Board's control - the employee was in the performance of his duties and a principal - agent relationship existed with the School Board	EVIDENCE ADDUCED BY THE VICTIM - the pupil was under the School Board's control - the employee was in a principal-agent relationship and was acting in the performance of his duties - the volunteer was performing a task for the School Board GROUNDS FOR EXEMPTION - the fault was committed by a pupil, an employee or a volunteer - the pupil who committed the fault or wrongdoing was not under the board's control - the employee was not the board's agent and/or the fault he has committed in the performance of a task for the School Board

	TERMS UNDER WHICH THE PRESUMPTION OF LIABILITY APPLIES **(Art. 1463 C.C.Q.)** **- Principal-agent relationship** **- School Board's authority and control over the employee** **- Employee subject to orders given him by the School Board** **- Performance of duties** **- The fault was committed not on the occasion of his duties but during the performance thereof**	**EVIDENCE ADDUCED BY THE VICTIM** **- the employee committed a fault during the performance of his duties** **- the School Board exercised control and authority over the employee and that latter was subordinated to it** **GROUNDS FOR EXEMPTION** **- the School Board did not exercise any control or authority over the employee** **- the employee was not subject to orders given him by the School Board** **- the fault was committed on the occasion of his duties and not during the performance thereof**

LIABILITY INCURRED BY SCHOOL BOARDS

FOR DAMAGE CAUSED BY THE RUIN OF ITS **BUILDINGS**	**TERMS UNDER WHICH THE PRESUMPTION OF LIABILITY APPLIES** **- Ruin of the building (Art. 1467 C.C.Q.)** **- School Board's property**	**EVIDENCE ADDUCED BY THE VICTIM** **- School Board's ownership** **- damage caused by the ruin of the building** **GROUNDS OF EXEMPTION** **- the School Board was not the owner** **- adequate maintenance and no defect of construction** **- no means by which to obtain an exemption except a possible recourse against the person responsible for the defect of construction**

CHAPTER 5

REMEDIES AVAILABLE TO THE VICTIM

5.1 *AGAINST WHOM IS A VICTIM ENTITLED TO INSTITUTE PROCEEDINGS?*

Any individual who suffers damages as a result of any breach of duty provided for in article 1457 is entitled to claim compensation from any person who has contributed to such damage. That may for example be the case where, in the school system, a supervisor fails to adequately supervise. The aggrieved party could also sue the school's principal for failing to appoint a sufficient number of people to supervise the pupils it is entrusted with. He could also sue any pupil responsible for the damage and that pupil's parents for failing to give that child a proper upbringing. And finally, he could also sue the School Board as it is the supervisor's and the school principal's employer.

As we can see, the wrongdoer is not always the one who is sued. Indeed the last paragraph of article 1457 provides that a person can also be liable to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody. Here, article 1457 introduces a general rule which is repeated in articles 1459 (liability incurred by persons) and 1460 (liability incurred by the guardian of a minor), as we have already pointed out.

In short, the third paragraph of article 1457 tells us that, even where he is not the direct cause of the injury, any person having the care or custody of another is liable to be *held* liable *therefor*.

5.1.1 *SOLIDARITY*

Under article 1480 of the Civil Code of Québec, where a court finds that several persons have jointly taken part in a wrongful act or have committed separate faults each of which may have caused the injury, and where it is impossible to determine, in either case, which of them actually caused it, all of the said persons are jointly and severally liable for reparation thereof.

This solidarity is intended to protect injured parties from faults committed by people who don't have the means to pay, with the result that the victim will, in order to obtain payment of any damages awarded by the court, will have

the option of suing either the person responsible for the injury or the person on whom the presumption of fault lies and who has not succeeded in discharging himself therefrom, or both.

Thus where a teacher and a School Board are held to be jointly and severally liable, either of them could be called upon to pay the total amount of the compensation awarded to a pupil.

Nevertheless, as we have already seen, the School Board alone will in most cases pay the said compensation in accordance with the provisions contained in collective agreements or management handbooks and governmental orders-in-council.

5.1.2 *PRESCRIPTION*

The term "prescription" refers to the statutory limitation period running from the day on which something happens to that on which a right is acquired or lost. What we are concerned with here is extinctive prescription, that is to say the ultimate period within which civil liability proceedings must be instituted. Once this ultimate period has expired, a victim can no longer assert its right before the courts and is accordingly no longer entitled to sue the wrongdoer for damages.

Under the Civil Code of Lower Canada, limitation periods varied. Thus, in bodily injury matters, there was a one year limitation period while in matters involving property damage, the limitation period was of two years.

Article 2925 of the Civil Code of Québec covers matters of prescription in civil liability cases. It reads as follows:

> **Art. 2925.** *An action to enforce a personal right or movable real right is prescribed by three years, if the prescriptive period is not otherwise established.*

Consequently, whenever material, moral or corporal damages are in question, the victim must now institute proceedings within a three year limitation period, which runs from the day of the incident.

However, whenever the damage appears progressively or tardily, the period runs from the day the damage appears for the first time. The damage will be the same in contractual as well as in extra-contractual matters.

However, in matters of defamatory libel, there is a limitation period of one year, running from the date on which the individual so defamed first knows of the libel.

Another important aspect of the Civil Code of Québec is that where, at the time of the judgment, the court notes that the course of the physical condition of a victim having suffered bodily injuries cannot be determined with sufficient precision it may, for a period of not over three years, reserve the right of the latter to apply for additional damages. This case is provided for in article 1615.

5.1.3 *THE BURDEN OF PROOF*

The injured party must, in order to succeed against the person who caused the damage, establish each one of the previously described elements of tort liability. In most cases, there will of course be no need to establish that a wrongdoer is endowed with reason, but the victim will be held to establish the three other elements by submitting a preponderance of evidence.

The court will indeed have to decide examine who, between the prosecution and the defence, has adduced evidence worthy of its support.

There is no need that each and every one of these elements be established beyond a reasonable doubt. It is only necessary that the judge become convinced in his own mind that the evidentiary element *he is examining* is probably factual.

In short, the victim will have to establish: the commission of a fault by the defendant, the damage suffered as a result, the value of such damage and the existence of a causal connection between the fault and the damage. Should the evidence provided be insufficient, the action will be dismissed.

Here is an example: A child was hit by a car as she was crossing the street after stepping off a school bus. The child's mother sued the School Board. The Court of Appeal did not hold the School Board liable since it had not been established that it had personally(sic) committed any fault. Things would have been different had it hired a driver who was incompetent where it came to carrying schoolchildren. In this case, it could not have been held liable for a fault committed by an independent contractor[40].

[40] Commission scolaire régionale Honoré-Mercier v. St-Onge, Court of Appeal, J.E. 80- 299.

CHAPTER 6

GROUNDS OF DEFENCE AND GROUNDS FOR EXEMPTION FROM LIABILITY

6.1 ABSENCE OF EVIDENCE OF ANY ONE OF THE FOUR ELEMENTS

In civil liability matters, under article 1457 of the Code of Québec, the plaintiff must establish that it has a right against(sic) the party he claims to be liable for the injury suffered. Hence, it is up to the plaintiff to adduce evidence of the four elements of liability. Consequently, he will have to show that the defendant is guilty of a fault, that he personally suffered damage which he will have to assess and that there is a causal connection between the said fault and the said damage. Should the evidence he introduces prove insufficient with respect to any one of these elements or should it be established before the court that the wrongdoer does not have the ability to discern, the action should be dismissed.

For example, a pupil sued a School Board and its directors in view of the circumstances surrounding the cessation of his studies at the General Training Division of Adult Education. He blamed his teachers for having misused their authority, lacked discernment and judgment, and made defamatory and false comments with regard to him, thereby causing him to be refused admission to another private adult education school. Having reviewed the evidence, the Court found that defendant had failed to prove his allegations and in particular that he had failed to adduce any evidence of damage, and to establish the existence of any connection between the damage he had allegedly suffered and any fault or failure whatsoever on the part of the teachers.[41]

Further on, we will examine other cases in which the Courts apportioned liability not only between several defendants but also between the victim and the defendants, reducing the compensation to which the victim was entitled accordingly.

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[41] St-Louis v. Commission scolaire de Montréal et al., unreported judgment, Superior Court, 500-05-014543-936.

6.2 APPORTIONMENT OF LIABILITY

This is also a ground of defence against an action for damages resulting from civil liability. The person who caused the damage may plead his case by apportioning some of the liability to a third party or to the victim itself. This case is governed by article 1478, which reads as follows:

> **Art. 1478.** *Where an injury has been caused by several persons, liability is shared by them in proportion to the seriousness of the fault of each.*
>
> *The victim is included in the apportionment when the injury is partly the effect of his own fault.*

This is a case in which third parties are involved in the wrongful act and the School Board will be entitled to apply to a court of law in order to be reimbursed by the said third parties for their share of the liability, in the proportion as indicated in the judgement and provided the latter are financially responsible. Where third parties who are involved are exempted from all liability by an express provision of a special Act, article 1481 of the Civil Code of Québec provides that their share of the liability is assumed equally by the other persons liable for the injury.

Where there is at one and the same time a fault committed by the victim and a fault committed by the person who caused the damage, both faults contributing to the perpetration of mischief, it is said that there is common fault and consequently, the latter's liability is diminished proportionally to the respective seriousness of the faults.

Here is an example in which liability was shared 50-50 between a victim and a School Board. The victim fell on the porch of a School Board building it was coming out of. She alleges that the building should have been equipped with a continuous railing up to the stairway, as provided for in the Building Code. She also alleges the absence of lighting. The Court ruled that the School Board was liable for one half the damages *based* on the failure to install a continuous railing near the stairway. The victim will be deprived of one half of the damages for having neglected to turn the light on before leaving the premises and for its idleness upon reaching the stairway[42].

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[42] Baribeau v. Commission scolaire De Grandpré, Superior Court, J.E. 80-178.

6.3 INSTANCES OF EXEMPTION FROM LIABILITY

The legislator, in articles 1470 and following *of the Civil Code of Québec* dealt with certain instances of exemption from liability. In so far as provided in the said articles, a person may free himself from his liability and plead any one of these articles in defence. Four situations provided for in these articles are liable to have a serious impact in the school system, to wit the case of superior force, that of the good Samaritan, that of no-liability clauses and that of acceptance of risks.

6.3.1 Superior force

This situation is provided for in article 1470 of the Civil Code of Québec, which reads as follows:

> **Art. 1470.** *A person may free himself from his liability for injury caused to another by proving that the injury results from superior force, unless he has undertaken to make reparation for it.*
>
> *A superior force is an unforeseeable and irresistible event, including external causes with the same characteristics.*

The second paragraph of this article defines superior force and includes what was also called a fortuitous event. For there to be superior force, the damage claimed for must therefore result from an unforeseeable and irresistible event. The said event must not in any way depend on the will of the person subjected thereto. The second paragraph prescribes that the event must be both unforeseeable and irresistible. However, it appears to us that even where an event is foreseeable, it should nonetheless be considered a case of superior force if it is impossible to prevent it in actual practice.

For example, floods brought about by torrential rains that were almost unprecedented in meteorological history, such as the rain that fell on July 14, 1987, would be a good example of superior force. Illegal strikes, landslides and lightning[43] were also likened to fortuitous events.

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[43] Dominion Comb & Novelty Co, v. Commission Hydro-électrique du Québec, Superior Court, J.E. 79-918.

It should be noted that it is the alleged person who caused the damage who has the onus of proving that the situation was indeed beyond his control.

6.3.2 The good Samaritan

This name does not appear as such in the Civil Code but you will probably remember seeing in the Gospel. This situation is provided for in article 1471 of the Civil Code of Québec which reads as follows:

> **Art. 1471.** *Where a person comes to the assistance of another person or, for an unselfish motive, disposes, free of charge, of property for the benefit of another person, he is exempt from all liability for injury that may result from it, unless the injury is due to his intentional or gross fault.*

Thus, should a victim wish to have a good Samaritan held liable for, he will have to adduce evidence of an intentional or gross fault committed by the latter, as indicated previously.

It should be observed that the concept of assistance contained in this article involves a person finding himself in an emergency situation and needing help. Thus, a teacher does CPR on a drowning pupil and in the process breaks a few of his ribs and possibly pierces his lung. Provided the teacher acted in good faith and despite the fact that he might not have applied the appropriate CPR technique, he cannot be sued in liability.

Furthermore, we do not believe this article would apply to the administering of medication except in emergencies. Thus, should a teacher entrusted with giving medication to many pupils make a mistake and give a pupil the wrong medication, he could not plead article 1471 in his defence. His actions would not, in our view, constitute assistance within the meaning of that provision.

6.3.3 No-liability clauses

These are clauses that are placed in contracts or advertisements and by which a person notifies the party with whom he is contracting or anyone frequenting premises of which he is the owner or using his services, that he cannot be held liable for any damages suffered by another.

The courts used to recognize the validity of such clauses. However, any party attempting to claim the benefit thereof had to prove that the victim had been aware of it. It could then be assumed that the latter had nonetheless accepted to do business with the declarant. The courts also refused to apply such clauses in cases involving gross negligence or gross fault on the part of their maker.

This subject is dealt with in articles 1474 to 1476 of the Civil Code of Québec, which read as follows:

> **Art. 1474.** *A person may not exclude or limit his liability for material injury caused to another through an intentional or gross fault; a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence.*
>
> *He may not in any way exclude or limit his liability for bodily or moral injury caused to another.*
>
> **Art. 1475.** *A notice, whether posted or not, stipulating the exclusion or limitation of the obligation to make reparation for injury resulting from the non-performance of a contractual obligation has effect, in respect of the creditor, only if the party who invokes the notice proves that the other party was aware of its existence at the time the contract was formed.*
>
> **Art. 1476.** *A person may not by way of a notice exclude or limit his obligation to make reparation in respect of third persons; such a notice may, however, constitute a warning of a danger.*

It therefore appears from these three articles that the legislator has now codified the jurisprudential rules in matters of property damage.

Furthermore, the second paragraph of article 1474 clearly provides that henceforth, in matters of physical or property damage, persons who cause injury cannot avail themselves of such clauses as a defence. It should also be pointed out that this article applies to contractual matters.

Likewise, article 1475 provides that the party invoking the notice of exemption from liability must prove that the other party was aware of its existence at the time the contract was formed. Here again, this is a

codification of jurisprudential rules. So when you go into a parking lot and pay to park your car therein, a contract of deposit is established with the owner of that parking lot. The latter may invoke the non-liability notice posted on his parking lot should you decide to sue him for damages, but he will have to prove that you had read the non-liability notice or that you were aware of it's existence.

As for article 1476, it deals with extra-contractual liability. It concerns not contracting parties but rather persons with no contract between them.

For example, a School Board owns fallow land. It posts a notice stating that it is not responsible for injuries sustained by unauthorized trespassers. Someone comes over and injures himself while playing on its land. The School Board cannot defend itself by pleading that it posted a non-liability notice. However, if it proves that the victim was aware of the said notice, the victim will, as a result be presumed to have been warned of the danger. This could be used either to mitigate or even to exclude the School Board's liability, in so far as the victim would have accepted *to run* the risk.

6.3.4 THE THEORY OF ASSUMPTION OF RISKS

The victim's assumption of the risk implies that he consented to the wrongful act. In other words, the victim freely and consciously, with full knowledge of the facts, tacitly agreed to suffer the consequences of a risk or danger the nature or extent of which he would have been perfectly capable of appreciating.

Where the person who caused the damage raises this defence in order to totally or partly escape liability, he must prove not only that the victim was aware of the risk but also that he wilfully and freely ran it.
Here are a few examples of cases where the theory of assumption of risks was applied.

In one case, the defendant was, in his capacity as trainer of a football team, obligated to abide by the regulations of the *Fédération de football amateur du Québec* (Québec Amateur Football Federation). These rules and regulations provided for a weight limit where 12 and 13 year old players were concerned. The defendant only concerned himself with their age and grade in school and ignored the said regulations, which applied even if this was a friendly game because the play was no less violent for all that. In addition, the evidence showed that had the opposing player's weight been within the prescribed limits, the accident could have been avoided. Faced

with this evidence, the defendant attempted to plead that the plaintiff's 12 year old son was aware of the risks he was running and accepted the consequences thereof. The court dismissed this defence because the accident was due to the trainer's abovementioned fault[44].

Also, in a previously mentioned case, a young man was injured by his companion during a hunting expedition. An attempt was made to have the victim share in the liability by claiming he had assumed the risks inherent in a hunting expedition. The Court of Appeal dismissed this claim in the following words:

> " The assumption of risks constitutes a valid plea for a third party only where two basic requirements are satisfied: first, the victim must have truly assumed the risk, whether explicitly or tacitly. It is not enough that he merely knew of the said risk or sensed its existence. Second, the said assumption must be free and informed.
>
> Considering the applicable standards and the evidence, the onus of which was on Appellants, in my view, Appellants have failed to establish with a preponderance of evidence (*conclusively*) that Pierre Gagnon, knowing the special risk involved in Roch Ouellette's wrong move, accepted to take part in the shooting practice in question. Evidence respecting facts prior to the accident rather shows that the victim did not have reasonable grounds to fear that what was going to happen would indeed come to pass."[45]

The Superior Court also ruled that a School Board was liable when a physical education teacher had a 9 year old pupil do a balancing exercise on a beam by making her hop on just one foot with both arms stretched out on each side. The pupil fell face down on the beam and injured her mouth. Dealing with the issue of assumption of risk, the Court stated the following:

> " In relation to such an accident, assumption of risk is an accepted expression, but nevertheless an expression that should not be taken literally. This is not a stipulation excluding liability. Such a stipulation could not be validly signed by a

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44 Chatelain v. Prémont, (1985) P.C. 120.

45 Ouelette v. Gagnon et al., see note 23
See also Roy v. École d'escalade de la Haute Perchée Inc., J.E. 84-192;
Roy v. École d'escalade de la Haute Perchée Inc., J.E. 88-345;
Lapointe v. Corporation municipale du Village de St-Victor, J.E. 80-496.

> minor anyway, since it would be prejudiced thereby. Rather, these are circumstances surrounding an activity that are liable to alter the extent of the care and attention that could be required from those entrusted with organizing and running the play. One must therefore consider the facts of each particular case, taking into account the age of the players. In some cases, the school will be free from any fault while in other cases, the school will either be partly or completely to blame, the whole depending on the precautions taken with regard to the accident victim's physical abilities and maturity of mind."

Under the circumstances of this accident, the Judge pointed out that, considering the type of exercise and the children's age, the teacher's duty of attention and of care was greater and that she should have stayed within reach of the pupil, to help her at the first warning sign, by grabbing her and preventing her from being injured. Hence, the theory of assumption of risks cannot be used to rebut this fault committed by the teacher.[46]

Finally, during a ball game on ice, a youngster is injured when hit into the boards by another pupil coming in at full speed. The Court of Appeal pointed out that taking part in any contact sport involves an assumption of certain risks inherent therein. Where damage is suffered through the occurrence of any unforeseen risk, the theory of assumption of risks must be applied. However, in this case, the Court ruled that neither the *Fédération de ballon sur glace du Québec* nor its employee had committed any fault considering that this case involved a sudden and unforeseeable move by a youth.[47]

Besides, a new article has been added to the Civil Code of Québec in this connection. Article 1477 reads as follows:

> **Ann. 1477.** *The assumption of risk by the victim, although it may be considered imprudent having regard to the circumstances, does not entail renunciation of his remedy against the person who caused the injury.*

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[46] Ciaramicoli v. Commission des écoles catholiques de Montréal, (1978) S.C. 327.

[47] Canuel v. Sauvageau and the Fédération de ballon sur glace du Québec, (1991) R.R.A. 18.

Here is (*a translation of*) the comment made in writing by the Justice Minister with respect to this article, on the occasion of the adoption of the Civil Code of Québec:

> **This is a new article. It enacts a rule that has been recognized by the courts as well as by the authorities, under which the mere assumption by a victim of the risks inherent in any activity does not entail renunciation of his remedy against the person who caused the injury. It no less remains that such an assumption may, under certain circumstances, constitute negligence or imprudence by the victim and thereby allow an apportionment of liability[48].**

In other words, this new provision does not change the basis on which the theory of assumption of risk is founded. It is intended to dispel a certain controversy that had, in recent years, appeared in legal circles, where attempts were made to say that the assumption of risk entailed pure and simple renunciation of any claim for damages made against any person. Hence, that article implies that such an assumption of risk by the victim is not a bar to his claim. The person who caused the damage may even be completely exempted because the victim knew the full extent of the risk involved. If the victim did not know the full extent thereof, there can nonetheless be a sharing of liability.

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[48] Le Code Civil du Québec, Commentaires du ministre de la Justice, Tome I, Les Publications du Québec, p. 905.

GROUNDS OF DEFENCE & GROUNDS FOR EXEMPTION

ABSENCE OF EVIDENCE OF ANY ONE OF THE 4 ELEMENTS OF LIABILITY	**Plaintiff has the onus of adducing evidence of:** **- ability to discern** **- fault** **- damage** **- causal connection**	**Absence of evidence or insufficient evidence on at least one of the 4 elements**
APPORTIONMENT OF LIABILITY	**Contribution by:** **- the victim and the person who caused the damage to the perpetration of mischief**	**Liability diminished proportionally to the respective seriousness of the faults**
SUPERIOR FORCE	**Evidence that must be adduced by the person responsible for the fault to exonerate himself**	**- The event was not reasonably foreseeable** **- Although it is foreseeable, the event is such as to be impossible to prevent**

THE GOOD SAMARITAN	**Evidence that must be adduced by the person responsible for the fault to exonerate himself**	**- The person responsible for the fault acted with the intention of coming to the assistance of the victim** **- The event occurred in an emergency situation where the victim needed immediate help following physical injury** **- The prejudice must not the result of an intentional fault or gross fault**

(continued on next page...)

GROUNDS OF DEFENCE & GROUNDS FOR EXEMPTION (continued)

INSTANCES OF EXEMPTION FROM LIABILITY	**- For property damage, evidence that must be adduced by the person responsible for the fault to exonerate himself** **- For physical damage, the person responsible for the fault may not plead any exclusion or limitation for bodily or moral injury**	**- the fault must not be intentional or a gross fault;** **- the person who caused the damage must prove that the victim was aware of the exemption from liability prior to the wrongful act;** **- notification of any exemption from liability may constitute a warning of danger.** **- a non-liability notice may constitute a warning of danger and allow the exclusion or mitigation of liability.**
ASSUMPTION OF RISK BY THE VICTIM	**Evidence that must be adduced by the person responsible for the fault to exonerate himself**	**- The victim had knowledge of the risk** **- He freely and consciously ran it**

CHAPTER 7

CONTRACTUAL CIVIL LIABILITY

7.1 STANDARDS FOR THE APPLICATION OF CONTRACTUAL CIVIL LIABILITY

As we have seen, attempts have been made in the Civil Code of Québec to standardise the rules that apply to contractual as well as extra-contractual civil liability. In point of fact, the legislator has combined these two types of liability into one and the same chapter and used similar terminology. So we will examine the standards for the application of contractual civil liability and look at special cases wherein actions have been brought against manufacturers and distributors of movable property as well as the contractual liability of agents or servants of the State.

7.1.1 ELEMENTS OF THIS LIABILITY

Article 1458 forms the basis for this liability, which derives from a person's contractual undertakings, whether written or verbal. Where a verbal contract is concerned, the victim will have a hard time proving the terms and conditions thereof.

Here, unlike article 1457, the Code refers to a failure in the duty to honour one's *contractual* undertakings rather than to the circumstances, usage or law governing any given situation. In matters of contractual liability, such a failure constitutes a fault. However, fault is assessed in accordance with the terms of the contract.

The other elements of liability, to wit the ability to discern, the damage or the causal connection between the damage and the fault must be established, just like in extra-contractual liability matters.

In this case, there is no presumption of liability as such beyond what is provided for in the contract. However, it may be provided for therein.

Employers' liability above all derives from the fact that the employer is the one to sign contracts. Any employee may be compelled, as a result of his own failure, to assume liability as a party to the contract.

It should be emphasized that School Boards sign a large number of contracts, be it with suppliers or with other persons, with a view to providing them with services such as, for example, adult education. Hence, the aforementioned rules apply to the school system, with regard to any contracts it may enter into.

7.1.2 JOINDER OF CONTRACTUAL AND EXTRA-CONTRACTUAL REMEDIES

Article 1458 provides that neither the person who has failed to honour his undertakings nor the other party may avoid *the rules governing* contractual liability. An individual would, for example, be prevented from bringing an extra-contractual action based on a breach of any contractual duty.

This rule will possibly have little impact on schools and School Boards. However, we should note that prior to bringing any action, one should ask himself whether what is involved is a breach of a contractual undertaking, a breach of usages or a breach of law. A person proceeding under the wrong provision could theoretically be denied any indemnity. Once again, it will be interesting to see how the courts will enforce this provision.

7.2 PROCEEDINGS AGAINST MANUFACTURERS AND DISTRIBUTORS

Within the school system, we purchase several products, which are either used as such or occasionally incorporated into a building. They are purchased pursuant to a purchase order or by contract. Suppliers with whom orders are placed can certainly be held liable for any injury caused to a School Board by goods that prove to be unsafe. But article 1468 also entitles the purchaser of a movable property to sue the manufacturer or the distributor thereof even where the victim neither directly dealt nor entered into any contract with the said manufacturer or distributor. Article 1468 governs such cases in the following words:

> **Art. 1468.** *The manufacturer of a movable property is liable to reparation for injury caused to a third person by reason of a safety defect in the thing, even if it is incorporated with or placed in an immovable for the service or operation of the immovable.*
>
> *The same rule applies to a person who distributes the thing under his name or as his own and to any supplier of the thing, whether a wholesaler or a retailer and whether or not he imported the thing.*

In order to determine the safety level of a movable property, reference must be made to article 1469, which reads as follows:

> **Art. 1469.** *A thing has a safety defect where, having regard to all the circumstances, it does not afford the safety which a person is normally entitled to expect, particularly by reason of a defect in the design or manufacture of the thing, poor preservation or presentation of the thing, or the lack of sufficient indications as to the risks and dangers it involves or as to safety precautions.*

As for it, the manufacturer, distributor or supplier of movable property can escape liability by proving that the victim knew or could have known of the defect, or by proving that at the time the incident took place, the existence of the defect could not have been known, according to the state of knowledge at the time that he manufactured, distributed or supplied the property. This defence is afforded him by article 1473, which reads as follows:

> **Art. 1473.** *The manufacturer, distributor or supplier of a movable property is not liable to reparation for injury caused by a safety defect in the property if he proves that the victim knew or could have known of the defect, or could have foreseen the injury.*

> *Nor is he liable to reparation if he proves that, according to the state of knowledge at the time that he manufactured, distributed or supplied the property, the existence of the defect could not have been known, or that he was not neglectful of his duty to provide information when he became aware of the defect.*

7.3 LIABILITY OF CIVIL SERVANTS

Article 1464 deals with the liability of agents or servants of the State or of a legal person established in the public interest and reads as follows:

> **Art. 1464.** *An agent or servant of the State or of a legal person established in the public interest does not cease to act in the performance of his duties by the mere fact that he performs an act that is illegal, unauthorized or outside his competence, or by the fact that he is acting as a peace officer.*

Under the Education Act, School Boards are legal persons established in the public interest. Accordingly, the latter's employees are directly covered by article 1464. This provision was established in order to protect third parties who, in good faith, do business with a School Board and to provide them with a remedy against it even where its employees have acted without jurisdiction.

This article also applies to extra-contractual matters. The courts had a running debate going on this question with respect to the liability of police officers and of their employers. We do not have to tackle this question here, but the new article is mainly intended to put police officers and their employers on an equal footing with the employees of any other organisation. However, this new Civil Code provision goes further and also covers the liability of all other government officers while also being intended to put them on an equal footing with any other person. Hence, it can no longer be said that a government employee who exceeds his jurisdiction is not *acting* in the performance of his duties.

CHAPTER 8

ACCIDENT PREVENTION IN SCHOOL

As we pointed out in the introduction, we feel we must devote a portion of this paper to the subject of prevention. In this chapter, we will attempt to underscore certain special problems that arise in schools and are liable to render teachers and School Boards liable. We believe that problems arise quite often within the school system and that we should point out those guidelines which would help in preventing accidents and ultimately claims for damages in such cases. Besides, we have discussed only those situations that arise most often and that most often cause problems. It does not follow that we should not check our schools for any other accident hazards and develop means of preventing them.

8.1 SUPERVISION

As we have already pointed out, teachers and School Boards are often held liable by the courts due to a lack of supervision. Teachers often ask us how to go about determining whether or not their supervision is adequate. There is no easy answer to this question since, as the Court of Appeal has already indicated, supervision is a relative duty which must be assessed while taking into account the time and place thereof and the people involved therein. For example, kindergarten or first grade pupils do not require the same degree of supervision as do high school or college pupils. However, certain rules have proved acceptable as pointed out in the *Guide de la responsabilité civile de la Commission des écoles catholiques de Montréal*:

> *1. All school or extra-curricular activities must be supervised by a certain number of responsible adults who as a rule must not actively participate therein.*
>
> *2. The ratio between the required number of supervisors and the number of pupils varies on the one hand in accordance with the pupils' age and degree of maturity and, on the other hand, according to the external circumstances and type of activity involved.*

In school, the ideal supervision ratio might perhaps be the same as in the classroom, that is to say one teacher to every thirty or so pupils.

Obviously, it is not always easy to stay within this ratio. It must nevertheless not be forgotten that a ratio of one supervisor to every two or three hundred pupils does not suffice and could constitute a fault, which would make the School Board liable (unless of course the said pupils are adults).

3. Should an accident occur while the supervisor is absent, the teachers and the board can be held liable unless they can prove that the supervisor could not have prevented the accident had he been present.

4. Supervisors are not held to foresee everything that can happen, but only what is normally foreseeable or probable.

5.The supervisor and the board cannot evade liability merely by prohibiting a dangerous activity; where an accident occurs thereafter, reasonable steps should have been taken so that the prohibition be complied with.

We are adding the four following rules to the ones set out hereinabove:

- Supervisors must have an active and energetic presence at the current activity.

- Any supervisor who is engrossed in a discussion with a colleague, thereby limiting his supervision to a small group and preventing him from following the activities of all of the pupils entrusted to his supervision thereby fails to properly discharge his duty of diligence and of prudence.

- It is not enough for a teacher or a supervisor to give orders to pupils under his care; he must also make sure that such orders are understood and complied with.

- A teacher's or supervisor's tolerance or bad example constitute faults in so far as they can be linked to the wrongdoing which caused the damage.

Here are a few examples of court rulings with respect to the supervision of pupils.

The Court ruled that four teachers supervising outside and a fifth teacher inside the school to provide first aid was a sufficient number of teachers to adequately supervise from 460 to 480 pupils playing in a schoolyard.[49]

A School Board was held to be liable for damage suffered by a pupil when pupils started throwing clods of earth at each other. None of the school's employees, supervisors or teachers was at the scene, save only one teacher who was chatting with some of his pupils more than 250 feet away from the scene of the accident.[50]

A pupil suffered a serious injury when he kicked open a glass door as he was leaving school at the end of classes. This accident occurred in a hallway leading to an exit. A supervisor was in the hallway. It was established that the teacher usually asked pupils to walk slowly as they were going out. The Court ruled that when teachers intervene in order to prevent dangerous actions, this constitutes active supervision. Accordingly, the Court ruled that there had been appropriate supervision in this case. [51]

Besides, can a pupil be entrusted with any supervision? As a rule no. However, in his abovementioned work Mr. Parent points out that this can be done under exceptional circumstances:

> *1. The said supervision must be warranted and be on an exceptional and temporary basis;*
>
> *2. The supervising pupil must be reliable and be able to effectively use influence and authority over his classmates;*
>
> *3. The supervision must not occur in circumstances involving any special risk;*

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49 Renaud et al. v. Commission scolaire Baldwin-Cartier,. see footnote 9.

50 Tremblay v. Commission scolaire Seigneurie, J.E. 88-1038.

51 Poupakis v. Commission des écoles catholiques de Montréal, unreported, Superior Court,500-05-006264-905. See also Salova v. Commission scolaire du Sault-St-Louis, Cour du Québec, 500-32-004741-940, where the Court acknowledged that 3 supervisors can adequately supervise 300 pupils in a playground.

> *4. The supervision of meals by pupils aged from fifteen to seventeen or eighteen is perfectly justifiable, even where it is of a permanent nature.*

Here is an example having to do with the supervision of pupils by another pupil:

> A School Board would be held liable in a case involving pupil who was pushed and shoved by his classmates as they jostled while being supervised by another pupil whom a teacher had entrusted with their supervision. The teacher who failed in his duty to supervise a pupil by delegating it to a schoolboy was found to be guilty of a fault, especially as that pupil was less than ten years of age[52].

8.2 EQUIPMENT AND MAINTENANCE

Without reviewing the problem raised by the *question of* equipment and maintenance, we will especially take a closer look at the problems affecting workshops, sports facilities and schoolyards, where most accidents happen in our schools.

8.2.1 WORKSHOPS

Accidents that happen in school workshops generally result from faulty equipment or from the teachers' tolerance towards wrong methods of using pieces thereof.

Thus, liability may be incurred where pupils are supplied devices that are not equipped with protectors or where the wearing of protective equipment is not required. It should be observed that the court has held a teacher and a School Board liable because although that teacher demanded that a saw be used *only when fitted* with its protector, he personally did not use such a guard when demonstrating it to his pupils. Liability was apportioned 50-50 between the teacher and the pupil since the latter was negligent and careless in using it[53].

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[52] Jacques de Grosbois v. Commission catholique de Ville St-Laurent, (1974) S.C. 292.

[53] Charlebois v. Commission scolaire régionale de Chambly, Superior Court, J.E. 84-854.

It seems to us that faulty maintenance, a bad example and failure to make sure that youngsters are safe are faults that are relatively easy to correct and that can be likened to precautions any reasonably careful person should take in a workshop.

A university student lost three fingers owing to an accident involving a surface-planing machine during a lab workshop. Although the instrument was not proved to be defective, the university still had to bear the burden of 40% of the liability because it failed to provide adequate instructions to its students who were called upon to operate the various instruments in the workshop and because its employee failed to intervene after noticing that Plaintiff was handling the said instrument in a dangerous manner. The Court ruled that the victim was 60% responsible for the accident given that he had handled the surface-planing machine without contacting the technician and without focusing his undivided attention on the operation of the instrument.[54]

In a case involving a School Board, the Court dismissed an action instituted by a student whose thumb had been stuck in the mechanism of a printing press owned by the School Board. The Court stressed that the accident was not due to a breach of the duty to teach about safety and to supervise and that on the contrary, the student had received the required instructions. The press was in working order and was equipped with all of the required safety mechanisms. The accident was solely due to the negligence of the student who had ignored the safety instructions he had been given.[55]

The Act respecting occupational health and safety (*Loi sur la santé et la sécurité au travail*) provides that pupils may, by regulation, be given the same status as workers. However, the government has not as yet passed such a regulation and School Boards are not held to supply their pupils with personal protection equipment. However, considering the risk involved, we think it is reasonable for School Boards to require their pupils to use such an equipment even though they are held to do so at their own expense.

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54 Bergeron v. Université de Montréal, Superior Court, J.E. 86-857.

55 Coulanges v. Commission des écoles catholiques de Montréal, unreported judgment, Superior Court, 500-05-013676-950.

You have to know that there are also other statutes and regulations which apply to schools, such as the *Règlement sur les établissements industriels et commerciaux* (Industrial and Commercial Establishments Regulations). These regulations provide safety rules that must be complied with. Thus, a CEGEP and one of its teachers were held to be 75% liable for having allowed a pupil to use a circular saw without a protective cover.[56]

Furthermore, teachers should make sure that they have adequately demonstrated how to use their devices and that their pupils have fully understood their demonstration.

Likewise, a teacher and a School Board could be held at least partially liable should the teacher have failed to adequately ascertain that the pupil had fully understood his instructions. Even after giving his pupil special explanations and inviting him to request further information should he need to, a teacher must ascertain the way in which the pupil uses the equipment in the workshop. He may be held liable should he fail to do so.

8.2.2 SPORTS FACILITIES

As in the case of workshops, it is necessary to make sure that the sporting equipment is not defective and that it is appropriate for the circumstances in which people want to use it.

We have noted that occasionally, for so-called educational reasons, tests are performed on new devices, which are physically dangerous for pupils to use. It has happened that a ball weighing some 15 pounds and measuring 6 feet in diameter was rolled over the bodies of children lying down on a stairway. Skateboards with multi-directional wheels that could easily jam at any time and cause a child to fall were also used. One should be very careful when using devices of this type.

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[56] Collège d'enseignement général et professionnel de Sherbrooke v. Soucie, Court of Appeal, J.E. 90-123.

Also, a judge might rule that there is negligent behaviour where a four by six foot mattress is used to have children jump from a springboard over a rope tied between two posts and where, through neglect, padded mats were not put down to cover a larger area. So, a child sent flying by a trampoline could easily fall next to a four foot wide mattress and thus suffer a concussion or spinal fracture.

Here are a few cases where the courts have had to rule on the issue of civil liability as far as sporting equipment is concerned:

- A pupil broke his leg while playing basketball in the school gym. The said pupil put the ball directly into the basket with his hand and in so doing touched the metal rim opening of the basket. The wooden backboard to which the basket was fastened thereupon detached itself from the column supporting it and fell on the player's leg. The Court acknowledged that the player's move was quite acceptable in the normal course of play and that it did not constitute a dangerous or prohibited move. The Court did not apply the presumption in old article 1054 of the Civil Code of Lower Canada, the equivalent of article 1465 of the new Civil Code of Québec, because the accident did not result from the autonomous act of the thing. The exact cause of the fall of the backboard was not established before the Court. The judge stressed that the School Board was obligated to check these fittings and make sure they were well affixed so as to withstand the impacts they could sustain. The check carried out by the School Board was inadequate and did not relieve it from its obligation as to the foreseeable nature of such impacts. It should have been much more rigorous in checking this equipment before making it available to youngsters.[57]

- A woman hurt her ankle during a game of volleyball, after her ankle remained trapped in a hole dug to anchor a post. The defendant in this case was the person in charge of sports organisation, field maintenance and she supplied all of the equipment. Despite the fact that this is a sport and that the plaintiff was taking risks, she was entitled to expect that the field would be maintained in an appropriate condition[58].

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57 urcotte v. Commission scolaire de Val d'Or, (1990) R.R.A. 330 to 333.

58 Benoit v. Ville de Montréal, (1987) R.R.A. 314.

- A woman hit her head on the springboard as she was doing a back somersault. The evidence showed that the springboard had a bad slant and that therefore, it was defective. However the court ruled by a ratio of 3 to 1 that the diver was liable as she was under an obligation to personally check the condition of the equipment *she was using*. Under the circumstances, neither the theory of risks inherent to sports activity nor the presence of a no-liability notice posted on the wall could be pleaded in opposition to the plaintiff's claim[59].

- During a judo lesson that was being given in the City offices, using the equipment therein, a young man injured himself. The direct cause of the accident was a hole in the exercise mat on which he fell. As he was getting up from that mat, his big toe got caught inside the hole and was dislocated. Damaged equipment should never be left where it can be used by customers[60].

- The court ruled that a School Board was liable when, as younger pupils were having fun lifting a stand during lunch break, the said stand fell on one of them, seriously injuring him in the head. The court ruled that the School Board had been negligent in allowing the presence of an object that was potentially dangerous when handled by the children it had in its school, especially since such an accident had happened before[61].

- A 5 year old boy fell from a piece of equipment installed in a schoolyard. It appears that the child had already received and complied with all of the required instructions when the accident happened. The equipment was neither defective nor dangerous. There had been appropriate supervision. Accordingly, the event was held to be a sheer accident brought about by the child's physical activities[62].

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59 Matthews v. Ville de Jonquière, (1982) Superior Court, 1122.

60 Brisebois v. Ville de Brossard, Superior Court, J.E. 89-1319.

61 Duquette v. Commission scolaire de Rouyn-Noranda, Superior Court, J.E. 84-638.

62 Gagnon v. Commission scolaire d'Alma, Court of Appeal, J.E. 89-570.

8.2.3 SCHOOLYARDS

A schoolyard is another place where accidents most often occur. There again, they are primarily due to inadequate supervision. As the number of supervisors is restricted by collective agreements, we feel it all the more important to be vigilant and effective. It should not be tolerated that two or three teachers who have three hundred kids to watch over gather together to chat in a corner of the schoolyard. It would be great if these teachers were to make their presence known to the pupils, move around the schoolyard and be on the look-out.

Certain intrinsically dangerous games such as sword fights and snowball fights should not be tolerated either.

Here is a case in which a School Board and teacher were held liable by reason of a game that was deemed dangerous:

- The game consisted in taking a ball away from other pupils with one's feet. The schoolyard where the game was being played was covered with packed snow. According to the victim, he was tripped by the defendant. The game was being supervised by a teacher, but no instructions had been given to the pupils as to this very popular game which had the blessing of the school's headship. It wasn't up to these 8 and 9 year old youngsters to make up their own rules to protect themselves from *movements* that could risk causing a fall. Simply by letting the children trip each other, the teachers were guilty of a fault and the accident was the natural outcome of a poorly organised game. The pupil who did the tripping cannot be held liable as he was simply acting the same way as all the other unsupervised pupils[63].

Here is a case in which a situation was deemed dangerous entirely regardless of any duty to supervise:

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[63] Gauthier-Fafard v. Commission scolaire de Granby, (1976) S.C. 985.

- An 11 1/2 year old boy wanted to extricate his miniature parachute from a branch and so he climbed up onto the fence surrounding the schoolyard. He then slipped and his arm got hooked on the steel fence. A fault had been committed by fencing in the schoolyard with a dangerous fence since it was foreseeable that children would climb onto it and risk hurting themselves[64].

Maintenance is very important when it comes to schoolyards, but our climate has caused our courts to explain that School Board liability does not go as far as to force them to maintain schoolyards as if they were tropical gardens. Here are a few examples:

- A 36 year old man who has just finished evening class uses the only exit available at that hour of the day. It has been snowing all day. He uses a snowed in passageway to get to the parking lot, falls down and seriously hurts his ankle. Here is the decision:

  > *"The court does not feel that winter, the defendant herein, has to clear and maintain all of its yards and other areas on its land."*

  The judge clearly stated that it is not reasonable to (*require that someone*) clear the snow from all areas so long as the usual and regular entrances are maintained[65].

- A small girl fell in a snow and ice-covered schoolyard. The court repeated that no presumption lies against the School Board and that it is not reasonable to require that all of the snow be removed from schoolyards[66].

- At every recess, children like to gather speed by pushing off a snow bank that is approximately 2 feet high and slide on a patch of ice located near the door at the school entrance. The children are warned not to do so but they nevertheless go in for this activity. A 12 year old girl slides and injures herself. The Court acknowledged that the teachers effectively

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64 Gauthier-Fafard v. Commission scolaire de Granby, (1976) S.C. 985.

65 Leblond v. C.E.C.M., Montreal S.C., 10-30-81, Judge Bisaillon, 500-05-013744-782.

66 Pasquale v. C.E.C.M., Montreal S.C., 09-23-75, judge G.M.Desaulniers, 800-05- 016507-73.

discharged their duties as educators and teachers and that supervision was appropriate (2 supervisors for 150 pupils). The location of these premises should have lead the School Board to take any measures required to prevent an accident, more especially as the school's Principal had for a long time been aware of the fact that in that spot, the ground is sloped down, thus creating a pond of water that ices over. Schoolyards must be planned so as to prevent foreseeable accidents.[67]

- Contrary to the preceding case, the body entrusted with controlling and managing a playground containing an area for skating was not held liable for an accident suffered by a child who fell and injured himself while playfully sliding down a small ice hill leading to the rink. The evidence showed that no fault had been committed by the said body who had allowed children to play a basically harmless and usual game for kids their age.[68]

Even though opinions appear to be divided where the maintenance of schoolyards is concerned, we should point out that the same does not hold true in respect of access roads leading to schools, whether they are located in schoolyards or at other school entrances.

Such is the case where the Court awards damages to a Plaintiff who fell on a step outside the school and who proves that the said entrance was poorly maintained.[69]

8.3 SPORTS ACTIVITIES

Here again we must consider what a prudent and diligent person would do under the same circumstances. The teachers and School Board are held to do everything in order to avoid usually foreseeable damage. As we have already seen liability may, where sports activities are concerned, be restricted as a result of the theory of acceptance of risk. However, the risks inherent to sports activities and the dangers deriving therefrom require that coaches be better qualified and do more supervising.

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67 Godon v. Commission scolaire Samuel de Champlain et La Compagnie d'assurances Lombardi, REJB 2000-20425.

68 L'oeuvre des terrains de jeux du Québec v. Cannon, (1940) 69 K.B. 112.

69 Martin v. Commission scolaire de La Capitale, REJB 1999-14339.

The courts use plain common sense when it comes to assessing a teacher's liability in the event of an accident. They do not require him to prohibit all sports activities or all games. Rather, they require that he avoid letting a pupil take useless risks and steer him towards activities more in keeping with his age and abilities.

Generally speaking, courts will be satisfied with evidence showing that suitable instructions were given as to the way a sport should be played or practiced and that adequate safety measures were taken so that accidents may be avoided.

Furthermore, the following elements may worsen a situation and result in increasing a teacher's liability:

- having in some way allowed dangerous behaviour by a guilty pupil without intervening, or,

- after having intervened to prohibit such dangerous behaviour, having failed to take steps so that the prohibition be complied with.

Here now are three examples of rulings relating to sports education or physical exercise in general:

- a pupil is injured during a game of touch football involving spirited 13 and 14 year old teenagers playing without appropriate protective gear. Adults must necessarily be present to ensure that the game is played according to the rules. The Court ruled that the School Board was responsible for having overlooked the risks inherent to practising this sport when it allowed a teacher to supervise two different games at a time.[70]

- a School Board was exonerated from any liability where, during another football game, a pupil was injured as a result of a tackle that was, besides, prohibited by the School Board. This was not an organized activity that required any special protective gear. The pupil’s behaviour was isolated and altogether unpredictable.[71]

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70 Paquette v. Commission scolaire des Manoirs, REJB 1997-05298.

71 Gingras v. Commission scolaire des Chutes de la Chaudière, REJB 1998-04321.

- A teacher allows children to play a fencing game with wooden swords and one of them is injured. The Board and the teacher are charged[72];

8.3.1 TEACHERS' QUALIFICATION

It is obvious, once again considering the risks inherent to sports and to physical exercise in general, that teachers and supervisors must be highly qualified. Moreover, they will be called upon to give pupils clear explanations on how to practice these activities not only by speaking to them but also by demonstrating what to do and then by letting their pupils practice by themselves.

For example, the court did not hold coaches liable following the death of a person during a skin-diving exercise. Coaches were expected not to achieve a certain result but to do their best by being diligent and careful, meaning they had not undertaken to eliminate all of the risks inherent to that sport. In that case, they had to take the proper steps in order to ensure the pupils' safety even though a death did occur. More particularly, the assistant-coach had the required training and experience and the safety measures were adequate. The victim, who had received personal attention, practiced a sport that was dangerous and had to follow the instructions she had received but, in this case, she panicked and this resulted in her drowning. The assistant-coach, who is above any reproach, did his utmost to save her. The risk was inherent to the practice of this sport and the pupil had assumed it[73].

A pupil was injured when bumped into while playing during a supervised period of physical education. The Court ruled that the substitute teacher supervising the schoolyard was not qualified in physical education. It therefore appeared that she had neither the training nor the experience to properly supervise. The Court therefore more particularly accepted the fact that the physical education teacher supervising this game of exhibition hockey was not a competent individual.[74]

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72 Germain v. Commissaires d'école de la municipalité de Terrasse Vaudreuil and Guérin, (1960) S.C. 476.

73 Huard v. Boissy, Court of Appeal, J.E. 85-642, Superior Court, 83-345

74 Genoix v. Commission scolaire régionale des Bois-Francs, (1981) S.C. 1189.

In a case, a School Board was held liable where, during a sporting activity, a skateboard had been used. The Court ruled that when it comes to sports education, School Boards are under an obligation of result and that they have an obligation to safeguard pursuant to the educational contract under which it is bound to its pupils. In such a context, the Court ruled that in order to disclaim responsibility, the School Board had to prove the existence of superior force. This is in our opinion an isolated ruling that is contrary to the body of case law which has always acknowledged that School Boards have but an obligation of means, meaning that they have to act in such a way as to prevent accidents that can be foreseen. This means that if this case were to be followed, the articles of the Civil Code dealing with civil liability would not apply when it comes to accidents that occur in schools. More particularly, this decision runs counter to a Supreme Court decision precisely in which the latter ruled that the obligation incurred by a College that organises an activity is not based on a contract and that there no presumption exists against the College's Directors. A fault must be established for which they are accountable.[75]

8.3.2 SUPERVISION OF SUCH ACTIVITIES

Here again, lack of supervision is what incited the courts to rule on the subject of teacher liability. As we mentioned above, one must be all the more careful as the activity is dangerous.

To hold many physical education workshops simultaneously with a single coach appears to be a very risky proposition, especially when devices are used. Thus, where a physical education teacher who has to supervise thirty pupils holds three workshops comprising a jump over a pommel horse and the use of skateboards and of a climbing rope, he is putting his pupils in a situation involving a high risk of accident. In such a case, the court could in fact hold that, by placing himself in a situation where it was impossible to supervise each and every one of those activities, the teacher committed a fault. It might be better to make sure that activities requiring close supervision are not held simultaneously with other activities, unless the latter require no more than minor supervision.

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[75] Grieco et al. v. L'externat classique Ste-Croix, (1961) S.C.R. 519.

This lack of supervision during sports activities was particularly hurtful to the world of education in the case of Bouliane v. Commission scolaire de Charlesbourg[76]. This claim led to some $2,800,000 in damages. In this case, two little girls were injured as they were taking part in a physical education programme when their toboggan hit a "grader"(sic) towed by a snowmobile left idle at the bottom of a hill. The accident was due to the children's sudden start and the vehicles' presence on a portion of the hill that was out sight for the victims. The children's sudden start was foreseeable and the "grader" had been doing maintenance work since that morning. Three adults were not enough to supervise some fifteen children hurtling down fifteen slopes, more especially as these individuals were not at their post when the accident occurred. The School Board assumed 30% of the fault.

The maintenance man caused a danger that has nothing to do with the risks inherent to tobogganing when he stopped at the bottom of the steepest hill. He could have blocked access to it by means of a chain instead of asking a fifteen year old child to stop pupils from sliding. The operator of the hill and his employee were apportioned 60% of the fault. The victims assumed 10% of the liability because at the outset, they could have warded off a sudden danger.

As you can see, the supervisors were in this case too few, considering the circumstances. The School Board was held liable only for a 30% share, but it could have had to pay more than its fair share had the limit of the ski hill owner's cover been insufficient to pay his share. Anyway, even though it doesn't cost the supervisors anything, such neglect is disastrous on a human level, considering the injuries suffered by the two girls.

8.3.3 EXEMPTION FROM PHYSICAL EXERCISE

Supervisors should exercise great caution when supervising physical exercise activities should a pupil refuse to do a certain exercise. Should his teacher force him to do it and there is an accident, there is a strong likelihood that he be held liable therefor.

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[76] Bouliane v. Commission scolaire de Charlesbourg, Superior Court: (1984) C.S. 323 and Court of Appeal: J.E. 87-808.

In other respects, when parents say that their child should be exempted from doing some physical exercise, their request should be carefully looked into before ignoring it.

So it was that in the case involving the pupil who fell while exercising on a trampoline, the court held the teacher and School Board liable. As a matter of fact after a first accident had occurred, the mother advised the school that she refused that her daughter practice that sport. Despite her prohibition, the school allowed the girl to use the trampoline after a few months absence. Furthermore, she was allowed to use it without having to do any warm up exercises and without being given the required instructions. Finally, to make it a bit more complicated, two people at once were allowed to use this device, a competition event having been added to the game[77].

8.3.4 HIGH-RISK ACTIVITIES

In our opinion, certain activities are so risky, considering any educational benefits they may hold for children, that it would be better to stop doing them altogether. So it is that white water rafting, small plane rides and trips to exotic countries jeopardize the children's physical integrity in what might be a rather disproportionate manner. Furthermore, other activities such as alpine skiing should be done only after pupils have undergone special training and under the closest possible supervision. Each pupil's experience in that sport must be ascertained. Any negligence in that respect is liable to have disastrous repercussions on the pupils' physical integrity.

Besides, those activities that are not insured are listed in the School Council's Risk Management Plan as follows:

1. Any motorized boat propelled by an engine of more than 5 HP or the equivalent unless it is not driven by a person holding her pleasure craft operator card and that this person is not a student, except for the boats authorized with the transport of people and who have the permits for this purpose;

2. Any water rafting activity by any means whatsoever, on any body of water or rapids exceeding Class R-II or superior to S-2, pursuant to International rivers and waters classification; the present exclusion covering all crafts used in water rafting;

3. Any off-the-road motorized vehicle drives by student or which they are the direct passengers unless they are not in a trailer tractor drawn by such vehicle or in a part of the vehicle reserved for the transport of people.

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77 Paterson dite Leblond v. Commission scolaire régionale de l'amiante, Superior Court, J.E. 83-502.

This exclusion will not be applicable within the framework of an activity connected directly to the training of a trade of the mechanics and only for one operational test except road which is held in the perimeter of the school establishment where this formation is given;

4. Any aircraft, except for the planes and helicopters authorized for the transport of people and who have the permits for this purpose;

4 a. Parachuting in all its forms including the activities of the parapente type, para-sailing and any similar activity using an accessory of flight;

5. Natural steep-rock climbing requiring roped party climbing or abseiling;

6. Bungee;

7. War-games;

8. Trampoline or any other similar ap-paratus (excluding the super-mini-trampoline, also called a “tram-polinette” and used as trampoline;

9. Deep-water diving, except in a swimming-pool;

10. Any contact combat sport except judo and Olympic wrestling : this exclusion more particularly includes boxing, kick-boxing and extreme combat as well as any martial art in which any weapon such as the nunchaku, the shuri-ken, the kusari or any other weapon prohibited by the Criminal Code is used;

11. Any jumping, acrobatics or style jumps on animals or mechanic copy of animals;

12. Any jumping, acrobatics or style jumps done with sliding or roller sport equipment unless that activity is done in a park specially designed for skate board or inline skates and if the structures used are maximum 1 meter high.

13. Any other sport described as extreme.

8.4 CORPORAL PUNISHMENT

Nowadays, everyone knows flogging is gradually disappearing as a tenet when it comes to the education of our children. In its article 651, the previous Civil Code of the province of Quebec, which remained in force until January 1st, 1994, gave

parents the right to correct the child with moderation and within reason. And article 649 recognized that the person having parental authority could delegate the custody, supervision or education of his child. Pursuant to this delegation, the courts therefore recognized that teachers had a right to correct their pupils within reason.

The provisions in article 651 are not repeated in the Civil Code of Québec and we must interpret this fact as meaning that the Civil Code no longer gives parents, and therefore teachers, such a right to correct.

Also, section 43 of the Criminal Code provides that:

> *S. 43*
> *Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.*

In a case heard before the Youth Division of the Cour du Québec, the Court pointed out that section 43 of the Criminal Code protects teachers who use a certain amount of force for the purpose of maintaining discipline. The provisions of the said section 43 make it possible to maintain the plea of a teacher accused of battery while at the same time legitimising the use of otherwise criminal force.[78]

A teacher who showed an unruly pupil to his desk and, in an effort to make him sit down, put his hands on his neck, thereby leaving finger-marks, was acquitted based on the existence of a reasonable doubt considering that the accused had used a force bordering on what could be described as reasonable.[79]

What emerges from this is that as far as the criminal law is concerned, teachers may plead section 43 in defence when accused of assaulting a pupil to whom they would have given a reasonable physical correction.

Any correction inflicted by a teacher in the absence of any prohibition by the parents should be proportionate to the fault that was committed and be exercised with moderation and reasonably, without inflicting injury.

The Supreme Court of Canada has already ruled on this issue and held that the person applying the force do so "by way of correction" and that the person so corrected be able to draw a lesson therefrom. It held that a schoolteacher's right to correct could be exercised only in the interest of education and that any punishment motivated by authoritarianism, capriciousness, anger or a bad mood constituted an offence under criminal law.[80]

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78 Protection de la jeunesse 633, (1993) R.J.Q. 1972.
79 R. v. Jutras, J.E. 89-1225.
80 Ogg-Moss v. R, (1984) 2 S.C.R. 173.

This plea is no longer a valid one as far as the civil law is concerned particularly where teachers are concerned. This is all the more true as it should be noted that section 76 of the *Loi sur l'instruction publique*, which provides that the governing board adopts the rules of conduct which apply to pupils, excludes corporal punishment from the governing board's jurisdiction. Some could interpret this section as a legal prohibition to inflict corporal punishment on pupils. For this reason, we strongly suggest avoiding using such punishment unless the teacher feels he is physically threatened. In such an event, he must use reasonable physical force to protect himself or to ensure the safety of others.

Moreover, we should point out that where a teacher inflicts corporal punishment, in spite of this, and transgresses the School Board's specific instructions in the matter, he could be deemed to have committed a fault outside the performance of his duties and even, a gross fault. Ultimately, the courts could deem that the teacher and not the School Board is personally liable for this fault.

The case law giving parents and teachers a right to correct their pupils within reason during school hours would no longer apply[81].

8.5 EXTRA-CURRICULAR ACTIVITIES

As for physical education, modern theories have it that education must not be restricted to the teaching of the subjects specified in the educational plan. The pupils' education is completed by many extra-curricular activities such as winter, summer and fall class outings. The previously mentioned principles must also be applied to these activities.

Consequently where, during a winter class outing, teachers allow pupils to go tobogganing quite a distance away from where they are and in the woods to boot, they may be held liable if a child were to hit a tree and hurt himself. Also, on the way back it would be safer to bring the children back to a predetermined point of arrival rather than have them get off the bus in different places.

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[81] Lavoie v. Commission scolaire régionale Manicouagan, Provincial Court, J.E. 79-970;
Leony St-Germain v. Les commissaires d'école de St-Léon de Grantham, (1935) 41 R.J. 480;
Filostrato v. Boyle, (1939) 45 R.L. 29

During a bicycle outing, a pupil collided with a car after leaving the course planned by the technician employed by the School Board. The insurance company covering the car sued the School Board to recover the damage caused by the bicycling pupil. The Court pointed out that no fault had been committed by the teachers, whose supervision was deemed appropriate, that the course had been fully explained and described to the pupils and to the teachers accompanying them. In short, the Court dismissed the case against the teacher and the School Board, stressing that the pupil's leaving the course he had been assigned was a sudden and unforeseen move on the part of a 16 year old pupil who was entitled to a certain amount of leeway given this activity was open to all. Finally, the Judge pointed out that even if the supervision had been better, this accident could not have been avoided by any action whatsoever on the part of the teachers.[82]

A school had pupils take part in the activities of the Valcourt Skidoo Festival. A 9 year old child was injured when trying out a skidoo. The Court held the school liable for having neglected to inform the parents and to obtain their consent to their kids taking part in this activity.[83]

Also, as regards sufficiency of information, we should point out a Superior Court judgment in which the Court considered a rafting school's failure not only to supply participants with information but also to obtain from participants any information as to their actual swimming abilities. Now the victim drowned precisely because she did not know how to swim well enough. When they boarded their craft, the participants did not know of and could not know the serious danger they were about to run and consequently, the victim could not have accepted to run the risk that led to her demise.[84]

Still, with respect to this duty to inform parents, the Superior Court ruled that a School Board was liable because a pupil was injured while skiing although the school principal's office had advised parents that every pupil who was a beginner would be given a ski lesson. But in fact, lessons were given only to those pupils who fell while skiing down the hill in front of the ski resort's ski instructors. In this case, as the victim had not fallen, she did not get a ski lesson. his judgment was set aside by the Court of Appeal. In arriving at this conclusion, the Court held that the direct cause of the accident was not

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82 La Sécurité, Assurances Générales Inc. v. La Commission scolaire du Sault-Saint-Louis et al., unreported judgment, Cour du Québec, 500-22-008862-974.

83 Blanchard v. Commission scolaire Maurillac, J .E. 97-285.

84 Légaré v. Centre d'expédition et de plein air Laurentien (C.E.P.A.L.), Superior Court, J.E. 94-1225 and Court of Appeal, J.E. 98-420.

that the child had not been given a ski lesson. The Court pointed out that even an experienced skier could have had the same accident. However, seeing that the school Principal's office had misinformed the victim's parents, thus leading them to institute proceedings, the Court declined to award costs against them.[85]

We do not mean to alarm, but we think it reasonable that schools take certain precautions when it comes to extra-curricular activities. A written authorisation must be obtained from the pupils' parents, especially for activities lasting more than one day. Parents must also be fully informed of all the risks and conditions inherent to any such activity. Furthermore, teachers will have custody of the children for the entire duration of the activity and their supervision should not let up.

8.6 TRAINING COURSES IN SCHOOL

More and more, especially in vocational training, pupils go on company training courses to put into practice the technical knowledge they have acquired in school. Youngsters, through inexperience or because the entrepreneur *they work for* is not as concerned as in school, very often cause property damage. Theoretically, these pupils are not under School Board supervision[86] and we believe that the latter could de exonerated from *liability for* any damages caused, for example, to the car of a client of the garage where the pupil is doing his training. We also believe that the owner of the garage should personally keep a watchful eye on the trainee. However, it is always unpleasant to refuse to compensate the garage owner in such cases, as he is doing the School Board and the pupils a service. So we urge teachers to make their pupils aware of their responsibility when training in this way.

8.7 CHILDREN OF BROKEN HOMES

In modern society, divorces and separations have multiplied at an alarming rate and so today, a large number of our pupils are victims of such family plights. School headships and teachers often ask what their liability is with respect to the parent who has custody of the child as well as with regard to the parent who is deprived thereof.

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85 Lebeurrier v. Commission scolaire de Montréal, Superior Court, 500-05-014056-889, Court of Appeal, REJB – 1999-16629.

86 Martel v. Commission scolaire régionale Dollard-des-Ormeaux, Superior Court, J.E. 79-114.

We are aware of the fact that because of the heartbreak felt at the time of a separation or divorce, parents unfortunately use the children, either to take vengeance on the other spouse or because they feel they have been deprived of a right with regard to the child.

As we have seen, children are in their school's care and custody during school hours and therefore their teachers are responsible for what happens to them. So how should one act with a father who shows up at school to take his child away with him but has neither custody of the child nor the mother's formal permission to do so? And besides, can a child be allowed to leave with a stranger who claims to be the mother's husband? And what happens if a child is injured or kidnapped? According to us, the School Board and headships could be held liable.

In such cases, school headships should take certain precautions. First of all, where a school hears of a family situation (divorce or separation), it would be useful for the headship to ask the parents about the legal arrangement governing the custody of their children. The best way to do this is to ask for a copy of the judgment or amicable settlement on this issue. Usually, these judgments provide for the granting of rights of visitation or outing to the parent who does not have custody. Therefore, unless the judgment expressly provides therefor, the child should not be allowed to leave with the spouse not entrusted with his custody unless the other spouse has expressly authorized it in writing. Nor should the spouse who does not have custody of the child be allowed, under the circumstances, to visit the child in school, his visitation rights being completely limited by the judgment to the times and places specified therein.

Nevertheless, even where a parent or both parents are denied custody of the child, they do not thereby lose their right and their duty to provide for his education. In such cases, they are usually allowed to obtain information on their child's academic results from his school. Schools should cooperate with any parent or parents making such requests. Cooperation could be refused only where a father has been deprived of his rights with respect to his child under the terms of a judgment or where the information requested is used to gossip on the child's personal life or family plight instead.

Finally, where a parent who is deprived of the custody of his child insists on seeing him at school, the other parent should be informed thereof and no such visit should be allowed without that parent's permission.

8.8 CONFIDENTIALITY OF RECORDS

In our schools many people play a part in the keeping of the pupils' records. Certain extra-contractual civil liability issues are involved when the latter pass on information to third parties.

As a matter of fact, those who are subject to a code of ethics and to professional privilege may suffer penalties imposed by their professional corporation.

Furthermore, victims of indiscretion can sue the person who committed the indiscretion for damages should they actually suffer any injury as a result thereof.

The same holds true for any person not subject to professional privilege. Indeed, School Boards and their staff are subject to the *Act respecting access to documents held by public bodies and the protection of personal information*. This Act compels public bodies to respect the confidentiality of personal records and information and any information of this type they may contain. Sections 159 and following of that Act contain criminal provisions relating to the disclosure of personal information. These fines vary from $ 200 to $ 2500 depending on the circumstances and are payable by the wrongdoer and not by his employer. But in addition, sections 166 and 167 provide for judicial redress against those who contravene provisions affecting personal information.

These two articles read as follows:

> **S. 166.** *A natural person wronged by a decision of a public body concerning him may, if he has no other redress, apply to the Superior Court to nullify the decision if it is based on nominative information which is inaccurate or which has been collected, kept or released in contravention of this Act.*
>
> *The court shall nullify the decision if it is established that the inaccuracy of the information or the contravention of the Act or regulation was not caused by a deliberate act of the person concerned. However, the public body may have the application rejected if it establishes that its decision would have been maintained even if the information had been rectified in due time.*

> **S. 167.** *Except on proof of a fortuitous event or irresistible force, a public body that keeps personal information is bound to compensate for the prejudice resulting from the unlawful infringement of a right established by Chapter III.*
>
> *In addition, where the infringement is intentional or results from gross neglect, the court shall also award exemplary damages of not less than $ 200.*

No doubt a person wronged as a result of a breach of the aforementioned Act by any person belonging to the School Board could bring an action based on extra-contractual civil liability against the person at fault belonging to the School Board. The preceding should remind us that the confidentiality of personal information is a serious issue and that pupils' case histories are not open for public debate, even with colleagues, where they are not concerned thereby.

But does this mean that this is an absolute prohibition, which applies to everyone? We don't think so. Thus for example, the Education Act which, for example, provides that programmes designed to help children with learning disabilities or who find it hard to adapt must form the subject of a consultation between parents, pupils, people called upon to give educational services to the said pupils and school principals. Obviously, these people must exchange relevant information if they are to successfully establish a plan of intervention.

Besides, teachers are always free to consult colleagues who are especially experienced with regard to a given subject in order to find solutions better suited to the problems children can have. Courts of law have always recognized such consultations between experts, so far as professional secrets as well as other questions are concerned.

Besides, from the very moment one teacher consults another teacher, the latter has a duty of confidentiality.

8.9 CHILDREN WHOSE DEVELOPMENT IS COMPROMISED

Despite the fact that the problems dealt with here are not directly related to civil liability, we feel it so important for teachers to get involved in protecting the rights of our youth that a few words must be said on the subject.

As a matter of fact, these problems are faced when bringing to the attention of the director of youth protection situations where there is reasonable cause to believe that the security or development of a child is in danger, within the meaning of sections 38 and 38.1 of the Youth Protection Act, Chapter P-34.1, which read as follows:

> **S.38** *For the purposes of this Act, the security or development of a child is considered to be in danger where*
>
> *(a) his parents are dead, no longer take care of him or seek to get rid of him;*
>
> *(b) his mental or affective development is threatened by the lack of appropriate care or by the isolation in which he is maintained or by serious and continuous emotional rejection by his parents;*
>
> *(c) his physical health is threatened by the lack of appropriate care;*
>
> *(d) he is deprived of the material conditions of life appropriate to his needs and to the resources of his parents or of the persons having custody of him;*
>
> *(e) he is in the custody of a person whose behaviour or way of life creates a risk of moral or physical danger for the child;*
>
> *(f) he is forced or induced to beg, to do work disproportionate to his capacity or to perform for the public in a manner that is unacceptable for his age;*
>
> *(g) he is the victim of sexual abuse or he is subject to physical ill-treatment through violence or neglect;*
>
> *(h) he has serious behavioural disturbances and his parents fail to take the measures necessary to remedy the situation or the remedial measures taken by them fail.*
>
> *Subparagraph g) of the first paragraph does not apply if the child is the victim of sexual abuse or is subject to physical ill-treatment from any person other than his parents and the latter take the measures necessary to remedy the situation.*

> **S.38.1.** *The security or development of a child may be considered to be in danger where*
>
> *(a) he leaves his own home, a foster family, a facility maintained by an institution operating a rehabilitation centre, a reception centre or a hospital centre without authorization while his situation is not under the responsibility of the director of youth protection;*
>
> *(b) he is of school age and does not attend school, or is frequently absent without reason;*
>
> *(c) his parents do not carry out their obligations to provide him with care, maintenance and education or do not exercise stable supervision over him, while he has been entrusted to the care of an institution or foster family for two years.*

In such cases, any person having reasonable grounds to believe that the security or development of a child is or may be in danger, is bound to bring the situation to the attention of the director of youth protection. Section 39 is very clear on that point and reads as follows:

> **S.39.** *Every person, even one having privileged information, who has reasonable cause to believe that the security or development of a child is in danger within the meaning of paragraph g of section 38, is bound to bring the situation to the attention of the director without delay.*
>
> *Every professional who, by the very nature of his profession, provides care or any other form of assistance to children and who, in the discharge of his duties, has reasonable cause to believe that the security or development of a child is in danger within the meaning of paragraph a, b, c, d, e, f or h of section 38 or within the meaning of section 38.1, is bound to bring the situation to the attention of the director without delay. The same obligation devolves upon any employee of an institution, any teacher or any policeman who, in the discharge of his duties, has reasonable cause to believe that the security or development of a child is or may be considered to be in danger within the meaning of the said provisions.*

> *Any person, other than a person contemplated in the second paragraph, who has reasonable cause to believe that the security or development of a child is or may be considered to be in danger within the meaning of paragraph a, b, c, d, e, f or h of section 38 or within the meaning of section 38.1, may bring the situation to the attention of the director.*
> *The first and second paragraphs do not apply to an advocate who, in the discharge of his profession, receives information respecting a situation contemplated in section 38 or 38.1.*

As we can see, this section is intended for professionals, even those having privileged information, except for lawyers, as well as any other person and therefore educators, school principals, teachers, supervisors, etc.

When section 39 states that a person "*has reasonable cause to believe*", it is enough for that person to be subjectively convinced that it is possible that the development of a child might be in danger. What is needed here is not a conviction beyond reasonable doubt. Mere suspicion could even give rise to an obligation to bring the situation to the attention of the director of youth protection. The Superior Court has already been called upon to rule to that effect and made the following statement[87]:

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87 Commission scolaire Baldwin-Cartier v. La Commission de la protection des droits de la jeunesse, J.E. 91-338.

... As for the petitioner, the director had no reasonable cause to act. Where the information provided for in section 39 has unfortunately often been used for purposes other than those provided for in the Act, it appears to be difficult to avoid considering the seriousness of the steps taken by a mother who met the principal of the school attended by her child to inform him of a situation mentioned by children attending a neighbouring day nursery when the said principal, although he had never formally recommended it, nevertheless indicated its existence to parents wishing to obtain such services.

Section 39 establishes a presumption of a general nature, and if the concept of reasonable cause creates a doubt in the mind of the person who is informed of a disturbing situation, it is not his business to consider himself to be the sole arbiter of the reasonable character of that cause or to take it for granted that the information will be given by some third party. The information must be given and it will be up to the D.Y.P. to inquire and to do whatever is required where an intervention is called for. Section 44 protects the anonymity of persons who comply with section 39 and once a person has given the information, that person has discharged his legal obligation.

...

CONCLUSION

As we mentioned in our introduction, this session is aimed at informing people about civil liability issues and not at terrifying them in view of the risk involved. We feel that by painting a clear picture of the risk of accidents, we allow them to review certain types of behaviour in schools with a view to preventing such accidents.

Too often, we get bogged down in a work routine that makes us forget the dangers children are exposed to.

Once again, we have their physical integrity and their life in our hands. This is what is important, not the prosecutions possibly resulting from accidents that may yet happen. In short, what matters first of all is prevention, not the consequences of monetary compensation.

This is no reason to put a stop to all activities possibly involving a risk of accident. If we were to act in this way, our schools would no longer be schools of life and we might have to close them. In his aforementioned paper, Mr Jude Parent quoted two very appropriate decisions. In the first of these judgements, delivered in 1970[88], Judge Lamarre stated the following:

> *If we were to let the fear of risk stop us in our tracks, institutions that were established to teach and educate children would find it impossible to have them take part in any game without threats of actions for damages on account of injuries suffered by pupils hurting themselves during a game. We would then be forced to close the gymnasiums in our schools and colleges.*

In the second judgement, Mr. Justice Mayrand of the Court of Appeal stated: *education does not consist of a mere statement of what not to do… schools must unavoidably* enjoy *some measure of autonomy.*

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88 Brunst v. St. George's School of Montreal Inc. (1970) S.C. 541.