



uOttawa

L'Université canadienne
Canada's university

**FACULTÉ DES ÉTUDES SUPÉRIEURES
ET POSTDOCTORALES**



**FACULTY OF GRADUATE AND
POSTDOCTORAL STUDIES**

Robert Edward Tourangeau

AUTEUR DE LA THÈSE / AUTHOR OF THESIS

Ph.D. (Education)

GRADE / DEGREE

Faculty of Education

FACULTÉ, ÉCOLE, DÉPARTEMENT / FACULTY, SCHOOL, DEPARTMENT

In loco parentis:

An investigation of the law, risk management and risk issues in the
context of education from the perspective of educators

TITRE DE LA THÈSE / TITLE OF THESIS

Bernard Andrews

DIRECTEUR (DIRECTRICE) DE LA THÈSE / THESIS SUPERVISOR

CO-DIRECTEUR (CO-DIRECTRICE) DE LA THÈSE / THESIS CO-SUPERVISOR

EXAMINATEURS (EXAMINATRICES) DE LA THÈSE / THESIS EXAMINERS

Raymond Leblanc

John Ross

Joseph Roach

Michel St-Germain

Gary W. Slater

Le Doyen de la Faculté des études supérieures et postdoctorales / Dean of the Faculty of Graduate and Postdoctoral Studies

In loco parentis:

**An investigation of the law, risk management and risk issues
in the context of education from the perspective of educators**

Robert Edward Tourangeau

Thesis submitted to the
Faculty of Graduate and Postdoctoral Studies
In partial fulfillment of the requirements
for the PhD degree in Education

Faculty of Education
University of Ottawa

© Robert Edward Tourangeau, Ottawa, Canada, 2008



Library and
Archives Canada

Published Heritage
Branch

395 Wellington Street
Ottawa ON K1A 0N4
Canada

Bibliothèque et
Archives Canada

Direction du
Patrimoine de l'édition

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre référence

ISBN: 978-0-494-48663-4

Our file Notre référence

ISBN: 978-0-494-48663-4

NOTICE:

The author has granted a non-exclusive license allowing Library and Archives Canada to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell theses worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats.

The author retains copyright ownership and moral rights in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

AVIS:

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque et Archives Canada de reproduire, publier, archiver, sauvegarder, conserver, transmettre au public par télécommunication ou par l'Internet, prêter, distribuer et vendre des thèses partout dans le monde, à des fins commerciales ou autres, sur support microforme, papier, électronique et/ou autres formats.

L'auteur conserve la propriété du droit d'auteur et des droits moraux qui protègent cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this thesis.

Conformément à la loi canadienne sur la protection de la vie privée, quelques formulaires secondaires ont été enlevés de cette thèse.

While these forms may be included in the document page count, their removal does not represent any loss of content from the thesis.

Bien que ces formulaires aient inclus dans la pagination, il n'y aura aucun contenu manquant.

ABSTRACT

In today's world, managing risk has become a key imperative of social and organisational life. Society has become more litigious. Courts and juries no longer view educational institutions as having the special status of protected institutions in the community. Today, there is a move towards viewing them in the same way as corporate entities for liability purposes. For these reasons, today's educators must be aware that their decisions are subject to public and judicial scrutiny and be fully prepared to respond to questions concerning their policies, procedures and practices.

The purpose of this study is to develop an in-depth understanding of how educators manage risk by investigating the law, risk management and risk issues in the context of education from the perspective of educators, especially administrators. This study is interested in examining two specific research questions:

1. What are the steps that educators take in making decisions about risk issues?
2. What factors do educators take into consideration in making decisions about risk issues?

In this study, a sample of six principals and vice-principals were asked to tell their story about a risk issue that they encountered during the course of their experience in education. Risk management and case law were used to analyze the stories of principals and vice-principals on risk issues for the purpose of identifying the patterns contained in the stories. More specifically, the steps and factors relating to risk management and case law were used to analyze and compare the patterns contained in the stories with the patterns embedded within risk management and case law to gain insight into the decision-making of educators in relation to risk issues.

Through such analysis, this study makes a significant contribution to education from both a scholarly and practical perspective. First, this study brings into sharp focus how risk management and case law can be used by educators to deal with risk issues. The study provides a cogent analysis of the three multidisciplinary components and demonstrates the similarity between constructs drawn from each of the three literatures and the considerations of educators when addressing risk issues.

Second, this study, through the application of pattern matching to narrative inquiry, utilizes the stories of principals in combination with risk management and case law for the purpose of providing educators with a common, rigorous and consistent language and methodology for discussion and decision-making in dealing with risk issues.

Third, the study's methodology has shown that it is capable of identifying gaps, similarities and dissimilarities in the steps and factors used by educators in dealing with risk issues.

Fourth, the study can serve as a formal process for managing and resolving risk issues in the context of education, taking into consideration the two categories of cases derived from risk management and the case law in conjunction with the benefits of both processes of reasoning, analytical and intuitive.

Fifth, the process and study's findings can be used by teachers, administrators and researchers to formulate recommendations for the development of policies, procedures and practices and to enhance the quality of the services that are provided.

Sixth, the provision of data from the cases and their interpretation can be used for the training of educators (teachers and administrators).

Seventh, the study has generated questions and areas for future research that may be used by other researchers.

Finally, the study enables educators to become proactive, and not simply reactive, in dealing with risk issues in the school setting.

ACKNOWLEDGEMENTS

I wish to express my sincere gratitude to my committee for the time, assistance and encouragement that they generously gave in support of my work over the years and in the preparation of this thesis. Professor Emeritus Joseph E. Roach of the Faculty of Law, University of Ottawa served as a sounding board for my ideas and, through his casebook on education and the law, provided me with a much-appreciated sound footing for the selection of case law for my thesis. His understanding and grasp of the issues involved and his support served as a constant source of encouragement.

I thank Dr. Raymond LeBlanc, Faculty of Education, University of Ottawa for his advice and support. Dr. LeBlanc's assistance went beyond that which would normally be expected of a committee member, particularly on those occasions when Dr. Andrews, my thesis supervisor, was on medical leave. Professor LeBlanc's positive feedback and encouragement at key times was instrumental in seeing me through from start to finish.

Also, I thank Dr. Michel Saint-Germain, Faculty of Education, University of Ottawa for his advice and support, particularly in the preparation of my seminar proposal, and for his suggestions concerning potential areas of research for my thesis and its organization.

My sincere thanks to Dr. Martin Barlosky, Faculty of Education, University of Ottawa who assisted in the preparation of and sat in on my seminar proposal in place of Dr. Andrews who was on medical leave. His appreciation of the issue of risk avoidance was timely and led to its inclusion in my thesis. Also, I would like to thank Dr. John Ross, Ontario Institute for Studies in Education, University of Toronto for his participation as an examiner, and for his positive observations and suggestions.

I am especially appreciative of the constant encouragement and support that my thesis supervisor, Dr. Bernard W. Andrews, Faculty of Education, University of Ottawa gave to me throughout my research and for his advice and assistance concerning the many procedural hurdles that had to be successfully cleared. For each area of research covered by my thesis, Dr. Andrews read not only my material but took the time to read other supplementary material that allowed him to advise me on the content of my thesis. He was a constant source of motivation and his positive feedback on my written material and from our discussions throughout the process was exceptional. This was particularly evident during the final stages of the process when he devoted countless hours to my work at a time when timelines had become extremely tight for the preparation of my thesis and its defence.

All of these persons have contributed to the attainment of my lifetime objective to make a contribution to the field of education.

TABLE OF CONTENTS

	Page
ABSTRACT	ii
ACKNOWLEDGEMENTS	iv
CHAPTER ONE – INTRODUCTION	1
1.1 Statement of the problem	5
1.2 Synthesis	15
CHAPTER TWO – LITERATURE REVIEW	17
2.1 Education and decision-making theory	17
2.2 Risk and risk management	28
2.3 Zero risk – risk avoidance and risk aversion	35
2.4 Case law and legal precedent	39
2.5 Law of torts	42
2.5.1 Duty of care	51
2.5.2 Standard of care	55
2.5.3 Breach of standard of care	61
2.5.4 Damage and causation in relation to damage	80
2.5.5 Vicarious liability	81
2.5.6 Defences – contributory negligence and voluntary assumption of risk	82
2.6 Conceptual framework	91
2.7 Specific research questions	95
2.8 Synthesis	95
CHAPTER THREE – METHODOLOGY	98
3.1 Qualitative research paradigm	98
3.2 Narrative inquiry	99
3.3 Participants	102
3.4 Design and procedure	104
3.5 Data collection and recording	109
3.6 Researcher and ethics	112
3.7 Synthesis	113
CHAPTER FOUR – FINDINGS	115
4.1 Story summaries	116

4.2	Findings	131
4.2.1	Recognition of duty of care and standard of care	131
4.2.2	Causation – teacher as a contributing cause	136
4.2.3	Causation – board policy as a contributing cause	138
4.2.4	Defences – contributory negligence and voluntary assumption of risk	151
4.2.5	Vicarious liability	152
4.2.6	Risk management and due diligence	153
4.2.7	Experience, intuition and common sense	155
4.2.8	Risk perception and risk acceptance	173
4.2.9	Monitoring, reflection and change	175
4.2.10	Advice - management and training	184
4.2.11	Risk avoidance and risk aversion	191
4.3	Synthesis	195
CHAPTER FIVE – ANALYSIS AND DISCUSSION		199
5.1	Analysis and discussion of themes – preliminary comments	199
5.2	Data analysis	205
5.3	Narrative inquiry	207
5.4	Two categories of stories	209
5.5	Dual-process reasoning	209
5.6	Two educational leadership styles	212
5.7	Recognition of duty of care and standard of care	215
5.8	Causation – teacher conduct as a contributing cause	218
5.9	Causation – board policy as a contributing cause	219
5.10	Defences – contributory negligence and voluntary assumption of risk	226
5.11	Vicarious liability	231
5.12	Risk management and due diligence	233
5.13	Experience, intuition and common sense	237
5.14	Risk perception and risk acceptance	243
5.15	Monitoring, reflection and change	246
5.16	Advice – management and training	248
5.17	Risk avoidance and risk aversion	252
5.18	Legal knowledge and documentation	255
5.19	Language and methodology	257
5.20	Synthesis	260
CHAPTER SIX – CONCLUSIONS		263
6.1	General	263
6.2	Recommendations	270
6.3	Limitations and areas for future research	276
6.4	Significance of the study	278

TABLE OF CASES	280
REFERENCES	283
APPENDICES	290

Appendix 1 – Risk Management Process (Standards Australia / Standards New Zealand)	
Appendix 2 - Steps in the Q850 Risk Management Decision-Making Process (Canadian Standards Association)	
Appendix 3 – Risk Management: Management or Administrative Process	
Appendix 4 – Principal Background Form	
Appendix 5 – Interview Protocol	
Appendix 6 – Social Sciences and Humanities Research Ethics Board Approval	
Appendix 7 – Risk Management Matrix	

LIST OF FIGURES

Figure 1: Story-patterns Comparison	93
Figure 2: Risk Management, Case Law and Stories Comparison	94
Figure 3: Continuum demonstrating the two educational leadership styles	213
Figure 4: Risk Management Matrix – Risk Assessment	300
Figure 5: Graph of Category of Case and Dual-process Reasoning	264

In loco parentis:
An investigation of the law, risk management and risk issues
in the context of education from the perspective of educators

CHAPTER ONE

INTRODUCTION

From the outset, the most difficult task that I faced in embarking on my doctorate studies was the choice of subject-matter and the research questions to be researched; so many areas of interest, so many questions to be answered. Yet, once the decision to conduct an investigation into the relationship between risk management, the law and education was made, I found myself wondering what had taken me so long to decide. I had wanted a thesis topic that would take advantage of my practical work and life experiences, and also my multidisciplinary background in education, engineering and law. By its nature, this topic seemed most appropriate. Of course, I came to realize in short order that what seemed so simple and obvious to me was not so easily explained to others. Throughout my studies, the question most frequently asked of me was: How are these three areas (risk management, law and education) related to one another and why did you choose your particular thesis topic? In retrospect, the answer lies in my past experience.

As a student at Toronto Teachers' College, I received instruction and training on how to prepare a lesson plan and conduct myself as a teacher (even how to dress) but little was said about how to manage a group of young children in a classroom or school yard or on a field trip. However, I did have the good fortune to have a physical education instructor (one

of the masters as the instructors were then called) relate an incident that had happened to him during his first year of teaching. At the end of a physical education class during which he had instructed us on how to go about supervising a softball game, he blew his whistle to signal that play was over. However, we continued after the whistle: I pitched, the batter swung and the back catcher moved to catch the missed pitch. That prompted our instructor to drive home what turned out to be one of the most important lessons that I ever learned either at Teachers College or at any time during my teaching career. During our instructor's first year of teaching at an elementary school, he blew the whistle in a similar situation and another student threw the late pitch followed by the swing of the bat. The back catcher, thinking the game had ended, stood up and was struck in the head by the bat. He died. I was struck by our instructor's willingness to share with us what was obviously a painful experience for him in order to ensure that we would be better teachers for it.

That lesson stayed with me throughout my career as a teacher and is still with me today. It drove home the point that we, as teachers, are not only responsible for teaching content but it is our responsibility to ensure that the environment in which learning takes place is a safe environment. In fact, our first priority is the safety of the children entrusted to our care. In years to come, the concept of "duty of care" became ingrained in my approach to situations involving children. And also out of that lesson, came the understanding that part of being a professional teacher was sharing information with your colleagues. Interestingly, decades later, one of the persons who agreed to participate in my thesis and whom I interviewed was also the recipient of that same information from that same instructor in that same year (we were surprised to learn that we had been schoolmates). He too had never

forgotten being told about the unfortunate result of that unexpected event, and it made him more aware of safety in relation to the children he taught throughout his career.

The importance of being vigilant in ensuring the safety of my students was dramatically reinforced by an incident that occurred during my sixth year of teaching. I was a teacher at an elementary school of about 300 students in a large rural town. On their way to school one morning, three boys were asked by a woman to remove a bat that was clinging to the brickwork of her house. Children being children and, in particular, boys being boys, they were only too glad to oblige: they proceeded to school with the bat in tow. At the school (surprise, surprise), they terrorized a few of the other students in the school yard by chasing them with the screaming bat. They arrived at my third period science class with the bat which was making every effort to escape from the cardboard box in which they had imprisoned it. Fortunately, I was aware that bats could be rabid and, as it turned out, this one was. All three boys were required to submit to the treatment for rabies – at that time, fourteen needles.

On reflection, what struck me was that, when I consulted several other teachers and administrators about notifying the health authorities and having the bat tested for rabies, their reaction was that I was over-reacting, and I should simply get rid of the bat. Although the concepts, principles and terms of risk management and the law that I am so familiar with today were not part of my vocabulary or my reasoning process, I realize in retrospect that intuition, common sense and my life experience played an important part in how I managed the unexpected event, which was undoubtedly a life and death situation. Not to mention, the lesson – my first priority was the safety of the children entrusted to my care.

Fast forward 35 years and I now found myself reflecting on my life experiences as an educator, engineer, consultant and lawyer. As an educator, I had seen my share of school-based incidents and had organized many school excursions some of which had some interesting twists and turns. As an engineer, I had been involved with cost-benefit analysis, environmental issues, critical path analysis, and construction safety. As a consultant, I had been involved with project risk management and the training of inspectors on how to conduct inspections and investigations relating to hazardous materials, including training in relation to due diligence. As a lawyer, I have been and continue to be involved with due diligence and legal risk management in relation to the management of litigation, the development and implementation of policy, and the drafting of legislation.

I realized that the management of risk arising out of unexpected events and the sharing of information was a part of all professions, not just teaching. But education had always remained my first passion and my thoughts turned to the lessons learned from that experience at Toronto Teachers' College many years ago and my own later experiences with students. I recognized that perhaps there were other stories involving unexpected events that other teachers had to tell; stories that could be shared with other teachers so that they could benefit from the knowledge and valuable lessons learned from those events; and stories that would serve to make education the beneficial and safe experience it is intended to be. And, just maybe, I could serve as the recorder of those stories and, together with my life experience, serve to inform and shine a light on how risk management and the law could be used to deal with risk issues in an educational setting. Remembering the master's story and the knowledge and value gained as a lawyer from reading case law (legal stories), I thought what

better way could there be for me to accomplish this task than to use the stories of other educators who had experienced risk issues during the course of an educational activity.

1.1 Statement of the problem

The first advice that many a first year teacher hears from his first principal is: make sure that you do what is best for the kids. What the average educator fails to appreciate is how much of their everyday work with and what they do for the “kids” is governed by both judge-made law and legislation. In fact, everything that they do as teachers (in or out of the classroom) is in one way or another governed by the law: as a lawyer would say, teachers are “governed as if they were creatures of statute.” They are governed either directly or indirectly by statutes, regulations, and other written documents based on the law, such as the policies and procedures contained in board of education manuals and the codes of ethics and standards of practice set out by the self-governing body of which they are members (e.g., the Ontario College of Teachers). At the same time, their practice must take into consideration the precedent-setting judgments of the common law (case law, often thought of as being unwritten law).

In the field of education, there seems to be reluctance on the part of both teachers and administrators to systematically examine the legal underpinning of the education system. Such examination is thought to be the domain of and best left to the lawyers. It is only after the occurrence of an event that puts a child under their care at risk of harm that the full implications of their status (being “governed as if they were creatures of statute”) become

apparent to them. This is especially so when the matter ends up in a court with its accompanying stress.

In today's world, managing risk has become a key imperative of social and organizational life (McWilliam and Jones, 2005, citing Giddens, 1990). As McWilliam and Singh (2003) have noted, "all social organizations, including schools, are risk organisations" (p. 1) and "as risk managers, teachers [and principals] must anticipate potential dangers and respond to them in appropriate (i.e., professional) ways" (p. 3). From the perspective of law, educational institutions (as is the case for all social and corporate entities) are governed either directly or indirectly by statutes and regulations and their policies, procedures and practices must be firmly grounded in the law. Today, there is a move towards viewing educational institutions in the same way as corporate entities for liability purposes (Goode, 2001). Courts and juries no longer view educational institutions as having the special status of protected institutions in the community. More and more, the school of today is being evaluated on criteria that differ from even the recent past and there are consequences associated with this. Society is more litigious today and parents are more likely to go to court to obtain satisfaction in cases where the risk of harm has materialized in injury to their child. For these reasons, today's educators must be aware that their decisions are subject to public and judicial scrutiny and be fully prepared to respond to questions concerning their policies, procedures and practices.

Valverde, Levi and Moore (2002) have noted that "legal institutions and legal conflicts are excellent sites on which to study the different forms that risk thinking and risk management take" (p. 90). In the context of education, the need to address issues of risk

management was addressed in an article entitled Risk Management in Education that was published in the April, 2000 Newsletter of Outdoors New Zealand. The risk issue set out in the article illustrates the need for an investigation of the emerging link between risk management and the law in the context of education. After some well publicized drownings which occurred during school outings, Water Safety New Zealand and Outdoor Assembly convened a Risk Management Forum that was attended by twenty five representatives from eighteen organizations. The Forum arose out of concern “at the lack of leadership being shown toward issues of risk management within the education context and the possibility that valuable lessons were being lost through the lack of formal processes of investigation.” The Forum agreed “that the processes needed to be put in place to minimize risk to children, teachers and parents involved with Education Outside the Classroom [school excursions].” Also, the Forum agreed that in many schools, “risk management was predominantly a paper trail and this needed to become more of a practical decision-making tool across the board.” As a result, the Forum decided that a review of risk management for school excursions was required; specifically, “to identify all current resources available for developing and implementing risk analysis and management strategies” with respect to school excursions, “to review the current processes and procedures used in analysing risk analysis and risk management,” and “to identify and recommend mechanisms for improving all facets associated with risk analysis and management” with respect to school excursions, “including a gap analysis of resources, processes and procedures.” The Forum also resulted in a decision to convene a further forum “...with a view to establishing specific guidelines and practices for risk management in the outdoors.” (p. 1).

Although the setting of the event is New Zealand, the event is universal in its application. Every day classroom teachers everywhere are faced with the challenge of ensuring that the children under their care are provided with a quality education in a safe environment where they are protected from harm. This article illustrates in a most unfortunate way the consequences that may flow from a risk issue, in this case the risk of a student drowning.

The story of risk has a long history (Bernstein, 1998). Its roots can be traced to the beginnings of recorded history. Socrates, Aristotle, Archimedes, Pythagoras, Galileo, and Machiavelli are but a few historical figures who have dealt with the concept of risk. For example, Machiavelli recognized, in his analysis of statesmanship and power (management and planning), the possibility of catastrophe and waste (the anticipation of risks).

The field of risk management is an important area that we are only beginning to explore in a systematic way. One of the earliest scholars who discussed management and risks was a French professional engineer and philosopher of administration, Henri Fayol. His book, entitled *General and Industrial Management*, was originally published in 1916 in French and translated into English in 1949. Even though the literature on the use of risk management in the private sector is extensive and risk management has been an integral part of most private sector organizations, many public organizations are just beginning to grasp the importance of implementing risk management programs (Knight, 2000). Leiss and Hradey (2005) have noted that, during the last forty years, a profound elaboration of the risk management approach in health and environmental areas has occurred in advanced economies.

Hill and Dinsdale (2002) note that effective risk management is becoming critically important for the public service, especially in regards to decision-making about policies, programs and services in the face of significant uncertainty. In Australia, the use of risk management in the public service is well-established (Reid, 2000). The governments of the United Kingdom (O'Donnell, 2003) and Canada are other examples of public organizations embracing the use of risk management to enhance service. In her study, Reid (2000) states that the legal profession has long recognized the usefulness of risk management and notes, as evidence of this, the publication by the Law Society of New South Wales of articles offering courses about risk management. Also, universities in Canada and England are required to assess risk in all activities they undertake. This enables proper procedures to be put in place to provide effective delivery and, at the same time, minimizes risk and potential liability (Birtwistle, 2002).

Risk management addresses the fundamental issue of applying expertise and judgment to making choices among competing interests with uncertain consequences. An introduction to the fundamental concepts about risk, its origins and its growth has become a key factor in the practice of modern management. As a result of the modern study of risk, a common language and methodology for the study of risk is emerging. However, until recently, little has been written on the application of risk management and the law in the context of education as opposed to the literature on the use of risk management by public and private organizations, such as governments, police forces and law firms. These organizations are concerned with cases involving some of the same issues as those with which educators are

concerned, such as quality of services, prevention of lawsuits involving civil wrongs, professional liability, and contract.

From a “law” perspective, risk has long been a part of the practice of law. Valverde, Levi and Moore (2002, p. 90) hold that risk is not a modern or postmodern preoccupation. They hold that “... anyone familiar with the history of law knows that monitoring and managing risk and uncertainty has been a very important dimension of law’s work for centuries, in insurance, tort, and contract law in particular” (p. 90). The study of cases involving the law of torts and negligence in particular provides information and insight into how judges make decisions and choices among competing interests. By reading and analyzing the case law and using the reasons for judgment stated by the judges in their decisions, a risk manager gains information and insight about the reasons for the decision of the judge and how the law was applied to the particular facts and circumstances of a case. A risk manager (or educator as risk manager) should be able to use such information and insight in the development of risk management policies, procedures and practices that favour the reduction of risk and lawsuits. As Slattery and Ganster (2002, p. 91) have noted: “decisions made in the past form a backdrop that can affect the perception of choices and outcomes in subsequent decisions.”

The judges’ decisions with reasons may serve as a retroscope through which the validity of a particular law, policy or procedure, or the appropriateness of a particular conduct is given an objective review. The reasons may affirm, negate or call for changes. Police organizations have long recognized the value of risk management and the contribution that the decisions of judges have made in particular cases for enhancing the quality of the services

that they provide. Similarly, educational organizations may also benefit from the concepts used by risk managers and judges in managing risk issues and the stories of teachers reflecting on their experiences with risk issues can be an important source of information for discovering how teachers make decisions in respect of risk issues.

The purpose of this study is to develop an in-depth understanding of how educators manage risk by investigating risk management and the law in the context of education from the perspective of principals and vice-principals. Risk management and case law were used to analyze stories of principals on risk issues for the purpose of identifying the patterns contained in the stories. More specifically, the steps and factors relating to risk management and case law were the focus of the analysis. The data collected from the recorded stories were used to analyze and compare the patterns contained in the stories with the patterns embedded within risk management and the case law to gain insight into the decision-making of educators in relation to risk issues. Analysis of the themes arising out of the comparison of the story patterns with those of risk management and the case law allows the study of experience as a unified whole and are what the German psychologists Max Wertheimer, Kurt Koffka and Wolfgang Kohler, referred to as *gestalt* (Haimes, 2001). Through such analysis, this study provides educators with a common, rigorous and consistent language and methodology that can be used for the development of “a sequential, step-wise form of decision-making in which each step builds upon and moves forward from the preceding one” (Leiss & Hrudehy, 2005, p. 2). This can serve as a formal process for managing and resolving risk issues in the context of education and enable educators to become proactive, and not simply reactive, in dealing with risk issues in the school setting.

The formal process of risk management that emerges from this study can be used in a number of ways for managing and resolving risk issues in the context of education so that injury can be prevented. First, it can serve as a decision-making tool in relation to the policies, procedures and practices used by teachers, administrators and researchers for resolving risk issues, and for eliminating or reducing them and their consequences. Second, it can serve to make recommendations concerning policy in relation to procedures, practices and guidelines for use in an educational context. Third, more specifically, the patterns that emerge may be used to determine how a risk issue can be addressed and to identify the steps and factors used by risk managers and judges in making their decisions about risk issues. Consequently, the process permits the learning of children to take place in a safe environment and reduce litigation in the courts.

Risk issues involve uncertain consequences, and those consequences vary in frequency and magnitude. For the purposes of this study, the “risk” involved in a risk issue is defined as the chance that an event will or may adversely affect the health and safety of persons involved in education,^a and the expression “risk issue” refers to an unexpected event that occurred or might have occurred during the course of an educational activity in which the occurrence of the event adversely affected or might have adversely affected the health and safety of the persons who were involved in the activity. It is important to note that, in this study, the word “principal” includes both principals and vice-principals of a school and the word “educator” comprises teachers and administrators (principals and vice-principals). Two of the stories refer to times when the participants were teachers and not school administrators

(principal or vice-principal). In this study, the differing use of these words depends on the context.

Also, at this point, it is important to comment on teaching as a profession since this has important implications for what is expected of teachers in the field of education and for their relationship with risk management and the law. The question of whether teaching is a profession has often been asked and has received much comment over the past 50 years. Traditionally, the three “learned professions” of law, medicine, and theology have been the yardstick against which other “new” professions have been assessed. With the passage of the *Teaching Profession Act, 1944* and the *Ontario College of Teachers Act, 1996*, teaching was recognized as a profession in Ontario. There remains the question of “what are the attributes of a profession?”

There is no common set of attributes that would positively serve to identify all of the professions, both old and new. According to Mickle (2001), the characteristics of any profession include systematic theory, authority that includes autonomous action and decision-making, community sanction, ethical codes, and a culture. Tourangeau (1996) quotes the McRuer Report (1968, p.1161), where the following significant attributes are listed:

1. the calling is one which depends for its effective pursuit on confidence of two kinds – the personal confidence of the patient or client in the technical competence of the practitioner, and the confidence of the public at large in the integrity and ethical conduct of the profession as a whole;
2. it requires a high standard of skill and achievement;
3. it provides a service to members of the public;

4. practitioners are usually employed under a contract for service rather than a contract of service (i.e., they operate as independent practitioners and are not subject to detailed control by those whom they serve);
5. the calling is one which more than mere technical competence is required for the service of patients and clients and for the protection of the public (i.e., standards of ethical conduct must prevail); and
6. confidence is reposed in the practitioner requiring that he or she does not exploit the intimate details of the patient's or client's life and affairs which are divulged to him or her. (p. 10)

What becomes apparent from an analysis of these attributes is that a professional practice requires more than mere technical competence: it requires a high standard of skill and achievement. It is because of this combination of competence and skill that a professional is licenced and entitled to operate as an independent practitioner who is not subject to detailed control by those whom he or she serves. However, with such independent judgment comes the requirement for accountability in the sense that educators are expected to adhere to a standard of care that ensures the safety of the children entrusted to their care. For this reason, as was previously noted, today's educators must be fully prepared to justify their conduct and be aware that their decisions are subject to judicial scrutiny. Often, accountability for the consequences of their actions and a determination of whether the risk of an undesirable consequence was one that should have been taken come in the form of litigation – a court case. As professionals, educators play a leading role in risk management

and must, therefore, be aware of the risks that they and their students face. And, they must have the tools necessary to manage those risks.

This study brings into sharp focus how risk management and the case law can be used to deal with risk issues in the context of education. It will enable educators to become proactive in preventing harm arising out of risk issues to the children under their care and not simply reactive in dealing with risk issues in the school setting. As Richard Susskind has noted, “clients want a fence at the top of the cliff, not an ambulance at the bottom” (Susskind quoted in Lightstone, 2002, p. 13).

This study will investigate the following general research question: How can risk management and the case law be used to deal with risk issues in the context of education?

1.2 Synthesis

This introductory chapter explains the personal origins for the chosen area of research. The chapter then goes on to describe the origins of the problem in the context of education and the need to address it from a risk management and law perspective (e.g., changing world, more litigious society, changes in how society’s perception of both educators and educational institutions, and increased importance of risk management). In this regard, the New Zealand article (Newsletter of Outdoors New Zealand, 2000) illustrates this need for an investigation of the emerging link between risk management and the law in the context of education. Also, the chapter sets the stage for the research by stating the purpose of the study and providing the reader with explanatory comments and definitions (risk and risk issue), necessary for

understanding the purpose and nature of the research. Finally, the chapter points to the use of storytelling (narrative) by educators combined with risk management and the law to investigate how educators manage risk issues. This establishes the plausibility of the research questions, both general and specific; particularly, the overarching, general research question.

CHAPTER TWO

LITERATURE REVIEW

This study is multidisciplinary and consists of three disciplinary components: education and decision-making theory, risk and risk management, and case law and legal precedent. The literature review examines these diverse yet related disciplinary components with respect to education from the perspective of principals through their stories in relation to risk issues.

2.1 Education and decision-making theory

According to Gore (1964), decision-making is the mechanism used by organizations to perpetuate both the identity of the organization and those activities of the organization that are considered to be of worth by society. Decision-making is initiated when an individual responds to a tension or, in the case of this study, a risk issue (Gore, 1964) and, according to Pablo, Sitkin and Jemison (1996), the risk involved in the decision-making process influences a person's perception of the decision situation, evaluation of alternatives, choices made, and other decision-related actions taken in response to a risk issue. According to Simon (1977), practice, learning and experience are the means by which a person who has the natural endowments of intelligence, vigour and some capacity for interacting with others develops that endowment into a mature skill. Simon goes on to state that the skills involved in intelligence, design and choosing are as learnable and trainable as the skills involved in striking a golf ball. This is one of the most important aspects about this study concerning

decision-making, risk management and case law in the context of education. Decision-making can be improved by training in orderly thinking (Simon, 1977).

In this study, it was anticipated that the decisions made by the participants in respect of any particular story would involve two types of decisions, either alone or in combination:

- routine, repetitive decisions for which specific processes for handling them have been developed by the school board and have been set out in a policy and procedure document; and
- *ad hoc* decisions resulting from unexpected, novel risk issues for which no specific policy or procedure document is readily available or evident.

These two types of decisions are analogous to the two types of polar decisions that Simon (1977) calls “programed decisions” and “nonprogramed decisions” (p. 45).

In those cases where educators make what Simon refers to as “programed” and “nonprogramed decisions” about risk issues, the decision often involves a factual or logical component and a value component. According to Simon (1977), in those cases where educators make programmed decisions about risk issues, the decision may simply be dependent upon such simple psychological processes as habit, memory and the simple manipulation of things and symbols. In such cases, judgment plays a limited role. However, in those cases where educators make non-programmed decisions about risk issues, the decision can be said to require greater judgment on the part of the decision-maker. Also, the psychological processes associated with non-programmed decision-making may not be quite so simple (as compared to programmed-decision-making) and can be said to depend upon some combination of experience, insight, intuition and, depending on the degree of difficulty

and the results obtained, creativity (Simon, 1977). For the purposes of this study, the primary focus was on risk issues involving non-programmed decisions.

The interplay of the different approaches to decision-making has been explicitly recognized in the literature (Shubik, 1958, p. 291). In making decisions in the context of risk management, there is an increasing awareness that a risk manager should attempt to access and use knowledge not only from the field of management but also from other such diverse fields as engineering, sociology, education, law, risk and risk management (Knight, 2000). An excellent example of this increased awareness is that of the Program of Research in Interdisciplinary Systems Management (PRISM) created for use by the School of Management at the University of Ottawa. PRISM supports and disseminates research studies in applied areas of interdisciplinary systems management including applications in public policy management and decision-making. The properties of a prism are used to symbolize the conceptual framework for PRISM's studies. The multidisciplinary components of management science, economics, engineering, mathematics, and computer science are combined (as the refracted components of light may be recombined to form white light using a prism) and represent the restored and integrated nature of decision-making and problem solving (www.telfer.uottawa.ca/research).

In an article on how people make decisions that involve risk, Reyna (2004) uses the term "fuzzy-trace theory" (p. 61) to describe a new approach to reasoning about risk that places intuition at the apex of development of reasoning. In fuzzy-trace theory, intuition is considered to be "an advanced form of reasoning" (p. 62). The article notes that "some theorists elevate emotion above reason, arguing that decision-makers ought to rely on their

gut feelings” (p. 62). Fuzzy-trace theory assumes that “people form two kinds of mental representations, verbatim and gist representations, but rely primarily on gist. Gist representations are fuzzy ... traces of experience in memory ...” (p. 61). Fuzzy-trace theory acknowledges that either verbatim or gist representations may be used to solve reasoning problems. However, researchers who study fuzzy-trace theory do not follow traditional approaches to reasoning and the resolution of reasoning problems such as judgment-and-decision-making tasks (Reyna, 2004). According to Reyna (2004, p. 61), “traditional theories of reasoning are modelled on logic or computation; reasoning is said to occur in a series of ordered steps and precision is considered a hallmark of good reasoning.” In this sense, the steps of the risk management process may be thought of as representing such a traditional approach. “In contrast, according to fuzzy-trace theory, reasoning processes unfold in parallel rather than in series, often operating on the barest of ideas (the gist of a problem), and are fuzzy or qualitative rather than precise” (p. 61). To some extent, Reid (2000, p. 391) agrees with Reyna. She states that the qualitative factors of “gut feel, intuition, and exercising personal judgment and personal expertise” have a legitimate role to play in risk management. Reid (2000) notes the use of those qualitative factors and the qualitative approach that she adopted in her study with respect to risk analysis, risk evaluation and selection. Reyna (2004) holds the view that, as a person gets older and gains knowledge and experience, he or she progresses from being “quantitative reasoners, who trade off amounts of risks and rewards, to qualitative reasoners, who process categorical[ly]” (p. 64). As a person grows into adulthood and gains experience and knowledge and as novices become experts, “intuitive gist-based reasoning increasingly supplants analytical verbatim-based

reasoning” (p. 65). Gist-based reasoning does not require mathematical precision but can proceed when “it is impossible to quantify the risk.” If that is the case, “... and if it develops with experience, it ought to be possible to marshal and hone it to produce better decision-making when outcomes are uncertain” (Reyna, 2004, p. 65). Reyna gives the example of expert cardiologists who process fewer dimensions of information than less expert physicians and who also “process those dimensions in a crude all-or-none fashion (patients were either at risk or not at risk of an imminent heart attack)” (p. 61). If Reyna is correct, then as educators gain knowledge and experience dealing with risks that involve uncertainty and defy quantification, an educator who uses “intuitive gist-based reasoning” can be trained to produce better decisions when outcomes are uncertain.

In a recent article published in the *British Journal of Psychology*, Hodgkinson, Langan-Fox and Sadler-Smith (2008), discuss a number of the current forms of dual-process theories of cognition by a number of researchers. They maintain that “there is an emerging consensus that a useful distinction can be made between two basic systems of information processing” (p. 8). On the one hand, they discuss systems based on a reasoning process that is ‘rational, analytical (reflective) or rule-based’ and on the other hand systems based on a reasoning process that is ‘experiential, intuitive (reflexive) or associative.’ At the same time, they argue “that analytic and intuitive processing capabilities are served by cognitive systems that permit individuals to switch back and forth strategically from one approach to the other, as required, ...” (p. 8). Their discussion of the various systems is consistent in many respects with the approach to reasoning about risk taken by Reyna (2004) and her comparison of traditional theories of reasoning (based on logic or computation) in contrast with that of

fuzzy-trace theory (intuitive gist-based reasoning). Hodgkinson et al. (2008) maintain that “intuition has the potential to unify lines of inquiry spanning cognitive, developmental, social, educational, health and organizational psychology” (p. 2) and that “it has also been implicated as the basis of expert-novice differences” (quoting Benner & Tanner, 1987; Dreyfus & Dreyfus, 1986). They distinguish between ‘insight’ and ‘intuition:’ insight involves “an insightful experience in which there is a distinctive and sudden understanding of a problem, or of a strategy that aids the solving of the problem” (referring to Mayer, 1996, p. 2) whereas “intuition occurs almost simultaneously, is affectively charged but does not have any accompanying verbalization or conscious awareness of the problem-solving process (referring to Hogarth, 2001) and may precede insight” (referring to Voltz & von Cramon, 2006, p. 2). Also, Hodgkinson et al. (2008, p. 8) refer to the definitions of Allinson and Hayes (1996, p. 122) for intuition and analysis: “Intuition refers to immediate judgement based on feeling and the adoption of a global perspective. Analysis refers to judgement based on mental reasoning and a focus on detail.” With respect to intuition, Hodgkinson et al. (2008, p. 5) further refer to the definition of Miller and Ireland (2005, p. 21) in which intuition is conceptualized in two distinct ways:

... as holistic hunch and as automated expertise ... Intuition as holistic hunch corresponds to judgment or choice made through a subconscious synthesis of information drawn from diverse experiences. ... ‘Gut feeling’ is often used to describe the final choice. Intuition as automated expertise is less mystical, corresponding to recognition of a familiar situation and the

straightforward but partially subconscious application of previous learning related to that situation. This form of intuition develops over time as relevant experience is accumulated in a particular domain.

These definitions describe a process of reasoning similar to that described by Reyna (2004), particularly in relation to the progression of a person from novice to expert.

According to Hodgkinson et al. (2008), “the ability to intuit in particular domains is acquired through experience and learning (referring to Agor, 1989; Harper, 1989; Klein, 1998) and relies upon pattern recognition processes” (p. 7). Also, Hodgkinson et al. (2008) referred to the findings of Simon (1997) and attribute to Simon the finding that “experts hold in their memory not only a set of patterns, but also information about the significance of the pattern (including information concerning its emotional salience, such as the danger or satisfaction from previous episodes associated with it)” (p. 7). Hodgkinson et al. (2008) also attribute to Simon the notion that “the intuitive ability of an expert is derived in large part from the large numbers of patterns held in long-term memory” (p. 7). Also, according to Hodgkinson et al. (2008), an “expert’s intuitive ability is also derived from their capacity to recognize salient environmental cues and rapidly match those cues to commonly occurring patterns ...” (p. 7). In a similar vein, Hodgkinson et al. (2008, p. 7) refers to Klein’s (1998, p. 24) ‘recognition primed decision model,’ and attributes to his model that “intuitive decision making entails the use of experience to recognize key patterns that indicate the likely dynamics of a given situation in order to conduct the ‘mental simulations’ (Klein, 1998, p. 45) required to rapidly evaluate the alternatives and select a singular course of action (Klein, 1998, p. 31).” Klein (1998) claims that these mental simulations are typically deployed in

“complex, time pressured, ‘life-or-death’ situations.” In this regard, the discussion in the article concerning practical intelligence is worthy of particular note. According to Hodgkinson et al. (2008, p. 6) intuition can be conceptualized as one element in practical intelligence (one of the three components of Sternberg’s (2003) triarchic theory of intelligence) where practical intelligence comprises, in part, “knowledge that is acquired experientially” (Hogarth, 2001). Practical intelligence “is nonanalytical and adaptive in that it involves the ability to understand and deal with judgmental tasks in complex real world settings; it is sometimes labelled as the ability to be ‘street-smart’” (Sternberg & Wagner, 1986; Sternberg, Wagner, & Williams, 2000). This reference to practical intelligence in the form of ‘street smarts’ has important implications for educators when faced with an emergency.

Also, recent studies by Lieberman, Jarcho, and Satpute (2004) have important implications for educators with respect to training. They have identified two processing systems, the intuitive (reflexive) system that entails the use of non-reflective consciousness, based on parallel processing, and is fast operating, slow learning and spontaneous and, in contrast, the analytic (reflective) system that entails the use of reflective consciousness, based on serial processing, and is slow operating, fast learning and intentional (Hodgkinson et al., 2008). At the same time, Hodgkinson et al. (2008) conclude that their “research clearly demonstrates that the concept of intuition ... has important ramifications for education ... personal ... organizational decision making, ... team dynamics, training and organizational development” (p. 19). They also conclude that “a much clearer picture is now also emerging of the roles that ... pattern recognition and expertise play in intuitive judgment” (p. 19).

Their research suggests that risk management training (being an analytical system) would provide the means to allow novices to become better risk managers at a faster rate than would be otherwise the case. It is probably in this sense that Reid (2000) intended her statement that “as scholarship and the application of legal risk management increases, it will become less necessary to rely on them [‘gut feel,’ intuition, and personal judgement and personal expertise]” (p. 402).

In a research study conducted by Waye (2002), jurors and judges used a story-model approach to decision-making. It was found that the decision-making of jurors and judges was made more on the basis of a narrative construction of the evidence as a whole using their own knowledge and experience rather than a clinical dissection of each piece of evidence.

According to the study,

All judges questioned ... indicated that they did not use Bayesian analysis as a general method of reviewing evidence. They indicated that they tended to analyze evidence against a narrative view of the case as a whole and did not calculate guilt on the basis of a combination of the prior odds of guilt and the individual odds of each new piece of evidential information. This approach to decision-making, commonly known as the ‘story model’ of decision-making, organizes, interprets and evaluates evidence against a narrative construction of the events supplied by the parties and from the knowledge and experience of the decision-maker. The story model of decision-making has been consistently observed among jurors and

judges ... According to research, judges and jurors often construct a number of stories about an event and will accept one story as the best when it accounts for the evidence presented at trial and is the most coherent in the sense of being internally consistent, plausible and complete. Confidence in a story is increased where the story appears to be the only explanation of the evidence. (p. 443)

The 'atomistic' model represents another approach to decision-making. In this model, the fact-finder assesses individual items of evidence and assigns probative weight to each item (the probability of each item as evidence of proof). The fact-finder then "arrives at a final determination by aggregating or disaggregating those probabilities" (Waye, 2002, p. 444). This model has not been embraced and its failure is "a significant obstacle to the adoption of Bayes theorem" (which requires information to be presented mathematically). "It seems that both judicial and lay decision-makers find it difficult to divorce the evaluation of individual items of evidence from overall judgment" (Waye, 2002, p. 444).

In an influential Australian article, Hodgson (1995 quoted by Waye, 2002, p. 444) puts the position that "(legal) decision-making generally involves a global assessment of a whole complex array of matters which cannot be given individual numerical expression. Such a decision depends very much more on commonsense, experience of the world, and beliefs as to how people generally behave ... than on mathematical computations; and concentration on mathematical probabilities could prejudice this commonsense process." This correlates well with the statement by Lord Reid in the 1974 case of *Southern Portland Cement Ltd. v.*

*Cooper*¹: “Chance probability or likelihood is always a matter of degree. It is rarely capable of precise assessment. Many different expressions are in common use. It can be said that the occurrence of a future event is very likely, rather likely, more probable than not, not unlikely, quite likely, not improbable, more than a mere possibility, etc. it is neither practicable nor reasonable to draw a line at extreme probability” (p. 160). Also, Fleming (1977) refers to foreseeability and asks “how great had to be the odds on it?” to which he responds “the spectrum of probability is wide, ranging – so far as our crude conventional terminology can reflect the calibration – from ‘fantastically remote’ through ‘possible’ to ‘not unlikely,’ ‘likely,’ ‘probable’ and ‘substantially certain’” (p. 198). He goes on to state that, according to the Privy Council in the 1967 case of *Overseas Tankship (U.K.) v. Miller S.S. Co.*,² “a ‘real risk’ is one which would occur to the mind of a reasonable man in the position of the defendant’s servant and which he would not brush aside as far-fetched” (p. 643).

The observations contained in the previous two paragraphs are intended to provide the reader with insight into the similarity in the way that judges and lay persons (juries) arrive at decisions within the context of a trial. As can be seen, educators need not be concerned or fear that the law will be applied in a manner that lacks common sense or requires the calculation of probability with mathematical precision. Risk issues and the quantitative component of risk are perceived in the same manner by judges and educators. The law is concerned with reasonable probabilities not precise mathematical possibilities or probabilities. As Fleming (1977) has stated, “the question cannot be reduced to one of mathematical chance alone, considered in isolation from other factors, including the

¹ *Southern Portland Cement Ltd. v. Cooper* [1974] 1 All E.R. 87 (P.C.), at p. 160.

² *Overseas Tankship (U.K.) v. Miller S.S. Co.* [1967] 1 A.C. 617 (P.C.), at p. 643.

seriousness of the injury risked” (p. 114). This should provide comfort to teachers who are faced with risk issues associated with an unexpected event; particularly if the unexpected event requires immediate reaction and corrective measures.

Educators are expected to exercise their judgment and make decisions for managing and resolving risk issues on the basis of the legislation that governs their practice and of what a “careful and prudent parent” would do in the circumstances arising out of a risk issue. In this respect, educators *in loco parentis* are not expected to calculate the probability of a risk issue occurring with mathematical precision before making a decision.

2.2 Risk and risk management

Although there is little agreement over a singular definition of risk, there are many acceptable definitions of risk. “The word ‘risk’ derives from the early Italian word ‘riscare,’ which originally means ‘to dare’” (Emblemsvag & Kjolstad, 2002, p. 843). In its simplest and most objective terms, risk in an organizational or institutional context is the expression of the probability and consequences of an event that is capable of influencing the success or failure of an organization’s goals (Standards Australia, 1999; Robbins & Smith, 2001). In similar terms, Hefce (2001, p. 2) defines risk as “the threat or possibility that an action or event will adversely or beneficially affect an organisation’s ability to achieve its objectives” (Hefce quoted in Birtwistle, 2002, p. 233). From a public service perspective, the Treasury Board of Canada Secretariat (2001) defines risk as follows: “risk refers to the uncertainty that surrounds future events and outcomes” (p. 8). Hill and Dinsdale (2001, p. 3) characterize

risk as being “a function of both the empirical characterization of risk (usually defined as the product of the probability and magnitude of some event occurring) and the cultural, social, and political contexts that shape people’s response and perceptions to uncertain events.”

Leiss and Hrudey (2005) refer to risk as having

... two essential components, ‘the factual aspect, or uncertainty with respect to the event’s occurrence, and the normative aspect, or its undesirable nature.’ The first is the realm of objectivity, involving both empirical observations and mathematical-statistical manipulations of the resultant data. The second is ‘the social, political world, the world of value judgments with respect to desirability, undesirability, reasonableness, beneficial effects, and prejudice.’ (p. 13)

Regardless of the manner of defining risk, two related elements are common to all definitions of risk: uncertainty and probability. Goode (2001) notes that one of the elements common to all definitions is the uncertainty of outcomes. Uncertainty arises where experience is limited and the causal connection between the event and the factors contributing to the risk issues is not clear. White (1995) notes that the notion of probability is central to all risk assessment techniques identified in the literature, although the interpretation of probability depends on whether it is viewed objectively or subjectively. In this regard, how risk is perceived and the context within which the risk occurs play an important part in the definition and characterization of risk. Fleming (1977) provides a useful definition for risk perception: “perception of risk is the correlation of past experience

with the specific facts in a situation and this depends to a large extent on knowledge as the basis for judging the harmful potentialities of contemplated conduct” (p. 108). This definition of risk perception recognizes that risk is a relative concept: risk perception is the significance assigned to risk by stakeholders. It is derived from the stakeholders’ expressed needs, issues and concerns, and as such, it tends to be subjective and intuitive in nature. As Fleming (1977) points out, “moreover, risk is a relative thing: it may be greater to one individual than to another. Hence the same act or omission may be negligent to the first, but not the second, e.g., more in the way of warning against live wires is required to a layman than to a skilled electrician” (p. 115). Reyna (2004) states that “the literature is replete with examples of how a person’s representation of gist (which reflects the person’s education, emotion, culture, and worldview), rather than verbatim information, governs the perception of risk” (p. 63).

In 1969, Chauncey Starr, a professional engineer, made a significant contribution to the study of risk, and risk perception in particular, through the publication of his article entitled *Social Benefits Versus Technological Risk*. In his article, he noted, among other things, that people respond differently to risks that are “voluntary” than to risks that are “involuntary.” As a result of his article, much research has been conducted on the factors that influence risk perception and its acceptability (Jenni, 1997). For example, Slovic (1987) summarized some of the key factors that influence risk perception and noted that perception and acceptability depended on the degree to which risk is: voluntary or involuntary; chronic or catastrophic; common or dreaded; injurious or fatal; known to those exposed or not known to those

exposed; known to science or not known to science; controllable or not controllable; and old or new.

Another factor that influences risk perception and risk acceptability is type of the population at risk. For example, risk perception plays a role in the acceptance of a double standard with respect to risk in certain cases, especially in the case of children. Society will tolerate the consumption of tobacco and alcohol by adults but not by children. This is an important factor that must be taken into consideration in examining the context within which educators must make decisions concerning risk issues. Given such a large number of factors that affect and influence an individual's perception of risk, it is not uncommon to find that the kind and number of attributes used to assess risk differ from one person to the next. Indeed, studies have shown that the perception of risk by lay persons (members of the public) differs from that of expert risk managers. Simply stated, lay persons tend to consider the consequences of an event should it occur while experts tend to concentrate on the probabilistic or frequency estimations of the occurrence itself.

As with the definition for risk, risk management has been defined in many ways. Reid (2000) defines risk management as "a systematic process that involves the development, implementation and ongoing review of a system for identifying and measuring risks that affect a business's activities which, if they eventuated, would result in exposure to significant loss, and devising and implementing strategies to minimise, transfer, share or, if possible, avoid those risks" (p. 15). Hill and Dinsdale (2001) refer to another definition of risk management as being: "a systematic approach to setting the best course of action under uncertainty by identifying, understanding, acting on, and communicating risk issues" (p. 4).

In short, risk management is a systematic process for making decisions and solving problems. It requires a process of reasoning: it is not merely a checklist of programmed procedures nor is it merely an intuitive or *ad hoc* response to an undesirable outcome. As was stated by the Court in *Molson v. Squamish Transfer Ltd.* (Molson, 1969),³ "... a reaction based on instinct is not enough, there must be a process of reasoning." This requirement for a process of reasoning was the subject of comment in the 1995 Supreme Court of Canada case of *RJR-MacDonald Inc. v. Canada (Attorney General)*,⁴ where McLachlin J. (now Chief Justice) commented on the use of the term "reasonable" in the context of the *Canadian Charter of Rights and Freedoms* and on the role of intuition. In that case, she stated:

In other words, the infringing measure must be justifiable by the processes of reason and rationality. ... In the legal context, reason imports the notion of inference from evidence or established truths. This is not to deny intuition its role, or to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility. (p. 89)

Reasonable risk management involves a formal strategy for identifying and quantifying risks in terms of frequency and consequence (risk analysis/risk assessment), and it provides all stakeholders with a flexible process and a set of tools to aid in making informed decisions about risk issues. It does not purport to lay out a set of programmed procedures such that one can predict with certainty the outcome of all conceivable factual situations. The use of reasonable risk management in making and implementing such decisions will delineate a

³ *Molson v. Squamish Transfer Ltd.* (1969), 7 D.L.R. (3d) 553 (B.C.S.C.).

⁴ *RJR-MacDonald Inc. v. Canada (Attorney General)*, (1995) 127 D.L.R. (4th) 1, at p. 89.

framework for and assist in managing and resolving risk issues, including managing the adverse effects of risks on an organization and those within it (Head & Horn, 1997), and also providing evidence of due diligence.

Having defined risk management, the next question that needs to be answered goes to the heart of risk management: “What is the process for managing risk?” In this regard, risk management can be viewed in two dimensions: as a decision process and as a management or an administration process (Head & Horn, 1997). A variety of risk management models have been developed by individual organizations in response to their particular needs, and the risk management process itself has been described in a variety of ways by different authors. As a decision process, there is a four-step risk management model developed by Crockford (1986); a five-step risk management model developed by Head and Horn (1997); and two risk management models developed by two independent standards making organizations - in Australia / New Zealand a five step risk management model (Appendix 1 – Risk Management Process) and in Canada, a six step risk management model (Appendix 2 - Steps in the Q850 Risk Management Decision-Making Process). Appendix 3 provides a definition of risk management in which Head and Horn (1997) describe risk management as a management or an administrative process involving the four functions of all management: planning, organizing, leading, and controlling.

Appendix 2 outlines the six steps of the risk management model contained in the standard (commonly referred to as the Q850 standard) developed by the Canadian Standards Association (1997). As used in the Q850 standard, the “Steps in the Q850 Risk Management Decision-making Process – Detailed Model” (Canadian Standards Association, p. 7)

comprises “six steps that follow a standardized management or systems analysis approach” (Canadian Standards Association, p. 4) for decision-making – “initiation, preliminary analysis, risk estimation, risk evaluation, risk control, and action/monitoring” (Canadian Standards Association, p. 7). Associated with each of the steps of the risk management model of the Q850 standard are a number of matters that were taken into consideration in this study. These matters are referred to as factors in this study. In Appendix 2, the text relating to these factors (based on matters taken into consideration in the Q850 standard) is set out in brackets after each of the steps with which they are associated. Also, the risk management model of the Q850 standard integrates risk communication as an important part of each step of the process. However, regardless of the differences in the number of steps or functions referred to in each of these ‘risk management process models,’ it is important to note that they invariably encompass, in one form or another, the six basic steps of decision-making: problem recognition, fact gathering, development of alternatives, selection of alternatives, implementation, and monitoring. The risk management process outlined in Appendix 2 is a useful tool for framing the steps of the risk management process and for assisting managers in making informed decisions about risk issues.

The Q850 standard was chosen for the purposes of this study for four reasons. First, as may be seen from an examination of the Q850 standard, it encompasses the six basic steps that are standard to the process for decision-making in the management of risk. Second, the Q850 standard addresses “the needs, issues and concerns of the stakeholders” (Canadian Standards Association, p. 13) and uses an iterative process in which “risk communication with stakeholders is an important part of each step in the decision process” (Canadian

Standards Association, p. 7). Third, as noted above, associated with each of the steps of the risk management model of the Q850 standard are a number of matters that are taken into consideration by risk managers at each step of the decision-making process. Fourth, the standard is appropriate to the Canadian context with respect to risk issues in the law and education.

2.3 Zero risk – risk avoidance and risk aversion

Finally, a comment on what is often referred to in the literature on risk and risk management as the ‘zero risk’ option. In one sense, zero risk may be described as being an expression of the tension that exists between, on the one hand, risk-taking and, on the other hand, innovation and opportunity in circumstances where outcomes are uncertain. It is the position of this author that managing this tension does not and should not be seen as synonymous with risk avoidance and its twin sibling risk aversion. Rather, proper management of this tension will allow educators, students and parents to interact freely and allow innovation and safety to flourish. Risk management can provide a results-based environment rather than the more typical command and control environment that tends to stifle innovation. Properly applied, risk management recognizes that one approach will not fit all situations and, although an activity may result in the figuratively speaking odd “scraped knee,” the benefit gained and the means used to gain it may far outweigh the cost. As the dilemma posed by Blaise Pascal,^b a 17th century French Intellectual, illustrates, action is a necessary part of living and everyone must make decisions and accept the consequences.

Pascal's dilemma was framed in the form of a wager: "God is, or He is not. But to which side shall we incline?" Pascal argued, on the one hand, that the risk of not believing in God could result in eternal damnation. On the other hand, the risk of believing in God could result in eternal happiness (the time 'wasted' attending church would be considered negligible). Risk is unavoidable and with every decision comes a trade-off between benefits and costs. So, in today's modern world of globalization, advancing technology and rapid change, it is best that we have the tools necessary for making informed decisions about risk issues.

This study is about resolving risk issues and the opportunity to investigate and prevent them from occurring in future, for as the saying goes – those who do not study history are bound to repeat it. Risk management and knowledge of the law can assist educational organizations be learning organizations as well as teaching organizations. A language and methodology that assists stakeholders of an educational organization to understand the culture, structure and rules governing the activities of the organization can assist educators in avoiding becoming risk averse. Risk avoidance and command and control rules that are aimed at avoiding risk at all costs cannot be the cultural calling card of an educational organization. Risk management represents a wider approach that includes the management of both opportunities and hazards. Innovation and educational activity without risk is an oxymoron.

Also, not only is risk-taking a necessary precondition for human interaction and development but refraining from risk-taking and becoming risk averse may represent the highest risk of all. An excellent discussion of this proposition is set out in an article by

Wildavsky (1979), a political scientist from the University of California, Berkeley, entitled “No risk is the highest risk of all” (p. 32). This is particularly true in the field of education where children are required to attend school. Without risk-taking, the technical and social innovations required to solve the problems that arise in our changing society would never emerge. And although it may be “difficult to see through the muck to discern, ‘how safe is safe enough?’” (Kane, 1992, p. 29), safety cannot be interpreted to mean ‘no harm whatsoever.’ Rather, it is only a matter of deciding ‘how safe is safe enough’ under the circumstances. Our society must make choices concerning risk issues and doing nothing may be the choice that is made; the risk is determined to be acceptable and the activity may proceed despite the risk issue involved (Starr, 1968; Derby & Kenney, 1981; Kane, 1992).

Also, it must be remembered that risk is not only about the bad things that happen but also about the good things that do not happen (McGraw & Bilotta, 2000; Jones & Sutherland, 1999). As Brookes quoting Wildavsky (1990) warns, “if we hinder progress on the grounds it brings some ‘bads,’ we will deny ourselves even greater ‘goods.’ If it seems too cruel to contemplate any harm at all, the even greater cruelty is to abandon net benefit, for giving that up guarantees that more people will have worse health” (p. 172). And, here is what Agriculture Secretary Yeutter of the United States had to say about zero risk, as quoted by Brookes (1990): “It is simply ludicrous to apply a zero risk standard to ... or anything else in this world, because the good Lord did not give us a risk-free world, or a risk-free environment for anything ... Biological zero is attainable but mathematical zero is not” (p. 172).

Finally, a brief comment about the precautionary approach^c in the context of zero risk

and zero tolerance. School authorities and teachers should not be placed in the position of having to prove that their policies will cause no harm before implementing an activity to ensure that they do not cause harm. Some activities are so inherently dangerous that they must be dealt with immediately when they occur, without the need for such proof. On the other hand, not all risks fall into such a category of danger and common sense must prevail where there is a risk of harm that falls short of such a category. In both of these situations, the principles of risk management (including the precautionary approach) can be of benefit to educators and school authorities.

Curricula that call for students to perform community service for course credit, the number of school excursions, school visits and adventure activities are increasing and students are being encouraged to volunteer for community service (Goode, 2001). At the same time, legislation calls for safe schools and safe environments. Educators are faced with a complex working environment in which they are expected to organize and participate in educational activities and, at the same time, be able to recognize the risks associated with school activities and take appropriate measures to protect the children who are under their care. However, the need to protect children does not mean that all risks must be eliminated, that is an unrealistic position.

Educators must be made aware that risk goes only to those risks that are foreseeable and that could reasonably be expected to be within the knowledge and experience of a careful and prudent parent under the circumstances – reasonable probabilities and not fantastic possibilities. On the one hand, the risks involved in some educational activities may not be capable of being reduced to acceptable levels and, therefore, such educational activities

should no longer be continued. On the other hand, in all other educational activities, some risk will always remain and the management of that risk should not be interpreted to mean that all risk must be eliminated.

In the domain of lawyers and risk managers, precaution and in extreme cases risk aversion is the balm that both seek to apply to forestall the worst errors in judgment in the management of risk issues (Leiss & Hrudey, 2005). The same can be said of educators in the domain of education. Yet, all three types of practitioners are fully aware and must be willing to accept that “mistakes will happen no matter how large a dollop of precaution is applied” (Leiss & Hrudey, 2005, p. 1). For this reason, the link between law and risk is important, and how the law allocates risk has important consequences for those who are responsible for managing risk issues. “A modern legal system is in large part a tool for guaranteeing the future by minimizing risks” (Valverde, Levi & Moore, 2002, p. 90) and as our modern society matures, this link between the law and risk strengthens (Cranor, 1993).

2.4 Case law and legal precedent

Having discussed at some length the concepts related to education and decision-making theory and risk and risk management, this part addresses the third component of this multidisciplinary study; case law and legal precedent relating to the law of torts and, more particularly, that branch of the law of torts that deals with negligence.

Individuals and organizations that undertake an activity necessarily face risk and loss exposure (Goode, 2001). Losses are recognized as being a fact of life (Head & Horn, 1985).

A risk manager is concerned about reducing situations that give rise to risk and to litigation that gives rise to liability. Since negligence is a major cause of action in the initiation of lawsuits, the conduct and underlying legal principles involved in all of the cases used in this study are related to the law of tort.

Although judges have not often explicitly stated their reasons for judgment in terms of risk management, the decisions of judges and their reasons for judgment have long reflected the principles involved in risk management. Judges do pay attention to such matters as legislation, lay and expert opinion, community values, risk perception and risk acceptance, problem definition, and alternatives. The decisions of judges together with the reasons for the decision serve as a retroscope through which the validity of a particular law, policy, or procedure or the appropriateness of a particular conduct or practice is given an objective review. The reasons may affirm, negate or call for changes in the policy, procedure, conduct or practice.

From the perspective of law, the focus of discussion in this study is on the stories that are referred to by Bruner (2002) as 'legal stories' (p. 37). This body of law, referred to collectively by lawyers as case law, comprises 'legal stories' that are 'told' within the confines of a legal system governed by court procedure and the rules of evidence. This governing procedure and these rules of evidence determine in large measure what part of the story is told, who is allowed to tell the story, who is best qualified to tell the story, and how the story is allowed to be told. For lawyers, the case law is used as legal precedent to inform decisions in future cases.

Prior judicial decisions (legal precedents) and their role in judicial decision-making have long been recognized as a source of law in Canadian courts. In deciding cases that are brought before them, judges are required to apply the law to the facts and provide reasons for their decisions. These reasons for decision in conjunction with the constitution and legislation become legal rules that are used as legal precedents for deciding future cases. This use of legal precedent is based on the principle that courts are expected to be consistent in their decision-making and like cases are expected to be treated alike; the decisions in past cases should be treated as binding.

However, the courts recognize that the facts of each case that comes before them may not be factually the same as the previously decided case that embodies the legal rule to be applied. In such a case, the court may, in its reasoning, distinguish the present case from the previously decided case and thereby modify the rule. In other words, the present court “devises a new version of the rule that supports the result of the precedent case but excepts the later case based on some critical new fact” (Alexander & Sherwin, 2004, p. 10). While the courts are not expected to treat a rule arising out of a past case as a ‘one size fits all’ solution for arriving at a decision, the difference must be explained if stability and predictability in the law are to be maintained.

Over time, the use of legal precedent by judges has produced a body of case law (that is presumably internally consistent) that serves as the foundation of what is known as the common law (‘lex non script’ or ‘unwritten law’). Traditionally, the courts have come to consider the use of legal precedent as the starting point for judicial decision-making. The rules arising out of the decisions of judges that form the basis of legal precedent are used in

this study for the purpose of comparison with the decisions made by educators in situations that are similar to the facts and law establishing the legal precedent.

2.5 Law of torts

The word “tort” is derived from the Latin “tortus” (twisted or crooked) and has become synonymous with the word “wrong” (Fleming, 1977, p. 1). Simply put, a tort is a civil wrong (as opposed to a criminal wrong) in which the rights of one person have been infringed by another person. The law of torts is a progeny of the common law, which means that the origins of the law of torts is found in the decisions of judges in particular cases relating to civil wrongs. The courts and the common law serve as the means by which a person whose rights have been infringed may seek redress of a breach or enforcement of those rights against the person who has infringed them through civil proceedings in a court of law. In other words, the common law recognizes on the one side the right of a person who has a right to a duty of care to seek redress from the person on the other side who has breached their duty to take care.

As such, litigation of a civil wrong involves a dispute between private parties (as opposed to the state representing the public versus an individual) that has as its primary purpose the settlement of conflicting claims between individuals. In its most basic terms, these conflicting claims have historically centred around achieving a balance between two competing interests – the interest of individuals in security and the interest of individuals in freedom of action (Fleming, 1977). For Fleming (1977), the first interest requires that “a

person who has been hurt in consequence of another's action should be compensated by the other regardless of the latter's motivation or purpose; the second interest requires that a person who harms another should be held responsible only when his activity was intentionally wrongful or indicated an undue lack of consideration" (p. 7). This means that the law as applied by the courts becomes the final arbiter in the settling of disputes between private parties. In a civilized, democratic society, the rule of law prevails, as opposed to the rule of individuals or the laws of the jungle. Disputes involving civil wrongs are settled by judges making decisions in accordance with rules fixed by law and not by rules based on the survival of the fittest.

However, the common law is based on a system of precedent in which a decision in one case will have an effect on future cases involving persons other than the original disputants or litigating parties. Therefore, a third interest has over the years become an important part of the common law; namely, the public interest in the outcome of disputes between private parties and the public interest in policy issues that affect society. For example, public policy interest dictates that the schooling of children should be compulsory and, in certain cases, that parents should not be allowed to waive the rights of their children. The combined effect of public interest and precedent on judicial decision-making means that "every case of a duty established in respect of a given situation-pattern establishes a legal duty in similar situation-patterns as they may arise" (*Nova Mink Ltd. v. Trans-Canada Airlines*, 1951, p. 256).⁵

In the language of tort law, individuals owe duties to one another and these duties are fixed by law and redress of a breach of these duties is grounded in a public policy interest –

the person whose interest has been harmed and who is without fault should be compensated in an award of damages by the person who has breached a duty imposed by law and caused the harm either intentionally or through a lack of consideration. At the same time, in Canada, the law recognizes as a matter of public policy that not all injury and not all losses associated with injury should result in an award of damages. The progress of society requires that individuals act and that certain activities be undertaken, all the while recognizing that certain activities or enterprises are inherently dangerous regardless of the measures taken to reduce or eliminate them. The risks associated with the public policy objective of educating of children and the methods used to effect that objective must be accepted. Teachers must teach children who are required to attend school and not all risks associated with educational activities can be eliminated regardless of the steps taken to reduce the risks. This point was made by the Court in the 1976 case of *Thornton, Tanner et al. v. Board of School Trustees of School District No. 57 (Prince George), Edamura and Harrower (Thornton)*:⁶

This is not to say that Thornton exclusively assumed the risk of the exercise to the absolution of the school authorities or that the school authorities were relieved of their common law duty to take care of this pupil during this activity in the manner of a reasonable and careful parent, ... Nor does it mean that the school authorities would be strictly or absolutely liable for any consequential injury however occurring to any pupil in respect of whom the school authorities had accepted the responsibility of care and control, ... (p. 57)

⁵ *Nova Mink Ltd. v. Trans-Canada Airlines* [1951] 2 D.L.R. 241, at p. 256; 26 M.P.R. 389 (N.S.S.C.)

⁶ *Thornton, Tanner et al. v. Board of School Trustees of School District No. 57 (Prince George), Edamura and*

Simply put, action cannot be avoided, individuals must of necessity act. In so doing, individuals who are endowed with free will are able to and must make choices between alternatives. At the same time, the golden rule has not yet been enacted by the law and become the law of the land. The law is continuing its slow, halting, confused and often painful way to develop general rules to guide the conduct of its citizens in relation to each other and to society in general. However, ultimately, the law must coincide with public opinion and cannot stand against it (Prosser, 1971 quoted in Wright & Linden, 1975, p. 4). When the choice of activities that individuals choose coincides with public policy, society as a whole benefits.

As Leiss and Hrudey (2005) have stated, “law is often about managing risk” (p. 3) and the question becomes: how does one reasonably manage the risk so as to avoid the foreseeable harm and, thereby, balance the interest in security and the interest in continuing the desirable activity? In the case of an accident, public policy dictates that the loss must lie where it falls. In the case of tortious conduct (negligence), judges apply the rules of tort law to the facts of the particular case in deciding whether there is liability and, if so, who should bear the loss and the quantum of damages that fairly represents the loss. However, even in the case of negligent conduct that causes loss, it cannot be presumed that liability will result. Under Canadian common law, only negligent conduct that creates an unreasonable risk of foreseeable harm towards a person who is owed a duty will attract liability. Absent a duty of care, a person can be as negligent as they wish. These considerations lead to the inevitable lawyer’s questions: What duty of care? What risk? Risk to whom? What harm? What is reasonable? What does foreseeability mean?

Harrower [1976] 5 W.W.R. 240, [1976] 73 D.L.R. (3d) 35, at p. 57 (B.C.C.A.).

To answer these questions, lawyers turn to the well-known aphorism used by Lord Atkin in the 1932 landmark case of *M'Alister (or Donoghue) v. Stevenson (Donoghue v. Stevenson)*⁷ to describe a general conception of relations giving rise to a duty of care. This case involved a person drinking from a bottle of ginger beer that contained a snail.

There must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. ... The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restrictive reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. (p. 580)

This landmark case provided then as it does now the courts with a general conceptual framework for beginning their deliberations on cases involving harm due to negligence. However, as always, the rub is in the details. It is one thing to say risk comprises a combination of frequency or probability of injury and the magnitude of the consequences resulting from the injury but it is another thing to measure or define what is meant by the

⁷ *M'Alister (or Donoghue) v. Stevenson* [1932] A.C. 562, at p. 580.

terms unreasonable and foreseeable in the classic formulation of negligence referred to in the 1856 case of *Blyth v. Birmingham Waterworks Co.*:⁸

Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. (p. 784)

Fleming (1977) postulates that “negligence ... consists in failure to take care against unreasonable risk of foreseeable injury” (p. 136). As the literature review on risk management has shown, risk is a relative concept that cannot be reduced to a simple a mathematical formula. Much depends on other factors alone and in combination with each other (e.g., perception and the magnitude of the injury or degree of risk). Nor can it be assumed that a person is negligent merely because the plaintiff sustained an injury; an injury does not automatically mean that negligence is involved.

Also, in considering the question of “What is reasonable?,” the courts have used the concepts of duty, foreseeability and reasonableness as they came to be developed under the common law. In *Nova Mink Ltd. v. Trans-Canada Airlines*,⁹ the Court stated that there is “a duty only where the circumstances of time, place and person would create in the mind of a reasonable man in those circumstances such a probability of harm resulting to other persons as to require him to take care to avert that probable result” (p. 254). Another case in point that deals with the question of duty in relation to reasonableness and foreseeability and whether a breach of the standard has occurred is the 1946 case of *Gard v. Duncan School*

⁸ *Blyth v. Birmingham Waterworks Co.* (1856) 11 Ex. 781, at p. 784.

⁹ *Supra*, Note 5, at p. 254.

Trustees.¹⁰ In that case, a student was injured while playing grass-hockey on the school grounds when he was struck in the eye by the hockey stick of another player. The Court stated that “the duty should not be determined from the happening of the extraordinary accident in this case, but from the danger that was reasonably foreseeable before the game” (p. 322).

In order to deal objectively with this “element of reasonable prevision of expectable harm” (*Nova Mink Ltd. v. Trans-Canada Airlines*,¹¹ 1951, p. 254) and its statement in negative terms (alter ego so to speak) the ‘unreasonable risk of foreseeable harm,’ the courts invented a fictional reasonable man.^d In the 1837 case of *Vaughan v. Menlove (Vaughan)*,¹² this reasonable man was described as being a “man of ordinary prudence” (p. 475). In the 1933 case of *Hall v. Brooklands Auto Racing Club*,¹³ the judge described the reasonable man as “... ‘the man in the street,’ or ‘the man in the Clapham omnibus,’ or, as I recently read in an American author, ‘the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves’” (p. 224). Many years later, the conduct of this reasonable man was described by Mr. Justice Laidlaw in the 1955 case of *Arland and Arland v. Taylor*¹⁴ as being “the ‘standard adopted in the community by persons of ordinary intelligence and prudence’” (p. 142). In other words, this reasonably prudent man is a mythical creature of the law who is neither infallible nor perfect and who is a person “capable of making mistakes and errors of judgment, of being selfish, of being afraid - but only to the extent that any such shortcoming embodies the normal standard of community behaviour”

¹⁰ *Gard v. Duncan School Trustees* [1946] 1 W.W.R. 305, at p. 322; 62 B.C.R. 323, [1946] 2 D.L.R. 441.

¹¹ *Supra*, Note 5, at p. 254.

¹² *Vaughan v. Menlove* (1837), 3 Bing N.C. 468, at p. 475 Common Pleas.

¹³ *Hall v. Brooklands Auto Racing Club* [1933] 1 K.B. 205, at p. 224.

(James, 1953, p. 280). Through the use of this concept of the reasonable man, the courts decide whether the risk and the person's conduct in the face of that risk was reasonable. As James (1953) has noted, the Courts decide on the basis of "not what actually happened, but what the reasonably prudent person *would then have foreseen as likely to happen.*" This "is the key to the question of reasonableness" (p. 281).

Negligence has both a narrow and a broad meaning (Wright & Linden, 1975, p. 147) both of which are essential to informing the management of risk in a school context. This part of the literature review describes and uses the term negligence in both its narrow and wider sense. In its narrow sense, using the concept of the reasonable man, it refers to conduct that falls below the standard adopted in the community. In its wider sense, it makes reference to a cause of action for negligence (Wright & Linden, 1975, p. 147). In their book, Wright and Linden (1975) use a six-part division of negligence and state that

a cause of action for negligence arises if the following elements are present: defendant's conduct must be negligent, i.e., in breach of the standard of care set by the law – the claimant must suffer damage – the damage suffered must be caused by the negligent conduct of the defendant – there must be a duty recognized by the law to avoid this damage - the conduct of the defendant must be the proximate cause of the loss or stated another way the damage should not be too remote a result of the defendant's conduct – the conduct of the plaintiff should not be such as to bar his recovery, i.e., he or she must not be guilty of

¹⁴ *Arland and Arland v. Taylor*, [1955] O.R. 131, at p. 142.

contributory negligence and must not voluntarily assume the risk. (p.

148)

In summary, the following six elements and questions^c need to be addressed in order to determine whether a cause of action in negligence is established:

- *duty of care* – was the duty of care owed?;
- *standard of care* – what was the standard of care?;
- *breach of the standard of care* – was there a breach of the standard?;
- *damage* – was there damage (harm or injury)?;
- *causation* (in relation to the damage) – did the breach cause the damage and, if so, is there a reasonably close causal connection between the conduct and the damage (proximate and not too remote)?; and
- *conduct* (of the person suffering damage) – did the person suffering the damage contribute to the negligence or did the activity involve a voluntary assumption of risk?

In establishing the steps of a cause of action in negligence, the law has employed a process of inductive analysis. Through the analysis of many individual cases over many years by the courts, the decisions of the judges collectively have resulted in the identification of the legal characteristics of conduct and the relationships between those involved that are common to the cases as a whole. In this manner, the steps of the cause of action in negligence have been established in general terms. Similarly, this same process of inductive analysis of the cases has identified specific factors concerning facts and circumstances that have been taken into consideration by the judges in arriving at their decisions. For the

purposes of this study, the next section provides a brief overview of each step of the cause of action in negligence in general terms followed by reference to the case law and the factors arising out of the case law that relate specifically to education. In this way, the guidance and reasoning of the courts together with the steps and factors that are taken into consideration by the courts in arriving at their decisions are used to inform the research about what to look for in the stories of the participants and serve as the basis for their analysis.

2.5.1 Duty of care

The ‘duty of care’ owed by one person to another may be restated as a ‘duty to take care.’ But, as the aphorism of Lord Atkin illustrates, a rule governing relations between individuals that gives rise to legal consequences (that imposes a duty to ensure that one person does not suffer harm because of the negligent act of another) is not merely a state of mind (Wright & Linden, 1975, p. 147). As the court put it in the 1932 case of *Bottomley v. Bannister*,¹⁵ “(the) law does not recognize a duty in the air, so to speak; that is, a duty to undertake that no one shall suffer from one’s carelessness” (p. 476). This means that not all injury gives rise to an action in negligence. As was stated in the 1932 case of *Donoghue v. Stevenson*,¹⁶ “where there is room for diversity of view, it is in determining what circumstances will establish such a relationship ... as to give rise, on the one side, to a duty to take care, and on the other side to a right to have care taken ...” (p. 619). For example, parents owe their children a duty of care and this requires that parents exercise a measure of

¹⁵ *Bottomley v. Bannister* [1932] 1 K.B. 458, at p. 476.

¹⁶ *Supra*, Note 7, at p. 619.

control over their children in order to protect them. Yet, at the same time, circumstances may also require parents to exercise a measure of control over their children in order to protect others with whom their children interact.

Similarly, school boards and teachers have a legal responsibility “to maintain reasonable supervision and discipline in the interest alike of the children’s own safety and that of the public” (Fleming, 1977, p. 151). Educators, as a result of their legislated status as professionals and right to practice teaching, are entrusted by society in general and by parents in particular with the right to make decisions concerning such matters as curriculum, teaching methods, supervision, discipline, conduct and school-related activities. The duty of care inherent to the performance of these activities is based on common law and legislative right to control children that are entrusted to their care. Through the application of the doctrine of *in loco parentis*, the common law holds that educators “stand in the place of the parents” of the child – they exercise the authority and oversight of a parent. In the 1997 Supreme Court of Canada case of *Toronto (City) Board of Education v. O.S.S.T.F., District 15*,¹⁷ Justice Cory referred to the special relationship that exists between a teacher and his or her students. In his reasons, he referred to the decision of Mr. Merritt (a member of the Board of Arbitration): “parents entrust their children to teachers *in loco parentis*, and require them to lead by example” (p. 501).

This common law duty is supplemented by legislation that requires children to attend school. That same legislation requires teachers to teach and school boards to provide not only proper supervision of students but also a secure and safe environment for them. A teacher who is given such charge over children has a concomitant duty to control them and

must ensure that the children are secure and in a safe environment. This legislative necessity to provide proper supervision and a secure and safe environment is set out in the *Education Act*¹⁸ (Ontario) (section 170 and subsections 264(1) and 265(1)) and the *Operation of Schools – General Regulation*¹⁹ (the Regulation). This statute and regulation sets out the duties of boards, principals and teachers (section 20 and subsections 11(1) and 11(3)). The text of these legislative provisions (statutory and regulatory) is set out below and will be the subject of further comment in the next section dealing with standard of care.

Section 170 of the *Education Act* (Ontario) sets out the duties of a board:

170. Every Board shall,

6. provide instruction and adequate accommodation during each school year for pupils who have a right to attend a school under the jurisdiction of the board;
8. keep the school buildings and premises in proper repair and in proper sanitary condition, provide suitable furniture and equipment and keep it in proper repair, and protect the property of the board;
9. make provisions for ensuring adequately the buildings and equipment of the board and for insuring the board and its employees and volunteers who are assigned duties by the principal against claims in respect of accidents incurred by pupils while under the jurisdiction or supervision of the board;

Subsection 265(1) of the *Education Act* (Ontario) sets out the duties of a principal:

265(1) It is the duty of a principal of a school, in addition to the principal's duties as a teacher,

- discipline
 - (a) to maintain proper order and discipline in the school;
- care of pupils and property
 - (j) to give assiduous attention to the health and comfort of the pupils, to the cleanliness, temperature and ventilation of the school, to the

¹⁷ *Toronto (City) Board of Education v. O.S.S.T.F., District 15* [1997] 1 S.C.R. 487, at p. 501.

¹⁸ R.S.O. 1990, c. E.2.

¹⁹ R.R.O. 1990, Reg. 298.

care of all teaching materials and other school property, and to the condition and appearance of the school buildings and grounds;

Subsections 11(1) and (3) of the Regulation list further details concerning the duties of a principal:

11(1) The principal of a school, subject to the authority of the appropriate supervisory officer, is in charge of,

- (a) the instruction and the discipline of pupils in the school; and ...
- (b) the organization and management of the school.

11(3) In addition to the duties under the Act and those assigned by the board, the principal of a school shall, ...

- (e) provide for the supervision of pupils during the period of time during each school day when the school buildings and playgrounds are open to pupils;
- (f) provide for the supervision of and the conducting of any school activity authorized by the board;

Subsection 264(1) of the *Education Act* (Ontario) sets out the duties of a teacher:

264(1) It is the duty of a teacher and a temporary teacher,

- religion and morals
- (c) to inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues;
- discipline
- (e) to maintain, under the direction of the principal, proper order and discipline in the teacher's classroom and while on duty in the school and on the school ground;
- duties assigned
- (l) to perform all duties assigned in accordance with this Act and the regulations. R.S.O. 1990, c. E.2, s. 264 (1); 2003, c. 2, s. 20 (1).

Section 20 of the Regulation lists additional duties of a teacher:

20. In addition to the duties assigned to the teacher under the Act and by the board, a teacher shall, ...

- (b) carry out the supervisory duties and instructional program assigned to the teacher by the principal and supply such information related thereto as the principal may require; ...
- (g) ensure that all reasonable safety procedures are carried out in courses and activities for which the teacher is responsible; ...
- (h) co-operate with the principal and other teachers to establish and maintain consistent disciplinary practices in the school;

In summary, in view of the special relationship that an educator has with his or her students under the common law and legislation, the question of whether a duty of care is owed by a teacher to his or her students is moot – the duty of care goes without saying.

2.5.2 Standard of care

The first step (duty of care) required to establish a cause of action in negligence answered the question of whether a duty of care is owed. This second step (standard of care) addresses the question: “What must a person do in order to fulfil the duty?” Both of these elements are legal concepts that are inextricably bound the one to the other and, being legal concepts, they are questions of law for the courts to decide. In the case of negligence, for conduct to attract negligent liability, the law requires that the conduct be such that it falls below the “standard adopted in the community by persons of ordinary intelligence and prudence” (*Arland and Arland v. Taylor*,²⁰ 1955, p. 142).

In educational terms, the objectives of an activity must be balanced against the risks (balance of benefits and costs) associated with the activity. In this context, it is particularly important to be reminded of two important aspects of activity in general and educational

²⁰ *Supra*, Note 14, at p. 142.

activity in particular: first, education of children is a compulsory activity under the law and, second, “almost any activity is fraught with some degree of danger to others but, if the remotest chance of a mishap were sufficient to attract the stigma of negligence, most human action would be inhibited” (Fleming, 1977, p. 114). This begs the question of what a person must do to fulfil the duty. Must a person guard against any and all possibilities without regard to the level of risk; that is, “a mere possibility which would never occur to the mind of a reasonable man” (Lord Dunedin in the case of *Fardon v. Harcourt-Rivington*,²¹ 1932, p. 83). Or, as the level of acceptable risk was described by the Court in the 1959 case of *Priestman v. Colangelo & Smythson*,²² “it was rather a reasonable probability” (p. 634).

This same issue has arisen in a similar but negative sense – the definition of reasonable risk is one thing but the definition of unreasonable risk or unreasonable probability is another. In the 1947 case of *United States v. Carroll Towing Co.*,²³ American Justice Learned Hand used a mathematical formula to define unreasonable risk. However, in the later English case of *Southern Portland Cement Ltd. v. Cooper*,²⁴ Lord Reid ‘probably’ said it best when he stated:

Chance probability or likelihood is always a matter of degree. It is rarely capable of precise assessment. Many different expressions are in common use. It can be said that the occurrence of a future event is very likely, rather likely, more probable than not, not unlikely, quite likely, not improbable, more than a mere possibility, etc. It is neither

²¹ *Fardon v. Harcourt-Rivington* [1932] All E.R. 81, at p. 83.

²² *Priestman v. Colangelo & Smythson* [1959] S.C.R. 615, at p. 634.

²³ *United States v. Carroll Towing Co.* (1947), 159 F. 2d 169, at p. 173 (C.C.A.).

²⁴ *Supra*, Note 1, at p. 160.

practicable nor reasonable to draw a line at extreme probability. (p.

160)

Such a view is in keeping with what has been stated previously regarding the failure of judges and lay persons to use Bayesian analysis. Therefore, the law answers the definition of unreasonable risk by recognizing that there is a range of possibilities and probabilities and, in measuring due care, a person - as Lord Dunedin stated in the 1932 case of *Fardon v. Harcourt-Rivington*²⁵ - "must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities" (p. 83).

Also, in measuring due care, it is well settled that one must balance the risk against the measures necessary to eliminate the risk (*Watt v. Hertfordshire County Council*,²⁶ 1954). To that proposition ought to be added this – one must balance the risk against the end to be achieved. "Inevitably, therefore, one is only required to guard against those risks which society recognizes as sufficiently great to demand precaution" (Fleming, 1977, p. 114). As Lord Reid stated in the 1951 case of *Bolton & Others v. Stone*:²⁷ "What a man must not do and what I think a careful man tries not to do is to create a risk that is substantial" (p. 1086). Simply stated, the law takes into consideration only that caution which a reasonable man of ordinary intelligence and prudence would consider necessary. By definition, a reasonable man would be expected to take both the degree of risk and the degree of injury into consideration in making a determination of whether to proceed with an activity or course of action. These points were addressed in the 1977 case of *Eaton v. Lasuta*.²⁸ In that case, a

²⁵ *Supra*, Note 21, at p. 83.

²⁶ *Watt v. Hertfordshire County Council*, [1954] 2 All E.R. 368 (C.A.).

²⁷ *Bolton and Others v. Stone* [1951] A.C. 850; [1951] 1 All E.R. 1078 (H.L.).

²⁸ *Eaton v. Lasuta* (1977) 2 C.C.L.T. 38, 75 D.L.R. (3d) 476, at p. 478 (B.C.S.C.).

student who was not athletically inclined fell and broke her leg while participating in a "piggy-back" race during her physical education class at school. The race required the student to run while carrying a smaller and lighter student on her back. The Court considered and affirmed the words of Justice Laskin (as he then was) speaking for the majority of the Supreme Court of Canada in the case of *Dziwenka v. The Queen*,²⁹ where he said:

... the standard of care to guard against unreasonable risk of injury must be assessed, in the particular circumstances, 'by balancing the magnitude of the risk, in the light of ... an accident happening and the possible seriousness of its consequences, against the difficulty, expense or any other disadvantage of desisting from the venture or taking a particular precaution': see Fleming, *The Law of Torts*, 3rd ed., at p. 118. As was said by Lord Macmillan in *Read v. J. Lyons & Co. Ltd.*, [1947] A.C. 156 at 173, [1946] 2 All E.R. 471, 'the law in all cases exacts a degree of care commensurate with the risk created.'

(p. 361)

In a similar vein, Justice Learned Hand in the 1940 case of *Conway v. O'Brien*³⁰ stated that the caution "demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk" (p. 612). James (1953) quotes Hand and notes that the factors to be evaluated in determining the reasonableness of the risk "are practically not susceptible of any quantitative estimate" (p.

²⁹ *Dziwenka v. The Queen*, [1972] 1 W.W.R. 350, at p. 361; [1972] S.C.R. 419.

³⁰ *Conway v. O'Brien*, 111 F. 2d 611, at p. 612 (2d Cir. 1940).

286) and the second two (gravity of the threatened harm and the value of the interest that must be sacrificed to avoid it) are generally not so, even theoretically” (*Conway v. O’Brien*,³¹ 1940, p. 612). In this regard, the concept of foreseeability is important. But, as we have seen, the law takes into consideration that foreseeability alone is not the only test – the law takes into consideration the ‘standard adopted in the community by persons of ordinary intelligence and prudence’ and not “a mere possibility which would never occur to the mind of a reasonable man” (*Fardon v. Harcourt-Rivington*,³² 1932, p. 83). In this regard, Lord Reid in the case of *Bolton and Others v. Stone*³³ (1951) noted that, “generally speaking, if injury to another person by the defendant’s acts [act of another person] is reasonably foreseeable, the chance that injury will result is substantial” (p. 1084).

Previously, in the literature review, the expression common sense has been used as a matter to be considered in decision-making. Although this is a common expression, rarely does anyone offer an explanation of what they mean by it when they use it. In her book entitled *Statutory Interpretation*, Sullivan (1997) defines the expression ‘common sense’ “to refer to any fact, assumption, evaluation, connection, or conclusion that a person takes to be obviously true and that he or she assumes is equally accepted by other members of the community – or at least by those of comparable intelligence and educational advantage” (p. 39). This definition neatly ties the concept of common sense to community standards and gives some indication of what others would consider reasonable.

In the case of *Portelance v. Board of Trustees of Roman Catholic Separate School for Section No. 5 in Township of Grantham*, the court quoted Lord Thankerton in the 1943 case

³¹ *Ibid.*, at p. 612.

³² *Supra*, Note 21, at p. 83.

of *Glasgow Corp. v. Muir*:³⁴

... all that a person can be held bound to foresee are the reasonable and probable consequences of the failure to take care, judged by the standard of the ordinary reasonable man ... (p. 454)

Having discussed standard of care in general, the question remains: "What is the standard of care expected of a teacher?" From the perspective of education, the classic formulation for the standard of care for a teacher is found in the reasons for judgment of Lord Esher in the 1893 leading case of *Williams v. Eady*.³⁵ In that case, an action was brought by a boy against a teacher for an injury caused by the teacher's alleged negligence in leaving a bottle of phosphorous out in the open. In his reasons for judgment, Lord Esher stated:

Schoolmaster ... bound to take such care of his boys as a careful father would take of his boys ... then ... bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that came their way. (p. 42)

This case is an affirmation of two important elements relating to negligence: first, that a duty of care is owed by the teacher to his or her students and, second, that the standard of care is based on the doctrine of *in loco parentis*. An important third point in regards to this doctrine was made in the 1977 *Eaton* case. In that case, the Court referred to the *Dziwenka v. The Queen* case,³⁶ where Laskin J. (as he then was) stated: "The duty of care owing to a

³³ *Supra*, Note 27, at p. 1084.

³⁴ *Glasgow Corp. v. Muir*, [1943] A.C. 448, at pp. 454.

³⁵ *Williams v. Eady* (1893), 10 L.T.R. 41, at p. 42 (C.A.).

³⁶ *Supra*, Note 29, at p. 360.

student, especially a handicapped one as in this case, in respect of his personal safety while operating dangerous machinery, is a stricter one than that owed by an employer to an employee working with dangerous machinery.” (p. 360)

In a negligence action, an educator under contract to a board of education is considered to be under a contract of service to the board of education (that is to say, an educator is an employee of the board). However, this case recognizes that the duty owed to a student is of a different kind and of a higher order than the duty owed by an employer to one of its workers in a normal employee-employer relationship in similar circumstances. The student is not an employee nor is the educator an employer – the relationship between educator and student is special and in the nature of parent-child.

2.5.3 Breach of standard of care

Having established the standard of care based on legislation and the common law doctrine of *in loco parentis* (careful and prudent parent), what needs to be considered are the factors that the courts have taken into consideration to determine what is required of the educator to satisfy the standard and whether the standard has, in fact, been satisfied.

In the case of *McKay et al v. Board of Govan School Unit No. 29 of Saskatchewan et al*,³⁷ (*McKay*) the courts affirmed the general common law duty but at the same time questioned its universality. In that case, an inexperienced and untrained high school student suffered serious injuries, which caused almost total paralysis, when he fell from parallel bars

³⁷ *McKay et al v. Board of Govan School Unit No. 29 of Saskatchewan et al*. 64 W.W.R. 301, [1968] S.C.R. 589, at p. 594; 68 D.L.R. (2d) 519 (S.C.C.).

while practising during a gymnastics class under the supervision of a teacher at the school he attended. In the reasons for judgment, the Court accepted that, in the case of a gymnastics class of 12 to 18 students, the standard of care set out by Lord Esher in 1893 in *Williams v. Eady*³⁸ applied. But the judge, as an aside, noted that he was not satisfied that Lord Esher's definition is of universal application, particularly in cases where a schoolmaster is required to instruct or supervise the activities of a great number of pupils at one time. The judge in the *McKay*³⁹ case stated:

While I am not satisfied that this definition is of universal application, particularly in cases where a schoolmaster is required to instruct or supervise the activities of a great number of pupils at one time, I am nevertheless of the opinion that a small group, such as that which Molesky had in his charge in the improvised gymnasium, is one to which Lord Esher's words do apply. (p. 594)

The judge then went on to state his view

that a reasonably careful parent would have been unlikely to permit his boy, almost totally inexperienced in gymnastics, to execute the manoeuvre which young McKay performed without exercising a great deal more care for his safety or ensuring that someone else did so on his behalf. ... it is clear to me that his supervisory duties required him to guard against foreseeable risks to which this inexperienced boy was exposed in the performance of exercises on

³⁸ *Supra*, Note 35, at p. 42.

³⁹ *Supra*, Note 37, at p. 594.

the parallel bars. There was, in my opinion, a real risk that the boy might fall and there was a concomitant duty to guard against that risk eventuating. ... there was a breach of that duty. (pp. 594-95)

The action against Molesky (the teacher) was dismissed by consent, having regard to the provisions of sec. 225a (added 1961, ch. 29) of *The School Act*⁴⁰ of Saskatchewan which provides that where the principal of a school approves or sponsors activities such as those here in question “the teacher responsible for the conduct of the pupils shall not be liable for damage ... for personal injury suffered by pupils during such activities”. However, under the doctrine of vicarious liability, the board of education was held liable for the injury suffered by the student – the employer was liable for the acts of its employee. This case raises several important factors that were taken into consideration by the Court and that educators should be aware of: the size of the group involved in the particular activity and the type of activity in relation to supervision, reasonably ‘careful and parent’ standard, experience of the students, availability of a statutory defence for the teacher, and vicarious liability.

In the 1976 *Thornton*⁴¹ case, the Court referred to the *McKay*⁴² case and added a judicial gloss on the general common law duty. In the *Thornton* case, a small group of 6 or 7 boys of a grade 10 physical education class were practicing to perform an aerial front summersault off a springboard. One boy, 15 years of age, participated in the gymnastics group and was injured and became virtually completely physically handicapped. In his reasons for judgment, Justice Carrothers took into account “the judicial modification of the reasonable-and-careful-parent test to allow for the larger-than-family size of the physical education class

⁴⁰ Now RSS, 1965, ch. 184, sec. 242.

⁴¹ *Supra*, Note 6, at pp. 57-8.

and the supraparental expertise commanded of a gymnastics instructor” (p. 57). Based on his “view of the factually relevant cases,” (p. 57) he went on to list “the component criteria constituting the appropriate duty or standard of care which is saddled upon the school authorities in a case of this kind” and upon which the courts “are to judge whether there has been observance sufficient for the school authorities to avoid a finding of negligence and its consequential liability” (p. 58):

(a) if it is suitable to his age [the student] and condition (mental and physical); (b) if he is progressively trained and coached to do it properly and avoid the danger; (c) if the equipment is adequate and suitably arranged; and (d) if the performance, having regard to its inherently dangerous nature, is properly supervised. (p. 58)

As the above quote indicates, the four criteria listed are factors that the courts would take into consideration in making a decision and of which educators should be aware.

In the 1981 Supreme Court of Canada case of *Myers et al. v. Peel County Board of Education et al.*⁴³ (*Myers*) – another gymnastics case - a high school student brought an action alleging negligence. The student was injured in a gymnastics class where 7 or 8 students were left unsupervised by the teacher. The student had attempted a straddle dismount, which he had never tried before. He fell on his head from a height of about eight feet onto some slab mats. His neck was broken, and he was for some time rendered quadriplegic. At trial, the defendant school board was found liable in negligence caused by inadequate supervision by teaching staff and the insufficiency of the protective mats in use.

⁴² *Supra*, Note 37.

⁴³ *Myers et al. v. Peel County Board of Education et al.* (1981) 123 D.L.R. (3d) 1; [1981] 2 S.C.R. 21, at p. 26,

Damages were reduced as a result of contributory negligence on the part of the plaintiff. The defendants appealed successfully to the Ontario Court of Appeal and the plaintiff appealed to the Supreme Court of Canada, seeking the restoration of the trial judgment. In the Supreme Court of Canada, the Court in *Myers*⁴⁴ referred to the following passage from the judgment in the *Thornton*⁴⁵ case:

Inherently and readily foreseeable there is an element of risk or danger in gymnastics ... of which risk or danger ... both the school authorities [the teacher and board] and Thornton [the student] were aware. (p. 26)

The Court went on to state:

The standard of care to be exercised by school authorities in providing for supervision and protection of students for whom they are responsible is that of the careful or prudent parent, described in *Williams v. Eady* ... It has, no doubt, become somewhat qualified in modern times because of the variety of activities conducted in schools, with probably larger groups of students using more complicated and more dangerous equipment than formerly ... but with the qualification expressed in the *McKay* case and noted by Carrothers J.A. in *Thornton* ... it remains the appropriate standard for such cases. It is not, however, a standard which can be applied in the same manner and to the same extent in every case. Its application

31-32, 35.

⁴⁴ *Ibid.*, at pp. 26, 31-2, 35.

will vary from case to case and will depend upon the number of students being supervised at any given time, the nature of the exercise or activity in progress, the age and the degree of skill and training which the students may have received in connection with such activity, the nature and condition of the equipment in use at the time, the competency and capacity of the students involved, and a host of other matters which may be widely varied but which, in a given case, may affect the application of the prudent parent-standard to the conduct of the school authority in the circumstances. (pp. 31-32)

...

On a balance of all the probabilities ... the absence of supervision contributed to the cause of the accident. In my opinion, it cannot be said that the presence of a teacher among six to eight students in the exercise room would not have had a restraining effect upon the students which could have influenced the course of events and prevented the accident. The respondent should have anticipated reckless behaviour from at least some of the young boys sent off by themselves to work on gymnastic equipment. The evidence revealed that it was a recurring problem to keep students from attempting gymnastic exercises without spotters and the proclivity of young boys of high school age to act recklessly in disregard, if not in actual defiance, of authority is, ... well-known. (p. 35)

⁴⁵ *Supra*, Note 6, at p. 26.

This case has been quoted extensively here for a number of reasons. First, as a decision of the Supreme Court of Canada, it is authoritative and has become the ‘law of the land.’ Second, the judgment deals with the element of risk or danger inherently or readily foreseeable in gymnastics and the duty of the school authorities in taking care of the pupil during this activity in the manner of a careful and prudent parent. It affirms that the general common law standard of *Williams v. Eady*⁴⁶ is still the appropriate standard. Third, it affirms the judicial gloss on that standard and the factors taken into consideration in other cases; namely, *McKay*⁴⁷ and *Thornton*.⁴⁸ The judge specifically refers to the factors relating to supervision and protection (equipment suitability). Fourth, it refers to other factors that should be taken into consideration by educators: increase in the variety of activities in modern times; the application of the standard of care varies from case to case; issue of contributory negligence and voluntary assumption of risk; the possible inclusion of other factors (“a host of other matters which may be widely varied but which, in any given case, may affect the application of the careful and prudent parent standard”⁴⁹ (*Myers*, 1981, p. 32) – revealing that the factors in the *Thornton*⁵⁰ case are not a code nor are they an exhaustive list of all factors); and reference to causation and the need to anticipate reckless behaviour.

Fifth, as the case progressed from trial to appeal in the provincial court (Ontario Supreme Court, Court of Appeal)⁵¹ to the appeal to the Supreme Court of Canada,⁵² two educational leadership styles were seen to emerge: one that espouses close supervision and

⁴⁶ *Supra*, Note 35, at p. 42.

⁴⁷ *Supra*, Note 37.

⁴⁸ *Supra*, Note 6.

⁴⁹ *Supra*, Note 43, at p. 32.

⁵⁰ *Supra*, Note 6.

⁵¹ *Myers et al. v. Peel County Board of Education et al.* (1978) 5 C.C.L.T. 271 (Ont. C.A.).

⁵² *Supra*, Note 43.

discipline by educators and the other that espouses the growth and acceptance of personal responsibility on the part of students with less discipline being required by educators. As the various decisions of the judges involved indicates, this factor was taken into consideration in making their decision, although they were divided in their views on the supervision issue. This factor has important implications for educators with regard to both protection and supervision issues. Further comment on this factor will be made later.

Also, as we have seen, in addition to the common law doctrine of *in loco parentis*, there is a legislative necessity to provide a secure and safe environment and it has both a protection and a supervision component. In the Supreme Court of Canada case of *Toronto (City) Board of Education v. O.S.S.T.F., District 15*,⁵³ Justice Cory, in his reasons, stated:

Mr. Merritt [a member of the Board of Arbitration] considered the professional standards for teachers embodied in s. 264(1)(c) of the *Education Act* (formerly s. 235(1)(c)). Although he recognized that these standards establish goals rather than absolute requirements, they nonetheless reflect the fact that parents entrust their children to teachers *in loco parentis*, and require them to lead by example. (p. 501)

As may be seen from the legislation set out in detail previously in the section dealing with duty of care, there is a difference between the duties and responsibilities of teachers and principals. This was one of the factors that court considered in making its decision in the 1959 case of the *Board of Education for City of Toronto v. Higgs*⁵⁴ (*Higgs*). The Court

⁵³ *Supra*, Note 17, at p. 501.

⁵⁴ *Board of Education for City of Toronto v. Higgs* (1959), 22 D.L.R. (2d) 49, at pp. 55-6 (S.C.C.).

stated:

...The analogy between ... the duty of a school master to his pupils and that of a parent to his children ... cannot be related with the same validity to the responsibilities which rested on Mr. Macpherson as principal of the school ... (p. 55-6)

Also, voluntary standards have become important indicators of the standard that is expected of educators. For example, in 1996 five organizations – the Ontario School Boards' Insurance Exchange, Ontario Physical and Health Education Association, Canadian Intramural Recreation Association, Ontario Federation of School Athletic Organizations, and Ontario Association for the Supervision of Physical Health Education – gathered to discuss safety issues surrounding sports in Ontario. They formed an Advisory Committee to develop a new set of guidelines for physical education and sports. The *Physical Education Ontario Safety Guidelines* were completed in March of 1999 and are based on the theory of risk management. The Guideline outlines three categories of supervision: constant visual, on-site, and in the area. The category of supervision required depends on the circumstances of the particular case. While it is understood that guidelines do not have the force of law, they represent a standard that a competent lawyer will bring to the court's attention. As noted by Carwana and Hutchison (2001) in *Risk Management in Canadian Education*, the courts have been delivering some very harsh messages to school boards recently with the result that guidelines and standards are often regarded by the courts as minimum levels of conduct.

The *Portelance v. Board of Trustees of Roman Catholic Separate School for Section No. 5 in Township of Grantham*⁵⁵ case (*Portelance*, 1962) involves the necessity to provide a secure and safe environment and, therefore, has both a protection and a supervision component. In that case, two 12-year old students who during the noon hour break chased another student into a dense brush area adjacent to the school playground that was owned by the board. As a result, both the boys were blinded after being struck in the eye by the sharp thorny branches of the hawthorn trees. In his reasons for judgment, the judge (p. 340) referred to a decision of the Ontario Court of Appeal in the 1960 case of *Durham et al. v. North Oxford Public School Bd.*⁵⁶ where the Court reviewed the standard of care “owing by a school authority to the pupil of an elementary school who enter upon and enjoy the use of the school premises as of right” (p. 716). The Court stated that “their duty was to use reasonable care to prevent damage from unusual dangers of which it knew or ought to have known” (p. 716). Also, in the *Portelance*⁵⁷ case, the judge defined what is meant by an unusual danger:

An unusual danger has been held to mean one which is unusual from the point of view of the particular invitee [student concerned].

...

The evidence clearly establishes that at the commencement of the fall term the pupils were told by their class teachers acting under instructions of the principal ... that they were to play in the cleared playing area ... [and not] ... to play in the ‘scrub area,’ not because it

⁵⁵ *Portelance v. Board of Trustees of Roman Catholic Separate School for Section No. 5 in Township of Grantham / Milkovich et al. v. Board of Trustees of Roman Catholic Separate School for Section No. 5 in Township of Grantham* (1962) 32 D.L.R. (2d) 337, at p. 340 (Ont.C.A.).

⁵⁶ *Durham et al. v. North Oxford Public School Bd.*, (1960) 23 D.L.R. (2d) 711, at p. 716.

was dangerous but because he [the principal] considered it was a
'dirty, muddy area.' (pp. 342-43)

...

... it has not been shown that such alleged inadequacy (of
supervision) was a cause of the injury in the sense that more complete
and adequate supervision would have prevented the unfortunate
mishap. (p. 346)

...

There was a teacher appointed to the task of supervising the thirty or
forty pupils in attendance during the noon lunch period and in the
view of the court the degree of supervision provided in the particular
circumstances did not fall below a reasonable and acceptable
standard. (p. 347)

...

Applying the careful parent test to the present case I am wholly
unconvinced that a reasonable and prudent parent would have
considered it his duty to have ordered these boys to desist from
participating in the game of Blacksmith [tag] at the time and place in
question. (p. 347)

The case raises several important factors that educators should be aware of: standard to
be exercised by a school board for the protection and supervision of students, perception of
danger by reference to a particular student as opposed to students in general, significance of a

⁵⁷ *Supra*, Note 55, at pp. 342-43, 346-47.

warning in regards to an unusual danger (not to play in the area of the hawthorn trees), reference to the level of supervision in the circumstances (adequacy/inadequacy), whether injury would have resulted regardless of the level of supervision, the level of supervision juxtaposed with the issue of causation of the injury, and the use of the “reasonable and prudent parent” test in relation to the standard expected.

The case of *Ramsden v. Hamilton Board of Education*⁵⁸ involved an action arising out of the negligent use of a chisel by a sixteen year old student who was being instructed in manual training in the presence of the teacher. The chisel came in contact with a sanding wheel and became lodged in the thigh of the student. As a result, the student’s leg had to be amputated below the knee. In his reasons for judgement, the judge stated:

It is to be hoped that, in all other institutions, at least where tools or machines are used by boys of ‘teen age, teachers and supervisors will be trained in the science of first aid, as efficiently as were these two teachers. (p. 774)

This 1942 case raises important factors that were considered by the court in arriving at its decision; that is, the age of the students and the training of the teachers in relation to the activity. There is the question in this case of what impact a lack of training on the part of the teachers would have on the reasoning of the Court today in similar circumstances, given the nature of the activity and its inherent danger and the later Supreme Court of Canada decision in the *Myers*⁵⁹ case.

⁵⁸ *Ramsden v. Hamilton Board of Education* (1942) 1 D.L.R. 770, at p. 774 (Ont. H.Ct.).

⁵⁹ *Supra*, Note 43.

Finally, the two cases of *Higgs*⁶⁰ and *Portelance*⁶¹ are helpful in answering the question of whether children should ever be left unattended and without supervision. In the 1959 *Higgs*⁶² case, the student Higgs was injured by another boy during a recess period when he was picked up from behind and dropped on the ice – Higgs brought an action in negligence. The Court considered the cause of the injury to be an accident. The Court stated:

I do not suggest that it is the duty of a school teacher or a supervisor to keep pupils under supervision during every moment while they are in attendance at school. Nor do I suggest that the duty of supervision should be measured or determined by the happening of an extraordinary accident. It has been said that the duty is to take such care as a careful father would take in the particular circumstances. He must guard the pupils against danger that could reasonably be foreseen. (p. 55)

In the *Portelance*⁶³ case, the Court stated:

... there is not an absolute duty never to leave children without supervision.

...

It is not the duty of teachers to keep pupils under supervision every moment of their attendance at school” (p. 346)

...

⁶⁰ *Supra*, Note 54, at p. 55.

⁶¹ *Supra*, Note 55, at pp. 344, 346.

⁶² *Supra*, Note 54.

⁶³ *Supra*, Note 55, at pp. 344, 346.

[but merely] to take such care as a careful father [parent] would take in the particular circumstances. He must guard the pupils against danger that could reasonably be foreseen ... (p. 344)

The Court concluded that the school board was not in breach of its duty because of a failure to remove the bush or to erect a fence around it.

The occurrences [injuries] were of 'the purest misadventure, and of such an extraordinary and exceptional character that they could not reasonably have been foreseen by anyone.' (p. 346)

The two cases are essentially in agreement that, in general, the duty of a teacher does not require the teacher to keep students under constant supervision. The Court in both cases also made some interesting comments concerning another factor that is important for teachers to note. Those comments relate to alleged breaches of supervision in circumstances of an extraordinary nature and indicate that the level of supervision is not to be measured or determined by the happening of an extraordinary event that could not reasonably have been foreseen.

Finally, in the *Higgs*⁶⁴ case, the Court made note of three other factors that are of value to educators. First, he alluded to the fact that in some circumstances the event might have occurred regardless of whether there had been supervision.

It is not shown that this accident might not have happened whether they had been there or not. It was the sort of accident which might have happened suddenly and unexpectedly and be all over before anyone could intervene. (p. 58)

This reference to the necessity for a cause and effect relationship is discussed further under the section dealing with causation. Second, he stated that:

The duty of supervision which a school authority owes to its pupils while they are at play must of necessity vary from school to school and even from day to day, and it is, therefore, not possible to elicit from the decided cases any guiding principle for the exact measurement of the degree of care to which any particular set of circumstances may give rise. (p. 55)

This is in agreement with previous comments concerning attempts to measure or determine with mathematical precision the level of risk or supervision required in light of the risk; a general principle that would cover every case with such precision is not possible.

And, third, it is interesting to note the Court's comment concerning the knowledge known to the teachers of the boy who injured Higgs:

He was known to the school authorities to be a boy who indulged in rough play. He had been warned and disciplined for his behaviour on more than one occasion in the past ... (p. 51)

This factor is of significance in relation to those cases that have found liability on the basis that the educator knew or ought to have known of (and ought to have made allowances for) the propensity of children to act in a foolish or reckless manner.

Another significant factor of which educators should be aware is that evidence of established practice or custom may be presented for the purpose of rebutting allegations of negligence. However, in order to establish such established practice or custom, it must have

⁶⁴ *Supra*, Note 54, at pp. 51, 55, 58.

been a practice or custom over a long period of years. Evidence of such established practice or custom tends to show what others in the same business (such as other educators, other schools or other boards) considered sufficient and, therefore, that the defendant could not have learned how to avoid the accident by the example of others. At the same time, evidence of established practice or custom will not always 'win the day,' since no amount of repetition of a careless practice will make it any less careless; "neglect of duty does not cease by repetition to be neglect of duty" (*Bank of Montreal v. Dominion Guarantee Co.*),⁶⁵ "for in the last analysis the standard of reasonable care is measured by what *ought* ordinarily to be done rather than what *ordinarily is done*" (Fleming, 1977, p. 118). Finally, just as compliance with established practice or custom is not conclusive of due care, so too deviation from established practice or custom is not conclusive of negligence. For educators, the ultimate test is whether they have met the careful and prudent parent test and provided reasonable care for the safety of children under their care in all the circumstances of the case.

In the *Portelance*⁶⁶ case, the fact that the principal had put in place a system of school yard supervision and that that the system had been functioning satisfactorily over a period of years was commented on favourably by the Court:

The system of supervision in effect at the school had operated satisfactorily for 5 years and there was nothing to suggest to the principal that it did not constitute a reasonable and safe system. (p. 346)

⁶⁵ *Bank of Montreal v. Dominion Guarantee Co.* [1930] A.C. 659, at p. 666.

⁶⁶ *Supra*, Note 55, at p. 346.

Also, in dealing with 'standard practice,' the Court in the 1952 case of *Wright v. Cheshire County Council*⁶⁷ stated:

Where you have as a fact a system in general use which has been adopted and followed with perfect safety until the particular accident 'it is a very strong thing indeed to say that the authorities were negligent.' (p. 795)

However, compliance with custom or general practice is not conclusive of due care. It is only one of the factors to be taken into account in deciding whether an act or omission was negligent. If there is evidence that clearly shows the custom or general practice to be a bad custom or general practice, then such custom or general practice cannot be a defence. Similarly, in the *Higgs*⁶⁸ case, the Court stated:

It is really the "system" employed by Mr. Macpherson for supervising the break period which is in question and it is a factor to be considered, although not a conclusive one, that exactly the same number of teachers had been actioned in the same area of the same playground in both winter and summer ever since Mr. Macpherson came to the school in 1952. (p. 56)

...

On the face of it there does not appear to be anything unreasonable about the system which was employed ... it can ... be taken that Mr. Macpherson had no reason to believe that the four teachers allocated

⁶⁷ *Wright v. Cheshire County Council*, [1952] 2 All E.R. 789, at p. 795.

⁶⁸ *Supra*, Note 54, at pp. 56-7.

to the various playgrounds by him constituted anything less than a reasonably safe system of supervision having regard to the number and ages of the children ... unless there existed on the day in question any unusual circumstances which made it reasonably foreseeable that a greater number of teachers would be required. (p. 56-57)

Essentially, the courts are saying that the development and implementation of a system for dealing with supervision in respect of risk issues will serve to provide evidence of due diligence. However, the system need only be such as to ensure that reasonable care was taken for the safety of the student. In the 1956 case of *Dyer (Otherwise Venables) et al. v. Board of School Commissioners of Halifax*),⁶⁹ a case involving the throwing of acorns in the school yard, the Court referred to the judge's words in *Wright v. Cheshire County Council*⁷⁰ where it was stated that the

defendant's servant was under an obligation ... to adopt those standards that would be ... adopted by a *reasonably careful parent*. That does not involve that the adopted system would have to be such that in no foreseeable circumstance or situation could there be any possible or conceivable contingency or slight mishap. If that were so, the activities of the young would be unduly circumscribed and only inactivity and inanition could be planned. (p. 796)

⁶⁹ *Dyer (Otherwise Venables) et al. v. Board of School Commissioners of Halifax* (1956), 2 D.L.R. (2d) 394 (N.S.S.C.).

⁷⁰ *Supra*, Note 67, at p. 796.

The Court also referred to the case of *Rich v. London County Council*⁷¹ where the judge stated:

It is true that there is a propensity in children to throw things ... It cannot be said that it is the duty of a reasonable, careful, and solicitous parent to endeavour to put a child into a strait jacket ... always provided that reasonable, proper, and adequate supervision over the child is exercised. (p. 382)

Finally, it should be noted that an error in judgment does not amount to negligence. In law, an error in judgment is not considered in the same light as negligent conduct resulting from carelessness, lack of skill or knowledge. The fact that an injury has occurred is not definitive that an act of negligence has occurred. Much depends on the standard of care requirement in the circumstances. As is the case for parents, an educator is not held liable for an honest error of judgment. To paraphrase Wright and Linden (1975), the practice of teaching is not an exact science and an educator is not an insurer and should not be made one. If every educator were held to the standard of that of guarantor, risk aversion would surely be the result with a consequent loss of educational benefits. Ultimately, the test for whether the conduct of an educator amounts to negligence depends on whether, in the particular circumstances of the case, the harm was caused by a lack of reasonable care for the safety of the children under their care. The case will be decided on the merits, each case being different and depending on its own particular circumstances.

⁷¹ *Rich v. London County Council*, [1952] 2 All E.R. 380, at p. 382.

2.5.4 Damage and causation in relation to the damage

In order for conduct to attract negligent liability, the person who has alleged the negligence must have suffered injury that is recognized in law as being worthy of compensation in damages. Furthermore, in order to establish negligence, a causal relationship between the breach of the standard of care and the harm must be established. The law requires a cause and effect relationship to be established: there must be a reasonable connection between the harm threatened and the harm done. In describing the causal relationship, the courts have often used what is referred to as the “but-for” test – the harm would not have happened but for the conduct. This factor was alluded to in the *Higgs*⁷² case - if the harm would have happened in any event, the causal connection between the conduct and the harm threatened may be said to be broken and the necessary element of causality might not be established.

Also, the causal relationship must not be too remote - it is said that the cause must be proximate, without which cause the event giving rise to the effect would not have occurred. The example of a pebble dropped in a stream illustrates by analogy that not all effects (injury) however small or remote is afforded the protection of the law. The law, as a matter of public policy and common sense, arbitrarily draws a cut-off point beyond which the effects of an event or series of events is deemed to end. Causality was an issue in the case of *Moddejonge v. Huron (County) Board of Education*⁷³ (*Moddejonge*). In that case two students, 14-year-old girls on a school excursion, drowned in a shallow lake when a breeze came up causing a

⁷² *Supra*, Note 54.

⁷³ *Moddejonge v. Huron (County) Board of Education* [1972] 2 O.R. 437, at p. 444, 25 D.L.R. (3d) 661 (Ont.

surface current which carried the students towards a sudden and fairly steep drop-off. One of the students could not swim and the other student swam out in an attempt to rescue a child and in the process both were drowned. The teacher on duty who was in charge of supervision was aware of the danger and had warned the students of it. The teacher could not swim and no lifeguard was on duty. The Court held that the teacher was responsible not only for the initial drowning but also for the drowning of the second student who might have survived 'but-for' her attempt to rescue the first victim. The Court found that the necessary causal relationship was established.

The initial act that set the events in motion was the negligence of the defendant. One of the links of causation was that someone might thereby be exposed to danger and that someone else might react to the impulse to rescue. (p. 444)

2.5.5 Vicarious liability

Vicarious liability is incident to a 'master-servant' or 'employer-employee' relationship and, in the normal course, teachers who are under contract with the board of education are considered to be employees of their employer, the board of education. Therefore, even though the board of education itself has not breached the duty of care owed to a student, the board will nonetheless be held liable for the misconduct of its educators (as employees of the board) where their conduct results in a breach of the standard of care. Generally, as long as an educator acts within the scope of his or her duties, the board will be liable to a cause of

S.C.).

action in negligence involving the actions of its educators. In the case of *Moddejonge*⁷⁴ case where the Court observed that the defendant “was acting within the scope of his employment. It follows that the defendant Board is also liable” (p. 444).

What is meant by the expression “scope of his or her duties or employment” is aptly described by the oft repeated phrase, “a servant steps outside the scope of his employment when “going on a frolic of his own” (*Joel v. Morison*,⁷⁵ 1834, p. 503). However, a factor of which educators should be aware is the corollary to this decision - if an educator does step outside the scope of his or her duties, it may follow that the educator and not the board may be held liable for the negligent conduct.

2.5.6 Defences – contributory negligence and voluntary assumption of risk

In order for a cause of action in negligence to succeed and attract liability, the court must be satisfied on a balance of probabilities that the questions relating to the first five steps described previously (duty of care, standard of care, breach of standard of care, causation, damage) have been proven by the person who has been harmed. In regards to the sixth step listed, Wright and Linden (1975) have stated that, in order for a person who has been harmed to succeed in a claim for damages, the conduct of the person harmed should not be such as to bar his recovery - that is he must not be guilty of contributory negligence and he must not voluntarily assume the risk. However, the person who has been harmed and has initiated the action (the plaintiff) is not required to disprove a claim that he has contributed to his or her

⁷⁴ *Ibid.*, at p. 444.

own harm or that he or she consented to it. Rather, the burden of proof continues to fall to the person who is defending the action to prove on a balance of probabilities that the person harmed has in some manner and degree been the 'author of his own misfortune,' so to speak, or has voluntarily assumed the risk.

At this point, discussion of the defences of contributory negligence and voluntary assumption of risk returns to the two educational leadership styles that are involved in the *Myers* case. As noted previously, as the *Myers*⁷⁶ case progressed from trial to appeal in the provincial court (Ontario Supreme Court, Court of Appeal) to appeal in the Supreme Court of Canada, two educational leadership styles were seen to emerge: one that espouses close supervision and discipline by educators and the other that espouses the growth and acceptance of personal responsibility on the part of students with less discipline being required by educators. That both teacher and student have responsibilities in respect of protection is demonstrated in the *Thornton*⁷⁷ case where the judge stated:

This is not to say that Thornton exclusively assumed the risk of the exercise to the absolution of the school authorities or that the school authorities were relieved of their common law duty to take care of this pupil during this activity in the manner of a reasonable and careful parent, ... Nor does it mean that the school authorities would be strictly or absolutely liable for any consequential injury however occurring to any pupil in respect of whom the school authorities had accepted the responsibility of care and control, ... (p. 57)

⁷⁵ *Joel v. Morison*, (1834) 6 C. & P. 501, at p. 503.

⁷⁶ *Supra*, Note 43.

As the various decisions of the judges involved indicates, this factor was taken into consideration in making their decision and they were divided in their views on this issue. In the Ontario Court of Appeal, the decision showed that, while a teacher is responsible for the protection and supervision of students, the teacher is under no legal obligation to maintain constant supervision and, furthermore, students too have personal responsibility to ensure their own safety. The Supreme Court of Canada agreed with the trial judge and the dissenting judge in the Court of Appeal and took the more conservative, cautious and protective approach – a careful and prudent parent would not have allowed his son to be involved in the activity in question without adult supervision, and the teacher should have anticipated the reckless behaviour.

Contributory negligence

Every person can be said to owe a duty to themselves - to take reasonable care to do what is necessary for their own safety. In determining the standard that is required to fulfil this duty, a person is required to conform to the same standard as the person who has allegedly caused the harm. That standard is that of the reasonable and prudent ordinary man – ‘the reasonable man’, our mythical, fictitious straw man of the law. Negligence is contributory in the sense that both parties, plaintiff and defendant, are to some degree legally responsible for the harm – the defendant has breached the duty of care owed to the plaintiff while the plaintiff has failed to meet the standard of care required for his own protection.

⁷⁷ *Supra*, Note 6, at p. 57.

However, in those cases involving educators and students, the educator in undertaking an activity is required to take into consideration the “careful and prudent parent” test and a subjective standard relating to the mental and emotional characteristics of the child; that is, age, intelligence and experience (*McEllistum v. Etches*,⁷⁸ 1956). Similarly, in making a determination regarding contributory negligence on the part of a child, the court applies that same subjective standard. This means that, in the case of a child, the standard is the same whether the child is acting as plaintiff or defendant. Being a subjective test means that only the mental and emotional characteristics of the particular child in the context of the circumstances under scrutiny are considered by the court as opposed to what a reasonable child of that particular age could reasonably be expected to do and to foresee under those particular circumstances. This standard for a child governs and makes allowance for such matters as the child’s capacity to perceive the risk; his or her sense of judgment and behaviour; the varied rate of development in the child’s intelligence and learning; and the opportunities or lack of them he or she might have had to become aware of the particular risk or duty of care. Also, as we have seen, when the educational activity involved is that of physical education, the Supreme Court of Canada has added a modification (a gloss) to the careful and prudent parent test; namely, the teacher must take into account “the judicial modification of the reasonable-and-careful-parent test to allow for the larger-than-family size of the physical education class and the supraparental expertise commanded of a gymnastics instructor” and the other factors that were considered by the Supreme Court of Canada in the *Thornton*⁷⁹ case.

⁷⁸ *McEllistum v. Etches*, [1956] S.C.R. 787, at p. 793.

⁷⁹ *Supra*, Note 6.

In the *Portelance*⁸⁰ case, the need for students to accept personal responsibility for their actions in certain circumstances was contained in the statements of the judge in his reasons for judgment:

They were both [the students] thoroughly familiar with the premises,
... It should have been perfectly obvious to boys of their age and
experience that if they ran heedlessly through such a thicket they
might sustain an injury of some kind. There was nothing uncommon
about it [the situation]. (p. 343)

The Court was not prepared to hold that the hawthorn trees and their thorny branches constituted an unusual danger. Finally, the law recognizes that reliance by an educator on the expectation that others will act reasonably to protect their safety is valid only as long as there is no pre-existing knowledge or experience (foreseeability) that the child is likely to conduct himself or herself in a reckless or foolish manner. This was the basis for the finding of liability in the *Williams v. Eady*⁸¹ case where the bottle attracted the interest of the boys and Lord Esher stated:

Schoolmaster ... then ... bound to take notice of the ordinary nature
of young boys, their tendency to do mischievous acts, and their
propensity to meddle with anything that came their way. (p. 42)

Therefore, an educator must take different precautions in those cases where he or she has or ought to have knowledge or experience that a particular child is capable of or may potentially act in a particular way in relation to an activity involving risk. The popular phrases ‘once

⁸⁰ *Supra*, Note 55, at p. 343.

⁸¹ *Supra*, Note 35, at p. 42.

warned, twice shy' or 'fool me once shame on you, fool me twice shame on me' aptly describe the reaction that a court would reasonably expect of an educator. However, not every activity involving injury to young children will result in an award of damages – each case will depend on the circumstances. For example, in the 1949 case of *Ware's Taxi Ltd. v. Gilliham*,⁸² a five year old being transported by taxi played with the locking device for the door and caused the door to open. The child fell out of the taxi. Justice Rand (in dissent) agreed that children due to their nature may get themselves into trouble, even while they are under the supervision of an adult. However, in the circumstances of the case, he was not prepared to award damages.

But the most assiduous surveillance is not absolute insurance against impulse or perversity. There is always an irreducible margin. With insignificant exceptions, children are sufficiently within control by what was furnished here [a taxi] just as they are within their own home, and no other accident of this nature, so far as known, had ever before happened ... (p. 645)

In the *Myers*⁸³ case, the Supreme Court of Canada affirmed that “the apportionment of fault is primarily and properly a matter within the discretion of the trial judge” (p. 38) and, therefore, restored the judgment at trial which apportioned the damages as 80 percent on the part of the school board and 20 percent on the part of the student.

⁸² *Ware's Taxi Ltd. v. Gilliham* [1949] S.C.R. 637, at p. 645.

⁸³ *Supra*, Note 43, at p. 38.

Voluntary assumption of risk

The maxim “*volenti non fit injuria*” is one of those Latin phrases often used by lawyers which, roughly translated into English, means “voluntary assumption of risk.” In terms of public policy, the defence of voluntary assumption of risk as a defence to an action in negligence rests on the notion that “no wrong is done to one who consents.” However, even with consent, there are still rules that must be followed. A person who consents to a fist fight is not consenting to a knife fight. As Canadians, we well understand the underlying philosophy of this expression – while physical contact in hockey is considered a normal part of the game, such contact is subject to written rules and to a lesser degree unwritten rules based on custom. Often, the distinction between the interest in freedom of action and the interest in security is one of degree.

The issues relating to voluntary assumption of risk in the context of education most often arise in relation to activities relating to sports within or outside the school or to other activities such as hiking, skiing or cultural visits that take place outside the school. In these cases, as a general rule, educators are required to send consent forms to parents and signed consent forms are required to be returned before a student will be allowed to participate in the activity. In addition to a consent form, some schools have included a waiver of liability form that is intended to save harmless the educator and the board from liability in the event of injury to the student by whatever means. And, as society has become more litigious and knowledgeable of their rights, this has become even more important. However, the courts

have been very chary to accept such waivers. There is some debate as to whether parents can in law sign away the rights of their children.

A waiver unlike a consent form is intended in effect to say despite any negligence that may occur as a result of my actions I am to be saved harmless from liability. Evidence of this and the reasons for it are found in the case of *Stevens v. Howitt*.⁸⁴ Although in that case an infant (not in an education context) was injured and the insurance adjuster obtained a release and indemnity agreement from a parent (a waiver), the principles may similarly be applied in an educational context; for example, a school excursion organized by a teacher. In the *Stevens* case, the Court stated:

Notwithstanding that there was no misrepresentation or fraud on the part of the adjuster, in my opinion his experience and knowledge makes it incumbent upon him to take care to explain the nature and contents of the document which he is requesting persons who are inexperienced and ignorant in the area of insurance and indemnity law to sign. In my opinion, there is a very heavy responsibility in these circumstances upon the representative of the insurance company when dealing with unknowledgeable parties to see to it that the terms of the agreement itself and their ramifications are clearly understood.

I would also refuse to give effect to the agreement on general principles. If the document is allowed to stand then it could be argued

that an infant's potential cause of action has effectively been destroyed. In most cases the parent is the next friend. There is always the possibility that facing the threat of indemnification the parent will not initiate the action, thereby precluding the infant from securing recovery for his injuries. Settlements of this type are, in my opinion, so contrary to the procedures set up in our Courts for the protection of infants that the document should be held to be unenforceable. (p. 52)

From the perspective of protection, it should be noted that the duty that is owed to provide a secure and safe environment is not absolute and a warning of an unusual danger may provide a defence to a negligence action. In the 1998 case of *Tenute v. Carleton Roman Catholic Separate School Board*,⁸⁵ a student fell and broke her ankle while leaving a volley ball tournament at school. The principal warned everyone to be careful while leaving the premises. They were also told to stay on the cleared sidewalk as they were leaving the school and they should be careful because it was icy outside. The student, in a hurry, apparently ignored the warning to be careful and stay on the cleared sidewalk. She ran and took a short cut across the corner of the school property. In its reasons for judgment, the Court stated:

An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises. The duty owed by occupiers 'is not absolute, and occupiers are not insurers liable for

⁸⁴ *Stevens v. Howitt* ([1969] 1 O.R. 761, 4 D.L.R. (3d) 50 (Ont. S.C.)).

⁸⁵ *Tenute v. Carleton Roman Catholic Separate School Board*. Unreported case: Court File No. 102143/96,

any damages suffered by persons entering their premises. Their responsibility is only to take 'such care as in all the circumstances of the case is reasonable.' ... Occupiers are also not liable in cases where the risk of injury is 'willingly assumed' by persons entering the premises or to the extent that such persons are negligent. It is a valid defence if an occupier has clearly and sufficiently warned the invitee of the existence of an unusual danger. (par. 9-11)

Again, in this case, the Court took into consideration the fact that a warning of an unusual danger had been given.

2.6 Conceptual framework

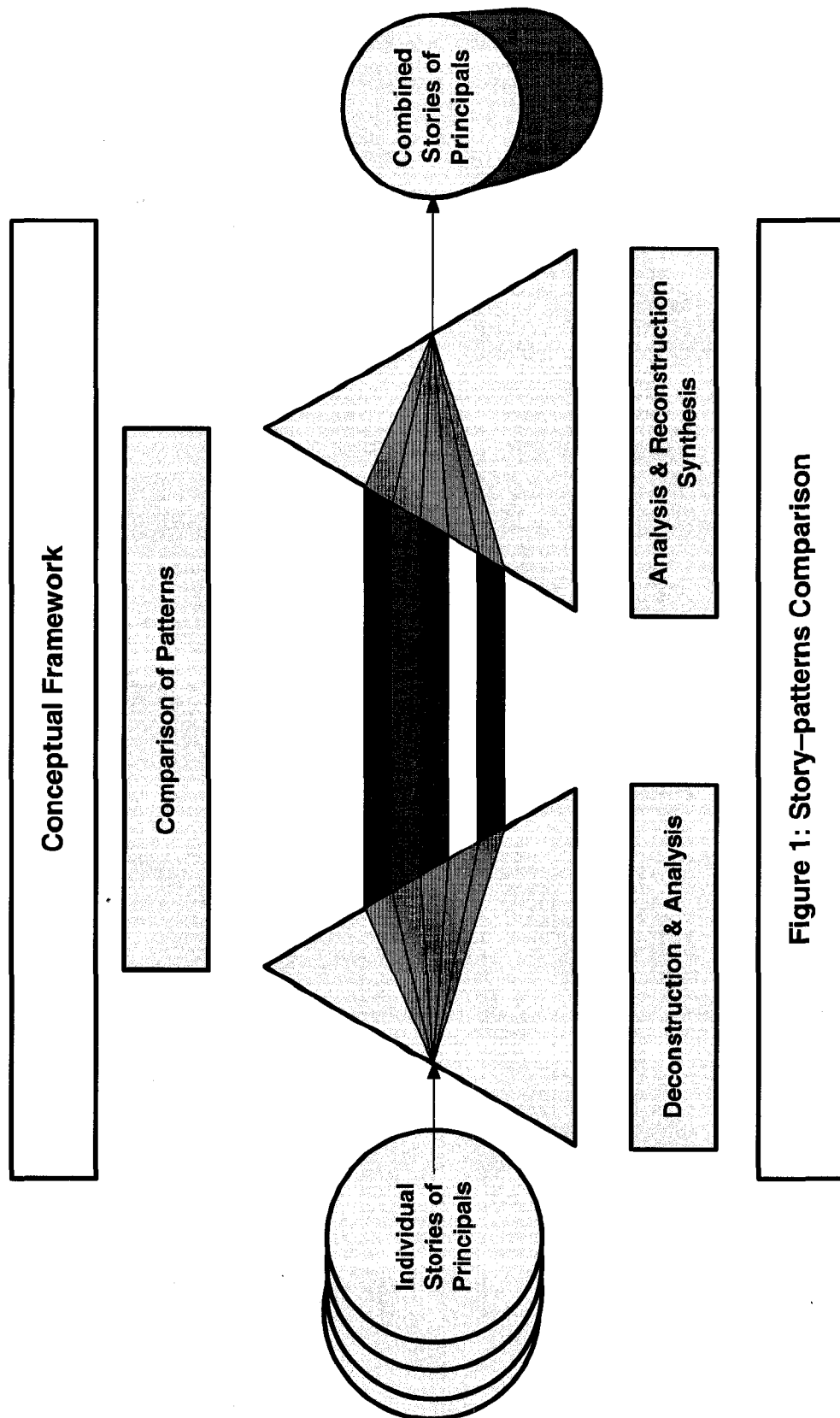
This study is multidisciplinary and consists of three disciplinary components: education and decision-making theory, risk and risk management, and case law and legal precedent. Figures 1 and 2 provide a graphic representation of the conceptual framework for this study.

Visible light may be thought of as being a beam of light that can be split into its constituent parts by passing it through a prism, resulting in the familiar patterns of light that form a rainbow. In this study, the story of each principal involving risk issues may be thought of as a beam of light (a collection of light waves running parallel to each other having different wave lengths and frequencies). This beam of light may be passed through a "prism of analysis" to discover the beam's constituent parts. The individual stories of the principals, once deconstructed into their constituent parts (Marshall and Rossman, 1989),

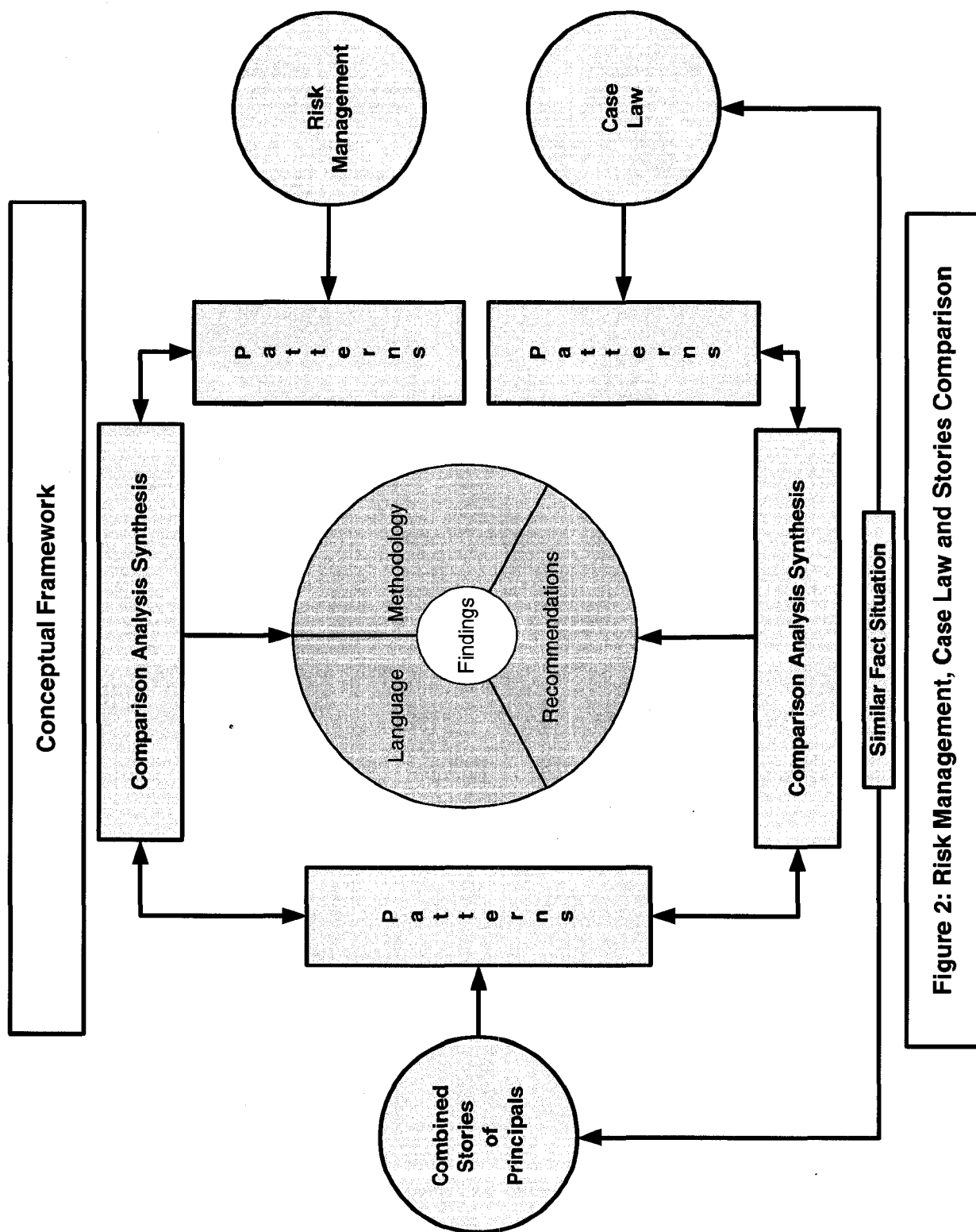
[1998] O.J. No. 862, par. 9-13 (Ont. C.J., Gen. Div.).

will provide “story-patterns” or categories about the decision-making process of the educators in much the same way as the visible light, once split into its constituent parts, forms patterns of light (See Conceptual Framework Diagram 1).

Subsequently, the individual stories of the principals may be reconstructed in much the same way as the light patterns of the rainbow may be recombined by passing them through a second “prism of analysis” (See Conceptual Framework Diagram 2). The individual stories, once reconstructed and collectively analysed and synthesized, will allow the identification of patterns common to the combined stories of the principals. These emerging patterns may be compared to the patterns embedded within risk management and case law. It was expected that the process of investigating and examining the story-patterns by comparing them to the patterns embedded within the risk management process and the case law would provide insight into the decision-making of educators concerning risk issues. As Tesch (1990) has stated, “while much work in the analysis process consists of ‘taking apart’ (for instance, into smaller pieces), the final goal is the emergence of a larger, consolidated picture” (p. 97).



Source: Robert E. Tourangeau, 2008



Source: Robert E. Tourangeau, 2008

2.7 Specific research questions

All decision-making inherently involves some degree of risk in that there is some degree of uncertainty associated with decision outcomes (Pablo, Sitkin & Jemison, 1996). In order to understand the decisions involving risk that are made by an individual or a group of individuals, the process of how the individual or group of individuals arrives at any particular decision is fundamental in developing theory on decision-making (Robertson, 1980).

This study examined two specific research questions:

1. What are the steps that educators take in making decisions about risk issues?
2. What factors do educators take into consideration in making decisions about risk issues?

2.8 Synthesis

The literature review begins by establishing the nature of the study as being multidisciplinary and consisting of three disciplinary components: education and decision-making theory, risk and risk management, and case law and legal precedent. The chapter reviews the literature for each of the components. In the case of education and decision-making, the literature review points out that in order to understand the decisions involving risk made by an individual or group of individuals, the process of how the individual or group of individuals arrives at any particular decision is fundamental in developing theory on decision-making. In this regard, the literature review refers to the work of Simon

(programmed decisions and non-programmed decisions); Shubik, 1958 (the interplay of different approaches to decision-making); Reyna, 2004 (fuzzy-trace theory); Hodgkinson, Langan-Fox and Sadler-Smith, 2008 (dual-process theories of cognition and the two basic systems of information processing – ‘rational, analytical (reflective) or rule based’ and ‘experiential, intuitive (reflexive) or associative’). The review goes on to link these research works to the law and risk management by reference to the work of Waye, 2002 (reference to the story-model and the atomistic model approaches to decision-making).

In the case of risk and risk management, the literature review provides greater detail concerning the definition of risk, risk management and risk perception by reference to the works of Hill and Dinsdale, 2001; Leiss and Hradey, 2005; Starr, 1969; Reid, 2000; and Head and Horn, 1997. The literature review refers to a variety of risk management models and explains why the Q850 standard was chosen for the purposes of the study and provides an outline of that standard’s six steps and associated matters (referred to as factors in this study) in Appendix 2. Finally, in order to place risk and risk management in context, the review provides commentary concerning the so-called ‘zero risk’ option, risk avoidance and risk aversion, and the precautionary approach in the context of zero risk and zero tolerance.

In the case of case law and legal precedent, the literature review provides an explanation of the history and purpose of legal precedent and of tort law. More particularly, the literature review sets out the meaning of negligence in relation to conduct and negligence as a cause of action. The six steps (elements) of a common law cause of action in negligence are reviewed together with the factors taken into account by and identified in the decisions of judges in the case law and legislation (Ontario legislation taken as being representative of

legislation in common law jurisdictions). Inasmuch as each case may be thought of as being a 'legal story' (Bruner, 2002), this part of the literature review links once again the use of narrative with that of the law.

Finally, the chapter sets out the conceptual framework in the form of both text and figures which serves as a bridge between the concepts relating to the use of narrative, risk and risk management, and the law and the methodology of the study.

CHAPTER THREE

METHODOLOGY

3.1 Qualitative research paradigm

The underlying assumptions of the qualitative research paradigm that contrast with the more traditional positivist quantitative paradigm have become familiar to educational researchers through the writings of such researchers as Firestone (1987), Guba and Lincoln (1988), and McCracken (1988). And, as Borg and Gall (1989) have stated, the qualitative research paradigm has been widely adopted by educational researchers. A qualitative research paradigm was chosen for this study since such a paradigm is well-suited for a research study in which the researcher intends to investigate and gain meaning from and insight into the process of decision-making of educators about risk issues in a school setting through in-depth interviewing.

Creswell (1994) suggests several reasons for selecting a qualitative paradigm as opposed to a quantitative paradigm. Four of these reasons are: the researcher's psychological attributes are such that the researcher is comfortable with a lack of specific rules and procedures for conducting research and possesses a high tolerance for ambiguity; the training and experience of the researcher is such that the researcher possesses literary writing skills; the nature of the problem being researched requires exploratory research in which the conditions are unknown and context is important; and the audience for the study comprises individuals who are accustomed to and supportive of qualitative studies.

From a court's perspective, a qualitative research paradigm has much in common with the study of case law. The study of case law may be thought of as a deductive process in which the lawyer looks for patterns, similarities and dissimilarities of the particular case with those of decided cases. In the research stage of a lawyer's work, the lawyer becomes the primary instrument for data collection and, like the qualitative researcher, must be prepared to ask questions in order to obtain answers. This requires close interaction with the client and acceptance that decisions will evolve and patterns will emerge as the process of exploratory communication and deductive research continues. Therefore, the training, experience and psychological attributes of a lawyer are well-suited to the selection of a qualitative paradigm. Also, as a result of my experience as a teacher and lawyer, I am comfortable with the methodological assumptions of the qualitative paradigm. Another matter concerning my experience is worth noting. One of the essential requirements for a researcher is the need to ensure the anonymity of informants and, within the bounds of the law, confidentiality of communications received from them. As a lawyer, I am particularly aware of the importance of these requirements and sensitive to them.

3.2 Narrative inquiry

The underlying assumption of this study is that the process of storytelling (the creation of a story derived from lived experience) will produce rich, authentic data through interrogating, rediscovering and recording a particular view of a risk issue (Chambers, 2003). Therefore, a central concern of this study is to make connections and identify shared

understandings between the law, risk management theory and the decisions of educators revealed through storytelling.

In the preface to their book on narrative inquiry, Clandinin and Connelly (2000) explain how the experiences of others, and John Dewey in particular, have informed their work. They attribute to Dewey the belief that “examining experience is the key to education” (p. xiii). They use Dewey’s notions of continuity and interaction to provide a foundational place for their thinking about narrative inquiry. For Dewey, one criterion of experience is the temporal notion of continuity of past, present and future experiences (i.e., experiences grow out of and give rise to other experiences) (Clandinin & Connelly, 2000, p. 2 citing Dewey, 1938). Another criterion is Dewey’s notion of interaction (i.e., situation in relation to context and culture is important). Also, based on Dewey’s view that experience is both personal and social, Clandinin and Connelly (2000) have noted that social context is an important aspect that must be considered in understanding individuals and how they learn. The views of Dewey and Clandinin and Connelly are encompassed within Schein’s (1985) definition of culture: “a pattern of basic assumptions invented, discovered, or developed by a given group as it learns to cope with its problems of external adaptation and internal integration that has worked well enough to be considered valid and, therefore, to be taught to new members as the correct way to perceive, think, and feel in relation to those problems” (p. 644). It should be noted that this definition of culture has characteristics that fit well with Sullivan’s (1997) definition of common sense (referred to previously) and its connection to community standards.

For Clandinin and Connelly (2000), “life - as we come to it and as it comes to others - is filled with narrative fragments, enacted in storied moments of time and space, and reflected upon and understood in terms of narrative unities and discontinuities” (p. 17). The stories of principals (narrative fragments) can tell us much about the decisions they make. However, analysis of the stories will require more than simply transcribing the stories and searching for emerging patterns. As Robert Coles (1989) has written in reference to advice that was given to him by one of his teachers: “he urged me to be a good listener in the special way a story requires: note the manner of presentation; the development of plot, character, the addition of new dramatic sequences; the emphasis accorded to one figure or another in the recital; and the degree of enthusiasm, of coherence, the narrator gives to his or her account” (p. 23). Therefore, statements made by the participants during the interviews that took account of such matters became an important component of this study.

Bruner (1986) recognized the versatility in narrative power (storytelling) and suggested that such a mode provides access to the construction of a variety of perspectives in order to make experience comprehensible. At a later date, Bruner (2002) asked the question: “What, then, is a story?” (p. 16) and answered by stating that it comprises five features: a cast of characters with recognizable expectations; a breach in the expected state of things; efforts to cope with the breach; an outcome or resolution; and, finally, an often overlooked feature - a coda or retrospective evaluation of what it all might mean. The analysis of each story of each principal required listening in the special way referred to by Coles (1989) and then recording the reflections of each principal on what it meant to them.

Clandinin, Davies, Hogan and Kennard (1992) have demonstrated ways in which stories promote understanding and collaboration between persons. Clandinin and Connelly (2000) state that “narrative inquiry is aimed at understanding and *making meaning* of experience” (p. 80), and one of its purposes is enhancing personal and social growth. Their response to the question “Why use narrative inquiry?” is: “Because narrative inquiry is a way, the best way we believe, to think about experience” (p. 80).

Clandinin and Connelly (2000) believe that “writers and readers of narrative inquiry research texts need to muster a certain tolerance for the unease that may accompany ambiguity and the abandonment of what Dewey (1929) called *The Quest for Certainty* (1929)” (p. 154). The stories of the principals about risk issues were investigated in terms of what Clandinin and Connelly (2000) refer to as a “three-dimensional narrative inquiry space” (p. 50), a ‘Dewey type space’ consisting of personal and social aspects (interaction); past, present and future aspects (continuity); and the notion of place (situation or setting).

3.3 Participants

A purposive sample was used as the basis for selection. In this regard, I approached two principals (who were known to me) to participate as storytellers in this study, and I requested that they inform other principals of my interest in having them participate. They agreed to assist me and, as a result, four other principals agreed to participate as storytellers. Although it was not my intent, all of the participants are retired as principals (4) or vice-principals (2) within the period of time from the year 1999 to the year 2006. A source for

further study might be to conduct a study involving principals who are currently active. Of the six participants interviewed, three of them were known to me personally.

The selection of principals as participant storytellers was based on their teaching experience in the classroom and their position of being leaders within the teaching profession. These individuals had undoubtedly experienced risk issues during the course of their educational experience, and they were well-versed in respect of issues relating to the school culture that may have affected their decisions in dealing with the risk issues. In selecting principals from a number of 'three-dimensional narrative inquiry spaces' having different interactions, different continuities and different situations or settings, the possibility that an individual principal would be influenced by other principals was reduced or eliminated.

Having restricted the sample selection to a population of principals from an elementary school background, I recognize that the sample has a purposive aspect to it. This had a significant effect on the size of the sample that was used as principals represent an elite population within the teaching profession. Access and participation was limited due to the fact that there are a limited number of principals available and willing to devote the time necessary to participate in a study. Six retired principals (4) and vice-principals (2) agreed to participate in the study; a number that is acceptable for in-depth study of a complex issue involving narrative inquiry (Schwab, 1993).

The principals provided a spectrum of backgrounds that balances such characteristics as years of experience as an educator and their status at the time of the occurrence of the risk issue. The selection of the participants was made using information obtained from a form

(Principal Background Form) that the principals solicited for the study were requested to complete (Appendix 4). Some of the principals used the form as a guide and instead provided the information directly via their taped testimony.

3.4 Design and procedure

Lincoln and Guba (1985) refer to “pattern theories” as an explanation that develops during naturalistic or qualitative research (Creswell, 1994, p. 94). Neumann (1991) refers to pattern theories as containing “an interconnected set of concepts and relationships ... ” and as being “systems of ideas that inform” (p. 38). This study investigated and examined the stories of principals as a means of providing insight into the decision-making of educators concerning risk issues. The stories of the principals and the risk issues associated with those stories were analyzed and synthesized and the patterns that emerged were compared to the patterns that are embedded within the risk management process. At the same time, the rules, decisions and reasons for decision found in the case law involving fact situations similar to or of relevance to the stories of the principals were analyzed and the cases for inclusion selected. As in the case of risk management, the patterns that emerged from the analysis and synthesis of the stories of the principals were compared to the patterns and rules that emerged from the analysis and selection of the case law.

In her study, Mickle (2001) developed and applied a five-stage methodology for using the law as a tool in developing risk management policy and procedure:

Stage 1 – identification of the areas for case law analysis;

Stage 2 – finding the relevant case law;

Stage 3 – limiting the number of cases that were found and identified;

Stage 4 - analysis of the case law using QSR NUD*IST software in relation to omissions and commissions; and

Stage 5 – evaluation of recommendations for policy and procedure.

Her study demonstrates the use of a systematic method to find and use case law for the purpose of developing risk management policy and procedure recommendations from an analysis of the case law. In reference to stage four (omissions and commissions), Mickle recognized that the analysis of the case law using QSR NUD*IST was not sufficient and, as a result, the assistance of a lawyer was used and found to be beneficial. In keeping with Mickle's decision to obtain the assistance of a lawyer for the purpose of analyzing the case law, the coding experience of the researcher in this study (gained through years of study and practice as a lawyer) was used for the purpose of analysis rather than using a form of software such as QSR NUD*IST.

For the purposes of this study, Mickle's methodology was applied to cases with a Canadian educational context. The first three steps of Mickle's methodology were truncated, in part, through the use of the casebook prepared by Professor Joseph Roach (1994) of the University of Ottawa, Faculty of Law. This casebook was used for many years as the text for a course in education and the law that was taught to educators. The galleried cases were used to provide educators with an appreciation of how case law can be used to increase student safety by increasing teacher awareness of risk issues and reducing the situations that create risk and lawsuits. In effect, the casebook embodies much of the underlying general

principles of the first three stages of Mickle's methodology, if not the particular methodology – identification of the areas for case law analysis, finding the relevant case law, and limiting the number of cases that were found and identified. The case law selected from the casebook was supplemented with other cases, as appropriate, found through research of legal publications such as the Ontario Reports and Supreme Court Reports.

Also, it should be noted that the Mickle study only included cases in which there was a finding of liability, and this necessarily eliminated many cases that might otherwise have provided valuable data. Mickle acknowledges that "case law that does not result in findings of liability, large settlements or other punitive action can also inform the risk manager ..." (p. 116). Not all damage results from a negligent act (Birtwistle, 2002), and as Dowie (1990) has noted, "to assume that a bad outcome implies a bad decision is the most fundamental and widespread of fallacies" (Dowie quoted in Birtwistle, 2002, p. 232). The case law used in this study includes cases in which both liability and no liability were found. As a general rule, an educator would not be negligent if they have acted in accordance with a practice accepted as proper by a responsible body. For example, in this study, a court of law is a responsible body. The use of the risk management process by educators would go a long way to providing evidence of accepted practice; that is, that they were diligent in carrying out the duty of care that is owed to the student (referred to by lawyers as "due diligence"). What is important in making a decision is that the process for making the decision was reasoned and informed and took into account the risk issues associated with the activity.

In this study, each of the cases were selected for inclusion and analyzed by:

- first, identifying the source of the case and the law;

- second, reviewing the facts of the case (the fact situation, including the particular conduct, that gave rise to the case);
- third, identifying the issue addressed by the case;
- fourth, reviewing the law applicable to the case;
- fifth, reading the decision in the case, the reasons for the decision and the comments of the judges; and
- sixth, the preceding points of analysis were used to identify and categorize any patterns that emerge for comparison with the patterns that emerged from the stories of the principals.

This is the usual method used by lawyers in analyzing a case to assess its value to assist them in resolving a particular case.

The steps and factors embedded within risk management and the case law were used to develop the coding procedure for deconstructing the stories and reducing the transcribed interviews to patterns. The stories of the principals, once deconstructed, provided “story-patterns” or categories respecting the decision-making process of educators. Subsequently, the individual stories of the principals were reconstructed and collectively analysed and synthesized for the purpose of identifying patterns common to the stories of the principals. These emerging patterns were compared with the patterns embedded within risk management and case law. The findings from this process were then analyzed and interpreted to answer the research questions.

The following is a summary of the steps of the procedure for the collection and analysis of the data:

1. Formulation of the research questions;
2. Design and procedure selection;
3. Preparation of a checklist of prompts to be used during the interviews;
4. Submission of proposal to Ethics Committee for approval and obtaining approval;
5. Reading and signing of an informed consent form by participants;
6. Completion of the Principal Background Form by participants;
7. Recording and transcribing the stories of the principals about situations involving risk issues;
8. Obtaining feedback from the principals interviewed through review and verification of transcribed interviews by participants;
9. Deconstruction and analysis of the individual stories of the principals for the purpose of pattern identification;
10. Comparison of the patterns from the individual stories of the principals with the patterns embedded within risk management and case law;
11. Reconstruction of the stories of the principals and analysis and synthesis of the combined stories for the purpose of identification of patterns common to the stories of the principals;
12. Comparison of the patterns from the combined stories of the principals with the patterns embedded within risk management and case law;
13. Analysis and synthesis of the findings from the previous steps for the purpose of obtaining a larger consolidated picture of what steps are taken and what factors are taken into consideration by educators in making decisions involving risk issues;
14. Assignment of pseudonym and a 'visual' title for each story; and

15. Presentation of findings, analysis and discussion.

3.5 Data collection and recording

Creswell (1994) refers to data collection as involving setting boundaries for the study, collecting information, and establishing the protocols for recording information. Also, he states that, for the purposes of data collection, researchers should consider the four parameters suggested by Miles and Huberman (1984): setting, actors, events and processes. In this study, the actors are the retired principals. Each principal was interviewed and asked to tell a story about a risk issue that occurred during the course of his professional life. The event and resulting learning experience had both negative and positive aspects and provided each principal with insight into how to resolve other risk issues. For the purposes of this study, the primary focus was on risk issues involving 'non-programmed' risk decisions made by educators. The data was collected through the use of a one hour recorded face-to-face interview with each principal who accepted and who was willing to participate. Each of the participants told their story in the form of a narrative that included the five features of a story described by Bruner. Each of the interviews was conducted in the home of each of the participants and this contributed greatly to the relaxed and cordial atmosphere that was common to all of the interviews.

Each of the interviews was begun by reading aloud the following opening statement:

Thank you for agreeing to participate in this study and for completing
the principal background form. I would like you tell your story about

a risk issue with which you were involved during the course of your experience as an educator. More specifically, I would like you to tell your story about an unexpected event that occurred during the course of an educational activity in which the occurrence of the event adversely affected or might have adversely affected the health and safety of the persons who were involved in the activity. Please take your time and, when you are finished telling your story, I will follow up with some questions in order to fill in or provide more detail concerning any information that may help me understand the nature and extent of the risk issues that you experienced and how you dealt with them.

The research questions were used to guide the interview. The interview was a semi-structured interview and, in order to ensure consistency in the interview process, an interview protocol (Appendix 5) was prepared by the researcher for use during the interview. The protocol encompasses many of the steps and factors set out in the Q850 standard (Appendix 2). To ensure construct validity, this protocol was reviewed by a lawyer and a risk manager selected by me who are persons familiar with case law and risk management issues respectively. Also, the researcher during the course of the interview asked questions of the participants (based on the interview protocol) for the purposes of clarification on matters as they arose and for providing a more detailed account of the story and the risk issue involved. Often, there was no need to ask a particular question since either the answer was given without having been asked or the particular question for one story did not apply to another.

The recorded interviews were transcribed and the transcript of each interview was given to the respective principal for the purpose of reviewing the transcript and suggesting any changes that he felt were important. When requested, I discussed any changes with them and recorded our discussions for inclusion in the data. Also, four of the participants returned their copy of their transcript to me and their comments, written on the transcript, have been included in the study itself as appropriate. One of the participants did not feel the need to comment or make any changes to the transcribed interview and his copy of the interview as transcribed was left in his possession as he wished. One other participant did not return or provide me with confirmation of his review of his transcript but he did confirm his willingness to allow the use of his transcript for the study. Once the transcribed interviews were reviewed and verified as to their accuracy by the participants (save for the one participant), the interview process was complete and the analysis and synthesis of the data took place. The data (digital recording files, copies of the transcripts – originals and verified copies) are stored at a lawyer's office. I intend to maintain storage of the data for five years and then, after that time, destroy the data.

The selection of case law was based on cases involving tort law with fact situations having an education context in general and, in particular, on risk issues that developed out of the stories involving fact situations similar to or relevant with respect to the principals' stories. For example, there is much case law on such matters as duty of care, standard of care, breach of standard of care and on such risk issues as general supervision, yard supervision, classroom supervision, injury recognition, school excursions, and student protection.

3.6 Researcher and ethics

Having chosen a qualitative research paradigm, the epistemological assumption is that the researcher was the primary instrument of data collection and this required interaction between the researcher and those being researched. My personal values, education and experience with respect to teaching, risk management and the law undoubtedly played a role in what this study was about and how I proceeded with respect to such matters as the selection of participants, the selection of a qualitative paradigm in the first instance, selection of the type of design for the study, analysis of the data collected and interpretation and presentation of the findings.

My seven years of teaching experience at the elementary and secondary school levels (primary, junior, intermediate and senior qualifications), my continuing experience as a member of the Ontario College of Teachers, as a voluntary member of the Ontario Secondary School Teacher's Federation and as an Associate Member of Elementary Teachers' Federation of Ontario, and completion of the Ontario Principals' Course, Parts I and II, provided me with background on the role of the principal, school conduct, the thesis topic and the context for the study. At the same time, as I have noted previously, this personal experience may have affected the manner in which the participants interacted with me, narrated their story and responded to my questions. Also, my knowledge and experience in risk management and as a teacher, an engineer and lawyer helped shape the manner and form of reporting that was selected for this study.

Apart from my experience in education, as stated previously, one of the essential requirements for a researcher is the need to ensure the anonymity of informants and, within the bounds of the law, confidentiality of communications received from them. Undoubtedly, the principals needed reassurance respecting confidentiality of the information and anonymity, since, as principals, they are a highly visible, elite group of persons. In this regard, each participant was assigned a pseudonym. In order to ensure that ethical considerations were addressed, each principal who participated received and endorsed an informed consent form. Also, since empirical data was provided by human subjects, the proposal was submitted to and received the approval of the Social Sciences and Humanities Research Ethics Board (Appendix 6).

3.7 Synthesis

This chapter begins with the underlying assumptions behind the choice of a qualitative research paradigm for this study. These are based in large measure on the four reasons set out by Creswell (1994) and the use of narrative inquiry (Chambers, 2003; Bruner, 2002; Clandinin and Connelly, 2000; Clandinin, Davies, Hogan and Kennard, 1992; Coles, 1989; and Dewey, 1938) for the purposes of the study. The five features of Bruner (2002) were used to answer the question “What, then, is a story?” (a cast of characters with recognizable expectations, a breach in the expected state of things, efforts to cope with the breach, an outcome or resolution, and a coda or retrospective evaluation of what it all might mean). Also, the question of “Why use narrative inquiry” was answered by Clandinin and Connelly’s

(2000) statement “because narrative inquiry is a way, the best way, to think about experience.”

A purposive sample was employed as the method to select the participants with a possibility that a ‘snowball’ effect (communication between participants concerning the study and subsequently agreeing to participate) had occurred. The design and procedure of the study builds on the methodology used by Mickle (2001) supplemented by the work and methodology (casebook) of Roach (1994). The steps and factors embedded within risk management and the case law provided the coding procedure used to identify the “story-patterns” arising out of the stories of the principals that were collectively analysed and synthesized for the purpose of obtaining a larger consolidated picture of what steps were taken and what factors were taken into consideration by educators in making decisions involving risk issues. The chapter summarizes the fifteen steps of the procedure used for the collection and analysis of the data arising out of the research questions. Finally, it is noted that my presence and my personal experience as an educator and lawyer (known to the participants) may have affected the manner in which the participants interacted with the researcher, narrated their story and responded to questions.

CHAPTER FOUR

FINDINGS

This study investigated the general research question: How can risk management and the case law be used to deal with risk issues in the context of education? It examined two specific research questions:

1. What are the steps that educators take in making decisions about risk issues?
2. What factors do educators take into consideration in making decisions about risk issues?

What became apparent from the analysis of the individual stories is that each participant with 30 years or more of experience in teaching, management and administration had individually managed risk issues with success. The analysis of the individual and combined stories of the participants with over 200 years of experience provided a rich source of data for the examination of the research questions. The findings of this Chapter Four and the analysis and discussion in Chapter Five arising out of the research questions will be discussed in accordance with the themes that emerged from the analysis of the data collected from the stories.

This chapter begins with a brief summary of each of the stories related to risk issues associated with them and is followed by the findings of the study related to the specific research questions. The story summaries are not intended to outline the steps and factors relating to the specific research questions but are inserted here for the purpose of providing the reader with context - a snapshot of the facts relating to the stories before proceeding

further. The findings are addressed in the eleven subsections of section 4.2 that follow the story summaries.

4.1 Story summaries

A brief summary of the stories will serve to provide the reader with a description of the setting, the nature of the unexpected event involved in the risk issue, and the ‘principal’ characters involved. Each of the participants has been assigned a pseudonym and the case associated with their particular story has been given an explanatory title for ease of reference.

Case Number 1: The tables case - Albert’s story

The participant in this story is Albert. He is a retired, male educator with 33 years experience as a teacher and an administrator in Ontario at the elementary school level comprising 24 years as a classroom teacher, 3 years as a vice-principal, and 3 years as a principal. In terms of related experience outside of teaching, Albert described himself as being handyman, over the years.

The school involved in this story was an inner city school of approximately 300 students with grades ranging from kindergarten to grade 6, and children ranging in age from 6 to 11 years. The activity involved was lunch period and the setting up, collapsing and storage of tables for eating purposes in the gymnasium where all students gathered to eat lunch. The risk issue and its associated unexpected event concerned the possibility of injury

in the setting up and collapsing of the tables and the stability of the tables when stored; specifically, injury to a student who may be involved in assisting the caretaker. At the time in question, Albert was a principal with the board of education.

The experienced and trusted caretaker of the school brought a safety issue to the attention of the principal of the school. The students at the school (not including the kindergarten students) ate lunch together in the gymnasium and were supervised by teachers. However, before the students and teachers arrived for lunch, one of the responsibilities of the caretaker was to prepare the large area of the gymnasium for lunch. The caretaker would set up 20 tables in all for the lunch period in the gymnasium. When not in use, the tables were folded and stored in a gym equipment room alongside other equipment used by the students for gymnasium classes.

The tables were portable, large and heavy (about 300 pounds) with 12 wheels attached to the legs per table and could accommodate 16 students per table. Being large and heavy, the tables were awkward to move around, set up and collapse. The folding mechanism was complex and, once the tables were unfolded, measures had to be taken to ensure that moving parts of the table and the tables themselves were locked in place. In setting up the tables, care had to be taken that fingers were not caught in the folding mechanisms and, since the heavy tables were tippy in their folded state, that the tables did not fall over or drop on any body part. In view of the physical characteristics of the tables, the caretaker, being very safety conscious, advised the principal that he was reluctant to allow students to assist him in setting up and collapsing the tables. There was a possibility that a student could be seriously injured if they were not careful.

Another safety issue associated with the tables centred around the location inside the equipment room where the tables were stored. The caretaker pointed out to Albert that it was dangerous for students to retrieve equipment from the storage space (small room) that was located next to the tables. The tables being tippy and heavy could fall over on a student and a serious injury result. As the caretaker observed, they were a hazard just sitting there and he considered them to be dangerous and very likely that they could tip over. Therefore, the caretaker chained and locked the tables to the wall in the storage room. Albert was ultimately responsible for ensuring that the tables were set up for lunch purposes and later collapsed and stored safely but not for the procedures to accomplish those tasks and the actual carrying out of the procedures – that was the responsibility of the caretaker. In this case, having recognized the hazards and risks involved in advance, measures were taken (as discussed above and further discussed in the themes portion of this study) to prevent any unexpected event in relation to the setting up and collapsing of the tables.

Case Number 2: The windows case – Joseph’s story

The participant in this story is Joseph. He is a retired, male educator with 35 years experience as a teacher and an administrator in Ontario at the elementary school level comprising 24 years as a classroom teacher and 11 years as a vice-principal, including 7 years as a principal at summer school. He taught virtually all subjects (math, English and history) to intermediate students at various schools with grades ranging from kindergarten to grade 8. In terms of related outside experience before becoming a teacher, he had participated in an

educational summer program that provided child care (day care today) and educational assistance and enrichment. It was a good experience because there was a lot of concern with regard to the childrens' physical well-being of which Joseph had to be aware.

The school involved in this story was an inner city, multicultural school of 400 students in an area having many immigrants (from a number of different countries) with many parents, often both, being at work during the day. The school had grades ranging from kindergarten to grade 6 with about nine regular classrooms and four special education classrooms. About thirty percent of the children were special education students. The school was an old school with floor to ceiling doors and panelling (wainscotings up about five feet high). The building of stone had been built in the 1890's and was, apparently, really quite a dark and lovely old place.

The activity involved was the children returning to the classroom from recess and a student in the classroom being out of Joseph's line of sight. The risk issue and its associated unexpected event concerned the student who, while out of sight of the teacher, decided to climb out a second storey window. Three other individuals were involved in responding to the unexpected event: two other teachers with many years of experience both of whom had previously taught the student and a secretary who was described as being a capable person. The principal was out of the school at the time. At the time in question, Joseph was twenty three years of age and in his first year of teaching. He was teaching a split grade five and six class consisting of a mixed ethnic, multicultural group of 32 students ranging in age from 13 to 15 years.

On a bright, sunny school day in the spring, the children were returning to class after lunch and Joseph was engaged in a discussion with another teacher and made the mistake, as he put it, “of standing in the hall with one foot in the door.” While he was out of the classroom, the student climbed out of one of the second storey windows of the classroom. The second floor in this case though really meant two and a half floors because of the construction of the old school. After about 30 seconds of discussion with another teacher, the children in the class began making noise with some of them shouting the teacher’s name. On hearing the students, Joseph immediately entered the classroom and as he described it: “I hear the noise, I come in the door and there he is, waving to me from the outside” and, apparently, revelling in the attention that his window exit was having on his classmates.

All of the windows were open because of the warm weather. There were no screens on the windows. The yard below was all pavement. The student was standing on the horizontal piping or conduits that housed the electrical wiring on the exterior of the building and that were next to and about three to four feet below the window. At the same time, he was holding onto the vertical piping with his right hand and waving with his left hand at Joseph. This is where he was when Joseph entered the classroom. He had been “standing out there telling the kids (his classmates), quite happily, that he was going to jump.”

Neither the teacher nor his classmates were immediately aware of how he was keeping himself from falling to the pavement below but everyone was aware of just what was below. Joseph quickly realized that this particular student was one who needed to take ritalin to calm him down and he was concerned that the student had not received his usual amount of medication and that, if he fell or jumped, he would be seriously injured or killed. And, as

Joseph described it, the class was looking at the event as an extremely novel experience and was both excited and frightened by it. Joseph, after much anguish and excitement, managed to physically get a hold of the boy and pull him inside.

Case Number 3: The fire case – Gerry's story

The participant in this story is Gerry. He is a retired, male educator with 30 years of experience as a teacher and an administrator comprising 12 years as a classroom teacher (mostly at the elementary school level), 6 years as a vice-principal and 12 years as a principal. His experience includes cross-panel experience in that he was a vice-principal of continuing education for 3 years, had some responsibility supervising high schools, and was vice-principal of a high school (summer and evening programs).

The school involved in this case was a large, suburban middle school with about 700 students in grades 6 to 8 ranging in age from 11 to 14 years with about one third being new Canadians, giving the school a large multicultural character. A third of the students were from families having a high socio-economic status, a third from families having a middle class socio-economic status, and a third from families having a low socio-economic status (subsidized housing or public housing). Some of the students were of low cognitive ability and were placed in special classes. The perception and image of the school in the community was very poor, and some of the families from the higher end of the socio-economic scale were sending their children to private schools. The school had a reputation as being

somewhat out of control – there were bullying and attendance problems. The school had had 5 principals in 10 years.

The activity involved was the evacuation of the school. The risk issue and its associated unexpected event concerned a fire in the school that had been deliberately set (arson) and that caused the evacuation of the school. The suspected arsonist was a student at the school. At the time in question, Gerry was an experienced principal (6 years) who had been transferred to the school on short notice and was supported by an experienced teacher serving in his first year as a vice-principal and on his first assignment. The other teachers of the school were of varying experience.

At the very end of the school year, near the end of the 1990s, Gerry resigned and went to work for another school board. The school had a reputation of being problematic (“somewhat out of control”), and for that reason, required an experienced principal. On short notice and at the last minute at the end of June, Gerry (who had served as principal in two other schools elsewhere) was transferred to the school with no time to learn the background of the school by meeting with and becoming acquainted with the staff (teachers and support), having a briefing with the out-going principal, or by someone giving him a tour of the school itself. Compounding the situation was the fact that he had come from another board, and the vice-principal was also new to the school.

Sometime in the first week of October on a mild mid-Fall day, Gerry was required to attend a workshop accompanied by two teachers from the school’s staff. It was the first time that he had been off-site since the year began. Shortly after the session began he received a call on his cell phone. It was the vice-principal calling to advise him that there was a fire at

the school, it was not a fire drill, and the school was being evacuated. When Gerry arrived at the school, the vice-principal and the teachers had successfully evacuated the school without any injuries to staff or students. The students were in the school yard milling about but without sufficient direction from the teachers. The fire department had been alerted and had already extinguished the fire, but there was still some lingering smoke. He approached and introduced himself as the principal to a fireman and was informed that the fire had been started on purpose: it was arson. He was then directed to the site commander and was told that the fire was completely out with minimal damage. However, the children would not be allowed back into the school until fans were able to clear the smoke and air quality tests were completed. After about an hour, the staff and students returned to their classrooms but not in the area where the fire had occurred; that is, the stage behind the gym.

In the meantime, Gerry interacted with fire officials, the vice-principal and teachers, the custodian of the school and the plant superintendent for the schools in the area. He reported the situation to the area superintendent immediately as the board needed to know if there were any injuries, if buses were needed, if counsellors were needed, or if repairs were required. Also, Gerry had to make an announcement to everyone concerning the situation, talk to the students and prepare the staff as to what to say about what had happened with respect to both the school and the students. At the same time, the secretary and the vice-principal were occupied with answering the telephone and reassuring parents that the fire was out and there was minimal damage, the children were safe, there were no injuries, the children had returned to classes, everything was under control, there was no threat of

recurrence, and they did not need to come to the school to pick up their children as they would be coming home at the regular times on the bus.

Case Number 4: The caves case: Patrick's story

The participant in this story is Patrick. He is a retired, male educator with 35 years experience as a teacher and an administrator in Ontario at both the elementary and secondary school levels, comprising 14 years as an elementary classroom teacher, 2 years as a secondary classroom teacher, 5 years as a vice-principal and 14 years as a principal. He had been closely involved with a major sport at the highest level for a number of years early in his career. At the time in question, Patrick was a teacher of mathematics and geography with five years of teaching experience and the leader of the three teachers who were responsible for supervising the activity. They "were all young teachers ... maybe in our (their) late twenties" and the other two teachers were of "about the same experience" as Patrick.

The school involved in this story was an inner city elementary school of about 400 students with a reputation as being a "tough school." The activity involved was a leisurely, pleasure excursion to a national park to go swimming in the lake located in the park and to demonstrate and discuss the geographical features of the park. "One of the highlights was going to be, and was, going to the caves at the lake," a natural cave formation known locally as 'the caves.' There were approximately 30 senior students, mostly boys (grades 7 and 8 ranging in age from 12 to 13 years) who Patrick described as being "quite a tough bunch of guys, mostly guys." The risk issue and its associated unexpected event concerned two

students who, during the time they were visiting the caves, disappeared and were not noticed as missing until the caves were exited by the class.

In June (mid 1970s), Patrick, the two other teachers and the students arrived at the park and proceeded to the caves. The caves apparently had been formed by erosion caused by a stream that ran through the caves. Inside, there was a vertical drop of about 40 feet and a slope of about 20 degrees (a descent into the caves might be a total length of as much as 150 feet). The path downward alongside the stream, although not considered to be steep, was slippery and difficult to navigate due to the water on the rocks and the darkness. At the bottom of the cave, the water from the stream filled a hollowed out area that gave it the appearance of being a pool of water but was actually merely the end of the open part of the stream. The stream continued on out of the cave through the rock formation, with no head room, for a distance of about 10 to 15 feet through the rock and emerged on the other side and continued its journey down a sloping cliff face. One could tell that the stream emerged on the other side outside the cave by the light that appeared to shine through from the other side when one was standing in the cave.

The teachers and students proceeded to the caves and cautiously negotiated the descent into the cave aided by flashlights (brought by the students) and more powerful lights (brought by the teachers). Adding to the adventure, the rocks on the path used for descending to the bottom of the cave were made slippery by the water from the stream and sometimes one had to descend backwards down into the cave. After seeing and discussing the geography of the caves, 'everyone' then made their way to the entrance and exited the caves. At least that was the plan. But there was an error made between the bottom of the cave and its lip.

A brief head count on the outside revealed two particular students were missing. Patrick described them as students “who had a hard time following instructions” and “those two, of any of them in the whole group, were two that always were not following instructions.” As it turned out, they had decided to exit the cave by another route, namely by swimming underground to daylight on the other side through the ‘pool of water’ at the bottom of the cave, without knowing exactly how far they would have to swim underwater to get there. An hour or so later, the two “soak ‘n wet” boys had managed to find their way back to the road and the group. Needless to say, the teachers and Patrick in particular were quite concerned at the unexpected turn of events.

Case Number 5: The Europe case – Richard’s story

The participant involved in this story is Richard. He is a retired, male educator with 33 years of experience in elementary education as a teacher and an administrator comprising 16 years as a teacher and 17 years as a principal and vice-principal.

The school had a range of grades from kindergarten to grade 8. It was one of the largest elementary schools with the board and had about 800 students with roughly half of the students in French immersion in a very affluent area of a large city. The activity involved was an overseas exchange program involving an exchange of students between Canada and a European country where the students from each country were billeted with families of the respective schools involved. Forty-six students on the trip were grade 7 and 8 students ranging in age from 13 to 15 years. The other principal participants in this case were: a grade

7 and 8 teacher (male) who was responsible for organizing the trip; a teacher (male) who was replaced by a vice-principal of the school (female); and a teacher who enjoyed the travel and experience who saw it as fun (male). The risk issue and its associated unexpected event concerned the hazards and risks presented by a school excursion that was not being carried out in accordance with what would be considered adequate planning, safety and supervision. All of the participants were experienced teachers. At the time, Richard was a vice-principal at the school.

In the mid 1990s, the 46 students were enrolled to take a trip to a European country. The trip was organized by one of the teachers of the school who was involved in overseas exchanges in which students were coming from the European country to Canada and being billeted with the families of the students in Canada “and then there would be a subsequent exchange back again to the European country” by students from Canada. It had been going on for probably fifteen or sixteen years before Richard became involved in this particular school and probably had gone on for two years while he was in the school, not knowing a lot of what it entailed. One year, Richard received a telephone call from a concerned parent whose underage child had returned from the European country the previous year with alcohol. This immediately raised concern in Richard’s mind, and he conducted a subsequent investigation. What he learned raised further concern. Fortunately, in this case, having recognized the hazards and risks involved in advance, measures were taken to prevent any unexpected event in relation to the overseas exchange program. Details concerning the hazards, risks and measures taken are discussed in the themes portion of this study.

Case Number 6: The runner case – Robert's story

The participant involved in this story is Robert. He is a retired, male educator with 35 years experience as a teacher and as an administrator at the elementary level, comprising 23 years as a classroom teacher and 12 years as a vice-principal. During the course of his teaching career he worked in 3 schools – his first 2 schools were kindergarten to grade six where he taught at all grade levels from grade 1 to grade 6. During his last 8 years in education, Robert served as vice-principal at a school (the school in question) with grades ranging from kindergarten to grade 8 and that included an autism unit. One of the earlier schools at which he worked as a vice-principal was a school for developmentally disabled children. In terms of related experience, he worked at a city park for 2 summers helping to supervise programs for children and found that he enjoyed working with children, particularly younger children.

The school involved in this case was a suburban elementary school of about 500 students, including 5 autistic classes of about 25 to 30 students with no more than 6 students per class. The students involved were 6 autistic students ranging in age from 8 to 9 years. The characteristics of autistic children were described by the participant in the following terms:

- their behaviour is unpredictable and not rational – you expect different behaviours,
- they understand but do not verbally communicate with you - communication is a problem,
- they require a different and higher level of supervision, and

- they do not mix socially.

The activity involved was an outing in the school yard. This was not an unusual occurrence but was part of a routine used as a means to provide a class of autistic students with some physical activity. Almost every morning and afternoon, the autistic children would go for a community walk along a prescribed pathway that they would follow through the community. On this occasion, they were simply enjoying the school yard, 6 students and 4 supervisors. The three other principal participants (other than Robert) were an experienced classroom teacher of autistic children and 2 educational assistants with experience in dealing with autistic children. The teacher would have had at least 8 years of experience at the school and was familiar with the particular student. Also, the school had an experienced principal. The risk issue and its associated unexpected event concerned one of the autistic children who, while out in the yard, decided (on his own) to go for a run off school property to an area that was frequented by heavy traffic of cars and trucks. At the time in question, Robert was a vice-principal with 5 years of experience.

On a warm, sunny day in the year 2003, a teacher, 2 teacher assistants and their class of 6 autistic students were enjoying the benefits of being outside in the open air of the school yard. Robert also happened to be out and about in the school yard as part of his role as an administrator and with the intention of being supportive in supervising the children. The supervisors were watching over the students – it was a large yard. However, since autistic children “don’t mix socially with each other terribly well,” the experienced staff as a rule “would keep an eye on them at a distance” and “tended to let them wander.” They were all watching the children as the children moved about on their own.

At the time, the staff was aware of and was keeping an eye on one particular student (being 8 or 9 years of age) who “liked to go ... on his own.” This particular student was described as being bright and capable of moving very quickly. He was known as having a tendency to wander but not off school property. However, in this case, that is exactly what he did. As Robert described it, “he suddenly took off and he was fast and when he ran nobody could catch him” ... “he was there one minute and the next minute he wasn’t but he was very capable of moving quickly.” Robert’s guess “is when he took off, [he] knew exactly where he was going and what he wanted to do ...”

Apparently, the class had walked over to a well-known local fast food chain store the day before so he knew the way. He had gone out of the yard, down the street two blocks, and across a busy four lane highway. It never dawned on anybody that he would disappear so quickly and go as far as he did. Another hazard posed by this unexpected event was the fact that autistic children when focused do not think about such things as the red and green lights of traffic lights. Since the traffic of both cars and trucks around the school was fairly busy and there was a four lane highway involved, Robert and the others imagined the consequences if he was to be hit by a car. Another concern was that of abduction but, given the nature of autistic children, it was not anticipated that they would readily agree to an approach by anyone let alone a stranger. In the end, they “had to call out an alert.” The next time he was seen (about 5 to 7 minutes after disappearing) was at the fast food chain store which was a good kilometre away from the school. Fortunately, he was unharmed and none the worse for wear.

4.2 Findings

The findings arising out of the research questions are discussed in accordance with the themes that emerged from the analysis of the combined stories and are reported using a narrative form and figures, as appropriate. An important point with respect to these findings is that the steps and factors relating to whether a cause of action in negligence has been established become, for the purposes of risk management, factors that are taken into consideration for the risk management process, and the steps and factors of the risk management process become factors that may be taken into consideration by a court of law.

4.2.1 Recognition of duty of care and standard of care

Duty of care and standard of care are two of the steps that need to be addressed in order to determine whether a cause of action in negligence is established. Findings with respect to these two steps were made in each of the cases. In the tables case, Albert stated that “my experience as administrator told me that my number one concern is the safety of my students and if somebody that I respect ... says ... this is a safety issue. ... I think we need to be concerned about it. Then I am very concerned about it and it goes to the top of my list.” Also, in describing why he wanted a boy to help the caretaker set up the tables, he thought that a student helping set up the tables looked to him “like a win/win because you’ve got him getting help and the boys (sic) getting the reinforcement he needs in doing a good job and getting pats on the back and what not and it gives him, the boy, a feeling of status and all

those things.” Albert frequently referred to the students as kids. This use of the words ‘my students’ and ‘kids,’ his concern for their safety and his reason for wanting to have a student help set up the tables are what one would expect of a parent in relation to their children and indicates an implicit understanding that the teacher-student relationship is special and in the nature of parent and child. Also, it was interesting to note that in describing the caretaker’s relationship with the kids he said that “they saw him as a real type of father figure and a leader and they really respected him, as I did too.” Albert recognized the impact of persons involved with children in a school setting and the importance of a father figure to children of that age.

In the windows case, Joseph’s concern over the safety of the student who had climbed out of the window was evident. As he stated, “I ... was quite shaken by it and still remember it vividly to today.” In dealing with the student afterwards, Joseph reacted in much the same way that one would expect of a parent as evidenced by his statement that “once we got him inside and I hugged him for awhile and tried to keep him calmed down.” On whether the unexpected event had an impact on him, he stated that “as a teacher and as a vice-principal, very definitely in both. ... You (referring to the interviewer) asked about an emotional, personal impact. I certainly went home and hugged my then six month old son very, very much and told my wife all about it and worked through it with her because it was, you know, I felt responsible.” Later in the interview, he stated that “I certainly made the point to all the other staff ... how it affects you personally and how it could have affected the child, and not in that order” Joseph’s concern for the student’s safety and his reaction to it both at school and at home are what one would expect of a parent in relation to their children and

indicates an implicit understanding that the teacher-student relationship is special and in the nature of parent and child.

In the fire case, Gerry in speaking of the event was emotionally affected by it. He stated: "I was hugely [upset], let me tell you ... take something like that personally." He was greatly concerned for the health and safety of the students. He spoke of his immediate concern to "keep everyone safe ... let the parents know the kids were okay. They're gonna be coming home on the bus at the regular times ... No injuries. No threat of reoccurrence. No real damage done ... noticeably. ... no environmental issues they're going to be worried about." Gerry's emotional stake in the event combined with his handling of the parents' concerns was what one would expect of a parent in relation to their children and indicates an implicit understanding that the teacher-student relationship is special and in the nature of parent and child.

In the caves case, Patrick in speaking of the students referred to them on a number of occasions as 'kids.' For example, early on in the interview when referring to the ages of the students he mentioned that "some of my kids were a little bit older." At another time in the interview, when reflecting on what he thought caused the problem, he stated that "there should have been some accountability as to who was looking after certain kids" and later "particularly in having teachers and students assigned to each other to give more accountability as to where our kids were." Also, in speaking of the unexpected event, Patrick noted "we then started to realize how vulnerable we as the custodians of the kids, as the teachers, were and vulnerable for their safety." This reference to the students as kids and, in particular, the reference to 'my kids,' 'our kids' and the feelings of vulnerability for the safety

of the students are what one would expect of a parent in relation to their children and indicates an implicit understanding that the teacher-student relationship is special and in the nature of parent and child.

In the Europe case, Richard was an experienced teacher and vice-principal who immediately reacted to the concerns of a parent who had alerted him to a situation involving her underage child and alcohol. As a result of his investigation, he responded to many of the issues in much the same way as one would expect of a parent. For example, he made certain that consent forms were completed. He held meetings with the parents to explain the situation. One of the steps that he indicated he would go through in resolving a problem in the school setting was to “put yourself in the position of the parent or the participant (the one involved in the problem).” On another occasion when he was addressing potential consequences, he stated that “if it were my son or daughter that was over there and something happened, I would certainly be asking questions.” His response to the unexpected event and his references to putting yourself in the position of the parents and his reference to their sons and daughters are what one would expect of a parent in relation to their child and indicates an implicit understanding that the teacher-student relationship is special and in the nature of parent and child.

In the runner case, although the student was found unharmed, the experience for the staff was not a pleasant one. In the words of Robert: “It was a scary time for all of us;” “It certainly was a frightening experience;” and “It shocked everybody ... that he got that far.” Robert spoke of looking “at something with an element of risk, just as you do a parent but more than just common sense.” There was considerable concern that the child was missing

and at the amount of time that the child was without supervision – “our main goal was to get as many staff on the streets to find the child and we found the child relatively quickly when you think about it but it was within that five to seven minute time span. That’s a long time to have a child like that disappear and not be under supervision, and beyond the schoolyard, which we knew.” Finally, Robert noted that, for teachers, “a large component of their job is care,” and this is particularly so for teachers who have autistic children under their care, since “there’s a higher risk of these students self-injuring themselves, for sure, depending on their extreme behaviours.” These references to the reactions of the teachers to the missing child and the comparison to viewing risk ‘just as you do a parent’ are a large part of the job of teachers. Taking care is what one would expect of a parent in relation to their children, and their comments indicate an implicit understanding that the teacher-student relationship is special and in the nature of parent and child.

The findings of this theme relate to two of the steps (elements) that need to be addressed in order to determine whether a cause of action in negligence is established - duty of care and standard of care. Factors taken into consideration with respect to these two steps included the relationship between the participants and their students and the degree of concern shown by the participants for the students’ safety. These steps and factors would also be used in the risk management process for the purpose of developing a risk management plan that satisfies the requirements of due diligence.

4.2.2 Causation – teacher conduct as a contributing cause

Causation is another step that needs to be addressed in order to determine whether a cause of action in negligence is established. Each of the cases was analyzed to determine the cause or causes of the unexpected event that might have adversely affected the health and safety of the persons who were involved in the educational activity. The conduct of the educator is one factor that needs to be considered.

When the unexpected event occurred in the windows case, Joseph quickly realized that this particular student was the one who needed to take ritalin to calm him down. Although he was not aware of any such previous occurrence, he was aware that the student “needed ritalin fairly regularly and, if he didn’t have it, he was in a great deal of trouble.” Also, he had spoken to previous teachers of the student about the medication and his apparent “silly spells.” Later in the interview, he indicated that the student was “off his meds.” In the fire case, Gerry was informed that the fire had been started on purpose - it was a case of arson. He was aware that a particular student at the school (who “had behaviour issues” was from a special education class and was known to and closely monitored by the staff) had a reputation of setting fires, although it was not certain whether it was at the previous school or at the home of the student. Although the person who set the fire was never identified, Gerry and other teachers suspected the student of having set the fire.

In the caves case, after entering and then exiting the cave, the teachers realized that two students were missing. The identification of the two students was quickly ascertained, and Patrick noted that “those two, of any of them in the whole group, were two that always were

not following instructions. Always had a difficult time following instructions so it wasn't a surprise that these guys were missing by any means and, if you have students like that, then it means that you're going to have ... a teacher watching them very, very carefully. That day, I don't think we were." Patrick did not recall having a discussion among the teachers before the excursion about which students would require particular attention. He noted that "it, certainly, is something that I took away from that incident that, certainly, I was aware of on future trips. Aware as an administrator that these are things that you should consider, should be discussing. Of course, you can't ... finger all of the possibilities but, definitely, when you have students that you are concerned with, these are the students that you should discuss and know whose going to be in charge."

In the runner case, however, the unexpected event was different from other runners' cases in that this unexpected event took place off school property and was something that had not happened previously with any student. The staff "had not seen this before and we had not seen this in a student before where they would go that far so it had to change our thinking somewhat on supervision." However, they did have some premonition about this particular student. Robert mentioned that there were other incidents within the school where they had to watch him closely. He was aware that the particular student who ran away was a student who had previously run inside the school. As he indicated, "this particular student liked to go out on his own" and "because there had been incidents within the school where we sometimes had to watch him ... we always made sure we had somebody on the doorway because sometimes he would go, but not off the schoolyard" At the time in question, Robert and the other supervisors "... were sort of watching this one student because he did

somehow have a tendency to wander ...,” but not wander off the school’s property. The unexpected event reinforced an earlier comment that Robert had made about working with an autistic child: “You need a different supervision level and [that is] why you have a higher supervision level in [autistic] classrooms.” In each of these cases, the particular propensities of the students involved were known to the participants beforehand.

In the tables and Europe cases, the unexpected event was the initial alert to the hazards and risk issues. In the tables case, Albert was alerted by the caretaker, as evidenced by his statement: “...if somebody that I respect ... says ... this is a safety issue. ... I think we need to be concerned about it.” In the Europe case, Richard was alerted by a parent of one of the children who had participated in a previous trip. The initial lack of awareness and subsequent corrective actions taken by Albert and Richard would be factors to take into account with respect to causation.

The findings of this theme relate to the step of causation that needs to be addressed in order to determine whether a cause of action in negligence is established and, specifically, the factor of teacher conduct as a contributing cause. These steps and factors would also be used in the risk management process for the purpose of developing a risk management plan that satisfies the requirements of due diligence.

4.2.3 Causation – board policy as a contributing cause

In addition to the conduct of the educator, board policy is another factor that needs to be considered as either the cause or contributing to the cause of the unexpected event. It

should be noted that the findings of this theme and its sub-themes are closely related to one another.

Division of responsibility

One of the first matters that arose out of the analysis of the stories was the notion, raised by both Albert and Robert in the tables and runner cases, that health and safety issues were matters related to the physical attributes of the school. Albert indicated that “any expense relating to the physical maintenance of the school such as windows, doors and roofs was not an expense over which the principal had control. It is beyond the control of the principal. ... The principals have no control over staff salaries or building structure components. Such expenses were part of the share of monies allotted for a particular school area.” Also, Albert noted that, “while safety issues relating the setting up of the tables were discussed with the staff,” his general feeling was “that, by definition, the way the budget was set up, it was more the responsibility of the caretaker for issues like lunch tables than it was the principal”: it was a caretaker issue. It was a part of board policy and the contract between the board and the union representing the caretaker. This was further accentuated by Albert’s “gut feeling ... that there was more specific training involving safety issues for care staff, a lot more, than there was for administrators.”

Albert’s view was reinforced by Robert who stated: “When I think of health and safety, I think of the structure of the school, if there’s a structural default ... we as administrators have to make sure all doors are operating properly.” He went on to state that “as far as the

structure of the school and health and safety issues regarding staff was concerned, there were specific persons at the board who dealt with those matters and superintendents would probably have a council where these matters were discussed. There was no central body at the board dealing with risk issues and not within the school either.” And, as Robert mentioned: “It isn’t like we’ve got a risk committee.” Yet, in both cases, the participants accepted the position that, as Albert described it, “the principal would be ultimately responsible” for risk issues in the school. Robert’s view was that, as an administrator, if he was aware of a structural deficiency (door or icy outside) for some length of time and an incident occurred in relation to that deficiency, then it was something that he should have done something about. In his words: “If the door closure is not working properly and the door slams on somebody’s fingers, and I’ve known that for two weeks, then I should have done something about that.”

Application of board policy

The application (or non-application) of board policy can contribute to or cause the occurrence of an unexpected event. For example, in the fire case, Gerry was critical of the fact that the procedures for transferring a principal from one school to another were changed and he was transferred into a school without adequate opportunity to prepare – “to meet the staff, to see the school functioning, talk to the previous principal and review safety issues.” As Gerry stated: “So, you have to realize that’s a period of high risk created by the board. Kind of a forced incompetency by making someone shift when they’ve never had the chance

to see the school ...” In commenting on the steps taken in managing the unexpected event, he intimated that, although “I can’t say what we could have done differently,” how such an event would be handled is “a whole different kettle of fish if you know the school ... I hadn’t even had one school council meeting yet for example” He further commented that when board transfer procedures are changed, safety issues and other issues are ‘thrown out of whack:’ “When you change your transfer procedures and you do something that is atypical, that’s going to throw other things out of whack.” He recommended that “when you do make a last minute switch, be aware of the fact that maybe you need some extra support in there”: for example, an extra vice-principal or having the superintendent spend more time at the school.

Both Albert and Gerry were critical of the fact that they had been transferred to a school environment with which they had no previous experience or particular training. In Albert’s case, as a prime example of what he saw as the difference in the amount of training offered care staff as opposed to administrators, he indicated that he “was placed as a principal at a school in a downtown working class environment with a lot of safety issues with no particular training at all. In fact, my experience was quite the opposite. ... I suddenly found myself at a school where we had prostitutes literally on the street in front of the school.” In Gerry’s case, he “had no previous experience in middle schools” and this was further compounded by the fact that he “had come from another board and the vice-principal was also new to the school.” In a similar vein, Joseph wondered why the particular student involved in his story had been placed in his classroom despite the fact that he had not received any training in dealing with such a student. On one occasion during the interview,

Joseph seemed to disagree with the placement of the student in his classroom in the first place - "I can't really explain why he was in my room" - and then on a later occasion - "that boy shouldn't probably have been in my class at all." His comments underline another aspect of board policy relating to communication; namely, the communication of a board policy to those who are responsible for implementing it. Joseph stated that "if there was one," referring to a board policy on leaving the room unattended, he "at that time in my (his) first year ... had not been made aware of it."

In the fire case, Gerry had a similar situation as the one to which Joseph referred. Without adequate time and support to prepare, he was required to deal with the particular student who was suspected as being the person who had set the fire. In the Europe case, Richard noted that there was a "very loosey-goosey policy already in place" and it "was probably written down somewhere ... and the guidelines behind the policy were not necessarily extensive as they are now."

Also, in the windows case, Joseph stated that "had I known then what I do now, certainly in my last years of teaching ... I was much more aware of being in the room." He then went on to state that "the worst situations were where you were forced into being not in the room which scared me and others I worked with" This was a reference to the fact that the teachers (during the lunch period) were sometimes "supervising three classrooms. So, what we would be doing is just walking the hall, looking into the room, ... we never felt that we had any control over what was going on there. Um, and you know, that's again, dollars against safety." A further instance where board policy could be said to be open to criticism is the tables case. In that case, the caretaker was required to set up and collapse the

tables without assistance within a time frame that was inadequate. This led to the further risk issue associated with having a student assist in an activity (setting up the tables) involving heavy equipment (having a complex and complicated mechanism).

Resource allocation

Resource allocation, both human and physical, is an area in which board policy plays an important role in contributing to the management of risk issues. In the fire case, Gerry noted that sufficiency of resources is an important factor and safety issues have to be given a high enough priority from the start of the year in order “that everyone be aware that bad things can happen early in the year as well as late in the year when you are prepared for them.” Gerry felt that the board should have provided additional human resources to deal with the situation created by his sudden transfer. In the tables case, Albert noted that the setting up, collapsing and storing of the tables was, according to board policy and as a matter of contract, the responsibility of the caretaker but the caretaker was not given adequate human resources to accomplish the task by himself in the time allotted. Albert believed that a student could be assigned to assist the caretaker, there being no board policy stating how the activity was to be accomplished. There was a document in place but it did not say “whether or not the students were allowed to help. ... It was silent on the matter.” Also, as was noted previously in the windows case, there were situations created by a lack of human resources where a teacher was responsible for supervision but the teacher was unable to be in the room at all times; namely, lunch time when he or she had to spread themselves between

three classrooms of children. His comment in relation to the lunch supervision issue -“that’s again, dollars against safety” - is an indication of how human resource allocation can impact the management of risk issues.

In the tables case, a reduction in resources led to the non-replacement of tables in need of repair and this in turn had an indirect impact on staff regarding supervision of the lunch period. According to Albert, the reasons for this change were unclear but may have been for such reasons as the board recognizing the safety issues associated with the tables or monetary restraints (the tables were quite costly at \$ 500 a table as were the costs associated with supervision and the hiring school lunch monitors). Albert “had a perception that the board, somebody was aware that they were perhaps hazardous so, therefore, don’t replace them or, it could have been that they were extremely expensive.” Without the hiring of school monitors, some of the students were required to eat their lunch in their classroom supervised by their teacher. This had an impact on and led to discussion concerning the question of where best to locate the students for eating lunch. Albert noted that the caretaker felt that the best place for the students to eat lunch would be in their classroom. However, the teachers were in favour of continuing the practice of the students eating lunch together in the gymnasium as this would relieve them of the worry of supervision and clean-up and allow them more time for their own lunch break. At one point in the interview, Albert indicated that he thought “the board didn’t see it as a priority to replace lunch tables” and he guessed that “the superintendents probably would prefer to see the students eating in the classrooms. It worked better. It didn’t involve extra supervisors, therefore, ... we don’t need to buy tables.”

Also, in the windows and runner cases, the lack of resources in respect of communication equipment became an issue. In the windows case, Joseph felt compelled not to leave the students alone; particularly, not the student who was standing on the piping. At the same time, he knew that he required the assistance of the other more experienced teachers who were familiar with the student. Joseph explained that, although there was a communication system in the classroom by the door that allowed for communication with the office, the system did not allow for communication with other teachers. He was reduced to shouting down the hall to make the other teachers aware of his predicament and to come to his assistance. This was further exacerbated by the fact that the principal of the school was off-site and only the secretary was available in the office. As Joseph noted, “the logical thing probably would have been to call the office and ask if the principal could come up or if there was someone off duty” who could come up to cover off supervision of the class. In the absence of communication equipment, one of the alternatives to leaving the classroom (as opposed to having a face to face discussion with another teacher) would have been to send a child to the other class with a note but Joseph indicated that he did not like having children leaving the classroom (recognizing that a solution to one problem may create another). He indicated that the outcome might have been quite different if he had not been assisted by the other teachers. In the runner case, on-going communication between teachers or between teachers and the school was only possible through the use of a limited number of ‘walkie-talkies.’

Lack of direction given to and lack of supervision of employees

The cases offer examples of how a lack of direction and a lack of supervision can impact risk issues. Although there was a policy governing school excursions, Richard (Europe case) alluded to this lack of direction and supervision by the board when he indicated that "... the guidelines behind the policy were not necessarily [as] extensive" as they later came to be. The policy was described at the time as being "loosey-goosey" and as "probably being written down somewhere." The excursion had gone on for so many years that everyone assumed that there was no need to question its organization or management. The view of all concerned was "if it ain't broke, don't fix it." Barring any problems, no one was looking at the school excursion as being an issue. Richard felt that the lack of policy had given rise to a lack of forethought as to what the outcome of something might be and nothing was going to change unless there was a crisis. In risk management terms, no one was asking 'what-if?' and developing scenarios. As he stated: "Well, the lack of policy certainly played into a lot of things because there was no forethought as to what the outcome of something is going to be and, in the case of most things, nothing changes until there is a crisis. Once there is a crisis, then you start looking at things that could go wrong and you develop your things and, as long as there wasn't any problems, nobody was looking at the field trips as being an issue." Direction and supervision came from the board only after Richard brought the risk issues to the board's attention.

Similarly, in the tables case, the use of the heavy tables and the procedure for setting them up and collapsing them were simply taken as givens, even though the time allotted for

the work to be done was not sufficient. This in turn led to the further risk issue associated with having a student assist in an activity (setting up the tables) involving heavy equipment (having a complex and complicated folding mechanism). Also, as noted previously, Albert “was given very little training.” Albert succinctly encapsulated the approach to the management of risk issues by stating the following: “At the time, we were, as principals, basically told that the policy was ... when in doubt, call your superintendent.” As indicated previously, his “gut feeling” was “... that there was more specific training involving safety issues for care staff, a lot more, than there was for administrators.” In the windows case, as noted previously, Joseph was not certain whether there was board policy on leaving a classroom unattended. If there was, he was not aware of it: it was not communicated to him. At the same time, a teacher was left with the dilemma of lunchroom duty where the teacher would be responsible for supervision but would be unable to be in the room at all times; for example, lunch time when the teacher would be supervising three classrooms of children at the same time. Also, as noted previously, in both the tables and fire cases, Albert and Gerry had been placed in a school environment with which they were not familiar and by implication had been given little direction or guidance.

In the fire case, Gerry was critical of the fact that the board had transferred a principal into the school without the opportunity to adequately prepare – to meet the staff, to see the school functioning, talk to the previous principal and review safety issues. As was noted previously, some of his remarks are informative concerning the part played by the board in how, and perhaps why, the unexpected event occurred. “So, you have to realize that’s a period of high risk created by the board. Kind of a forced incompetency by making someone

shift when they've never had the chance to see the school ...” He was quite upset that the fire had been deliberately set in the school, possibly by someone from the school, and the children had been put at risk. He had been transferred into ‘a middle school’ with which he “had no previous experience” and without proper time for preparation. Gerry recommended that, in a case such as his, “when you do make a last minute switch, be aware of the fact that maybe you need some extra support in there;” for example, an extra vice-principal or having the superintendent spend more time at the school.

Also, the caves case is informative in relation to board policy and supervision. Patrick stated that, at the time of the excursion: “It was ... totally left up to the teachers running the proposed” excursion to organize it. “You ran those outings by the Principal but it was totally a teacher organized situation.” The only procedure that was in place by way of school policy was that “a letter must go home to get the parents’ permission but, as I recall, nothing more than that and outlining to the principal as to where you’re going, times, places, scheduling.” The teachers were required to provide the principal with evidence of the signed consent forms. “You didn’t at that time have to get any kind of permission from the board as you have to do today.”

Custom (established practice)

There is evidence that custom played a part in respect of the risk issues arising out of the stories. In the Europe case, that (adherence to custom) is exactly what happened. The unexpected event in that case was the initial communication from a parent who alerted him to

the initial problem which was alcohol-related and involved an underage student. It occurred during the second year of Richard's work at the school. Richard felt that the situation had developed primarily because the school, its teachers and administrators, and the board had become very comfortable with the program. The school and its administrators had not paid particular attention to the excursion since the teacher (and the school) had been doing it for so long. They felt that everything was in hand and under control, and it became easier as time passed to adopt the philosophy "if it ain't broke, don't fix it." New administrators (such as he was) were faced with an established program that appeared to work well, and so they would feel comfortable to let it continue – they had other things to worry about. In Richard's words: "New administrators coming in, of course, would know that it had been taking place for years and years and everything was going okay so I've got other things to worry about" In relation to the teachers involved, he stated: "I think it developed because the teachers became very comfortable in what they were doing. And so, things just became easier to have ... I hate to use the word "ignore" things but became easier to just let things go ..."

As the activity had proceeded for many years without incident or injury, the perception of all concerned was indeed "if it ain't broke, don't fix it" and this perception was exacerbated by the unquestioned acceptance of the excursion within the community of parent stakeholders, at least until the risk issues were brought to light. In fact, this perception led to a political component being added to the management of the risk issues. Two of the considerations in allowing the excursion to proceed were that many of the parents would have been upset if the excursion had not proceeded and there would be a possibility of litigation relating to the cancellation of reservations. Other evidence of accommodation

being made by the school and school board administration in order to have the excursion proceed was the continued selection of one of the persons to accompany the students as a supervisor, despite evidence of that person's potential unsuitability.

In the tables case, there was also evidence of custom in that the setting up of the tables had undoubtedly been going on for some length of time throughout the board of education area. Not until the caretaker with the knowledge, experience and expertise to recognize the risk issues was any measure taken to deal with them in the particular school. Similarly, in the runner case, supervision of the students in the school yard was conducted on the basis that "it had never happened before" and it was, therefore, unexpected. There was a procedure in place to deal with a runner inside the school but not for a runner outside. The teachers had not turned their mind to the possibility that a student could escape their supervision while outside in the play area and run away, or that they would ever want to do such a thing.

The findings of this theme relate to the step of causation that needs to be addressed in order to determine whether a cause of action in negligence is established and, specifically, the factors relating to board policy as a contributing cause and the division of responsibility, application of board policy, resource allocation, lack of direction given to and lack of supervision of employees, and custom (established practice). These steps and factors would be used in the risk management process for the purpose of developing a risk management plan that satisfies the requirements of due diligence.

4.2.4 Defences – contributory negligence and voluntary assumption of risk

Contributory negligence

Contributory negligence is a defence to an action of negligence. Contributory negligence on the part of the students involved may be said to have played a part in the windows, fire, caves and runner cases. For example, in the fire case, the fire was determined to be a case of arson and in all likelihood deliberately set by a student, leaving aside for the moment the mental state of that student. And certainly in the caves case, the action of the two students there was deliberate as well, albeit foolish and irrational. In the windows and runner cases, the acts of the students were also foolish and irrational, leaving aside for the moment aside the health issues involved.

Voluntary assumption of risk

Voluntary assumption of risk requires that participation in the educational activity is based on informed consent of the rules involved in the activity on the part of the person consenting. In the caves case, each student was required to obtain a consent form signed by their parents. The consent form briefly indicated the types of the planned activities, the scheduling, the method of transportation by bus, and details concerning supervision. The students were briefed on the details of the excursion – its nature and purpose and advised that the caves were dark. Also, Patrick had explained to the students that “this water now runs

out, runs out down into (the lake) ... but you cannot go out this way. ... There is no way we can go out this way. You have to return the way you came in.” He had explained that they “could not get out because the water was too high. So, there was no instruction on how high ... long it was. They just decided there’s daylight and we’re going to swim to daylight.” The consent form and briefings on the details of the excursion did not have the desired effect.

In the tables case, no mention was made of any consultation with the parents or of a consent form in regards to the participation of the student in setting up the tables. In the Europe case, it was specifically noted by Richard consent forms from the parents were only required after he became involved.

The findings of this theme relate to the step of defences that needs to be addressed in order to determine whether a cause of action in negligence is established and, specifically, the factors of contributory negligence and the conduct and actions of the students and voluntary assumption of risk and informed consent. These steps and factors would be used in the risk management process for the purpose of developing a risk management plan that satisfies the requirements of due diligence.

4.2.5 Vicarious liability

In all of the cases relating to the stories, the teachers were employees of the board and were acting within the scope of their duties, despite questions that one might raise concerning the Europe case. Also, the duty of care arising out of the special relationship between the teachers and the students existed in every case and could not be disputed.

The findings of this theme relate to the step of damages (and liability for them) that needs to be addressed in order to determine whether a cause of action in negligence is established and, specifically, the factors of vicarious liability, status of the participants in relation to the board and actions of participants relating to scope of duty. These steps and factors would be used in the risk management process for the purpose of developing a risk management plan that satisfies the requirements of due diligence.

4.2.6 Risk management and due diligence

Implementation of the risk management process serves to ensure that all persons involved in an educational activity (the stakeholders) are properly protected and supervised in respect of reasonable risks of foreseeable injury. Foreseeability was an issue in the windows, fire, caves and runner cases and, to a lesser extent, in the tables and Europe cases.

In the windows, fire, caves and runner cases, the participants did not foresee the unexpected event or the risk associated with it: they were taken by surprise. Joseph had spoken to previous teachers of the student about his need for medication and his apparent “silly spells” but he did not think “that any of us expected that particular type of action from him ever. There wasn’t any indicator that he would do something that self-destructive or that potentially self-destructive but he certainly had found ways to get attention that were far less threatening to him in the past.” Certainly, in the fire case, the participant and the other teachers did not anticipate that an arsonist would set fire to the school. The fact that the fire was set by an arsonist meant that the student who was known to have set fires elsewhere

became, in the minds of the school staff, the prime suspect. However, the arsonist was never identified.

In the caves case, Patrick and the other teachers were completely taken by surprise at what the students had done; as Patrick stated, “never for a second” thought “that these guys had exited under water.” He “wasn’t prepared that that eventuality was going to happen. It surprised me [him].” In the runner case, that this was a totally unexpected event is evident from several statements made by Robert: “This type of incident we’d never had happen before”; “This was not an expected occurrence and it wasn’t one that we were really prepared for because that’s why he got away”; “It hadn’t happened with any other student before”; “It didn’t dawn on us that this could happen”; “I don’t think it ever dawned on anybody that he would go as far as he did or that he would get that far and disappear so quickly”; and “We had not seen this before and we had not seen this in a student before where they would go that far so it had to change our thinking somewhat on supervision.”

In the tables and Europe cases, the risk issues also came as a surprise. In the tables case, Albert was alerted by the caretaker that “this is a safety issue.” In the Europe case, Richard was contacted by a parent whose underage child had returned from Europe the previous year with alcohol. In both cases, the caretaker and the parent were the persons who recognized the hazards and risk issues of which Albert and Richard were unaware.

The findings of this theme relate to the six steps of the risk management process that need to be addressed in order to implement a risk management plan that meets the requirements of due diligence and, specifically, due diligence in relation to risk management and foreseeability. Of importance here is the iterative nature of the risk management process

– there is no particular step at which these factors need to be taken into consideration; they may be taken into consideration at each step of the risk management process. These steps and factors would be used for the purpose of determining whether a cause of action in negligence has been established.

4.2.7 Experience, intuition and common sense

In all of the cases, one of the most evident themes was the role played by experience, intuition and common sense in the management of the risk issues.

In the tables case, both Albert and the caretaker had experience that helped them in resolving the risk issues. Albert had experience as a vice-principal. Also, as a principal, he had served in a school where a similar situation existed in regards to the setting up of tables in a gymnasium and converting it to a lunchroom. In terms of past experience, knowledge, skills or training outside of teaching, he indicated that he did not have any special training but he noted that “I am a handyman myself, so I am aware of, ..., the mechanics involved in the tables and just what could happen because they are top heavy.” On being advised of the safety issues associated with the tables, Albert proceeded to obtain first hand knowledge concerning the operation and storage of the tables. He was aware of the safety issues and their consequences. He considered this to be “more general knowledge than it is training that I (he) had to become a principal.” Nevertheless, he thought that these factors helped him in understanding the mechanism involved with the tables.

Also, Albert reasoned that his teaching experience and education was another reason why he felt “confident in dealing with risk issues.” He noted that common sense was

important and that not every alternative could be found in a book of policy and procedure. As he stated, "I'm not the type that feels you always have to follow the book." Another important factor that Albert would take into consideration in making a decision was his reliance on the advice of those persons that he considered to be knowledgeable and trustworthy. When such persons brought a safety matter to his attention, he "would err on the side of caution" and defer to their advice. In this regard in reference to the caretaker, Albert described him as a person who was astute, trusted, experienced and safety conscious. The caretaker had worked on and was in his spare time involved with construction and, therefore, he was well-acquainted with safety issues and the need to pay attention to them. He readily agreed with the caretaker's assessment.

Albert and the caretaker agreed that if a student were to assist the caretaker that student had to be a student who had the physical and mental capabilities to deal with the safety issues. And on the infrequent occasion when a student did assist in setting up the tables, Albert noted that the caretaker closely supervised and instructed the student on the table's operation and the safety issues associated with them. On the other hand, the caretaker advised that he should be the only one to collapse the tables and move them back into storage room. Another safety issue associated with the tables centred around the location inside the equipment room where the tables were stored. The caretaker pointed out to Albert that it was dangerous for students to retrieve equipment from the storage space that was located next to the tables. The tables being tippy and heavy could fall over on a student and a serious injury could result. As the caretaker observed, they were a hazard just sitting there and he considered them to be dangerous and very likely that they could tip over. Again, Albert

recognized the soundness of his advice and agreed. In respect of the safety issue regarding retrieval of equipment by students in the storage room next to the tippy tables, the caretaker recommended that the tables be chained and padlocked to the wall when they were not in use to ensure that they would not tip over on a student and injure them. Albert agreed and the caretaker proceeded with the work of providing for the chaining and padlocking of the tables.

In the Europe case, the experience, intuition and common sense of Richard (an experienced vice-principal at the time) also played a part in being able to recognize the potential hazards. Once he became involved and began to investigate, he quickly recognized the risk issues associated with the excursion and became concerned. He too (as in the tables case) dealt with the risk issues in terms of probability and consequences. Richard found himself in the unenviable position of becoming involved with the situation at such a late date. He was convinced that, if something untoward happened, the school (the board) would be held liable – as he stated: “If it were my son or daughter that was over there and something happened, I would certainly be asking questions.”

Richard was not so concerned with the normal activities associated with such an excursion (e.g., bussing and air transport, billeting). And, although he had no problem with students being billeted with the families, he noted that the teachers were staying in hotels. Also, he learned that the year before some things had been confiscated at the border from students coming back from the European country and his experience told him that he should be concerned, especially since some of the illegal goods were liquor and knives. He was concerned about under-aged students drinking alcohol and becoming impaired on a school excursion or being detained by security officials at the borders of a foreign country because

of possession of illegal goods. As Richard noted, as good as relations may be with the European country, there was still the possibility of diplomatic issues. Furthermore, Richard was not aware of any insurance policy being in place to cover the students and this coupled with the fact that no consent forms had been given to or received from the parents gave him further cause for concern.

Also, he learned that “the teacher had made himself into a travel agency so that all of the finances and everything happened to be going through the particular teacher which, right away, became tentacles going up” ... “The money was being paid directly to the teacher.” The organizing teacher had made special arrangements with the airline used for transportation and he was getting free transportation to and from the European country a couple of times a year using the particular airline. Richard viewed this as a possible conflict of interest. Another risk issue of special concern to Richard was the fact that there would be other older students from other schools (who had been on previous trips with the particular teacher-organizer) on the trip to the European country of whom the school, school board and parents knew nothing. There could be interaction between those persons and students from the school and then the school would have trouble responding to a question of why they did not know that the person was involved.

The situation had implications for the school in that “people had signed up. People were [had been] saving money for four years. In other words, they knew that in grade 4 ... this was going to be a grade 8 trip so for 4 years they had put aside financial planning to do so and all of the arrangements being made when, basically, the situation came to light.” This was an excursion in which many of the siblings of the students had participated in previous

years. “So it was disappointment, possibly. It was cancellation of the trip. It was financial consequences possibly coming back from the airline ... ” that was to be used for transportation and from other suppliers of goods and services “and it was expectation of the parents that this was a school sanctioned excursion because everything was going through the school even though it was, in background, not going through the school.” These were some of the “possible consequences of what could have happened with the students overseas and liability.”

Richard arranged for community meetings with the parents to fully discuss the excursion and explain the nature of the arrangements that had been made. The parents were apprised of the fact that older, high school students from other schools were involved. Initially, like the school administration, they had been unaware of this situation. The parents had mixed feelings about what they had been told. Some teachers on staff and parents had a different perception of the situation than that of Richard. The impression that came out of the story was that, if Richard had not asked the ‘what-if’ questions, they would not have been concerned. The program had been established in the community for some twenty years and many parents wanted it to continue. Others were relieved that the school had become aware of the situation and that the issues were being addressed. Richard also brought the situation to the attention of the board of education and its trustees through the superintendent for the school, and the board was equally relieved at the discovery of the issues underlying the excursion. Richard noted that there was a “very loosey-goosey policy already in place” and it “was probably written down somewhere ... and the guidelines behind the policy were not

necessarily extensive as they are now.” Whatever guidelines there were, Richard thought that the teacher was operating outside of the guidelines.

It was decided that participation in the excursion would be restricted to only students from the school. Consent forms were obtained from the parents after meetings with the parents as a group were held. Certainly, the excursion was no longer viewed as being an activity arranged through a travel agency and yet, at the same time, being viewed as a school-sanctioned activity. It became a school-sanctioned excursion through a registered, licensed travel agency brought in by the school with the board saying – “yes, all of the regulations and guidelines that we have set out are occurring [being complied with] so, if there is liability, now you’ve got all of the right players involved.” Also, in regards to supervision, the supervisors attending on the trip were changed so that there was now a female supervisor whereas previously there had been only males, even though the students had been both male and female. The female vice-principal served two functions; one, being able to attend to the needs of female students and, two, reassuring parents, school administration and the board that an experienced administrator was on board to ensure that the guidelines were being followed and students protected.

Richard’s involvement was that of “an administrator with my tentacles up in things that were going to or possibly could have happened and been a major catastrophe.” Richard made note of the fact that in our changing world of today nothing can be left to chance.

In regards to risk and risk management per se, Richard noted that no risk manager came to advise the school and no risk management was being discussed with the board for other purposes. The situation was not discussed at a staff meeting. There was no particular person

or group of persons in the school who would be responsible for risk issues in the school.

Afterwards, some were set up. Although Richard did not have any risk management training at the time, Richard's experience allowed him to visualize the hazards and risk issues and to develop scenarios and alternatives for dealing with them. He was cognizant of the part that perception plays in managing risks issues and the unexpected events associated with them. Richard feels that an administrator becomes more comfortable dealing with risk issues as he or she gains experience but he thinks that "you have to watch though being too comfortable and I believe [he believes] some people get too comfortable too easily." Finally, Richard made note of another significant factor of the risk management process and due diligence with his reference to dealing with risk: "I don't think that you can eliminate risk. There is always something that you are not going to think of." He further indicated that, even if he 'thought of it (the risk),' there are some risks that he would be willing to take "for the benefit of everybody ... as long as you've got the common sense to be able to handle it and don't panic."

Unlike the tables and Europe cases, the windows, fire, caves and runner cases involved a risk issue with life threatening consequences that required immediate action (on the spur of the moment and as events transpired in real time). Undoubtedly, the time available dictated that experience, intuition and common sense played a major part in the development of scenarios on what to do next and in managing the risk. For example, before the occurrence of the unexpected event in the windows case, Joseph was aware that the student had been in a special education class (a junior opportunity class) up to grade 4. He had read the information contained in the student's Ontario Student Record card and had gotten to know

him during the time that he had taught him up to the time of the event. He was aware basically of his past experience and the fact that he was on ritalin medication but was not himself knowledgeable “about what being on that medication meant.” However, he was aware that the student “needed ritalin fairly regularly and, if he didn’t have it, he was in a great deal of trouble.” Joseph had spoken to previous teachers of the student about the medication and his apparent “silly spells” but he did not think “that any of us expected that particular type of action from him ever. There wasn’t any indicator that he would do something that self-destructive or that potentially self-destructive but he certainly had found ways to get attention that were far less threatening to him in the past.” In any event, he did not think a course would have prepared him for the event that occurred. He was not aware of any such previous occurrence. Nor was the unexpected event something that the school board or any of the teachers were prepared for either. The windows were not screened, even though there were other schools with the board that had windows with screens. Whether the screens on the windows of the other schools were already in place before the unexpected event at his school was not clear.

In this case, time was of the essence and the risk issue for which he had no particular training was unfolding in real time. As Joseph stated, “It’s not something I felt I had any training for.” Joseph intuitively felt that he could not leave the classroom to get help but needed to stay and deal with the situation. Instead, he called the other teachers for assistance. He called to the colleague with whom he had been talking just before the occurrence of the unexpected event and to any others who might be within earshot for assistance “but they were reluctant because they had their own class also and didn’t feel they could leave them.”

However, once the nature of the situation became clear, “then they came running.” One teacher who Joseph described as a solid, older teacher came and she was joined by another who tried to talk to the student. Both teachers had taught the student “previously and they helped get him calmed down” but they could not get him to come inside. Eventually, the student was calm enough that he strayed over to another window by “scrabbling along things (the piping) to look at the class” and Joseph managed to “put a bear hug on him ... and pulled him inside the window [the classroom].” He “wasn’t kicking and screaming at that time;” he acted as if “he just thought his great fun was over.” On the other hand, Joseph was quite “shaken by it and still remembers it vividly today.” As stated above, he had no prior indication that something like this would occur. Joseph expressed the thought that had the other teachers not given him some assistance to calm the student down, he is not quite sure that he would have been successful. This case, like the tables and other cases, illustrates that communication and the sharing of information, expertise and responsibility among stakeholders (teachers), are important factors in dealing with risk issues.

In the fire case, there were actually two unexpected events – the fact of the fire and the management of the response to the fire. And, if the last minute transfer of Gerry to the school is considered, there was a third unexpected event. Gerry felt that board policy had played a part in the occurrence of the fire and the events that led up to the fire. (This is dealt with more extensively under the theme relating to causation with the board as a contributing cause of the unexpected event). Of course, after the unexpected event, time was available to reflect and evaluate both the event and the response to it. The results of this reflection and

evaluation are examined in greater detail under the theme of ‘monitoring, reflection and change.’

Gerry was quite upset about the fact that a fire had been deliberately set in the school by what was thought to be a student, and the children had been put at risk because of it. Also, he felt that he had been transferred into the school without proper time for preparation. “It was a very last minute transfer. Like, I didn’t find out about it until the end of June and so I went to this large and fairly troubled school with no time to know the background. ... I didn’t know any of the students ... and I didn’t know any of the staff.” Gerry noted later in the interview that he had been transferred to the school despite the fact that he “had no previous experience in middle schools.” He also noted that safety issues have to be given a high enough priority from the start of the year in order “that everyone be aware that bad things can happen early in the year as well as late in the year when you are prepared for them.” In view of the last minute transfer, he suggested that monetary resources be made available “for the teachers to come, that is, come in one day beforehand” (a day before school starts), in order to devote a day completely to safety. As he rightly pointed out, “You know, even the first day of school, that there could be a fire or whatever, ... so those policies have to be ready to go.” He indicated that such a day long session would be considered to be training. However, he stated that resources for that purpose were not available.

In the late 1990s, before the unexpected event, Gerry’s board went to a self-insured model and the principals “started to get a lot more risk management-type stuff. It just became a perception.” Personnel came in “from the organization that ran our self-insurance program and started talking to us principals about risk management and a lot of that had to do

with individual teachers and staff members, you know, stepping up on stools and stuff like that but it also had to do with school systems and handling emergencies and who to call and that sort of thing.” The goal was to increase perception of risk management rather than the provision of a formal risk management training program. They were asked to “think of a situation” [a form of scenario development] and then ask themselves questions such as “Where are the risks there? What should I manage?” Training was ongoing and every year they would “probably have two presentations by risk management specialists on risk management.” There was some indication that the teachers were also given training on such subjects as cardiovascular resuscitation, first aid, Epi Pen, and procedures for children suffering from anaphylactic shock. The custodian received considerable training, particularly in regards to hazardous materials.

Aside from the fire itself, Gerry recognized that a fire presented a number of other related hazards and risks. In this case, Gerry’s greatest concern was, as it is with any fire, the possibility of serious physical injury or loss of life. As he put it, “when there is a fire in a large place like a school, there’s instant hazards, life and death hazards. Those hazards stem from the fire being out of control, someone getting trapped, and something like that to injuries leaving the school.” He recognized that during an evacuation of a large school of 700 students there could be much confusion and it required everyone to be rational, remain calm, and follow planned routes. Any deviation by an individual or group of individuals because of injury or inattention could cause a problem for everyone in their immediate vicinity – people could be trampled. He went on to note that, in a real fire situation when there is the smell of smoke or the sight of fire, the students become less focussed than they

would be in a fire drill because there is an emotional component that is added. There could be injuries during the time the school is being evacuated. Also, with the nature of the student body and being outside the school standing about for an hour, there was the possibility of “everything from fights, bullying, to kids just walking off” the school grounds.

According to Gerry, the vice-principal had handled the situation as well as he could. He had successfully evacuated the school without injury to any student. He had not panicked and, once given direction, had been able to focus and perform well the tasks asked of him. He had moved around and tried to make sure that the teachers themselves were not shocked but were focused and paying attention to what was happening. He had let them know what was happening, that the fire was out, and that they would have to remain outside for a while and keep an eye on the children. Gerry realized that in a situation such as this the teachers themselves might not be focused and could become involved in discussions among themselves while the students were interacting in and dispersed throughout an unstructured environment. During the one hour period of time that the students had to remain outside, Gerry felt that they were not properly supervised. It was “a time fraught with emotion,” with much anxiety. In respect of the response to the unexpected event (fire and management of response), Gerry felt that “the teachers kind of didn’t keep their eye on the ball” in that there was a lack of supervision.

In the caves case, before the excursion, Patrick had assumed leadership of the excursion and as he put it “my neck was on the line.” Patrick had a system in place to ensure adequate supervision over the activity and for the safety the students. He prepared the other teachers and the students on what to expect and on how they were to proceed “and in

particular about the pool of water, particularly about exits and entrances” but he noted that the unexpected event still surprised him. He had been to the caves on a number of occasions and was familiar with them. The teachers and students were briefed by Patrick on the details of the excursion – its nature and purpose and about the caves and their potential hazards – the geography of the caves (steep, slippery slopes and running water), supervision within the confines of a dark cave, and the need to bring a flashlight, since they would be “operating in an area that there is no light except flashlight.” Also, Patrick had explained to the students that “this water now runs out, runs out down into (the lake) ... but you cannot go out this way. ... There is no way we can go out this way. You have to return the way you came in.” And he talked to them about that and explained that they “could not get out because the water was too high. So, there was no instruction on how high ... long it was. ...” Each of the three teachers was assigned an equal number of students and a paper list containing the names of those students was prepared and given to each teacher. Each student was required to obtain a consent form signed by their parents. The consent form briefly indicated the types of the planned activities, the schedule, method of transportation (by bus), and details concerning supervision.

Patrick and the other teachers were completely taken by surprise at what the students had done. Patrick “never for a second” thought “that these guys had exited under water.” He “never, ever thought that they would exit that way under water.” “It never struck me (him).” He “wasn’t prepared that that eventuality was going to happen. It surprised me (him).” The two students “just decided there’s daylight and we’re going to swim to daylight.” Once they realized the two students were missing, Patrick re-entered the cave to conduct a search for the

boys and not finding them in the cave he returned to the surface. Among the teachers, the thought was that the boys had simply preceded them out of the cave and had started back down the trail leading up to the caves from where they had started. So after 10 minutes in the cave to determine that they were not there, the group took 20 minutes to walk back to the starting point, and then took another 20 minutes wondering what their next step would be. They decided the next step would be to return and do a search thinking that the boys had gone out ahead of them and got lost. The teachers did not feel that they were at the stage where the police needed to be notified. No park staff were in the area. The boys, after being out of sight for about an hour, showed up on their own, soaking wet. In retrospect, Patrick thought that the cause of the problem was “maybe a combination of (number 1) two students who had a hard time following instructions and (number 2) teachers who, even though we were I think prepared for what we were doing, at the pool side, there should have been some accountability as to who was looking after certain kids.” He noted that it was “very hard in that kind of situation, the darkness, flashlights.” On subsequent visits to the caves, the students were showed the water at the bottom of the cave and where it came out and, because it was so dangerous, they were told that a person could not exit the water from inside the cave but had to return the way they had come in.

Significantly, Patrick, somewhat similar to Richard, recognized that with respect to risk “there are hundreds of possibilities” and “you cannot prepare for all eventualities but they (teachers) should be tuned in to their responsibility.” He noted that a teacher is expected to “show common sense” and be aware “of what possibilities there are in dangers and what possibilities there are in students injuring themselves.” And, later, he noted again the need

for teachers to be prepared and aware of their responsibility: “You can’t prepare for everything but the teacher has to be aware that they are responsible for the students.” Patrick supported the idea that training and the sharing of information, expertise and responsibility could help teachers. First, as he put it, “It doesn’t have to be a course but, certainly, somewhere in education, in the training of teachers, there should be, certainly, an emphasis on safety and their responsibilities and their due diligence. You cannot prepare for all the eventualities but they should be tuned in to their responsibility. What possibly could happen.” Second, he stated that “the more experience I [he] had, the more comfort I (he) felt.” He further stated that “... Life experience is certainly of value to someone being in the teaching profession.” The sharing of information at staff meetings and between individual staff members and in-service training is “invaluable to other teachers, younger teachers and inexperienced teachers.” Third, he “always emphasized with staff that we have to share this [responsibility for dealing with school-related issues].” As he put it, “We’re all in it together.” And, as part of this responsibility, “if you’re out there, due diligence, doing what you have to do, then you’re going to be covered. I can’t expect you to be superman or superwoman out there but if you do what you are supposed to be doing, then we’re all covered and the kids are going to be safe.” Although Patrick had never received any formal training in risk management, these statements certainly indicate the value of experience, intuition and common sense. Patrick’s statement that “we’re all in it together” is recognition that communication and the sharing of information, expertise and responsibility among stakeholders are important factors in dealing with risk issues.

The runner case is an excellent example of the important role played by experience, intuition and common sense. When speaking of looking at something with an element of risk, Robert notes that you should look at risk “just as you do as a parent but more than just common sense.” That this was a totally unexpected event is evident from several statements made by Robert: “This type of incident we’d never had happen before;” “This was not an expected occurrence and it wasn’t one that ... we were really prepared for because that’s why he got away;” “It hadn’t happened with any other student before;” “It didn’t dawn on us that this could happen;” “I don’t think it ever dawned on anybody that he would go as far as he did or that he would get that far and disappear so quickly;” and “We had not seen this before and we had not seen this in a student before where they would go that far so it had to change our thinking somewhat on supervision.” They were simply not fully prepared for a ‘runner’ who took off while outside the school. While there had been runners inside the school, the probability of it occurring was low - “in the scope of a year you might have one ...” Also, they had a planned procedure for runners inside the school such that “we usually noticed it within 30 seconds of them disappearing” and “the average time of finding them was about one minute.” This procedure was known as an alert whereby the principal and vice-principal would immediately find out what was happening and then decide on a course of action to find a student who had gone missing inside the school, but not a student who had run away off the school’s property. If an autistic student was seen to be leaving the school, the procedure was that they could be restrained on the basis of their lesser ability in respect of understanding, decision-making and responsibility, thereby representing a greater risk of injuring themselves and being injured when out on the street. This procedure, however, may

or may not have been written out and there was no checklist of that procedure. No discussion had taken place at a staff meeting of what to do if an autistic student went missing from the school grounds, and there was no recollection of any documented policy, procedure or process that would be consulted other than if a regular student wanted to leave. Insofar as runaway students from regular classes were concerned, there was a procedure which stated that they were not to be physically restrained from leaving but the parents would be notified and requested if they wanted the police called, and this was the procedure generally for all schools. In this case, Robert and the other teachers had knowledge of the behaviours of autistic children and previous experience with runners inside the school. They called an alert because this was a procedure with which the teachers had experience. The student had gone off school property and had run away to parts unknown. Their knowledge and experience allowed them to quickly adopt the alert plan (system for autistic runners inside the school) and adapt it to deal with the circumstances of the situation (a runner outside the school). Therefore, the description of the procedure that was used to conduct the search outside the school was similar in many respects to the way the search would have been conducted inside the school – the problem was assessed, the options considered, and each searcher was given a location to search for the children. Because of their knowledge and experience, they were also able to intuitively make a decision as to where the student was going.

Robert communicated and consulted with the teachers in the autism unit because they were familiar with the students and knew their tendencies, and they were the experts – they could foresee situations involving the children that you would not normally see with a grade 4 class. As these teachers were used to handling situations beyond the norm, he took his lead

from them. He noted that experience helps and that the “experience of the teachers particularly in knowing the tendencies of the pupils” played a part. And he noted as well that the system which was in place for autistic runners inside the school was adopted and adapted to suit the circumstances, giving concrete evidence of a process of reasoning. In the analysis of the cases that follow, this requirement of a process of reasoning was evident.

As a vice-principal, Robert was used to thinking in terms of assuming a leadership role: logical thinking and organizing as opposed to doing it yourself – “support is part of leadership.” He considered delegation to be a part of leadership as evidenced by his statement: “I think you’re used to thinking in terms of organizing, leadership role, who’s doing this, ... making sure that each person has a role and things are covered off just generally.” In other words: “I guess it’s the sort of logical thinking and organizing and making sure that things are done in a logical organized manner.” Apart from his involvement with his car, Robert organized the search and assigned tasks and left it to others to carry out the tasks in a logical organized manner. From what Robert remembered, in going through the steps that had been taken,

The classroom teacher along with the education assistant took charge of the students and they got them in the school. Other individuals present were assigned tasks – it was done quickly with common sense. The staff was notified and any one free would come and be assigned a duty to perform.

Over time, Robert’s experience (8 years at that school) provided him with knowledge about the autism unit, an appreciation of what needed to be done, and contributed to the

development of a closer relationship with the staff. He gained experience with and knowledge of the children. As a result, he had a greater appreciation of what can happen, what you need to deal with it, how to get yourself ready for it, and how to mentally deal with situations that you have not dealt with before. As he stated, “experience helps.”

The findings of this theme relate to the six steps of the risk management process that need to be addressed in order to implement a risk management plan that satisfies the requirements of due diligence. This theme sets out the factors of experience, intuition and common sense that was evident in all of the stories of the participants. Other specific factors taken into consideration were problem identification, stakeholder identification, hazards, prior knowledge and historical record, probability, consequences, perception, scenario development, risk control options, implementation, communication, documentation, training of participants, monitoring of and reflection on option implemented. Again, there is no particular step at which these factors need to be taken into consideration; they may be taken into consideration at each step of the risk management process. These steps and factors would also be used for the purpose of determining whether a cause of action in negligence has been established.

4.2.8 Risk perception and risk acceptance

The tables and Europe cases demonstrate the role of perception and personal preferences in dealing with risk issues. Even though Albert agreed with the caretaker’s assessment and the alternatives that the caretaker suggested were implemented, his

perception was different than that of the caretaker. The caretaker was reluctant to allow a student to assist him at all but, after discussion with Albert, they agreed to allow a student to assist him in setting up the tables and, as noted above, the caretaker advised and Albert agreed that the caretaker would be the only one to collapse the tables. The impression was that, if the caretaker had not brought the matter up for discussion, the practice of having a student assist in both the setting up and the collapsing of the tables would have continued. At the same time, although the teachers had been told of the hazards posed by the tables, for some of them the perception of the risk associated with the hazards was different than that of the caretaker who had first-hand knowledge and experience in handling the tables. From time to time, whenever the caretaker observed students in the gymnasium equipment storage room unsupervised, he would report this to Albert. Subsequently, Albert would bring the concern about students being unsupervised in that area to the attention of the teachers at a staff meeting. Some of the teachers felt that it was acceptable to allow a reliable student by himself to retrieve or store gym equipment in the equipment storage room. Albert saw this as a “grey area.” As noted previously in the Europe case, the parents had similar mixed feelings about what they had been told. Some teachers on staff and parents had a different perception of the situation than that of Richard.

The findings of this theme relate to the six steps of the risk management process that need to be addressed in order to implement a risk management plan that satisfies the requirements of due diligence. This theme sets out the factors of risk perception and risk acceptance. Again, there is no particular step at which these factors need to be taken into consideration; they may be taken into consideration at each step of the risk management

process. These steps and factors would be used for the purpose of determining whether a cause of action in negligence has been established.

4.2.9 Monitoring, reflection and change

The final step in the risk management process is the monitoring of the actions taken in response to the risk issue. Each of the participants commented on how the unexpected event had changed the way that they approached the management of risk issues throughout the rest of their career; that is, the unexpected event associated with the risk issue in each of the stories of the participants served as a change agent. Since the result of these stories is change, the value of sharing information and communication became apparent.

In the tables case, the safety issues concerning the tables were brought to the attention of the teachers and superintendent. Albert stated that the superintendent was made aware of what had been done to secure the tables to the wall and the reason behind it during the course of the superintendent's usual visit to conduct a tour of the school. Also, Albert thought that the caretaker had probably brought the matter directly to the attention of his supervisor. Although Albert was uncertain as to why the board at some point decided not to replace the tables as they broke down, he indicated that one of the reasons for the change may have been because of "the board recognizing the safety issues associated with the tables."

After the unexpected event in the windows case, there were staff meetings covering health and safety issues. The event resulted in health and safety issues being discussed about other situations and questions such as "What if this happened?" or "What if that happened?"

led to serious conversation. "At the time, the (board) was just putting together its policies and procedures ... " and this resulted in "big, huge books" that, by the time Joseph became a vice-principal, "were ominous but very helpful." One example of a change in policy that resulted from the unexpected event related to supervision and management in the absence of the principal. At the time in question, the principal of the school had been called to a meeting at the board office, and at that time there was no vice-principal allocated to a school of that size. Apparently, the secretary was seen as being the second in command if the principal was away from the office. There was no person who was directly concerned with health and safety issues for the school other than the principal and, in some respects, the custodian also had responsibilities in this area. After the incident, the principal informed the staff that the 'solid, older,' experienced teacher who had assisted in calming the student was in command of the school if he was absent. The secretary would look after office related matters such as phone calls.

Joseph was not aware of any policy documents that came out of their discussions as a result of the unexpected event but by the Fall of the next year, all of the windows had been covered with "big, heavy screens on them made out of the equivalent of a chain link fence." Joseph thought that it was entirely possible that it could have happened again, probably by the same student given the amount of attention that it brought him in the first instance. Joseph thought that the screens "were put on for the protection of all the students and realizing ... the extent of the problems that existed in that particular school population." For Joseph, the event carried over into other risk issues (referred to as health and safety issues), and his personal attitude towards those matters changed dramatically such as bussing, sports

played in the yard, equipment used, and children playing on concrete. "In future (after the incident), there was always a reporting procedure" if some unusual event occurred that involved health and safety but, at the time in question, he could not recall such a required reporting procedure. He made a point of telling other staff wherever he went in schools, as teacher and vice-principal. He stated that "as far as my future perspective was concerned, I, certainly, never was wandering again in that school, or any other" when faced with similar circumstances. Also, in the windows case, while there had been a number of very helpful staff meetings, "there wasn't too much emphasis on health and safety issues until immediately after that event."

In the fire case, Gerry touched on this (event serving as change agent) when he stated that in order "to bring about meaningful change ... you've got to develop a compelling purpose to change." He felt that the event "did act a little bit as a positive change agent. It gave me [him] a little bit more flexibility or credibility." It provided a compelling purpose for change in the school among the staff and made them more receptive to change: the staff realized that perhaps everything was not as it should be. For a long time afterwards (12 or even 15 months later), the unexpected event was a good reference point for showing that the school had moved forward and improved in certain areas such as the life of the school in general and safety in particular. Also, Gerry noted that there was not much change in policy after the event, although there was some change in procedure; in particular, the supervision of students by the teachers and the monitoring of the teachers by the principal. As a result of the fire having been deliberately set, all of the supervision policies of the school were reviewed and changes in procedure were made to the policies such as "we were checking with kids

when they went to the washroom and didn't come back in time," and "keeping a list of the people who went out" of class for any reason together with the time of leaving and returning. The effectiveness of the procedures during the incident were evaluated with one of its main purposes to ensure that, assuming the arsonist was still "out there" or in attendance, that it did not happen again. This was a continuing risk that the school had to deal with.

In the caves case, Patrick noted that the feeling afterwards was that the teachers had not really paid enough attention to the potential for disaster that the unexpected event entailed. As Patrick stated, "the gravity of that situation really didn't hit me until I was riding on the bus back to (the city) with the whole group and thinking, 'This could have been disastrous'." Earlier in the interview Patrick had stated that "It wasn't until really we got back to the school and started thinking about what had happened that the gravity of the whole situation sort of struck me. They could have quite easily been at the bottom of that cave and drowned." On reflection, as noted previously, he thought that the cause of the problem was "maybe a combination of (number 1) two students who had a hard time following instructions and (number 2) teachers who, even though we were I think prepared for what we were doing, at the pool side, there should have been some accountability as to who was looking after certain kids." Also, as noted previously, on subsequent visits to the caves, the students were showed the water at the bottom of the cave and where it came out and, because it was so dangerous, they were told that a person could not exit the water from inside the cave but had to return the way they had come in. On their return to the school, the principal was advised of the situation and they discussed what had happened among themselves and with the students who had participated in the excursion. They also took the opportunity after that

to speak to other teachers both at a staff meeting and individually with other teachers who were going to be involved in other school excursions. Patrick indicated that the impact of the experience was such that it changed the way the school dealt with excursions of this nature.

He observed that

certainly ... for particularly the three teachers, it changed our whole approach to safe school outings from the school.” Afterwards, they “walked through the day and put it, pieced it together, as to what had gone wrong. What we maybe should have done. How we may have better been prepared ... It changed the school’s whole approach as to how to deal with safety factors on outings. And, far reaching, my own personal approaches, it certainly changed my whole approach to such enterprises in the future and, particularly, becoming an administrator. That particular incident stuck with me ... stuck with me through all my education experience as to what should be done in preparation. What you should be aware of. What you should be thinking of. What are the possibilities. What can go wrong. What you should be doing. What you should be prepared for. ... Actually, it’s an incident that I think about constantly when I hear about safety features and school accidents, teacher vulnerability, student vulnerability.

Later in the interview, he made similar statements concerning the impact of the unexpected event on school excursions - “we changed procedures, tightened those up, how

we would deal with a similar situation or similar excursions. How we would do it differently ...” Patrick indicated that subsequent school excursions of different types were successful, in part, because of how they built on this particular incident in preparation for those other excursions. The sharing of information with all staff led to better preparation and, to quote Patrick: “The better prepared you are for these things, the more fun the kids are going to have out there and the less chance that something tragic could happen.” In future years, as an administrator, Patrick had checklists with many points that had to be cleared with him before students and teachers became involved in any kind of situation in the environment outside the school. For example, he wanted answers to questions such as: “What’s the educational purpose? What are the objectives? What are the outcomes going to be ...? What kind of preparation have you done with the students? What were some of the hazards that might occur or you might run into in a trip such as this? How are you going to deal with communication in the case of an emergency?” Also, he wanted letters of consent sent to parents and he ensured that those letters were then passed through his office.

In the Europe case, Richard noted that the comparison of planning before the unexpected event and planning afterwards was dramatically changed. The unexpected event had an effect beyond this particular event. The legal implications of the issues involved came to the fore and the board began to look at all of its policies (e.g., ski trips). As a result of the risk issue involved in this case, a new policy on school excursions was developed and the board issued regulations governing school excursions. Today, the “board policy on ski trips is much more strict and stringent” and includes greater content. After this event, “even field trips that had occurred successfully in the past and were a precedent” for future excursions

required a written plan to be developed and provided to administration “before it was approved.” Also, Richard noted that as far as training of staff was concerned, “a certain number of staff members had to now be trained in first aid where they wouldn’t have had to before;” it had not been a requirement in the past. Also, as noted previously, although there was a policy governing school excursions, the guidelines underlying the policy were not as extensive as it later came to be. As a result of this case and in future cases, he influenced the excursions in that he made sure that the details were considered - “that all of the “i”s are dotted and “t”s are crossed in all issues that you can think of that could go wrong [scenarios], backup plans, emergency phone numbers, all of those things are in place before you even consent to have the field trip, the planning of the field trip even start(s).”

Richard indicated that the following steps were those that he would consider in addressing an issue: who is responsible, making sure everyone is aware of the situation and is up to date, sounding boards (bouncing ideas off others), getting ideas from others, discussing things with superiors, withdraw yourself from the issue as the organizer, put yourself in the position of a parent or participant, pick as many holes as you can, run it by somebody in charge who in turn would be expected to run it by their superiors, look at board policies and guidelines and make sure that you are adhering to them, and then ask people (involve people).

In the runner case, Robert complimented the staff in that, as teachers of both regular and autistic students, they as a whole had always accepted responsibility for the autistic students. Therefore, this particular unexpected event had a significant impact on the school as a whole, its staff, and their policies and procedures. As Robert indicated:

We became aware that this could happen” [and] “stemming from that we certainly became a lot more careful and I think it was something we suddenly became aware of that there was a gap we had been missing in what we were doing in supervising those children.” “When we think of what might have happened ... it certainly led to a closer supervision ... it certainly meant that we suddenly recognized that this was something that could happen and we didn’t want it to happen again ... After the fact, we looked at it holy cow, we can’t have this happen again, you know. Once was enough.

He also noted that certain students required closer supervision than others - “What came out of all that too, was needless to say we kept a closer reign, particularly on some students.” In assessing the cause of the problem, Robert had this to say:

I think what caused the problem was that we didn’t closely, we allowed them too much room, we didn’t supervise closely enough. We should have had them within arm’s length ... and I think it was the assumption ... that they weren’t going to take off too far ... We just didn’t give them that much credit.

After the unexpected event, staff meetings were held to discuss risk issues such as general security (e.g., locking of school doors) and supervision relating to the school (e.g., yard supervision, hallway supervision). For example, similar to the fire case, students had to be accompanied when out of the classroom. The issues discussed would be recorded in staff room minutes. Today, “at the beginning of the year, every teacher receives a document that

they have in their classroom and within that document are certain policies and procedures ... that they [teachers] have to have knowledge of in terms of risk, whether it's for field trips, what's expected for sports activities," or for lock downs or specific health and safety issues such as peanut butter and anaphylactic shock. In recent times, teachers have "had to sign off that they'd read it and were aware of it and ... there was a concerted effort to make them aware."

Afterwards, one or two 'walkie-talkies' were dedicated to the autism unit and they were always carried with the teachers. The unexpected event was discussed at a staff meeting and staff generally became aware of what had happened and what could happen. The unexpected event reinforced an earlier comment that Robert had made about working with an autistic child: "you need a different supervision level and [that is] why you have a higher supervision level in [autistic] classrooms." After the unexpected event, it changed their "thinking somewhat on supervision - ... We kept them a little closer under control. Also, it meant that when we had a new play structure built, we made sure we had a fence around it." As was alluded to by Richard Susskind, fences can be an important safety feature (Susskind quoted in Lightstone, 2002, p. 13).

The findings of this theme relate to the six steps of the risk management process that need to be addressed in order to implement a risk management plan that satisfies the requirements of due diligence and, in particular, the final step in the risk management process – action and monitoring (implementation, evaluation of effectiveness of plan and establishing a monitoring process). Other specific factors taken into consideration were scenario development; change in documentation; command structure; information sharing; change in

policy regarding school excursions and school and board policies, procedures, and practices; training; and student supervision and discipline. Again, although the focus is on the step of action and monitoring, there is no particular step at which these factors need to be taken into consideration; they may be taken into consideration at each step of the risk management process. These steps and factors would also be used for the purpose of determining whether a cause of action in negligence has been established.

4.2.10 Advice – management and training

Each of the participants offered advice and suggestions for other educators with respect to training and the management of risk issues. Much of their advice related to training in general and training of new teachers and administrators in particular. Their stories served as a rich source of data and clearly reflected the wealth of knowledge that they had accumulated through hands-on experience over the course of their careers, comprising over 200 years of collective experience.

Albert's advice to other educators would be that "it would be good to have a person responsible for risk issues that you knew you could call who might be an expert, a mini-expert, in ... especially the use of ... equipment in a school. Because we have a lot of dangerous equipment in a school." In retrospect, Albert felt that the influence of the caretaker in this case may have been a deciding factor in his decision to agree with the need to chain the tables to the wall – "I would say that was 90% the caretaker's decision and I just agreed with him." He was not certain if a beginning teacher would have had the same

concerns and have accepted the advice of the caretaker as he had. He considered that a manual relating to use of equipment would be an excellent idea. Also, he recommended that a committee comprised of principals, a board office person, and perhaps a caretaker with knowledge and experience with equipment to handle safety issues would be an excellent idea. He envisaged that the types of safety issues that he described in the interview would be the examples of the types of safety issues he would report to the committee (the tables, prostitution, drug use, and discarded syringes). At the time in question, he noted that there was a person (Chief of Social Services) who was available for the purpose of support with respect to these types of safety issues. (Such a person would undoubtedly be a valuable addition to such a committee). He thought that such a committee would be of great benefit to a new principal especially today when the principals were being appointed at a younger age than they had been in the past, and with less experience than previous teachers who had been appointed to positions of responsibility.

In the windows case, Joseph had advice that was similar to that offered by Albert. He advised that “you must have a chain of help comm. [*sic*] [command] that you know. ... People that you can contact immediately in this type of situation, who you know have the expertise to handle it.” Also, he advised that new teachers in particular need to be informed, and policies should be known and communicated to everyone. He noted that the information that is available on various health and safety issues is very good. Today, these issues are taken seriously by the board, principal, vice-principal, and the person in charge of such issues at the board, and these individuals work in concert with the school custodians. The

suggestion here was that the sharing and communication of information about and the implementation of solutions to risk issues is the responsibility of all stakeholders.

In the fire case, as was the case for Joseph with respect to his board, Gerry felt that new administrators are relatively well-prepared. His advice for someone who is placed in a compromising position by the employer (and, as he noted, where the employer has equally been placed in a compromising position and having to act) is to rely on your training and experience to work your way through the problem. So, here too, training helps. However, he further commented that when board transfer procedures are changed, safety issues and other issues are “thrown out of whack.” He recommended that “when you do make a last minute switch, be aware of the fact that maybe you need some extra support in there;” for example, an extra vice-principal or having the superintendent spend more time at the school. He believes that teachers need something put in place to assist them – ideally, an administrator for an area whose sole responsibility is school excursions. An important part of his advice was that the administrator be trained and that the training include legal training. He noted that such a position was already the norm for the secondary schools with his board – there is a person in that position who handles setting up extracurricular sports. The administrator would make sure that all liability issues are dealt with (permission forms, steps involved in the excursion, back-up plans, transportation issues, involvement with reputable persons). As a result of the appointment of such an administrator, Gerry commented that “more things will go right and more things will occur [more educational activities].” However, as with other participants, he recognized that this was a suggestion that would involve the issue of resource allocation.

Also, as discussed previously, Gerry noted that sufficiency of resources is an important factor and safety issues have to be given a high enough priority from the start of the year. In that regard and in view of the last minute transfer, he suggested that monetary resources be made available “for the teachers to come, that is, come in one day beforehand” (a day before school starts), in order to devote a day completely to safety. As he rightly pointed out, “You know, even the first day of school, that there could be a fire or whatever, ... so those policies have to be ready to go.” He indicated that such a day long session would be considered to be training. However, he stated that resources for that purpose were not available.

In the caves case, Patrick echoed the advice of other participants in regards to the use and value of persons with expertise in particular areas. During the course of his work as an administrator, he brought in other professionals from various disciplines to provide assistance to teachers, for example, police officers, psychologists, and even lawyers. He supported the view that training and the sharing of information, expertise and responsibility could help teachers and that teachers can be trained to deal with risk issues. Patrick considers experience, training, and sharing to be important factors in this regard. Patrick offered advice on a number of matters relating to the assistance and training of teachers with respect to risk issues and the zero risk option. First, as he put it, “It doesn’t have to be a course but, certainly, somewhere in education, in the training of teachers, there should be, certainly, an emphasis on safety and their responsibilities and their due diligence. You cannot prepare for all the eventualities but they should be tuned in to their responsibility. What possibly could happen.” Second, he stated that “the more experience I [he] had, the more comfort I (he) felt” and that “most teaching or development of teachers is done on the job. ... You can be

trained and you should be made aware of what you're expected to do in a supervision situation. He further stated that "... Life experience is certainly of value to someone being in the teaching profession." For Patrick, the sharing of information at staff meetings and between individual staff members and in-service training is "invaluable to other teachers, younger teachers and inexperienced teachers." Third, he "always emphasized with staff that we have to share this [responsibility for dealing with school-related issues]." As he put it, "We're all in it together." And, as part of this responsibility, "if you're out there, due diligence, doing what you have to do, then you're going to be covered. I can't expect you to be superman or superwoman out there but if you do what you are supposed to be doing, then we're all covered and the kids are going to be safe."

In the Europe case, Richard offered suggestions on a number of matters relating to the assistance and training of teachers. With respect to risk issues and the zero risk option, he offered this advice: "I don't think that you can eliminate risk. There is always something that you are not going to think of." He further indicated that, even if he 'thought of it (the risk),' there are some risks that he would be willing to take "for the benefit of everybody ... as long as you've got the common sense to be able to handle it and don't panic." As with the other participants, he supports training and advises that performance reviews of teachers in their interim years should be conducted by persons other than the principal or vice-principal. Specifically, he feels that educators are still not given enough training on policies. Principals are responsible at the moment to provide the training, and this does not go much beyond providing persons with a copy of the written the policy and advising them to read it. He indicated that the method of delivery and the message they give to staff is left to each

principal: it may be informal or formal, in the form of a one hour workshop, or at a staff meeting. In his case, there may have been workshops before the unexpected event but the guidelines would not have been as extensive. Richard believes that a four year bachelor of education degree would be better than the present three year bachelor degree with a one year course at a faculty of education. He feels that this would ensure that teachers obtain more practical hands-on experience, and he believes that during their interim years, they should have a mentor assigned to them. They would be required to meet either four times a year or even up to three times a month with their mentor. He noted that principals and vice-principals do not have the time to conduct performance reviews correctly. Again, like Gerry, he recognizes that it is a question of resources and, like Patrick, he noted that a teacher or administrator becomes more comfortable as he or she gains experience. However, he also feels that some persons get comfortable too easily. This is an indication that complacency is something that teachers should be made aware of and should guard against. It also suggests that if stakeholders become too comfortable, too complacent, group think can set in.

In the runner case, Robert noted that he had no special training in risk management. However, he offered advice on a number of matters relating to the assistance and training of teachers with respect to risk issues and the zero risk option. His advice to other administrators was: when you look at a situation try and assess everything, look at what can happen and set up something to prevent it. Training helps.” He noted that “you can’t wrap everybody in cotton batten and you can’t prevent everything and if there’s one thing that I learned when I was doing ... my principal’s training was an accident in and of itself does not constitute negligence because accidents do happen.” This statement indicates that at one

point in his career, Robert received some training relating to the law of negligence and that such knowledge can alleviate risk avoidance and risk aversion, although he had no special training in risk management. As with Joseph and Gerry, Robert's view is the same; that is, the general level of training and preparation for new administrators today has improved. He offered the following comment: "today general training level is better - they are well-prepared in terms of having policies and procedures in place but nothing replaces experience."

As with the other participants, Robert is a firm supporter of training. He has a bias towards having as much training as possible, and he notes that there has been much change from earlier times. His support of training is evidenced by the following statement: "I think there's always room for some training. My bias towards training is as much training as we can. I think it's important but I think it has to be done within the workday. I'm a believer that you can't keep dragging teachers out day after day, night after night for training ..." Robert recognizes that training conducted on teacher preparation or lunch time or on after work hours may become counter-productive and could lead to teachers becoming risk averse.

Robert indicated that the following were factors that he would take into consideration in addressing risk: risk of someone getting hurt; the consequences however that might happen; age and level of the students; the students themselves; the make up of the class; the probability of the risk occurring; different degree of risk associated with an autistic versus a regular class; and amount and degree of supervision. He also touched on and reinforced Gerry's comments that an unexpected event could provide a compelling purpose for change and may provide a vehicle to make change more receptive. In relation to unexpected events

such as was involved here, Robert noted that, when teachers are asked to make a change “from what they’d done in the past,” “the teachers accepted it if you could give a good reason for it as to why they needed to do things a certain way.” This is an example of how the sharing and communication of what should be done with respect to a change in policy, procedure or practice can be made more acceptable and less intrusive to teachers. When the decision-making process is open and transparent, staff are less likely to perceive a policy change as being intrusive.

The findings of this theme relate to the six steps of the risk management process that need to be addressed in order to implement a risk management plan that satisfies the requirements of due diligence and, in particular, the final step in the risk management process – action and monitoring. The specific factor of advice relating to management and training was taken into consideration. Again, although the focus is on the step of action and monitoring, there is no particular step at which this factor needs to be taken into consideration; it may be taken into consideration at each step of the risk management process. These steps and factors would be used for the purpose of determining whether a cause of action in negligence has been established.

4.2.11 Risk avoidance and risk aversion

Risk avoidance and risk aversion became evident in several of the stories. Richard and Robert recognized that zero risk was not an option. Richard does not believe that we can get rid of all risks – “there is just ... something that is going to happen beyond your control.”

Richard believes that with any activity there are certain things you have to accept – “I don’t think that you can eliminate all risk. There is always something that you are not going to think of.” He further indicated that, even if he ‘thought of it (the risk),’ there are some risks that he would be willing to take “for the benefit of everybody ... as long as you’ve got the common sense to be able to handle it and don’t panic.” Robert’s and Patrick’s comments on zero risk echo those of Richard. Patrick recognized that with respect to risk “there are hundreds of possibilities” and “you cannot prepare for all eventualities ...” However, a teacher is expected to be aware “of what possibilities there are in dangers and what possibilities there are in students injuring themselves.” And, later, he noted that “you can’t prepare for everything but the teacher has to be aware that they are responsible for the students.” Similarly, Robert advises that

... when you look at a situation, try and assess everything and it’s impossible to take out all of the risks but really try and look at what can happen and set up something to prevent it, or do the best you can to safeguard. It’s difficult because you can’t wrap everybody in cotton batten and you can’t prevent everything and if there’s one thing that I learned when I was doing ... my principal’s training was an accident in and of itself does not constitute negligence because accidents do happen. ... That’s the reality but if you’d taken all the steps that would normally prevent this kind of thing then I think then that’s what you have to look at.

These statements and advice are consistent with the case law – “there is always an irreducible margin”⁸⁶ (*Ware’s Taxi Ltd.*, 1949 , p. 645).

At the same time, Richard understood the nature of risk aversion and its impact. In describing his understanding of the terms ‘risk aversion’ and ‘risk averse,’ he stated that “people are trying to eliminate risks of things that occur rather than dealing with things as they happen. People are trying to see ... to avoid things that could happen so that things will go smoother.” Yet, Richard absolutely believes that there is no way to eliminate all risks – “There is just ... something is going to happen beyond your control.” He thinks that this is having an impact on what teachers are doing with students. However, he felt that the cause of risk aversion with teachers was the time that is now involved in organizing excursions, not because the teachers do not want to do these things (or because of liability issues either). He does not think that teachers are “shrinking away” in the face of liability issues. As he put it: “I think there is a liability issue but teachers face liability every day. Teachers are in front of the classroom. There are issues that occur every single day ... I think it’s paperwork that needs to be generated to do it and they don’t have time to do that.”

Richard described the dilemma that teachers and administrators face: “in an ideal world, you would not need all the paperwork and guidelines.” That is to say, in such a world, everyone involved in an educational activity would have acted responsibly and with common sense and, if an unexpected event occurred, it would be an accident. As Robert noted: “An accident in and of itself does not constitute negligence because accidents do happen.” But, on the other hand, as Richard noted: “Then you’ve got the issue that nothing is an accident because then when you’ve got a litigious society and becoming more and more of a litigious

⁸⁶ *Supra*, Note 82, at p. 645.

society, then I believe they are necessary.” One can appreciate the concern that a teacher with limited experience would have faced with the dilemma presented by these statements. In the caves case, the pressure felt by a teacher who undertakes an off-site, educational activity (an excursion) was demonstrated by Patrick in his assertion that “my neck was on the line.” He noted that, over time, the policies and awareness of the board of education with respect to school excursions changed: “There was more concern with litigation and there was more concern with parents’ concerns. So the board policies became increased.” This concern over litigation and the general feeling that ‘nothing is an accident’ has led to more stringent procedures for such educational activities as approval of school excursions. Patrick noted that school excursions now “have to be okayed by the Superintendent at the time.” Richard believes that statistics would probably show that “less field trips are occurring now than occurred ten or fifteen years ago.” Robert offers some helpful advice on how to overcome the development of risk avoidance and risk aversion on the part of teachers. He found that a change in policies and procedures would be accepted by teachers “if you could give a good reason for it as to why you needed to do things a certain way.”

Robert noted the deadening effect that more stringent procedures have on teacher performance - “when I think of my career from where I started and to where we are now the understanding of risks and the whole policy and procedures around everything, some people would say it’s almost deadening now in terms of trips.” So, as Robert noted, things that would have been done many years previously would now be given second thought. Richard provides an added perspective to the impact of this change from earlier times. Richard indicated that the policies are seen as being “intrusive” in that they place constraints on how

teachers may proceed; teachers perceive the policies as being superimposed on them. There is a feeling among “teachers in general that the policies are too restrictive and too difficult to put in place.” As noted above, Richard indicated that the amount of paper work and the time needed to fill out the forms was one of the main deterrents to teachers being involved in school activities: they want to continue to be involved but they are finding it too time consuming. And, as Patrick indicated, the increase in and concerns about litigation are contributing to an increase in more stringent procedures for school excursions.

The findings of this theme relate to the six steps of the risk management process that need to be addressed in order to implement a risk management plan that satisfies the requirements of due diligence and, in particular, the factors of risk avoidance and risk aversion. These steps and factors would be used for the purpose of determining whether a cause of action in negligence has been established.

4.3 Synthesis

The findings are addressed in the eleven subsections of section 4.2 relating to the six steps of a cause of action in negligence and the six steps of the risk management process and the factors associated with those steps. Also, it is important to note once again the iterative nature of the risk management process and the fact that the factors identified with respect to both the risk management process and the case law are to a large extent interchangeable. Indeed, the findings indicate that the risk management process and the case law may, by analogy, be thought in the manner of being a stereoscopic pair of photographs that when

viewed through the appropriate lens are capable of bringing into sharp relief how risk management and the case law can be used to investigate risk issues in the context of education.

In the case of the six steps and factors relating to the risk management process, the findings reveal that the participants did not narrate their stories using the language of risk management. However, although the participants had not received formal training in risk management, they collectively identified and used the steps and factors set out in the Q850 standard. The participants shared information, expertise and responsibility; identified and defined the problem; conducted preliminary analysis by identifying the hazards using risk scenarios; estimated the consequences of the risk associated with the unexpected event; evaluated the risk in terms of the needs, issues and concerns of those involved (stakeholders); identified feasible risk control alternatives; and then proceeded to select and implement an alternative followed by reflection on and implementation of lessons learned from the unexpected event. One of the most evident steps of the risk management process that was part of each participant's story was their monitoring of and reflection on the causes and results of the unexpected event with respect to policies, procedures and practices not only of the individual participants but also the school and, in some cases, their school board. This allowed the participants to provide useful advice that was shared with others and to make recommendations with respect to management, training and changes to existing policy, procedure and practice.

Similarly, in the case of the six steps and factors relating to the cause of action in negligence, the findings reveal that the participants did not narrate their stories as 'legal

stories’(stories told using the language usually associated with courtrooms and legal proceedings) but narrated their stories using ‘plain, everyday language’. However, collectively their actions reflected many of the steps and factors of the case law relating to causes of action in negligence. The findings reveal that the methodology of the study is a tool that can be used to identify the factors and answer the questions associated with the steps of a cause of action in negligence in particular cases; namely, was a duty of care owed?; what was the standard of care?; was there a breach of the standard?; was there damage (harm or injury)?; did the breach cause the damage and, if so, is there a reasonably close causal connection between the conduct and the damage (proximate and not too remote)?; and did the person suffering the damage contribute to the negligence or did the activity involve a voluntary assumption of risk?

The findings reveal that the methodology of comparing the stories of the participants with the known steps and factors embedded within risk management and the case law is suited to and capable of providing valuable information about how educators respond to risk issues and what they do in response to risk issues in the context of education. Also, the findings reveal that the methodology is capable of providing answers to the two specific research questions. Another important finding was the capability of the methodology to identify gaps, similarities and dissimilarities in the policies, procedures and practices of educators in dealing with risk issues. In turn, this allowed for the subsequent making of recommendations relating to appropriate changes in policies, procedures and practices.

From the perspective of decision-making theory, the use of dual-process reasoning by each of the participants was evident. The findings indicated evidence that both processes of

reasoning ('rational, analytical (reflective) or rule-based' and 'experiential, intuitive (reflexive) or associative') played a role in decision-making for both the proactive, preventive cases and the reactive, corrective cases.

CHAPTER FIVE

ANALYSIS AND DISCUSSION

5.1 Analysis and discussion of themes - preliminary comments

The literature review revealed the steps that are taken and the factors that are taken into consideration by risk managers and judges in making decisions about risk issues with respect to the three disciplinary components of this study: education and decision-making theory, risk and risk management, and case law and legal precedent.

In this study, both deductive and inductive analyses were used to investigate risk management and the law in the context of education from the perspective of principals. As noted previously, the steps and factors embedded within risk management and case law were used to develop the coding procedure for deconstructing the stories and reducing the transcribed interviews to patterns. The individual stories of the principals, once deconstructed, provided “story-patterns” or categories respecting the decision-making process of the educators. These patterns were revealed through, one, the particular facts and circumstances of the stories and, two, the steps taken and factors taken into consideration by the educators in making decisions about the risk issues found in their stories. Subsequently, the individual stories of the principals were reconstructed and collectively analysed and synthesized for the purpose of identifying patterns common to the stories of the principals. These emerging patterns were compared with the patterns embedded within risk management and case law. As a result, a number of themes emerged from the analysis of the data

collected from the stories. The findings, using the themes that emerged from this process, were analyzed and interpreted to answer the research questions. However, before proceeding with an analysis of the data and elaborating on these themes, some further preliminary comments on the stories are appropriate.

First, in analyzing the data from the interviews, the purpose was not to determine negligence, liability or fault, or no negligence, no liability or no fault. Analysis of the data from the interviews proceeded for the purpose of determining what educators did when confronted with and how educators responded to an unexpected event involving risk issues. Each story was analyzed to determine the steps and factors that the educators took into consideration in making decisions about the risk issues relating to the unexpected event in their stories. The combined patterns arising out of the individual story patterns were compared with the patterns embedded within risk management and the case law. For this purpose, the patterns for risk management and the case law set out in the interview protocol (refer to Appendix 5) were used.

Second, it is important too for the reader to understand that this study involves a language and methodology that combines the steps and factors of the risk management process and case law with the stories of the participants to identify steps and factors that can be used by educators to develop a reasonable risk management plan. This is not the same thing as doing what lawyers refer to as legal risk management (see below). A risk management plan for use by educators refers to using the steps and factors learned from the case law and applying them to the risk management process for the purpose of ensuring that due diligence has been met and of reducing or eliminating the occurrence of unexpected

events and the risk issues associated with them. The development of a reasonable risk management plan for use by educators that will serve to ensure the safety and security of the students entrusted to their care is an aim of this study. This will assist in ensuring that injuries are prevented and that a cause of action in negligence does not become an issue.

On the other hand, legal risk management refers to the management of a file where litigation is either threatened or has been initiated. The case becomes that of reacting either to the threat of court action or a court action (the unexpected event has occurred and there is a cause of action) and not that of preventing or responding to the unexpected event in the first instance. For example, in legal risk management, the questions become: What is the risk (probability) that the case will be won or lost? What effect will the outcome have on future cases? Is it better to settle than proceed to defend the action? What are the legal consequences? What is the financial cost? What is the political cost in terms of perception within the community? This is what is generally referred to as legal risk management. However, in recent years, there has been a change in the way that risk management is being used by lawyers. As the title of the article by Lightstone (2002) suggests (*Thinking like a client: The renaissance of preventive law*), lawyers are beginning to be more cognizant of the benefits of providing their clients with advice on how to avoid problems and not just providing advice on how to solve them after they arise – the benefits of being proactive and preventive and not just reactive. As Lightstone (2002) states: “Preventive lawyers and their clients work together to develop methods for anticipating and preventing legal problems, in order to avoid future conflict and expenses” (p. 12). And, as the metaphor by Richard

Susskind suggests, better a fence at the top than an ambulance at the bottom (Susskind quoted in Lightstone, 2002, p. 13).

Third, we have often heard the expression “nothing is so easy as to be wise after the event.” Here again we must recognize the difference in thinking between lawyers and educators. The lawyer is armed with hindsight and the most accurate diagnostic instrument, the retroscope. With 20-20 vision, he or she is able to seize on the unfortunate result of an activity and then proceed to second-guess the educator, charging him or her with fault, despite the fact that, at the time, the educator was not fully aware of the circumstances surrounding the activity and that the situation was dynamic and required immediate attention. The courts are aware of this difficulty and take this factor into consideration; that is, if a reasonable person would be affected by the circumstances involved in an emergency, then this factor would be given consideration in assessing that person’s conduct in responding to the emergency. Evidence of this is found in the *Moddejonge*⁸⁷ rescue case where the Court was reviewing the argument that the rescuer had made a rash and futile decision that was not reasonable as a result of which the rescuer drowned. In its reasons for judgment, the judge stated:

One must not approach the problem with the wisdom that comes after the event. Justice is not to be measured in such scales. (p. 444)

Also, as was noted previously, an error in judgment does not amount to negligence. As was stated by the Court in *Wagner v. International R.R.*:⁸⁸ “‘Errors in judgment,’ however, would not count against him, if they resulted ‘from the excitement and confusion of the

⁸⁷ *Supra*, Note 73, at p. 444.

⁸⁸ *Wagner v. International R.R.*, 232 N.Y. 176, at p. 177.

moment.’ The reason that was exacted of him was not the reason of the morrow. It was reason fitted and proportioned to the time and the event” (p. 177).

Fourth, another unanticipated but interesting development occurred in that the unexpected events occurred at times when not all of the participants were administrators and, even as between those who were administrators, some of them were vice-principals at the time of the unexpected event and others were principals. The status of the six participants at the time of the unexpected event was: two teachers with one year and two years of teaching experience (the windows and caves cases); two vice-principals with 2 and 5 years of experience (the runner and Europe cases); and two principals with 2 and 6 years of experience (the tables and fire cases). This has provided the study with data relating to how risk issues were managed by teachers, vice-principals and principals at various stages and at various times during the course of their careers. Yet, at the same time, the interviews were conducted at a time when all of the participants were retired either as a principal (tables, fire, caves and Europe cases) or vice-principal (windows and runner cases). This provided the study with data on the perspective of principals with respect to risk issues with which they were involved not only at the time of the unexpected event but after the unexpected event as well, at a later time when they had become vice-principals or principals. The impact of the risk issues associated with the unexpected event went beyond the moment and affected their management of risk issues throughout their careers.

Fifth, the overarching factors that were common to all of the stories were protection and supervision. These factors encompassed all those matters required for ensuring the safety and security of the children and other participants. For the purposes of analysis in this

study, the difference between the two factors is important. Protection refers to the physical environment within which the learning experience takes place; that is, the condition of the school building (doors, windows, floors, lighting, alarm systems, etc.) and equipment (tables, desks, chairs, flashlights, etc.). Supervision refers to the oversight of school activities, the students and the participants (the storytellers themselves); that is, the system used to monitor students, such as the ratio of students to supervisors on a school excursion.

Sixth, in telling their stories, the participants did not expressly state that they were following some checklist of procedures for making their decisions relating to the risk issues involved as would be the case if a risk management process had been followed. Nor did they specifically refer to the reasoning processes used by them in making decisions at any particular point in the story. However, it was clear that, in telling the stories, their approach to decision-making included both processes of reasoning: ‘rational, analytical (reflective) or rule-based’ and ‘experiential, intuitive (reflexive) or associative.’

Finally, a word about ‘liability’ and ‘damages.’ Liability refers to responsibility for a negligent act and damages refers to compensation in the form of money for injury or loss suffered as a result of that negligent act. Damages is one of the elements underlying a cause of action in negligence and, unless the person who is the subject of the negligent act has suffered injury or loss, no action in negligence will lie. Injury or loss is a necessary prerequisite to a finding of liability. As the case law illustrates, there is no cause of action in negligence without injury and negligent conduct in the absence of injury does not give rise to a finding of liability. Indeed, not even negligent conduct involving injury or death may give rise to a finding of liability and an award of damages: it depends on the circumstances (e.g., a

hockey incident). The participants seemed to understand this principle, as evidenced by their relief when no injury or loss occurred. At the same time, they seemed to understand that had the outcome been different, their conduct (both before and during the event) may have become more of a subject of concern. Their immediate interest was in “damage” in the sense of injury to student, and not liability and “damages” in the sense of monetary compensation. At a common sense level, they seemed to understand that if no injury resulted all could be forgiven. Yet, at the same time, they were motivated to ensure that the possibility of injury to the children arising out of the unexpected event did not happen again.

Although none of the cases in this study resulted in injury or litigation, analysis proceeded on the basis that the purpose of the analysis was not to determine negligence, liability or fault, or no negligence, no liability or no fault. As the reader may recall, cases involving both liability and no liability can be equally informative for the purposes of this study. Analysis proceeded on the basis that the steps and factors relating to the risk management process and the case law can serve to provide educators with a common, rigorous and consistent language and methodology to prevent or minimize educational risk issues. The discussion of the themes that emerged from the findings after analysis of the combined stories proceeded with these comments in mind.

5.2 Data analysis

According to Tesch (1990), “the process of data analysis is eclectic; there is no ‘right way’” (Tesch, 1990 quoted in Creswell, 1994, p. 153). Yin (1989) identified two of the

dominant modes of data analysis as being: the search for “patterns” by comparing results with patterns predicted from theory or the literature and “explanation building” in which the researcher explores plausible or rival explanations and attempts to build an explanation about the case. In this study, the dominant mode of data analysis is the search for patterns. As noted previously, the steps and factors embedded within risk management and the case law were used to develop the coding procedure for deconstructing the stories and reducing the transcribed interviews to patterns. The individual stories of the principals, once deconstructed, provided “story-patterns” or categories respecting the decision-making process of the educators. Subsequently, the individual stories of the principals were reconstructed and collectively analysed and synthesized for the purpose of identifying patterns common to the stories of the principals. These emerging patterns were compared with the patterns embedded within risk management and case law. It was understood that, while much of the work embodied in the analysis process would consist of ‘taking apart’ the stories, the final goal was a synthesis process resulting in the emergence of a larger, consolidated picture (Tesch, 1990). This process is reflective of a systems thinking approach, as opposed to a mechanistic, reductionist approach (White, 1995).

In this study, a systems thinking approach is one in which a system is defined as “a set of elements connected together which form a whole, this showing properties which are properties of the whole, rather than the properties of its components” (Checkland, 1990, p. 3). Such a systems thinking approach is particularly relevant to tackling ill-structured (non-programmed) “messy” problems in which human behaviour and context can affect the management of risk. Also, according to Creswell (1994), “qualitative researchers have no

single stance on addressing traditional topics such as validity and reliability in qualitative studies” (p. 157). Creswell’s (1994) perspective is that these concepts are important and should be addressed and framed “within the procedures that have emerged from qualitative writings” (p. 158). For the purpose of this study, the transcripts of the stories of the principals and case law served as a check on the accuracy of the information collected, analyzed and synthesized and whether that information matches reality (Merriam, 1988 quoted in Creswell, 1994, p. 158). Findings of the study are reported using a narrative form and figures, as appropriate.

5.3 Narrative inquiry

Both the narrative and reflections upon the narrative by the participants facilitated understanding and generated new insights. Through reflection on and analysis of the sequence of events that led to the risk issues and decisions associated with the unexpected event, the participants identified steps that were taken and factors that were taken into consideration, in addition to those steps and factors that were not taken, and perhaps those that should have been taken. Further, my own reading of and reflections on the stories provided another perspective. This process is consistent with the literature on narrative inquiry. Chambers (2003) noted that the creation of a text or story derived from lived experience produces rich, authentic data. Bruner (1986) recognized the versatility in narrative power (storytelling) and suggested that such a mode provides access to the construction of a variety of perspectives in order to make experience comprehensible. Also,

the analysis of the stories illustrates “how powerful narrative can be in enabling a learner to reflect upon their own practice” (Chambers, 2003), and how we can learn from experience (Dewey, 1938).

Generally, the language of risk management and the case law was not used by the participants to narrate their story and to respond to questions. The stories of the participants were not told as ‘legal stories’ in the sense described by Bruner (2002) as being a story involving a court and legal proceedings. Rather, the stories were told by all of the participants in the form of a narrative comprising the five features described by Bruner (2002): a cast of characters with recognizable expectations; a breach in the expected state of things; efforts to cope with the breach; an outcome or resolution; and, finally, a coda or retrospective evaluation of what it all might mean. Their stories are what Clandinin and Connelly (2000) refer to as narrative fragments that became a part of the life of the participants and which revealed much about the decisions made by the participants.

Also, none of the participants referred to any applicable statutes and regulations or the steps and factors of the risk management process or case law, such as risk management, risk management planning, duty of care, causation, contributory negligence, community standards, foreseeability, and due diligence. However, collectively their actions did reflect many of the steps and factors of the risk management process and the case law. This became more evident as the interview progressed beyond the time of the unexpected event and simply the telling of the story, some of the language of the participants had overtones of the risk management process and the case law; Patrick – hazards, possibilities, due diligence,

litigation; Richard – risks, risk aversion, possibilities, due diligence, litigation; and Robert – risk, probability of risk, degree of risk, consequence.

5.4 Two categories of stories

As the stories were analyzed, an unanticipated but interesting development occurred in that the stories provided a means for illustrating the importance and value of initiating the risk management process at the earliest stage of an activity. Analysis showed that the stories may be characterized as belonging to two different categories. One category may be described as representing a proactive, preventive approach in which time was available to take reasonable preventive measures in dealing with the risk issues. The other category may be described as representing a reactive, corrective approach in which time was of the essence and required an immediate response and corrective action in dealing with the risk issues. Two of the cases arising out of the stories, one having an on-site setting (tables case) and the other an off-site setting (Europe case), are in the proactive, preventive category and the four other cases arising out of the stories, three having an on-site setting (fire, windows and runner cases) and one having an off-site setting (caves case), are in the reactive, corrective category.

5.5 Dual-process reasoning

In the two proactive, preventive cases, time was available for the development of scenarios and the identification of foreseeable risks and consequences, since the unexpected

event relating to the risk issue was identified at an early stage. This in turn allowed time to take reasonable preventive measures. The decisions taken and the measures implemented in response to these cases to reduce or eliminate the risks were in the nature of what Simon (1977) has described as being 'programmed' decisions. The reasoning process was in the nature of what is referred to in this study as rational, analytic (reflective) or rule-based. However, in the four reactive, corrective cases, the unexpected event relating to the risk issues happened in 'real' time; the teachers and students were directly and immediately involved. Given the nature of the risks and consequences (life and death) and the circumstances surrounding the unexpected events, these cases required an immediate response and corrective action because time was of the essence. Decisions had to be made without delay based on unknown or limited known information. Thinking was much dependent on the experience, intuition and common sense of the decision maker. The decisions taken and measures implemented in response to these cases were in the nature of what Simon (1977) has described as being non-programmed decisions: decision-making was more *ad hoc* in nature. The reasoning process was in the nature of what is referred to in this study as experiential, intuitive (reflexive) or associative. In reactive, corrective cases such as these, experience, intuition and common sense would play a major role (Reyna, 2004; Hodgkinson et al., 2008). Also, this is consistent with the literature review relating to the role of these factors in emergencies (Klein, 1998). The life and death nature of the circumstances surrounding the unexpected events in these reactive, corrective cases provided some tense moments and varying degrees of emotional but controlled stress for the teachers out of concern for the safety of the students. However, as one would expect in both of the

proactive, preventive cases, emotional concern for student safety was not as large a factor as in the reactive, corrective cases due to the less urgent nature of the response measures needed to control the potential consequences of the unexpected event.

At the same time, in both the proactive, preventive cases and the reactive, corrective cases, there is evidence that both processes of reasoning played a role in decision-making. As was noted by Hodgkinson et al. (2008), the cognitive-experiential self theory of Epstein and his colleagues (Denes-Raj & Epstein, 1994) posits that “analytical and intuitive processing capabilities are served by cognitive systems that permit individuals to switch back and forth strategically from one approach to the other, as required, ...” In the proactive, preventive cases, the analytical reasoning was done at the outset to prevent any unexpected event from occurring in the first place, thereby reducing but not eliminating the need for intuitive reasoning. In the reactive, corrective cases, the intuitive reasoning was done first and then, on reflection, followed by analytical reasoning after the unexpected event. At the same time, there were instances where both processes of reasoning were being used in unison; for example, in the caves and runner cases. In this way, the analysis of the stories illustrates the importance and value of initiating the risk management process at the earliest stage of an activity. This will allow time for both forms of the reasoning process to be used in the decision-making process. Furthermore, the training of the participants – in addition to their experience, intuition and common sense – played a role in the reasoning process. As educators, the participants had undoubtedly taken courses in child psychology as part of their training. They understood that they were dealing with children and that such matters as the

age, intelligence and experience (not to mention foolishness) of the children were relevant factors to consider.

When the proactive, preventive cases are placed in juxtaposition with the reactive, corrective cases, the proactive, preventive cases are excellent examples of how a present knowledge and application of the steps and factors of risk management and the case law can serve to reduce or eliminate unexpected events relating to present and future education-related activities and the risk issues that often accompany them. The language and methodology of risk management and the legal reasoning found in the case law can provide the means by which the various stakeholders can communicate with each other effectively to produce a reasonable risk management plan that satisfies the need for due diligence. In dealing with risk issues, an ounce of prevention is truly worth a pound of cure.

5.6 Two educational leadership styles

In the *Myers*⁸⁹ case, two educational leadership styles emerged from the reasons and decisions: one that espouses close supervision and discipline by educators, and the other that espouses the growth and acceptance of personal responsibility on the part of students with less supervision and discipline by educators. The stories of the participants reveal that the degree of supervision required with respect to an educational activity depends on the circumstances in which the activity occurs. Similar to the decision in the *Myers*⁹⁰ case, the stories revealed that the degree of supervision may range from close supervision and

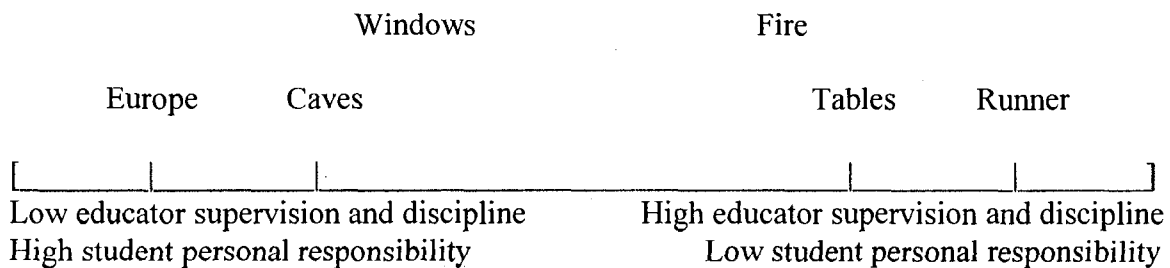
⁸⁹ *Supra*, Note 43.

⁹⁰ *Ibid.*

discipline by educators at one end of the continuum to greater reliance on student personal responsibility with less supervision and discipline by educators at the other end. This factor has important implications for teachers with respect to issues of protection and supervision.

Figure 3 represents a graphic representation of the two educational leadership styles.

Figure 3
Continuum demonstrating the two educational leadership styles



Source: Robert E. Tourangeau, 2008

The runner case is an example of the close supervision and discipline leadership style and the Europe case is an example of the greater reliance on student personal responsibility (less supervision and discipline). The tables case would fall next to the runner case along the continuum and the caves case would fall next to the Europe case. Insofar as the windows and fire cases are concerned, they may be examples of cases that fall outside the continuum in that they may be considered to be extraordinary, unforeseeable events. In this sense, the reasoning and decisions of the judges in the *Myers*⁹¹ case (as it made its way through the courts to the Supreme Court of Canada) represent a reasoned response to the reality that exists in the education system. Their reasoning and decisions mirror closely the two educational leadership styles that were exhibited by the cases associated with the stories. In making their decisions, the judges took these differing leadership styles into consideration,

although they were divided in their views on the supervision issue. In the Ontario Court of Appeal, the decision showed that, while a teacher is responsible for the protection and supervision of students, the teacher is under no legal obligation to maintain constant supervision and, furthermore, students too have personal responsibility to ensure their own safety. The Supreme Court of Canada agreed with the trial court judge and the dissenting judge in the Court of Appeal, and took the more conservative, cautious and protective approach, that is, a careful and prudent parent would not have allowed his son to be involved in the activity in question without adult supervision and the teacher should have anticipated the reckless behaviour. This is consistent with the decision in the *Williams v. Eady*⁹² case where the judge stated that a headmaster must take into consideration the fact that children will do foolish things.

Similarly, the various stakeholders (parents, teachers, principals, board administrators, and the caretaker) in the tables and Europe cases held differing views concerning the degree of supervision required in the circumstances. Some students within the same group of students may do foolish things and so may require differing degrees of supervision, as the cases associated with the stories demonstrated. What is important is that the extremes of the continuum and the points in between the extremes represent various levels of risk perception and risk acceptance by the various stakeholders at the time in question. Therefore, it becomes important for the various stakeholders to consider the level of risk that each of them is prepared to accept in relation to any particular individual or activity. Educators need to know the position of all of the stakeholders, including the teachers, parents, school

⁹¹ *Ibid.*

⁹² *Supra*, Note 35, at p. 42.

administrators (principals and vice-principals), board administrators, volunteers, students, caretakers and other support staff, and other teachers, as a means for assessing what the standard of the community is insofar as protection and supervision are concerned. Also, although the Supreme Court of Canada took the more conservative, cautious and protective approach in the *Myers*⁹³ case, the case was decided in the context of its particular circumstances. That case does not stand for the proposition that the standard of care in all cases is that of a careful and prudent parent who exercises close supervision and discipline. The standard of care will depend on the particular circumstances of the case.

5.7 Recognition of duty of care and standard of care

The duty of care owed by a teacher to a student was set out in the case of *Williams v. Eady*⁹⁴ as being that of a careful and prudent parent:

The standard of care to be exercised by school authorities in providing for supervision and protection of students for whom they are responsible is that of the careful or prudent parent, described in *Williams v. Eady*. (p. 42)

This decision was applied by the Supreme Court of Canada in the case of *Myers*.⁹⁵

As the case law has shown, since all of the stories of the participants involve educators and students, the duty of care owed by the educator in each of the stories is established in

⁹³ *Supra*, Note 43.

⁹⁴ *Supra*, Note 35, at p. 42.

every case due to the special relationship that exists between educators and their students; the special relationship of being *in loco parentis* (*Toronto (City) Board of Education*⁹⁶). The Supreme Court of Canada in the *Myers*⁹⁷ case (which referred to the *McKay*,⁹⁸ *Thornton*,⁹⁹ *Dziwenka v. The Queen*¹⁰⁰ and *Williams v. Eady*¹⁰¹ cases) affirmed that the standard of care in the case of teachers is that of a careful and prudent parent. Also, the *Thornton*¹⁰² case (having been considered in the *Myers* case) added a gloss to the standard of care insofar as children involved in a physical education activity are concerned, a gloss that is consistent with the literature on risk perception with respect to children generally – society has a different perception of standard of care insofar as children are concerned. Furthermore, a careful reading of the *Myers*¹⁰³ case establishes that a careful and prudent parent is a parent who takes reasonable precautions to avoid unreasonable risk of foreseeable consequences.

Having established that, first, a duty of care was owed and, second, the standard of care is that of a careful and prudent parent, the essential questions that need to be addressed are the lawyer's questions: Did the participants recognize the duty of care that they owed to their students? Did the participants understand what the standard of care was that they had to meet in order to satisfy the duty of care? What steps were taken and what factors were taken into consideration by the educators in order to fulfil their duty and meet the standard of care? In analyzing this theme of recognition of duty of care and standard of care for the purpose of

⁹⁵ *Supra*, Note 43.

⁹⁶ *Supra*, Note 17.

⁹⁷ *Supra*, Note 43.

⁹⁸ *Supra*, Note 37.

⁹⁹ *Supra*, Note 6.

¹⁰⁰ *Supra*, Note 29.

¹⁰¹ *Supra*, Note 35, at p. 42.

¹⁰² *Supra*, Note 6.

¹⁰³ *Supra*, Note 43.

responding to these questions, I must state that the words on a paper cannot begin to do justice to the feelings expressed by the participants and their sense of responsibility for the students under their care. Each of the participants undoubtedly recognized the duty of care that was owed by them to the students as evidenced by their concern over the safety of the students once they became aware of the risk issue involved in their story. Although their response to the risk issues was rational and measured, each of the participants was moved by the experience (particularly the participants in the reactive, corrective cases).

One of the most personal impressions that I have of the interviews is the same feeling that I had many years ago when the master at the teachers' college narrated to his students the story of the baseball game and bat – I was struck by their willingness to narrate a personal story that had meant a great deal to them personally in order to potentially help others. Their reaction to the unexpected event was consistent with what one would expect of a parent in relation to their children and indicates an implicit understanding that the teacher-student relationship is special and in the nature of parent and child. The impact of their experience is evidenced not only by their reaction to the unexpected event and its associated risk issues but also by the fact that this particular story was the one chosen by them to narrate, above all others that had occurred during the course of their long teaching careers. Assuming of course that there were indeed others.

Also, in regards to these two steps of the law of negligence (duty of care and standard of care), none of the participants expressly referred to a duty of care or a standard of care but they all seemed to understand that, as educators who had been given the duty to care for and supervise children, they were responsible for ensuring their safety and security in the same

manner and to the same extent as that of a parent. However, it was not clear that they understood that the standard of care was an objective standard. The standard is not what they personally did, should do or should have done but, as an educator *in loco parentis*, what would reasonably be expected of a careful and prudent parent of that particular child.

5.8 Causation – teacher conduct as a contributing cause

One of the aspects of the issues relating to probability and foreseeability is the impact of teacher conduct as a contributing cause of the unexpected event. As was held in the *Williams v. Eady*¹⁰⁴ case, the standard of care expected of a teacher is that of a careful and prudent parent who must take into consideration the fact that children will do foolish things. Other case law has also referred to this propensity or proclivity of children. In the *Myers*¹⁰⁵ case, the Supreme Court of Canada held that the school board should have “anticipated reckless behaviour from at least some of the young boys ... and the proclivity of young boys of high school age to act recklessly in disregard, if not in actual defiance, of authority is, ... well-known.” And along this same vein in the *Myers*¹⁰⁶ case, the Ontario Supreme Court (Court of Appeal) took note of the trial judge’s opinion that “the mere presence of a teacher ... probably would have deterred the plaintiff Gregory Myers from the foolish move that led to his injuries.” In the 1956 case of *McEllistrum v. Etches*,¹⁰⁷ in which a boy of 9 years of age suffered a leg injury, the Supreme Court of Canada decided that in determining whether a

¹⁰⁴ *Supra*, Note 35, at p. 42.

¹⁰⁵ *Supra*, Note 43.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Supra*, Note 78.

child exercised the proper care one must take into consideration the age, experience and intelligence of the child. These are factors that educators are already trained to consider in dealing with children. From an educator perspective, in each of the reactive, corrective cases (windows, fire, caves and runner), the students did do foolish things and, although the event itself was unexpected and perhaps unforeseeable, the particular propensities of the students were known to the participants beforehand.

5.9 Causation – board policy as a contributing cause

In listening to the participants tell their story, the significance of board policy in influencing the steps taken and factors taken into consideration by educators in managing risk issues became apparent. There was a sense in some cases (tables, windows, fire and Europe) that board policy was a contributing cause with respect to the occurrence of the risk issue or was in part responsible for causing the risk issue to develop.

However, what must be kept in mind by the reader is that the comments of the participants respecting the risk issues associated with the unexpected event relate to a particular moment in time with their board. Each of the participants acknowledged that their board had changed with the times so to speak and that changes had occurred in the development and implementation of policy at the board level over the years since the occurrence of the unexpected event. At the same time, the participants noted that those changes had both positive and negative impacts. In this regard, the analysis of this theme produced a number of sub-themes relating to board policy and, regardless of the changes and

their impact in today's terms, the results of the analysis of the risk issues associated with the stories serve to demonstrate the importance of board policy in relation to risk issues.

Division of responsibility

Legislation provides that the board directly or through its employees is responsible for providing a safe environment for its students, teachers and others while in attendance on school property. One of the first matters that arose out of the analysis of the stories was the notion, raised by both Albert and Robert in the tables and runner cases, that health and safety issues were matters related to the physical attributes of the school. Such issues were expected to be handled by 'specific persons at the board' or was more the responsibility of the 'caretaker.' However, both Albert and Robert accepted the position that "the principal would ultimately be responsible" for the risk issues of the school. This bifurcated policy with one person having ultimate responsibility for safety and another person having control over the resources needed to deal with a safety issue relating to the building structure and equipment of the school brings with it the potential for confusion. A health and safety issue may be passed over or missed as the principal may think that the initiative to deal with the matter rests with the caretaker or other persons and vice-versa. Albert disagreed with this bifurcated policy that gave rise to a lack of control over budget. He feels that, "philosophically, if the principal is responsible for the safety of the school then the principal should have control over monetary issues that concern safety."

Application of board policy

Another important aspect of board policy that may play a part in contributing to or causing the occurrence of an unexpected event is when the board

1. does not have a policy in place;
2. has a policy in place but the policy is either not communicated properly or is not readily available to those required to implement it;
3. has a policy in place but the policy is not well-drafted;
4. has a policy in place but fails to implement the policy;
5. has a policy in place but fails to provide the resources necessary to properly implement the policy;
6. has a policy in place but for one reason or another does not follow its own established policy and does not implement it in the normal fashion; or
7. has policies in place that may be contradictory.

The tables, windows and fire cases are examples of the first item: teacher not aware of policy (windows case - on leaving class unattended / on lunchroom supervision) or no apparent policy on experience with respect to school transfers (tables and fire cases).

The windows and Europe cases are examples of the second item: if policy in place on supervision, it was not communicated properly (windows case – on leaving class unattended / on lunchroom supervision); policy was not readily available (Europe case - guidelines on school excursions); no clear communication of policy (tables case - on table replacement or on location for children to eat lunch).

The tables and Europe cases are examples of the third item: policy was not well-drafted (Europe case - 'loosey-goosey') and (tables case – documentation silent with respect to who may assist caretaker).

The tables case is an example of the fourth item: policy in place for table replacement but tables not replaced because of withdrawal of financial resources.

The tables and fire cases are examples of the fifth item: policy in place for caretaker but time frame not practical (tables case – no human resources support for setting up and collapsing tables and no financial resources for table replacement (tables case), and no provision of additional administrative support (fire case – when “things thrown out of whack”).

The fire case is an example of the sixth item: last minute transfer to a school (“kind of a forced incompetency”).

The tables and windows cases are examples of the seventh item: possible dilemma faced by those required to implement policy. If policy is not to leave class unattended then what is the teacher to make of simultaneous lunchroom supervision of three classrooms and does this amount to a form of forced incompetence (windows case). Also, what is to be done if stated policy is to have children eat lunch using tables in a gymnasium but financial resources are withdrawn for table replacement as necessary (tables case).

This analysis demonstrates clearly that the study is capable of identifying gaps in the management of risk issues. It also demonstrates the need for the board to develop policy that is well-drafted and takes into consideration the needs of the stakeholders; to communicate policy to those who are required to implement it; to ensure that policy is implemented in

accordance with its terms; and to support the implementation of policy by providing adequate resources (financial and administrative) and training.

Resource allocation

The tables and windows cases are excellent examples of how the allocation of financial resources for equipment can have an impact on risk issues. In the tables case, a reduction in resources led to the non-replacement of tables in need of repair and this in turn had an indirect impact on staff regarding supervision of the lunch period. The caretaker who had responsibility for setting up and collapsing the tables was not provided adequate monetary resources to replace the tables as they became in need of repair. In the windows case, Joseph noted that, although there were no screens on the windows of his school, the windows of other schools had been equipped with screens that would have prevented the unexpected event that occurred at his school. (Whether the screens on the windows of the other schools were already in place before the unexpected event at his school was not clear from the transcript.) However, regardless of whether the board had pre-knowledge of the risk issue or as a matter of hindsight, they clearly recognized that such windows required screens. Also, it is worth noting Richard's comments concerning monetary resources. He understood that politics also plays a role. He believes that "not only money, but personal agendas" play a large part in developing policy relating to risk issues. The implication is that liability issues and the potential for litigation play a part in the development of board policy in relation to school excursions.

Lack of direction given to and lack of supervision of employees

The tables, caves and Europe cases offer examples of how a lack of direction and a lack of supervision can impact risk issues. In the tables and Europe cases in particular, the lack of involvement of the board in the supervision of its employees and the lack of direction led to what may be described as 'group think' brought on by a customary way of doing things. The two cases involving excursions are informative in relation to board policy and supervision. In each of these cases, board policy at the time of the unexpected event was not as extensive as it later came to be. Nor was there administrative support of any consequence in terms of training. In the Europe case, the prime directive seemed to be: "if it ain't broke, don't fix it." In the caves case, the pressure felt by a teacher who undertakes an off-site, educational activity (an excursion) was demonstrated by Patrick in his assertion that "my neck was on the line." Patrick stated that, at the time of the excursion: "It was ... totally left up to the teachers running the proposed" excursion to organize it. "You ran those outings by the principal but it was totally a teacher organized situation." From these statements, the inference was that if a student was injured while participating in an excursion of which he was the leader then he would feel personally responsible and would perhaps be held personally liable, by comparison with the other teachers.

As a person who has taken students on many excursions myself, I can relate to his concern. In 1972, I took a group of about forty students on an overnight hiking and camping trip in a national park during the dead of winter. When I asked my principal if the board had

approved the excursion, his comment was “yes, it was okay to go but the board told me to tell you that if something goes wrong, you better head for the hills.” This was not a ringing endorsement of support from the board in relation to an educational activity involving risk. What was needed was more direction and guidance from administration as to what would constitute adequate procedure and practice in the eyes of the board.

Custom (established practice)

There is evidence that custom played a part in respect of the risk issues arising out of the stories. As the case law has indicated, the repetition of a negligent, unsafe activity over time without injury does not make the activity any less negligent, although it may provide evidence that the particular occurrence of an injury was an isolated event. One of the most harmful effects of custom is that it can lead to ‘group think’; in the Europe case, that is exactly what happened. The unexpected event in that case was the initial communication from a parent who alerted him to the initial problem which was alcohol-related and involved an underage student.

In each of the tables, runner and Europe cases, the use of risk management might have identified the risk issue associated with the custom or established practice and either prevented it or allowed it to be dealt with sooner. This is not to say that the persons responsible did not care but merely to point out that the custom or established practice had been in place for so long that no one thought to question it. No one asked “What-if?” Evidence that risk management would have served to avoid the unexpected event is shown

by the measures that were taken to deal with the activities in future. To varying degrees in each of the cases, many of the steps and factors involved with risk management and due diligence were followed. In another sense, custom can be said to have played a part in all of the risk issues associated with the stories in that no formal system was in place to deal with risk issues in general, or even to bring teachers together to brainstorm about risk issues.

While the participants' stories indicated that there were procedures in place to discuss safety issues, they were more in the nature of issues that had already arisen in fact not issues that may arise in future, and the procedures for discussing those safety issues varied from one school or principal to the next.

5.10 Defences – contributory negligence and voluntary assumption of risk

At first glance, one might assume that a discussion of defences with respect to contributory negligence and voluntary assumption of risk on the part of students is inappropriate as being simply an attempt by an educator to absolve himself or herself of responsibility for potential negligent conduct. However, this would be a wrong assumption. Education, by its very nature, involves risk and, as the literature and case law indicate, a world of zero risk is neither possible nor desirable. At the same time, to paraphrase Wright and Linden (1975): The practice of teaching is not an exact science and an educator is not an insurer and should not be made one (p. 184). Sometimes, students do foolish things. If teachers are entitled to rely on contributory negligence and voluntary assumption of risk on the part of students, they must know and be prepared to meet the obligations and standards

that the law imposes on them. An educator must be knowledgeable about the legal significance of contributory negligence and voluntary assumption of risk, and about the legal significance of consent and waiver forms. To avail themselves of such knowledge does not necessarily mean that the teacher is under any less of a duty of care and standard of care, or that the propensity of a child to do a foolish act could or would now be ignored. To know and understand these concepts is to be aware and foresee that students do have a propensity to do foolish acts and this can be the mechanism that initiates scenario development to anticipate and deal with such acts. Analysis of both of these defences in relation to risk issues associated with the stories has provided insight into the gaps of the decision-making of the educators from the perspective of the risk management process and case law. These gaps also contributed to the occurrence of the unexpected events and would undoubtedly have been matters of concern had injury occurred and a cause of action been completed.

Contributory negligence

Contributory negligence is a defence to an action of negligence. Contributory negligence on the part of the students involved may be said to have played a part in all of the reactive, corrective cases. Inasmuch as the acts of the students as a contributing cause have already been discussed elsewhere in this thesis, no further comment is considered necessary here. However, it is important to note that the age, intelligence and experience of the particular students involved would be factors taken into consideration by the courts in

assessing the conduct of the students as a contributing cause (*McEllistrum*¹⁰⁸). Also, in the tables case, the fact that the physical activity involved heavy equipment having a complex folding mechanism could bring into play the judicial gloss that has been placed on *Williams v. Eady*¹⁰⁹ by the *Myers*¹¹⁰ case. The transcripts reveal that it was apparent to all the participants after the event that more attention to detail and planning would serve to inform them better of the risk issues.

Hindsight is 20-20 and the retroscope is a device that is often more readily available to lawyers than educators. In making a determination of whether the educators had met their due diligence obligation under the careful and prudent parent test, these after-the-fact observations of the participants concerning the particular propensities of the students would be a matter for examination in juxtaposition with consideration of the behaviour of the students as contributing to the unexpected event. In a negligence action, the acts of the students would be examined and evaluated to determine whether they contributed to the unexpected event. For example, in the fire case, the fire was determined to be a case of arson and in all likelihood deliberately set by a student, leaving aside for the moment the mental state of that student. And certainly in the caves case, the action of the two students there was deliberate as well, albeit foolish and irrational. In the windows and runner cases, the acts of the students were also foolish and irrational, leaving aside for the moment aside the health issues involved.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Supra*, Note 35, at p. 42.

Voluntary assumption of risk

Voluntary participation in an activity is a defence to an action of negligence based on the *volenti non fit injuria* proposition (voluntary assumption of risk – there can be no injury to one who consents or, as others might put it, the law does not assist a volunteer). In each case, the acts of the students would be examined and evaluated to determine whether they voluntarily assumed the risks associated with the educational activity. In an effort to demonstrate that participation in an activity was voluntary (that there was a voluntary assumption of the risk of injury), educators have often required parents to sign a consent or waiver form or both before their child is permitted to participate in the activity. However, this presupposes that the parents themselves are aware of the risk issues involved in the activity; in other words, their signing of the form is based on ‘informed consent.’ Also, the signing of the form by the parents does not guarantee that the child understands the meaning behind the consent form. In the caves case, the consent form and briefings on the details of the excursion did not have the desired effect. Consent forms and waiver forms cannot stop children from acting foolishly and recklessly and the Court’s have said teachers must be prepared for such acts. The caves case can be used as an example that instructions duly given and consent forms duly signed do not necessarily mean a teacher can assume that the students or even their parents understand the content of the forms or that foolish acts will not occur in any event.

Therefore, it must be understood that voluntary assumption of risk as evidenced by consent forms and waiver forms, if they are to have any meaning and effect, must be based

¹¹⁰ *Supra*, Note 43.

on an informed consent and waiver. The law holds the person relying on the consent or waiver responsible for ensuring that all of the risks involved with an activity are clearly stated and understood by the person signing the form. For such forms to have the expected effect, a cursory statement of time and place would not be sufficient. This applies whether the form is a consent form or a waiver form. However, as evidenced by the decision in the *Stevens v. Howitt*¹¹¹ case, the courts are chary of allowing parents to sign away the rights of children to redress through the courts for negligent acts that result in injury. Although in the *Stevens* case an infant (not in an education context) was injured and it was an insurance adjuster who obtained a release and indemnity agreement from a parent (a waiver), the principles may similarly be applied in an educational context; for example, a school excursion organized by a teacher.

Furthermore, the wording of the forms is important and open to interpretation. As the 1998 case of *Lunenburg (County) District School Board v. Piercey*¹¹² illustrates, the courts will hold the drafter of the form responsible for any matters contained in them (e.g., a guarantee of safety). Briefly, the facts of the case were that a 14 year old grade nine student was rendered quadriplegic in May, 1990, while participating in the "electric fence" game at an adventure camp organized by the school board. Letters were sent to the parents detailing the nature of the activities planned and advised: "Please be assured that everything possible is done to ensure a safe and adventurous 48 hours" (pp. 71, 73). The school was found to be negligent, through its employees, in its failure to, at any time prior to the camp, review the

¹¹¹ *Supra*, Note 84.

¹¹² *Lunenburg (County) District School Board v. Piercey/Lunenburg County District School Board, Appellant and Roy Eugene Piercey, J.R. Milligan and Kathleen MacDonald, Respondents (sub nom. Piercey v. Board of Education of Lunenburg County District, (1998) 167 N.S.R (2d) 68 (sub nom. Piercey v. Board of Education of*

scope of activities planned and direct any concerns to the director. This failed to ensure the guarantee made to parents that ‘everything possible would be done to ensure a safe environment.’

As society has become more litigious and knowledgeable of their rights, this factor has become even more important. As noted above, there is some debate as to whether parents can sign away the rights of their children. A waiver unlike a consent form is, in effect, intended to provide that the person or persons responsible for the activity will be saved harmless from liability in negligence for any damages that may result from the activity. However, the value of having a signed consent and a signed waiver form lies in the fact that they can be used to provide evidence of due diligence, especially if it can be shown that the signature was based on an informed consent. At the same time, the criteria for establishing informed consent are onerous and add to the time, paperwork and planning involved with educational activities, especially excursions.

5.11 Vicarious liability

Vicarious liability was another theme that developed out of the analysis of the data from the stories. As the case law demonstrates, an employer is responsible for the acts and conduct of its employees when the employee is acting within the scope of his or her duties. Apportionment of fault is primarily and properly a matter within the discretion of the trial judge (*Myers*¹¹³). Therefore, in a case where liability is found, the law on contributory

Lunenburg County District) 502 A.P.R. 68, at pp. 71, 73, 41 C.C.L.T. (2d) 60 (N.S.C.A.).

¹¹³ *Supra*, Note 43.

negligence means that a judge will decide the degree to which and the amount of damages for which the parties (plaintiff and defendant) are liable for damages. As was noted previously in reference to the *Myers*¹¹⁴ case, the law in Saskatchewan provides that if a teacher is acting within the scope of his or her duties and the principal has approved the activity, then the teacher may not be held liable for damages despite a finding of negligence on their part. Under the doctrine of vicarious liability, the board of education in *Myers*¹¹⁵ was held liable for the injury suffered by the student – the employer was liable for the acts of its employee. However, the teacher may still be subject to supplementary discipline based on board policy or disciplinary action in relation to professional standards.

In all of the cases relating to the stories, vicarious liability of the board, in whole or in part, would not be an issue since, as was stated previously, the duty of care arising out of the special relationship between the educators and the students exists in every case and could not be disputed: the educators were employees of the board and were acting within the scope of their duties. Also, in the fire and windows cases, the board would have been vicariously liable for the actions of the school secretaries and, in the case of the tables case, the board would have been liable for the decisions made not only by the principal but the caretaker as well. In the Europe case, the board would probably have been responsible for the organizing teacher's activities since the board had allowed it to continue as a 'school activity' over such a long period of time – even though one might argue that he was "on a frolic of his own" (*Joel v. Morison*,¹¹⁶ 1834, p. 503).

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

5.12 Risk management and due diligence

In its *Workplace Health and Safety Bulletin*, the Alberta government defines ‘due diligence’ as being the level of judgment, care, prudence, determination, and activity that a person would reasonably be expected to do under particular circumstances. Although most persons associate the concept of due diligence with the law, it is in fact a concept that applies equally to other forums, including education. The use of the term ‘due diligence’ in the context of risk management is equivalent to its use in a legal sense. The decisions and legal reasoning of the judges found in the case law add flesh to the otherwise lifeless steps of the risk management process. However, as the *Molson*¹¹⁷ case illustrates, something more than instinct is required to satisfy the defence of due diligence. Due diligence requires a process of reasoning. It requires a manager to be proactive in having a system in place for the identification of hazards, assessment of risks and the implementation of preventive measures, and that system must be monitored continuously and revised as necessary. However, again as the case law indicates, the law does not expect the system to take into account fantastic possibilities – the standard is that of the reasonable man (a careful and prudent parent). The law will require the system to take into consideration only those preventive measures that can be said to be foreseeable and reasonably practicable. This is not to say that other factors such as experience, intuition and common sense do not have a role to play in the reasoning process (*RJR-MacDonald Inc. v. Canada (Attorney General)*,¹¹⁸ 1995). As the literature review has indicated, both processes of reasoning (theories of cognition) play a role in problem solving

¹¹⁶ *Supra*, Note 75, at p. 503.

¹¹⁷ *Supra*, Note 3.

and decision-making: 'rational, analytical (reflective) or rule-based' and 'experiential, intuitive (reflexive) or associative' (Reyna, 2004; Hodgkinson et al., 2008).

Two of the most important factors that lie at the heart of the risk management process and due diligence are, first, the identification of the problem or opportunity and the related risk issues and, second, scenario development. Once the problem or opportunity and the related risk issues are identified, scenario development is the factor of the risk management process that can provide answers to the many "what-if" questions arising out of risk issues associated with hazards and activities. Also, the case law can provide further factors that should be taken into consideration (e.g., defences and 'but-for' causation questions). Scenario development, as with all steps in the risk management process, is iterative and forms a continuous loop that can be engaged at each step. When properly implemented, scenario development contributes to and goes a long way in ensuring that the requirement of due diligence has been met. It will assist in establishing whether the processes, procedures and practices of a particular system (e.g., a risk management plan) that has been put in place satisfy the requirements of the defence of due diligence. This serves to ensure that all persons involved in an educational activity (the stakeholders) are properly protected and supervised in respect of reasonable risks of foreseeable injury. At the same time, it serves to reduce the effects of risk avoidance and risk aversion arising out of the fear of litigation and concerns of personal liability and allows administrators to agree to go forward with educational activities proposed by teachers.

At the time and on reflection after the event, each of the participants in the reactive, corrective cases (windows, caves, fire and runner) was clearly taken by surprise at the

¹¹⁸ *Supra*, Note 4, at p. 89

unexpected event and they clearly considered the unexpected event so unlikely that they never expected it to occur at all. For example, in the runner case, they were simply not fully prepared for a 'runner' who took off (off school property) while outside the school. Even in the proactive, preventive cases (tables and Europe) the risk issues came as a surprise. No notice was taken of the risk issue in each case until the caretaker (tables case) and the parent (Europe case) sounded the alarm so to speak. They asked themselves the question 'what-if?' and the scenarios developed afterwards. As Richard stated in the Europe case, his involvement was that of "an administrator with my tentacles up ..." Furthermore, in each of the reactive, corrective cases, the consequences of the unexpected event could have resulted in serious injury or death of one or more of the students. And the same could be said of the consequences with respect to the proactive, preventive cases, although the consequences would not be considered imminent. However, in addition to questions concerning consequences, the question that must be asked is: What was the probability that the event would occur? This is the other part of the equation relating to the definition, analysis and assessment of risk. In answering this question, the literature review including the case law indicates that it is not simply a question that calls for a mathematical response akin to "what are the odds of drawing an ace" in a game of poker. Rather, as the literature review has shown, decisions involving risk management have both an objective and subjective component based on reasonable probabilities and persons who must make decisions regarding probability rely on qualitative factors such as experience, intuition and common sense. This is especially the case when, despite a system being in place to ensure the safety of the students, an unexpected event occurs.

Assertions by the participants in the reactive, corrective cases that the unexpected event took them by surprise underline the participants' belief that, up to the point of the occurrence of the unexpected event, everything reasonably possible was being done to ensure the safety of the students. They no doubt felt that everything was in order and under control. They felt they were practicing reasonable risk management and due diligence (even if those terms were not used in their narrative to describe the process). The probability that the students in the reactive, corrective cases would act in such a foolish and irrational manner is undoubtedly a matter that must be taken into consideration in making a determination whether the risk associated with the unexpected event or even the event itself was foreseeable. Certainly, once the unexpected event occurred, either at the time or on reflection, the potential consequences of the unexpected event – serious injury or death – were quite foreseeable. So too did the probability become foreseeable. From a perception perspective, the participants recognized that, at the time of the occurrence of the unexpected event, the probability of the consequences becoming reality was of a different and higher order than the probability of the foolish act occurring in the first place. The issue then becomes a matter of deciding whether a reasonable person (a reasonable parent) in the community would have had the same expectation. If yes, then the defence that the unexpected event was an extraordinary event that was unforeseeable may succeed, especially if it could be shown that the concept of due diligence in conjunction with reasonable risk management practice was used to develop and implement the system to ensure the safety of the students involved in the activity.

5.13 Experience, intuition and common sense

In all of the cases, one of the most evident themes was the role played by experience, intuition and common sense in the management of the risk issues. Every participant, directly or indirectly, referred to one or more of them. All of the participants to one degree or another had used their past and previous experience to advantage in dealing with the unexpected events. Implicit in their description of how they handled the risk issues was the understanding that exposure to different situations provided them with experience on how to deal with future problems. What was particularly significant was that each participant gained further experience from and used the experience of the unexpected event to advise others. They believe that the knowledge that they gained could be passed on to others by sharing information informally or through formal training. They believe that this would assist others to avoid the experience of being faced with the same unexpected event, and if they did face the same event, it would assist them in knowing how to deal with it. What also became evident from the analysis of the stories was the fact that at the time in question none of the participants had received any formal training in risk management from their board or during the course of their training as teachers (except for Gerry's experience).^f This would account for the major role played by experience, intuition and common sense.

In the runner case, when speaking of looking at something with an element of risk, Robert notes that you should look at the risk "just as you do as a parent but more than just common sense," and this is analogous to and consistent with the case law which states that

instinct is not enough, there must be a process of reasoning (*Molson*¹¹⁹). Concrete evidence of such a process would be if a system were in place that reflected that reasoning process (e.g., a risk management plan that meets due diligence requirements). Robert noted that the system that was in place for autistic runners inside the school was adopted and adapted to suit the circumstances, giving concrete evidence of a process of reasoning. Robert also noted that experience helps and that the “experience of the teachers particularly in knowing the tendencies of the pupils” played a part. In the analysis and description of each of the cases that follow, this requirement of a process of reasoning was evident.

In the fire case, the response to the unexpected event may be considered to consist of two parts – the fire itself and management of the response to the fire. In that case, Gerry felt that “the teachers kind of didn’t keep their eye on the ball” in that there was a lack of supervision. Recognition of the hazards and risk issues associated with them by the principal and vice-principal and their response to them are examples of scenario development and the factors that were taken into consideration in response to the scenarios. This case is helpful in drawing attention to the difference between a programmed event (evacuation of the school) and a non-programmed event (the fire and supervision in the school yard) and illustrating a case where both categories of events occur at the same time and require both approaches to decision-making – the reasoning processes of ‘rational, analytical (reflective) or rule-based’ and ‘experiential, intuitive (reflexive) or associative.’ In the windows case, Joseph acknowledged the role played by experience in his reference to the two other teachers who assisted him. He indicated that the outcome might have been quite different if he had not been assisted by the other teachers. In the caves case, Patrick’s statement that “we’re all in it

¹¹⁹ *Supra*, Note 3.

together” is recognition that communication and the sharing of information, expertise and responsibility among stakeholders are important factors in dealing with risk issues. These cases illustrate that communication and the sharing of information, expertise and responsibility among stakeholders (teachers and others), are important factors in dealing with risk issues.

In the proactive, preventive cases (tables and Europe), a customary procedure (established practice) was challenged by a person who recognized a hazard and whose perception of the risk associated with the hazard differed significantly from that of the majority, largely based on that person’s experience, intuition and common sense. In both of these cases, time was available for the development of scenarios and the identification of foreseeable risks and consequences, since the unexpected event relating to the risk issue was identified at an early stage. These cases are excellent examples of persons working together and sharing information to resolve a potential risk issue. The value of experience, intuition and common sense played an important part in the development of ‘what-if’ scenarios and alternatives together with the selection and implementation of the alternatives for managing the risk. The difference between these cases and the reactive, corrective cases was that the availability of time allowed the educators to assume more of a proactive, preventive role.

In the tables case, scenario development was clearly a step that contributed to the alternatives selected by Albert and the caretaker together. Each of them engaged in activity that contributed to the development and selection of alternatives. On being advised of the safety issues associated with the tables, Albert proceeded to obtain first hand knowledge concerning the operation and storage of the tables. The caretaker assessed the risk in terms

of probability and consequences; there was the potential for a student to be seriously injured if care was not taken. Such preliminary analysis and gathering of information are important factors in the risk management process. Also, communication continued throughout the process of dealing with the risk issue – implementing, monitoring and evaluating the alternatives selected – allowing only certain individuals to assist the caretaker, training these individuals, chaining the tables to the wall, and ensuring that teachers were reminded of the hazard. Each of these practices was preceded by a ‘what-if’ scenario and followed by a decision based on the communication and sharing of information between stakeholders. Also, the tables case demonstrates the role of perception and personal preferences in dealing with risk issues, e.g., the “grey area” referred to by Albert in relation to whether it was acceptable to allow a reliable student by himself to retrieve or store gym equipment in the equipment storage room.

The Europe case is an excellent example of the many potential risk issues that may be encountered during the course of planning an excursion and of how to manage them. In this case, the experience, intuition and common sense of Richard (an experienced vice-principal at the time) played a part in being able to recognize the potential hazards. Richard identified the risk issues as being: potential conflict of interest on the part of the organizing teacher; previous and potential border difficulties associated with illegal goods; potential financial litigation; older students (up to 18 years of age) from high schools mixed in with elementary school children; teachers billeted in hotels and students billeted elsewhere; parents unaware of organizing teacher’s arrangements; lack of insurance; lack of consent forms and meetings with parents to discuss them; and male-only supervision. Liability issues became his chief

concern. Here, it should be noted that, when the interview as a whole is taken, Richard's concern for liability was closely related to his concern about the responsibility of the teachers and the board for the safety of the school's students. Over the years, he and the school believed the excursion to be a school-sanctioned excursion and, therefore, the school would be responsible. He believed that the expectation of the parents was that it was a school-sanctioned excursion. As a result, in this case and in future cases, he influenced the excursions in that he made sure that the details were considered - "that all of the "i"s are dotted and "t"s are crossed in all issues that you can think of that could go wrong [scenarios], backup plans, emergency phone numbers, all of those things are in place before you even consent to have the field trip, the planning of the field trip even start(s)." These are common sense details that would be considered part of reasonable risk management planning – scenario development, communication, documentation, selection and implementation of alternatives. Fortunately in this case, finding out about the risk issues ahead of time meant that unexpected events could be avoided. This is one of the most important aspects of this story: there was time to permit the vice-principal to be proactive and preventive in regards to the risk issues involved. As in the preceding cases, this case illustrates that communication and the sharing of information, expertise, and responsibility among stakeholders are important factors in dealing with risk issues.

One final comment with respect to the preventive or corrective measures taken to eliminate or reduce risk issues is worth making. It has often been stated that 'you can't prove a negative' and in a somewhat related way, from a risk management point of view, there has been the question: "How will I ever know whether the measures I took made a difference?"

Along this same vein, one of the judges in the *Myers*¹²⁰ case (Ontario Supreme Court, Court of Appeal) quoted the trial judge:

I do not suppose that anyone can prove that the mere presence of a police officer in uniform acts as a deterrent to persons contemplating unlawful acts, but I think it is common sense to say that the police officer's presence does have that effect. In my opinion, the mere presence of a teacher ... probably would have deterred the plaintiff Gregory Myers from the foolish move that led to his injuries. (p. 300)

Analogous to whether a preventive measure would make a difference, many years later the experience, intuition and common sense of the caretaker became evident. During the interview, Albert noted an unfortunate incident that had occurred in a school in another board of education area in which an 8 year old boy was tragically killed at a school as a result of a heavy table having fallen on him. The description of the table referred to in the Coroner's report was similar to those in Albert's story (lunchtime table had a high centre of gravity, making it tippy; had wheels; was 3 metres in length; and folded in the middle). He stated that the children at the school liked to help set up and take down the tables. Also, the Coroner stated that such tables should be stored away from children and be secured against an immovable surface such as a wall and they should never be moved by children.

¹²⁰ *Supra*, Note 51, at p. 300.

5.14 Risk perception and risk acceptance

The perception of risk and the degree of risk acceptance by the various stakeholders relating to community standards – including parents, teachers, school administrators (principals and vice-principals), board administrators, volunteers, students, and caretakers and other support staff – are important factors that must be taken into consideration with respect to risk management planning and due diligence. As the literature review indicates, risk perception is the significance assigned to risk by stakeholders and is derived from their expressed needs, issues and concerns. It is subjective and intuitive in nature, and is dependent on many variables ((Reyna, 2004; Jenni, 1997; Slovic, 1987). Therefore, it is not uncommon to find that the kind and number of attributes used by different educators to assess risk differs from one educator to the next. Indeed, studies have shown that the perception of risk by lay persons (members of the public) differs from that of expert risk managers. A lay person's assessment of risk tends to be intuitive and is identifiable by its reliance on absolute answers (yes/no), safety, discrete events, and personal consequences. In contrast, an expert's assessment tends to be scientific and is identifiable by its reliance on such matters as probabilistic theory, acceptable risk, changing knowledge, comparative risk, and population averages. Lay persons tend to consider the consequences of an event should it occur while experts tend to concentrate on the probabilistic or frequency estimations.

This was particularly evident in the cases associated with the stories: the focus of the participants, especially in the reactive, corrective cases, was on the consequences and more on the probability of the consequences than the probability of the event occurring. The

probability of the unexpected event occurring in the first instance was not something that any of the participants had considered. In the reactive, corrective cases, the unexpected event seemed more like a fantastic possibility at the time but, once forewarned, they became forearmed and possibility became probability. Each understood immediately that the scenarios had the potential for disaster – a threat to life and limb. During the event itself, decisions were made quickly and without express statements of alternatives based on probabilities and consequences. However, it should be noted that the unexpected events were not entirely unpredictable; that is, there was a measure of foreseeability in each of the windows, fire, caves and runner cases. In those cases, the students who became the centre of attention were not unknown to the participants as persons who might do foolish acts. The participants simply considered the particular acts that led to the unexpected events as being fantastic possibilities.

In the reactive, corrective cases, time did not permit the participants to make a determination of the probability of an event occurring with mathematical precision. Nor was mathematical precision in determining probability used by the participants in the proactive, preventive cases, since this is not possible. In each of these cases, the consequences of the unexpected event could have resulted in serious injury or death of one or more of the students. And the same could be said of the proactive, preventive cases, although the consequences would not have been considered imminent. However, in addition to questions concerning consequences, the question that must still be addressed is: “What was the probability that the event would occur?” and “How is the probability to be determined?” This is the other part of the equation relating to the definition and estimation of risk. In

answering these questions, the literature review including the case law indicates that it is not simply a question that calls for a mathematical response akin to “what are the odds of drawing an ace” in a game of poker. Rather, as the literature review has shown, decisions involving risk management have both an objective and a subjective component based on reasonable probabilities. Persons who must make decisions regarding probability rely on qualitative factors such as experience, intuition (reflexive and gist-based reasoning) and common sense. Reliance on these factors is especially the case when, despite a system being in place to ensure the safety of the students, an unexpected event occurs.

For the purposes of assessing risk, a matrix based on the likelihood (probability) that an event might occur and the severity (magnitude) of the consequences should the event occur could be used. Appendix 7 contains an example of such a matrix (Source: Robert E. Tourangeau, 2008). In conjunction with the determination of risk, the interpretation of what the numbers mean must be established. For example, an activity having a high likelihood of occurrence with a major severity of adverse consequences (Number 9) would mean that an activity would not proceed, whereas an activity having a medium likelihood of occurrence with a moderate severity of adverse consequences (e.g., Number 5) could mean that the activity may proceed, provided specific management, monitoring and operating conditions are met for dealing with the identified hazards. This can serve to inform and allow the various stakeholders to determine, both individually and collectively, the degree of risk acceptance among the stakeholders which, in turn, can be used to inform decision-making concerning risk management planning and due diligence. Since zero risk is not a practical option, we need to chart a middle course where we address hazards – with associated

uncertainties and ambiguities – in a targeted, rational, and efficient manner. The use of such a matrix can assist in avoiding risk aversion.

5.15 Monitoring, reflection and change

The risk management process is iterative in nature. Therefore, monitoring and reflection are necessary at each step in the risk management process. In each of the cases, the participants took the opportunity to reflect on their experience with respect to the unexpected event and the risk issues associated with it. Each of the participants involved in this study accepted responsibility for their role in the occurrence of the unexpected events arising out of the risk issues. At the same time, as the themes analysis illustrates, they collectively were able to identify a number of gaps and the sources of those gaps that had contributed to the occurrence of the unexpected events. In each of the cases, the unexpected event became a catalyst for change and served as a vehicle to conduct a form of gap analysis: it developed awareness, showed weaknesses in the system, provided a compelling purpose for change, and served as a wake-up call. After the unexpected events, the policies and procedures changed considerably. In this way, the cases have demonstrated the value of post event monitoring, reflection and evaluation, and how the sharing of information, expertise and responsibility can assist in ensuring that an unexpected event does not reoccur. The importance and value of reflection was further demonstrated in that, over the course of their careers, each of the participants brought their experiences and new-found knowledge to other schools and shared them with other teachers. Also, in identifying gaps in the management of risk issues, the

study demonstrated that the language and methodology used in the study were capable of identifying systemic risk issues. These risk issues included the bifurcation of health and safety (protection versus supervision), information sharing, need for a forum to discuss and increase awareness of risk issues, group think, resource allocation, policy implementation, communication, and availability of documentation (statute, regulation, case law, policy and policy accessibility). For example, analysis of the risk issues associated with the stories shows that documentation was lacking in two senses: i) none of the participants mentioned whether legislative (statutory or regulatory) documentation was available for reference; and ii) policies for school excursions and equipment were not readily available or if it was, it was incomplete or not communicated. With respect to guidelines relating to school excursions, the participants either did not mention them or, if they did mention them, the participants noted that there was a lack of them at the time, they were not well-drafted or they were not followed. Also, in some cases, the board and the teachers did not follow their own policies: for example, the board transferred one of the participants as a principal at the last minute to a troubled school with which he was not familiar; and the teachers in the Europe case did not obtain parental consent for the excursion.

The cases associated with the stories demonstrate that the participants consider communication, documentation, the sharing of information, expertise and responsibility to be integral to the implementation of an educational activity and to ensuring safety in relation to it. Continuous monitoring of and reflecting on educational activities in conjunction with procedures for ensuring timely communication and sharing of information is essential. This

is consistent with the steps and factors relating to the risk management process and the case law set out in the literature review.

This highlights one of the most important differences between risk management in general and risk management of a case involving litigation. While a decision in a case before the courts is generally accepted as ending a dispute between the parties, the decision of the court (case law) is expected to be taken into consideration by risk managers in dealing with the management of future risk issues involving different parties. This is the value of the case law for risk managers. The particular dispute is ended but the lessons learned are put into practice as necessary through the risk management process. The risk management process ensures that the decisions taken with respect to and the results of the unexpected event (regardless of whether the courts are involved and whether the results are positive or negative) are added to the experience of those involved and shared with others. The melding of the steps and factors of the risk management process and case law will serve to provide others with a common, rigorous and consistent language and methodology for managing risk issues. It will also serve to reinforce reasonable risk management practice and due diligence and thereby bring about change in those cases where change is found to be necessary.

5.16 Advice – management and training

Each of the participants offered advice and suggestions for other educators with respect to the management of risk issues. Much of their advice related to management and training in general and the training of new teachers and new administrators in particular.

All of the participants in the study expressed their view that training was desirable and essential; as one participant stated: “as much training as we can.” Each of the participants stressed the essential value of training for future teachers and administrators. However, analysis indicates that teacher’s duties are taxing on the time of teachers and, apart from the normal “on the job” training that comes from being in the school setting every working day, some of the participants feel that dedicated time should be set aside for teachers to obtain training and that financial resources should be allotted for that purpose. Training should be a paid activity and not added onto the duties of teachers during the school year. In this regard, Gerry made the point that sufficiency of resources is an important factor and safety issues have to be given a high enough priority from the start of the year. In the situation in which he found himself (last minute transfer), he suggested that monetary resources be made available for teachers to come in a day before school starts in order to devote a day completely to safety. He indicated that such a day long session would be considered to be training. At the same time, the participants recognized that the allocation of resources is an issue with respect to training and support personnel.

The analysis illustrates that without a common, rigorous and consistent and common use of language and methodology for training purposes, educators who are members of the same board or even members of the same staff or educators transferring to or from another board will receive differing information and perceptions. At the time of the unexpected event, no participant had received training in risk management by their board, other than Gerry’s experience (see end note f). He indicated that he had received some such training, prior to the unexpected event, but it was of a nature designed to increase ‘perception’ of risk

management rather than the provision of a formal risk management training program. All of the participants to one degree or another had used their past experience to advantage in dealing with the unexpected events. Implicit in their description of how they handled the risk issues was the understanding that exposure to different situations provided them with experience on how to deal with future problems. Also, since all of them felt that communication of their experience in the particular situation outlined in their story would benefit others, they implicitly believe that training can turn non-programmed events into programmed events. In this regard, their advice regarding training is consistent with the literature review. As Simon (1977) stated, “the skills involved in intelligence, design and choosing are as learnable and trainable as the skills involved in striking a golf ball.”

Decision-making can be improved by training in orderly thinking. The judicial decisions set out in this study illustrate the importance of ensuring that teachers and supervisors are constantly alert and aware of activities taking place around them. Keeping up-to-date on case law relating to education is essential. For example, as the case law illustrates, teachers need to know the individual special needs, abilities and disabilities of the students, as well as be aware of the potential for certain students to undertake foolish, spontaneous or impulsive risks.

Although the participants had not received any formal training in risk management (no mention was made of any legal training either) during the course of their careers as a teacher and administrator, their advice and suggestions for other educators certainly indicate the value of experience, intuition and common sense. For details concerning the advice provided by each of the participants, the reader is directed to the theme on ‘advice – management and

training' in the chapter on findings. However, it is well to be reminded here of Patrick's statement that "we're all in it together," and "if you're out there, due diligence, doing what you have to do, then you're going to be covered. I can't expect you to be superman or superwoman out there but if you do what you are supposed to be doing, then we're all covered and the kids are going to be safe." In these statements, Patrick recognizes that communication and the sharing of information, expertise and responsibility among stakeholders are important factors in dealing with risk issues and that training which emphasizes the duties and responsibility of teachers is necessary. Training can serve as the 'dollop of precaution' to reduce risk issues and enhance due diligence. His statement that "we're all in it together" further emphasizes the importance of and need for all stakeholders to be on the same page.

As noted previously, it is a difficult exercise to attempt to measure the benefits from a course followed to a course not followed. However, it was evident from each of the persons interviewed that they are convinced that investments of time, money and staff resources in more systematic management of risk would be beneficial to achieving their educational objectives. None of the participants expressed any hesitation in recommending training with respect to risk issues. Indeed, management of risk cannot be developed and practiced freely and routinely by teachers without dedicated and ongoing allocation of resources in training, communication, promotion and process support.

5.17 Risk avoidance and risk aversion

Analysis of the stories of the participants in the caves, Europe, and runner cases revealed that risk avoidance and risk aversion have become an issue for some teachers. The causes revealed by the cases associated with the stories were: amount of paper work, lack of time, differences in risk perception and risk acceptance by the stakeholders, general notion that ‘nothing is an accident,’ different agendas between stakeholders, resource availability, fear of litigation, litigation awards, and lack of administrative or board support. These causes of risk avoidance and risk aversion are similar in some respects to those identified in the literature (e.g., differences in risk perception and risk acceptance by the stakeholders, fear of litigation, and litigation awards). Two of the most important causes of risk avoidance and risk aversion are risk perception and risk acceptance. Today, there is a greater recognition and understanding of risks and the policies and procedures for different situations, although this has had somewhat of a deadening effect on school excursions. In the runner case, Robert noted the deadening effect that more stringent procedures have on teacher performance. Things that would have been done many years previously would now be given second thought. Richard provides an added perspective to the impact of this change from earlier times. Richard indicated that the policies are seen as being “intrusive” in that they place constraints on how teachers may proceed; that is, teachers perceive the policies as being superimposed on them. There is a feeling among “teachers in general that the policies are too restrictive and too difficult to put in place.” Richard indicated that the amount of paper work and the time needed to fill out the forms was one of the main deterrents to teachers being

involved in school activities: they want to continue to be involved but they are finding it too time consuming. And, as Patrick indicated, the increase in and concerns about litigation are contributing to an increase in more stringent procedures for school excursions.

These statements indicate that teachers feel that much time and great care must now be taken in planning school activities and events and that, no matter how well they plan the event, they may still be unable to satisfy policies that have been put in place by others. This is particularly the case if teacher, school and board policies and the perceptions on which they are based are not in line with each other so to speak. Each stakeholder or group of stakeholders may have a different level of risk that they are prepared to undertake – some persons or entities are risk-takers while others are not, and still others fall somewhere in between. Board perceptions may be influenced by insurance and legal considerations whereas teachers may be more influenced by curriculum related educational objectives. This is consistent with the findings regarding the two educational leadership styles, the two reasoning processes, and the findings on risk perception and risk acceptance. Undoubtedly, these considerations contribute to risk avoidance and risk aversion on the part of educators.

In today's world, there is no way of avoiding this development of risk aversion arising out of policy issues and a more knowledgeable and litigious society not to mention the move towards viewing educational institutions in the same way as corporate entities for liability purposes (Goode, 2001) and the larger awards of damages. However, as the literature review has shown, academics, scientists, authors, judges and educators (including the participants) are united in their view that zero risk is not an option. Risk is unavoidable and with every decision comes a trade-off between benefits and costs. Risk management and knowledge of

the law can assist educational organizations to become learning organizations with respect to risk management. A language and a methodology that assists stakeholders of an educational organization to understand the culture, structure and rules governing the activities of the organization can assist educators to avoid becoming risk averse. Risk avoidance and command and control rules that are aimed at avoiding risk at all costs cannot be the cultural calling card of an educational organization. Risk management represents a wider approach that includes the management of both hazards and opportunities. Innovation and educational activity without risk is an oxymoron. Fortunately, the participants themselves have provided some sound advice and useful suggestions on what can be done to assist teachers in regards to this issue; particularly, advice in regards to training.

The more explicit the treatment of uncertainty, the easier it is to explain decisions to teachers and the reasons for a change. As Patrick explained in the runner case, teachers react well to change when it is explained to them – when they are given a reason for change. Involving the stakeholders in the risk management process ensures that the interests of all stakeholders (needs, issues and concerns) are met, and their risk perceptions and levels of risk acceptance are accurately reflected and understood. This is especially important for ensuring informed consent with respect to consent forms and waiver forms.

As the comments of the participants on reflection of the risk issues illustrates, ensuring due diligence through the implementation of reasonable risk management-related practice, particularly scenario development, can serve to alleviate risk avoidance and risk aversion. Scenario development is the part of the risk management process that can provide answers to the many “what-if” questions arising out of risk issues associated with hazards and activities.

When properly implemented in accordance with risk management principles, scenario development contributes to and goes a long way to ensuring that the requirement of due diligence has been met. In combination with the steps and factors from the case law, the steps and factors of the risk management will assist in establishing whether the processes, procedures and practices of a particular risk management plan satisfy the requirements of the defence of due diligence. This ensures that all persons involved in an educational activity (the stakeholders) are properly protected and supervised with respect to reasonable risks of foreseeable injury; that everyone is safe. At the same time, it reduces the effects of risk avoidance and risk aversion arising out of the fear of litigation and concerns of personal liability and allows administrators to agree to go forward with educational activities proposed by teachers. A culture of zero risk and negative reaction to risk must not be the cultural calling card of educators. In the context of education, zero risk is not an option. What is needed is a culture that encourages, considers and facilitates risk. An environment must be provided within which the two educational leadership styles and two reasoning processes may flourish and be attained. There has to be a place for everyone.

5.18 Legal knowledge and documentation

The analysis indicates that while educators have a good feel for what is expected of them, they are not able to easily relate their practice to the legal requirements set by the law in the form of legislation or case law. None of the participants referred to any applicable statutes and regulations. Experience and common sense were the terms used most often to

describe their stories. Terms such as duty of care, *in loco parentis*, standard of care, 'careful and prudent parent,' reasonable man, community standards, causation, contributory negligence, voluntary assumption of risk, foreseeability, vicarious liability, statutory or regulatory duties and responsibilities, and due diligence were not terms that were used by the participants in describing the stories themselves. Although the legal significance of duty of care, standard of care, or 'careful and prudent parent' was not expressly stated in those words, the impact that the unexpected event had on the participants illustrated their commitment to the students and the community. They were keenly aware of and recognized the special relationship that exists between teacher and students (teacher standing in the place of the parents) and their need to ensure the safety of their students.

By addressing risk issues from a legal perspective, educators could be made to feel more comfortable that they are doing the right thing and less concerned with litigation. Knowledge of the steps and factors relating to legislation and the case law would provide teachers with knowledge about what practices to avoid and which ones to follow, in much the same way as is done by police organizations in carrying out their duties under the law. For example, if educators are entitled to rely on contributory negligence and voluntary assumption of risk on the part of students, they must know and be prepared to meet the obligations and standards that the law imposes on them. An educator must be knowledgeable about the legal significance of contributory negligence and voluntary assumption of risk, and about the legal significance of consent forms and waiver forms. An educator needs to know what is meant by the expression 'informed consent' in order to properly inform the parents of the meaning and content of consent forms and waiver forms. Analysis of both of these

defences in relation to the risk issues associated with the stories has provided insight into gaps in decision-making from the perspective of the risk management process and case law. These gaps contributed to the occurrence of the unexpected events and would undoubtedly have been matters of concern had injury occurred and a cause of action thereby completed (i.e., if injury had resulted). Knowledge of risk management, legislation and the case law would lead to understanding. Educators would be more aware of their duties and responsibilities and the need to take into consideration the propensity of students to do foolish acts. This in turn can be the mechanism that initiates scenario development to anticipate and deal with such acts.

5.19 Language and methodology

Analysis of the individual responses of each of the participants reveals that taken as a group the participants implicitly followed many of the steps of the risk management process and what would be required of a person in fulfilling the requirements of due diligence under the law. However, one of the themes that developed out of the analysis was the lack of a common, rigorous and consistent language used by the participants to tell their story and to describe the way in which they responded to the unexpected event. Some, as in the fire, runner and Europe cases, used language that had risk management overtones but, for the most part, all of the participants used language that could best be described as being 'plain, everyday language' in its origins. In telling their stories, the participants used the terms experience and common sense for the purpose of describing factors upon which they had

relied in making their decisions. None of the participants consistently and overall used language that consisted of terms relating to the law (legislation or case law) or risk management. Although individually there was rational and logical thinking and reasoning, there was no discernible use by the participants as a group of a systematic decision-making or problem-solving methodology that spanned the full breadth of what is required to ensure due diligence. All of the participants stressed the importance of sharing their experience with others and of the value of training. In order for this to occur, the use of a common, rigorous and consistent language and methodology would be necessary. Based on the findings, the steps and factors of the risk management process and the case law would undoubtedly provide guidance and assistance in ensuring that due diligence is fully addressed. This would provide a better opportunity for ensuring that protection and supervision issues are dealt with in a timely manner.

For example, group think was a factor in the fire, runner and Europe cases. In the fire case, the teachers adopted a “wait and see” stance with respect to the transfer of a new principal to the school. In the Europe and runner cases, the particular system relating to each had been in place for many years without incident and so no one questioned it. In the Europe case, the feeling was that “if it ain’t broke, don’t fix it.” At the same time, each of the participants in the reactive, corrective cases (windows, caves, fire and runner) was clearly taken by surprise at the unexpected event. In each case before the unexpected event occurred, the procedure followed was considered reasonable by the participants. At the time and on reflection after the event, they clearly considered the unexpected event so unlikely that they never expected it to occur at all. The issue then becomes a matter of deciding

whether a reasonable person in the community would have had the same expectation. If yes, then the defence that the unexpected event was an extraordinary event that was unforeseeable may succeed, especially if it could be shown that the concept of due diligence in conjunction with reasonable risk management practice was used to develop and implement the system to ensure the safety of the students involved in the activity.

When the proactive, preventive cases are placed in juxtaposition with the reactive, corrective cases, the proactive, preventive cases are excellent examples of how a present knowledge and application of the steps and factors of risk management process and the case law can serve to reduce or eliminate unexpected events relating to present and future education-related activities, and the risk issues that often accompany them. The language and methodology of risk management and the legal reasoning found in the case law can be used to organize and manage an activity. They can be used to provide the means by which the various stakeholders can communicate with each other effectively to produce a reasonable risk management plan that satisfies the need for due diligence in a particular case. At the same time, the risk management process and the case law can give concrete guidance on the particulars of activities in other cases similar to the particular activity contemplated.

By way of analogy, risk management can be compared to driving a car. Once various operations are performed often enough, one no longer has to go through a checklist of procedures each time – hazards become easily identified and the risks associated with them are assessed and dealt with efficiently, effortlessly and effectively. However, although hazards and risks become known quantities, every now and then a wake-up call is delivered in the form of a vehicle passing us without our realizing it until the vehicle has passed.

When this happens, one is reminded of the value of continually monitoring and analyzing one's driving procedures. As Simon (1987) would put it, the aim would be to have "analyses frozen into habit."

5.20 Synthesis

Given the multidisciplinary nature of this study and its complexity, analysis and discussion is set out in nineteen sections. This has the advantage of providing the reader with a concise analysis and discussion of the data relating to the research questions and the themes that emerged from the findings. The subject-matter of the first six sections contains analysis and discussion relating to matters of a general nature. The first section (5.1) contains preliminary comments about the purpose of the analysis, differences between legal risk management and risk management per se, the difference between lawyers and educators, the status of the participants at the time of the risk issue (unexpected event), the overarching factors of protection and supervision, the use of both processes of reasoning ('rational, analytical (reflective) or rule-based' and 'experiential, intuitive (reflexive) or associative') by the participants, and the legal significance of 'liability' and 'damages'. The second section (5.2) refers to the use of pattern matching and a systems thinking approach for the purpose of data analysis. The third section (5.3) refers to narrative inquiry and the form of a narrative. This section also makes reference to the fact that the collective actions of the participants reflect many of the steps and factors of the risk management process and the case law. The fourth section (5.4) provides comment concerning the two, time dependent, case categories

arising out of the study ('proactive, preventive case' and 'reactive, corrective case'). The fifth section (5.5) provides more detailed comment concerning dual-process reasoning and the use of both processes of reasoning ('rational, analytical (reflective) or rule-based' and 'experiential, intuitive (reflexive) or associative') by the participants in both categories of cases ('proactive, preventive case' and 'reactive, corrective case'). The sixth section (5.6) refers to the two educational leadership styles ('low educator supervision and high student responsibility' and 'high educator supervision and discipline and low student personal responsibility') and their relationship to the levels of risk perception and risk acceptance by the various stakeholders

The next eleven sections (5.7 to 5.17) contain analysis and discussion of subject-matter that correlates directly with and is in the same order as the subject-matter of the eleven sections set out in Chapter Four on findings. Section 5.18 contains comments on the extent of the legal knowledge of the participants and of the use by and availability of documentation to the participants. The final section (5.19) notes the fact that taken as a group the participants implicitly followed many of the steps of the risk management process and the case law that would be required of a person in fulfilling the requirements of due diligence. However, this section notes the lack of a common, rigorous and consistent language used by the participants to tell their story and to describe the way in which they responded to the unexpected event, noting that for the most part, all of the participants used language that could best be described as being 'plain, everyday language' in its origins. Also, although individually there was rational and logical thinking and reasoning, there was no discernible use by the participants as a group of a systematic decision-making or problem-solving

methodology that spanned the full breadth of what is required to ensure due diligence. The section notes that the language and methodology of risk management and the legal reasoning found in the case law can be used to organize and manage an educational activity involving a risk issue.

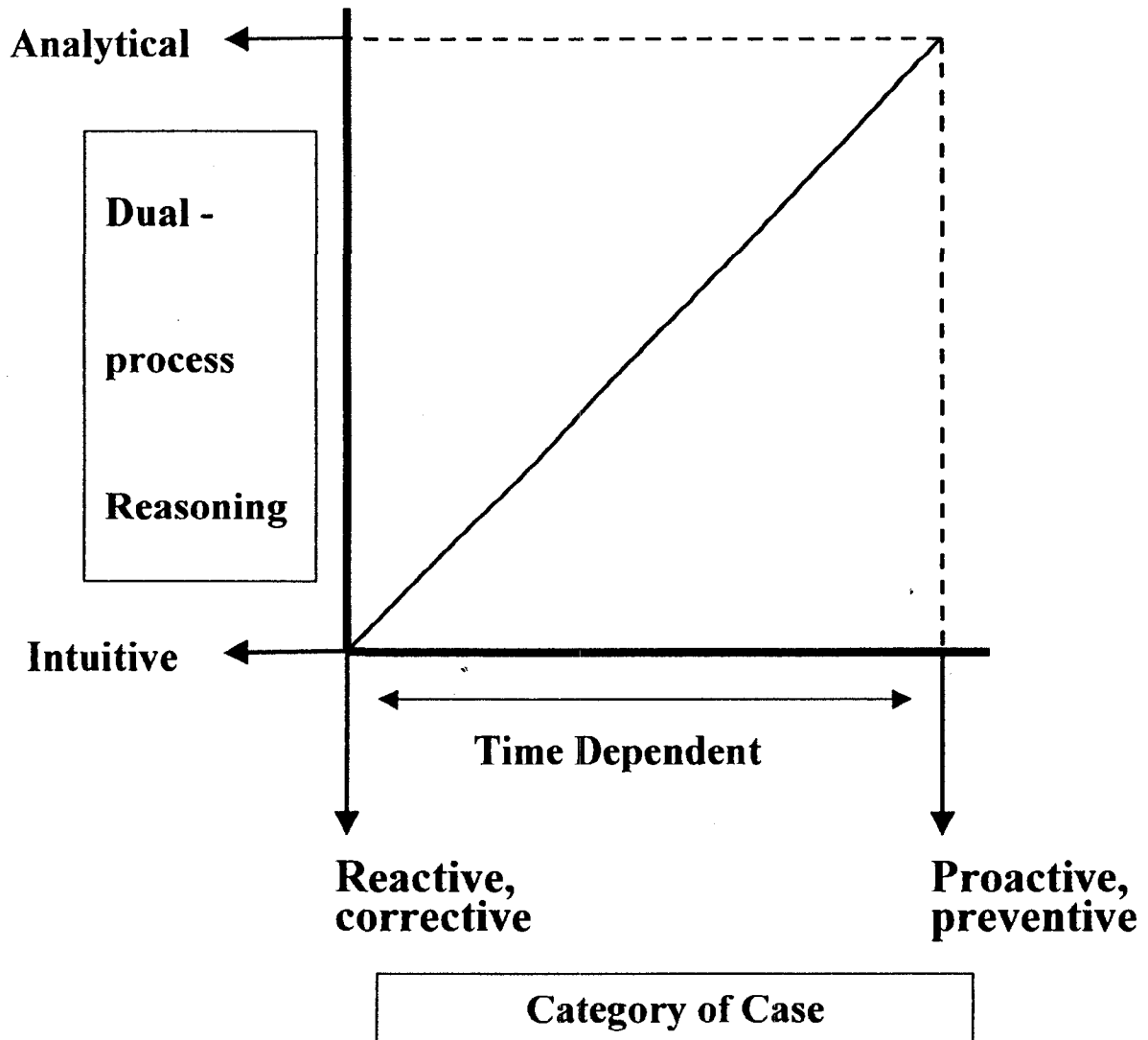
CHAPTER SIX

CONCLUSIONS

6.1 General

This study is multidisciplinary and consists of three disciplinary components: education and decision-making theory, risk and risk management, and case law and legal precedent. The purpose of this study is to develop an in-depth understanding of how educators manage risk by investigating risk management and the law in the context of education from the perspective of principals and vice-principals, through an examination of the two research questions of this study. More specifically, the findings arising out of the research questions have been discussed in accordance with the themes that have emerged from the analysis of the data collected from the stories. From the perspective of decision-making theory, the use of dual-process reasoning by each of the participants was evident. This included evidence that both processes of reasoning ('rational, analytical (reflective) or rule-based' and 'experiential, intuitive (reflexive) or associative') played a role in decision-making for both the proactive, preventive cases and the reactive, corrective cases. Figure 5 represents a graph of the two categories of cases and the two processes of reasoning.

**Figure 5 - Graph of
Category of Case and Dual-process Reasoning**



Source: Robert E. Tourangeau, 2008

The analysis revealed that the reasoning process used by the participants in each of the cases was time dependent - in the reactive, corrective cases where time was of the essence, intuitive reasoning was used to a greater extent initially, followed by a switch to both

intuitive and analytical reasoning during and after the unexpected event. In the proactive, prevention cases, time was not as critical a factor and this allowed the participants to make greater use of analytical reasoning with a measure of intuitive reasoning involved in the development of scenarios and alternative solutions. Also, analogous to the blending of analytical and intuitive reasoning, there was a blending of what Simon has described as 'programed' decisions (routine, repetitive decisions) and 'non-programed' decisions (*ad hoc* decisions).

From the perspective of risk management, the stories of the participants were narrated using 'plain, everyday language' without overt reference to the concepts, principles, steps and factors of the risk management process. However, although none of the participants had received any formal training in risk management at the time of the unexpected event (other than Gerry's experience - see end note f), comments by each of the participants subsequent to the initial narration revealed that the participants had collectively identified and used the steps and factors set out in the Q850 standard. In each case, the participants shared information, expertise and responsibility; identified and defined the problem; conducted preliminary analysis by identifying the hazards using risk scenarios; estimated the consequences of the risk associated with the unexpected event; evaluated the risk in terms of the needs, issues and concerns of those involved (stakeholders); identified feasible risk control alternatives; and then proceeded to select and implement an alternative followed by reflection on and implementation of lessons learned from the unexpected event. Analysis of the data from the interviews revealed what educators do when confronted with and how they respond to risk issues. At the same time, the analysis revealed gaps in their policies,

procedures and practices. One of the most evident steps of the risk management process that was part of each participant's story was their monitoring of and reflection on the causes and results of the unexpected event with respect to policies, procedures and practices not only of the individual participants but also the school and, in some cases, their school board. This allowed the participants to provide useful advice that was shared with others and to make recommendations with respect to management, training and changes to existing policy, procedure and practice.

From the perspective of the law, the participants did not narrate their reflections as 'legal stories,' that is as a story involving a court and legal proceedings. However, collectively their actions reflected many of the steps and factors of the case law. Analysis revealed that the participants implicitly understood and were keenly aware of the special relationship that exists between teacher and students (teacher standing in the place of the parents). Their concern about the potential consequences of their actions and those of their students revealed an inherent understanding of their responsibility for the protection and safety of their students, both legally and otherwise. Analysis further revealed that the law relating to negligence can serve to identify the concepts, principles, steps and factors that educators can use in the development of a risk management plan that satisfies the requirements of due diligence. Also, the stories of the participants revealed the two educational leadership styles of the participants that is reflected in the reasons for decision of the courts; that is, one that espouses close supervision and discipline by educators, and the other that espouses the growth and acceptance of personal responsibility on the part of students with less supervision and discipline by educators. In this regard, the stories revealed

that the degree of supervision required with respect to an educational activity depends on the circumstances in which the activity occurs, and it may range from close supervision and discipline by educators to greater reliance on student personal responsibility with less supervision and discipline by educators.

The participants in the study did not expressly state that they were following some checklist of procedures in making their decisions relating to the risk issues involved as would be the case if a risk management process had been followed. Nor did they specifically refer to the reasoning processes used by them in making decisions at any particular point in the story. Generally, in telling their stories, the language of risk management and the case law was not used by the participants to narrate their story and to respond to questions. However, the study findings reveal that the concepts, principles, steps and factors relating to the three disciplinary components of this study are able to provide educators with a common, rigorous and consistent language and methodology that can be used for the development of a sequential, step-wise form of decision-making and the formulation of recommendations concerning policies, procedures and best practices.

Seminars and workshops that incorporate the use of the study findings would allow stakeholders to communicate effectively with each other in planning educational activities and in ensuring due diligence requirements are met based on reasonable risk management practice. 'Everyone needs to be speaking the same language' and be 'on the same page' when risk is being assessed and communicated. The language and methodology of this study can serve as a formal process of risk management for managing and resolving risk issues in the context of education and, in turn, will enable educators to become proactive and not

simply reactive in dealing with risk issues in the school setting. Sharing experiences and participating in the development of scenarios before they arrive on our doorsteps as a risk issue associated with an unexpected event will go a long way to meeting due diligence requirements and ensuring the safety of students. By consciously and regularly developing "what-if" scenarios, and by discovering possible unintended consequences in advance of choosing a particular course of action, decision-making will obviously be based upon more relevant and complete information and will significantly decrease the chances of being "blindsided" by some unforeseen event or potential crisis. School authorities should ensure that educators receive training about the legislation and other documents that affect their conduct and the manner with which they are expected to carry out their professional duties. Of equal importance are the decisions and reasons of the case law that have interpreted the legislation or documents.

The development and implementation of policy relating to risk issues should be open and transparent. It is important that training not be seen as a means for administration to absolve itself of responsibility for activities that give rise to negative results and to make teachers the target for such results. Training must be supportive of teachers and facilitate their taking reasonable risks in fulfilling educational goals set by the school boards and the Ministry of Education. The explicit treatment of uncertainty will make it easier to explain decisions as teachers react well to change when the reason for change is explained to them. Involving the stakeholders in the risk management process ensures that the interests of all stakeholders (needs, issues and concerns) are met, and that their risk perceptions and levels of risk acceptance are accurately determined and understood. Risk management must be seen

as a tool to help exploit opportunities as well as a tool to manage hazards. This will assist in alleviating risk avoidance and risk aversion.

Educators should receive training concerning what the courts have to say about factors that affect the standard of care expected of a teacher. The courts have indicated that there are circumstances that will affect the application of the prudent-parent standard and have provided some indicators as to what circumstances might affect the application of the general common law standard. The application depends on the number of students being supervised at any given time, the nature of the exercise or activity in progress, the age and the degree of skill and training which the students may have received in connection with such activity, the nature and condition of the equipment in use at the time, the competency and capacity of the students involved, and a host of other matters which may be widely varied but which, in any given case, may affect the application of the prudent-parent standard to the conduct of the school authority in the circumstances. The policies and procedures of the board should ensure that teachers are aware of these circumstances.

Educators must understand risk management and their own potential for liability if they are to advise others. This calls for university professional development and teacher education programs to inform prospective and practicing educators about the standard of care that courts might reasonably expect of them, both inside the school and on and off the school grounds. For educators today, the challenge is to facilitate a broad view of risk management through the creation and maintenance of a reasonable risk management environment that encourages a culture of innovation in educational activity rather than a culture of risk avoidance (and control) and risk aversion. Each school will need to customize and adapt best

practices and lessons to suit its own particular culture and environment. An approach that comprises a healthy blend of analytical and intuitive management of risk is needed.

6.2 Recommendations

The following recommendations are based on the study findings. The order of the recommendations is intended to reflect a logical sequence for their implementation.

However, the order (of priority) may vary depending on the circumstances of and the existing status of each recommendation with each school and board area.

Policy development

- Ensure that risk management policies and procedures are not developed and implemented as a rigid set of rules that ostensibly covers every conceivable situation. They must be flexible and able to deal with individual persons and situations that change from time to time with changing circumstances from school to school and from day to day.
- Ensure that policy that is well-drafted and takes into consideration the needs of the stakeholders. This may be accomplished through the use of skilled personnel to either draft or scrutinize the wording of the policy statement.

Guiding principle - atmosphere of innovation

- Ensure that training is seen as being and is supportive of teachers and that it facilitates their taking reasonable risks in fulfilling educational goals set by the boards and the Ministry of Education. Training must not be seen as a means for administration to absolve itself of responsibility for activities that give rise to negative results and to make teachers the target for such results.

Documentation

- Develop a manual relating to use of equipment that is used in the school.
- Provide documentation relating to legislation and professional standards.

Mentoring

- Assign a mentor for teachers. Teachers, during their interim years, should have a mentor assigned to them and be required to meet at regular intervals with their mentor (e.g., either four times a year or even up to three times a month). This would also recognize that much teacher development occurs “on the job.” This would assist teachers who are in their interim years to be informed and up-to-date on policy.
- Maintain contact with retired principals. They are an excellent source of advice for less experienced educators and would make excellent mentors. This would retain “corporate memory” and keep experienced and caring persons involved in education in the communities where they previously served and in which they continue to live.

Training

- Develop and implement a policy on training based on input offered by the participants in this study (see findings). Alternatively, review and revise existing policy on training considering comments offered by participants.
- Conduct in-house and in-service training seminars and workshops on school time (on a formal or an informal basis) for the purpose of explaining risk management and policy and the reasons for any change in policy. (If the training is conducted outside of school time, then those attending should be paid for their time.) As the cases associated with the stories illustrate, people learn well when they deal with work-related real-life issues and when they get immediate feedback from life and work itself. In-service workshops to discuss risk issues should be a regular part of risk management. Such training is “invaluable to other teachers, younger teachers and inexperienced teachers.”
- Conduct seminars and workshops on a formal basis for the purpose of training stakeholders in the concepts, principles, steps and factors relating to risk management and case law.

Communication and consultation

- Designate specific staff meetings for the purpose of communicating and sharing information concerning risk issues that have occurred or might occur as well as for following up on previously discussed risk issues.

- Designate a person in each school who would be responsible for risk issues within the school and for ensuring that all stakeholders are kept informed about and work together in dealing with risk issues.
- In planning school excursions, meet with colleagues; use a risk management process (e.g., the Q850 standard) in conjunction with legislation and case law; review board policies; learn about and take advantage of previous experience within school; keep a list of activities such as successful excursions and even previous unexpected events; use the Ontario School Boards' Insurance Exchange list; and bring in experts. Let the whole school know and ask for suggestions – *share, consult, communicate and document*.
- Provide training for parents from teachers or other qualified persons about how to assess risk for themselves. Teachers should not assume that parents understand terms and concepts relating to consent forms and waiver forms or that they appreciate the risks associated with educational activities. Consultation and communication with parents and other stakeholders must be a part of reasonable risk management and due diligence practice.

Support

- Engage the assistance of experts and professionals from various disciplines outside of the school setting to assist and provide guidance to educators; for example, police officers, psychologists, risk managers, principals, subject-matter coordinators, and even lawyers.

- Designate a person at the board office as an administrator solely for the purpose of dealing with and coordinating educational activities involving risk issues. The person would require training, including legal training. The person would be responsible for dealing with all liability and safety issues relating to an educational activity (e.g., permission forms, steps involved in the excursion, back-up plans, transportation issues, involvement with reputable persons). This person could also serve as a contact person for obtaining advice or for obtaining the services of an expert relating to any particular risk issue. This person could publish a newsletter to keep people up-to-date.
- Establish a central risk management committee for providing support in dealing with risk issues. Consideration would be given to local variations with respect to such matters as risk perception, risk acceptance and local expertise. The committee members would include teachers, principals, a board office person, and perhaps a caretaker with knowledge and experience with equipment. Its mandate would be to deal with any risk issue relating to the protection and supervision of those involved in educational activities (e.g., a school excursion) or risk issues that may affect those activities (e.g., prostitution, drug use, and discarded syringes in vicinity of a school). The committee would be responsible for reporting on the allocation of resources needed for dealing with risk issues and training.
- Ensure that adequate administrative and financial resources are available.

Operational procedures

- Establish a clear chain of command and protocol for dealing with risk issues. The protocol would clearly delineate the persons responsible for matters relating to protection and supervision and ensure that there is seamless cooperation between them.

Best practices and voluntary standards

- Ensure that the policies and procedures of school authorities reflect the policies and procedures set out in voluntary standards. For example, in regards to the nature and condition of the equipment, the policies and procedures manuals provided to teachers by school authorities should incorporate policies and procedures that meet the requirements of the voluntary standard *CAN/CSA – Z614-98*, which is a playground standard and contains reference to the risk management factors that should be taken into consideration for any safety issue.
- Develop a list of best practices in relation to educational activities that have proven to be successful in achieving educational objectives in a safe manner.
- Determine the feasibility of adopting a pilot project with respect to an innovative educational activity. This would serve as a guide in the preparation of a risk management plan for that activity which could then be used by other schools.

Risk perception and risk acceptance

- Undertake a comprehensive assessment of each school's risk perception and risk acceptance (levels of risk tolerance), and structure the educational activities around

acceptable levels of risk. Such an assessment ought to take into consideration both the degree of risk that all stakeholders, including parents, students, school administrators and the community are willing to accept, and the degree of risk necessary for educational benefit.

- Adopt an integrated risk management process that helps teachers and administrators progress from seeing risk as a danger to be avoided to seeing risk as an opportunity that needs to be managed. This may be accomplished by conducting a thorough diagnosis of the actual educational activities in which teachers and the school are expected to be involved. Its purpose would be to provide guidance for the teachers and the school based on their uniqueness, differences and similarities.

Legislative initiatives

- Consider requesting the implementation of legislation making risk management mandatory with a waiver of liability for teachers who have excursions approved by administrators as per the province of Saskatchewan. The implementation of such a request would be helpful, especially in relation to risk aversion issues.

6.3 Limitations and areas for future research

This study has a number of limitations. First, my presence may have had an impact on the responses to the research questions. My experience was known to the participants and their responses may have been influenced by this. Being an experienced educator myself,

they assumed that I understood the general ages of the children at various grade levels, understood what was meant by the term 'middle school' and generally may have felt it unnecessary to elaborate on matters that they would otherwise have provided greater detail. Also, being an experienced lawyer, they may have been more guarded in what they said in the telling of their story, although that did not appear to be the case.

Second, the quality of the information provided may be varied and dependent on the particular principal's perception of the issue and his ability to recall and articulate the process involved in making decisions at the time.

Third, the participants were all retired, male, elementary school principals (4) or vice-principals (2) and the schools were all located within urban areas. Further work in this area could investigate the role, if any, played by gender or differences between school boards and panels (elementary/secondary) or among them. Also, time had passed since the retirement of the participants (all of them noted that changes had taken place since the occurrence of the risk issue). This could be another area for future research: perspective of active participants.

Fourth, the common law was used as the basis for defining negligence and for analysis of the data. Future research might be undertaken to determine whether the other body of Canadian law, the civil law, would identify other steps and factors that might impact the management of risk issues in the context of education.

Fifth, the methodology of the study used an open-ended, semi-structured interview rather than an interview in which each participant was asked the same questions. This might be an area for future research: variation in responses of each participant to similar questions.

Sixth, future research could be undertaken to conduct an intra-case analysis of the steps and factors taken into consideration by teachers, principals and vice-principals or to investigate the implications of dual-process reasoning on the management of risk issues.

Finally, a further study could be undertaken in which coroner's inquests and their recommendations are considered.

6.4 Significance of the study

This study is significant from both a scholarly and practical perspective. First, this study brings into sharp focus how risk management and case law can be used by educators to deal with risk issues. The study provides a cogent analysis of the three multidisciplinary components and demonstrates the similarity between constructs drawn from each of the three literatures and the considerations of educators when addressing risk issues.

Second, this study, through the application of pattern matching to narrative inquiry, utilizes the stories of principals in combination with risk management and case law for the purpose of providing educators with a common, rigorous and consistent language and methodology for discussion and decision-making in dealing with risk issues.

Third, the study's methodology has shown that it is capable of identifying gaps, similarities and dissimilarities in the steps and factors used by educators in dealing with risk issues.

Fourth, the study can serve as a formal process for managing and resolving risk issues in the context of education, taking into consideration the two categories of cases derived from

risk management and the case law in conjunction with the benefits of both processes of reasoning, analytical and intuitive.

Fifth, the process and study's findings can be used by teachers, administrators and researchers to formulate recommendations for the development of policies, procedures and practices and to enhance the quality of the services that are provided.

Sixth, the provision of data from the cases and their interpretation can be used for the training of educators (teachers and administrators).

Seventh, the study has generated questions and areas for future research that may be used by other researchers.

Finally, the study enables educators to become proactive, and not simply reactive, in dealing with risk issues in the school setting.

TABLE OF CASES

Arland and Arland v. Taylor, [1955] O.R. 131.

Bank of Montreal v. Dominion Guarantee Co. [1930] A.C. 659.

Blyth v. Birmingham Waterworks Co. (1856) 11 Ex. 781.

Board of Education for City of Toronto v. Higgs (1959), 22 D.L.R. (2d) 49 (S.C.C.).

Bolton and Others v. Stone [1951] A.C. 850; [1951] 1 All E.R. 1078 (H.L.).

Bottomley v. Bannister [1932] 1 K.B. 458.

Conway v. O'Brien, 111 F. 2d 611 (2d Cir. 1940).

Durham et al. v. North Oxford Public School Bd., (1960) 23 D.L.R. (2d) 711.

Dyer (Otherwise Venables) et al. v. Board of School Commissioners of Halifax (1956), 2 D.L.R. (2d) 394 (N.S.S.C.).

Dziwenka v. The Queen, [1972] 1 W.W.R. 350, [1972] S.C.R. 419.

Eaton v. Lasuta (1977) 2 C.C.L.T. 38, 75 D.L.R. (3d) 476 (B.C.S.C.).

Fardon v. Harcourt-Rivington [1932] All E.R. 81 (H.L.).

Gard v. Duncan School Trustees [1946] 1 W.W.R. 305, 62 B.C.R. 323, (1946) 2 D.L.R. 441.

Glasgow Corp. v. Muir, [1943] A.C. 448.

Hall v. Brooklands Auto Racing Club [1933] 1 K.B. 205, at p. 224 (C.A.).

Joel v. Morison, (1834) 6 C. & P. 501.

Lunenburg (County) District School Board v. Piercey/Lunenburg County District School Board, Appellant and Roy Eugene Piercey, J.R. Milligan and Kathleen MacDonald, Respondents (sub nom. Piercey v. Board of Education of Lunenburg County District, (1998) 167 N.S.R (2d) 68 (sub nom. Piercey v. Board of Education of Lunenburg County District) 502 A.P.R. 68, 41 C.C.L.T. (2d) 60 (N.S.C.A.).

M'Alister (or Donoghue) v. Stevenson [1932] A.C. 562, at p. 580 (P.C.).

McEllistum v. Etches, [1956] S.C.R. 787.

McKay et al v. Board of Govan School Unit No. 29 of Saskatchewan et al. 64 W.W.R. 301, [1968] S.C.R. 589, (1968), 68 D.L.R. (2d) 519 (S.C.C.).

Moddejonge v. Huron (County) Board of Education [1972] 2 O.R. 437, (1972) 25 D.L.R. (3d) 661 (Ont. S.C.).

Molson v. Squamish Transfer Ltd. (1969), 7 D.L.R. (3d) 553 (B.C.S.C.).

Myers et al. v. Peel County Board of Education et al. (1981) 123 D.L.R. (3d) 1; [1981] 2 S.C.R. 21.

Nova Mink Ltd. v. Trans-Canada Airlines [1951] 2 D.L.R. 241; 26 M.P.R. 389 (N.S.S.C.).

Overseas Tankship (U.K.) v. Miller S.S. Co. [1967] 1 A.C. 617 (P.C.).

Portelance v. Board of Trustees of Roman Catholic Separate School for Section No. 5 in Township of Grantham / Milkovich et al. v. Board of Trustees of Roman Catholic Separate School for Section No. 5 in Township of Grantham (1962) 32 D.L.R. (2d) 337 (Ont.C.A.).

Priestman v. Colangelo & Smythson [1959] S.C.R. 615.

Ramsden v. Hamilton Board of Education (1942) 1 D.L.R. 770 (Ont. H.Ct.).

Rich v. London County Council, [1952] 2 All E.R. 380.

RJR-MacDonald Inc. v. Canada (Attorney General), (1995) 127 D.L.R. (4th) 1 (S.C.C.).

Southern Portland Cement Ltd. v. Cooper [1974] 1 All E.R. 87 (P.C.).

Stevens v. Howitt ([1969] 1 O.R. 761, 4 D.L.R. (3d) 50 (Ont. S.C.).

Tenute v. Carleton Roman Catholic Separate School Board. Unreported case: Court File No. 102143/96, [1998] O.J. No. 862, par. 9-11 (Ont. C.J., Gen. Div.).

Thornton, Tanner et al. v. Board of School Trustees of School District No. 57 (Prince George), Edamura and Harrower [1976] 5 W.W.R. 240; (1976) 73 D.L.R. (3d) 35 (B.C.C.A.).

Toronto (City) Board of Education v. O.S.S.T.F., District 15 [1997] 1 S.C.R. 487.

United States v. Carroll Towing Co. (1947), 159 F. 2d 169 (C.C.A.).

Vaughan v. Menlove (1837), 3 Bing N.C. 468, at p. 475 Common Pleas.

Wagner v. International R.R., 232 N.Y. 176.

Ware's Taxi Ltd. v. Gilliam [1949] S.C.R. 637.

Watt v. Hertfordshire County Council, [1954] 2 All E.R. 368 (C.A.).

Williams v. Eady (1893), 10 L.T.R. 41, at p. 42 (C.A.)

Wright v. Cheshire County Council, [1952] 2 All E.R. 789.

REFERENCES

- Agor, W. (1989). The logic of intuition: How top executives make important decisions. In W. Agor (Ed.), *Intuition in organizations: Leading and managing productively* (pp. 141–153). London, UK: Sage.
- Alexander, L., & Sherwin, E. L. (2004). *Precedent*. University of San Diego Legal Studies Research Paper No. 05-14. Available at SSRN: <http://proxy.bib.uottawa.ca:2477/abstract=591666>.
- Allinson, C. W., & Hayes, J. (1996). The Cognitive Style Index: A measure of intuition-analysis for organizational research. *Journal of Management Studies*, 33, 119–135.
- Benner, P., & Tanner, C. (1987). Clinical judgment: How expert nurses use intuition. *American Journal of Nursing*, 87, 23–31.
- Bernstein, P. L. (1998). *Against the gods: The remarkable story of risk*. New York, NY: John Wiley & Sons, Inc.
- Birtwistle, T. (2002). Liability and risk assessment in student activity abroad-the UKCOSA survey. *Education and the Law* 14, (4), 231–252.
- Borg, W. R., & Gall, M. D. (1989). *Educational research: An introduction*. (5th Ed.). New York, NY: Longman.
- Brookes, W. T. (1990). The wasteful pursuit of zero risk. *Forbes* (April 30).
- Bruner, J. (1986). *Actual minds: Possible worlds*. Cambridge, MA: Harvard University Press.
- Bruner, J. (2002). The legal and literary. In *Making stories: Law, literature, life* (pp. 37-62). Cambridge, MA: Harvard University Press.
- Bruner, J. (2002). The uses of story. In *Making stories: Law, literature, life* (pp. 3-35). Cambridge, MA: Harvard University Press.
- Canadian Standards Association (1997). CAN/CSA-Q850-97 *Risk management: Guideline for decision-makers – A national standard of Canada*, pp. 1-46. Etobicoke, ON: Canadian Standards Association.
- Carwana, J. P., & Hutchison, B. (2001). *Risk management in Canadian education* 1, (3). Markham, ON: Butterworths Canada Ltd.

- Chambers, P. (2003). Narrative and reflective practice: Recording and understanding experience. *Educational Action Research* 11, (3), 403-414.
- Checkland, P. (1990). *Systems thinking, systems practice*. Chichester, UK: John Wiley & Sons.
- Clandinin D. J., Davies A., Hogan, P., & Kennard B. (1992). *Learning to teach, teaching to learn*. New York, NY: Teachers College Press.
- Clandinin, D. J., & Connelly, F. M. (2000). *Narrative inquiry: Experience and story in qualitative research*. San Francisco, CA: Jossey-Bass Publishers.
- Coles, R. (1989). *The call of stories: Teaching and the moral imagination*. Boston, MA: Houghton Mifflin.
- Cranor, C. F. (1993). *Regulating toxic substances: A philosophy of science and the law*. New York, NY: Oxford University Press.
- Creswell, J. W. (1994). A Qualitative Procedure. In *Research design: Qualitative and quantitative approaches* (pp. 143-172). Thousand Oaks, CA: Sage.
- Creswell, J. W. (1994). A framework for study. In *Research design: Qualitative and quantitative approaches* (pp. 1-19). Thousand Oaks, CA: Sage.
- Crockford, N. (1986). *An introduction to risk management*, 2nd ed. Cambridge, MA: Woodhead-Faulkner.
- Denes-Raj, V., & Epstein, S. (1994). Conflict between intuitive and rational processing: When people behave against their better judgment. *Journal of Personality and Social Psychology*, 66, 819-829.
- Derby, S. L., & Kenney, R. (1981). Risk analysis: Understanding 'How safe is safe enough?'. *Risk Analysis*, 1 (3), 217-224.
- Dewey, J. (1929). *The quest for certainty: A study of the relation of knowledge and action*. New York, NY: Paragon Books.
- Dewey, J. (1938). *Experience and education*. New York, NY: Collier Books.
- Dowie, J. (1990). Clinical decision making: Risk is a dangerous word and hubris is a sin. In D. Carson (Ed.), *Risk taking in mental disorder: Analyses, policies and practical strategies*. Chichester, UK: SLE Publications.

- Dreyfus, H. L., & Dreyfus, S. E. (1986). *Mind over machine: The power of human intuition and expertise in the era of the computer*. New York, NY: Free Press.
- Emblemsvag, J., & Kjolstad, L. E. (2002). Risk analysis – a field version. *Management Decision* 40, (9), 842-852.
- Fayol, H. (1949). *General and industrial management*. New York, NY: Pitman Publishing Co.
- Firestone, W. A. (1987). Meaning in method: The rhetoric of quantitative and qualitative research. *Educational Researcher* 16, (7), 16-21.
- Fleming, J. G. (1977). *The law of torts*. Sydney, AUS: The Law Book Company Limited.
- Giddens, A. (1990). *The consequences of modernity*. Cambridge: Polity Press.
- Goode, H. F. (2001) *Risk management in the Arizona public universities*. Ph.D. dissertation, Arizona State University.
- Gore, W. J. (1964). *Administrative decision-making: A heuristic model*. New York, NY: John Wiley & Sons.
- Guba, E. G., & Lincoln, Y. S. (1988). Do inquiry paradigms imply inquiry methodologies? In D.M. Fetterman (Ed.), *Qualitative approaches to evaluation education* (pp. 89-115). New York, NY: Praeger.
- Haimes, Y. Y. (2001). Risk analysis, systems analysis, and Covey's seven habits. *Risk Analysis* 21, (2), 217-224.
- Harper, S. C. (1989). Intuition: What separates executives from managers? In W. H. Agor (Ed.), *Intuition in organizations: Leading and managing productively* (pp. 89-90). Newbury Park, CA: Sage.
- Head, G. L., & Horn, S. (1985). *Essentials of risk management*. Vol. 1. (3rd ed.). Malvern, PA: Insurance Institute of America.
- Head, G. L., & Horn, S. (1997). *Essentials of risk management*, (Vol. 2, 3rd ed.). Malvern, PA: Insurance Institute of America.
- Hefce, (2001). Risk management: A briefing for governors and senior managers. HEFCE 01/24. Bristol, UK: Hefce Publications.

- Hill, S., & Dinsdale, G. (2001). *A Foundation for developing risk management learning strategies in the Public Service*. Produced for the Action-Research Roundtable on Risk Management, Canadian Centre for Management Development. Ottawa, ON: Government of Canada.
- Hill, S., & Dinsdale, G. (2002). *Building risk management capacity in the Public Service, A new world of risk?* Vol. 5, no. 3. Policy Research Initiative produced for the Action-Research Roundtable on Risk Management, Canadian Centre for Management Development. Ottawa, ON: Government of Canada.
- Hodgkinson, G.P., Langan-Fox, J., & Sadler-Smith, E. (2008). Intuition: A fundamental bridging construct in the behavioural sciences. *British Journal of Psychology*, 99, 1-27.
- Hodgson, D. (1995), The Scales of Justice: Probability and Proof in Legal Fact-Finding. 69 *Australian Law Journal* 731.
- Hogarth, R. M. (2001). *Educating intuition*. Chicago, IL: University of Chicago Press.
- James, F. "Nature of Negligence" (1953), 3 *Utah L. Rev.* 275.
- Jenni, K. E. (1997) *Attributes for risk evaluation*. Ph.D. dissertation, Carnegie Mellon University, Engineering and Public Policy.
- Jones, M. E., & Sutherland, G. (1999). *Implementing turnbull: A boardroom briefing*. The Institute of Chartered Accountants in England and Wales (ICAEW). London, UK: The Center for Business Performance.
- Kane, D. (1992). Science and risk: How Safe is Safe Enough?. *Harpur Academic Review*, 9, 11-34.
- Klein, G. (1998). *Sources of Power*, Cambridge, MA: MIT Press.
- Knight, L. (2000). *A Study of risk management in law enforcement*. Ph.D. dissertation, University of La Verne, California.
- Leiss, W., & Hrudey, S. E. (2005). On proof and probability: Introduction to "Law and Risk". In Law Commission of Canada (Ed.), *Law and Risk* (pp. 1-19). Vancouver, BC: UBC Press.
- Lieberman, M. D., Jarcho, J. M., & Satpute, A. B. (2004). Evidence-based and intuition-based self-knowledge: An fMRI study. *Journal of Personality and Social Psychology*, 87, 421-435.

- Lightstone, S. (2002). Thinking like a client: The renaissance of preventive law, *National* 11, (6), 12-17. Toronto, ON: The Canadian Bar Association.
- Lincoln, Y. S., & Guba, E. G. (1985). *Naturalistic inquiry*. Beverly Hills, CA: Sage.
- Marshall, C., & Rossman, G. B. (1989). *Designing qualitative research*. Newbury Park, CA: Sage.
- Mayer, R. E. (1996). The search for insight: Grappling with gestalt psychology's unanswered questions. In R. J. Sternberg & J. E. Davidson (Eds.), *The nature of insight* (pp. 3-32). Cambridge, MA: The MIT Press.
- McCracken, G. (1988). *The long interview*. Newbury Park, CA: Sage.
- McGraw, J. F., & Bilotta, J. G. (2000). The effectiveness of risk management: Measuring what didn't happen. *Management Decision*, 38 (4), 293-300.
- McRuer Report. Ontario Royal Commission. *Report of the Inquiry into Civil Liberties*, 1968. Toronto, ON: The Queen's Printer for Ontario.
- McWilliam, E., & Jones, A. (2005). An unprotected species? On teachers as risky subjects. *British Educational Research Journal*, 31 (1), 109-120.
- McWilliam, E., & Singh, P. (2003). *Safety in numbers? Teacher collegiality in the risk-conscious school*. Paper presented at the AARE/NZARE Conference, Auckland, December, 2003.
- Merriam, S. B. (1988). *Case study research in education: A qualitative approach*. San Francisco, CA: Jossey-Bass.
- Mickle, A. (2001). *Athletic training risk management: Developing policy and procedure from case law analysis*. Ph.D. dissertation, New Mexico State University, Las Cruces, NM.
- Miles, M. B., & Huberman, A. M. (1984). *Qualitative data analysis: A sourcebook of new methods*. Beverly Hills, CA: Sage.
- Miller, C. C., & Ireland, R. D. (2005). Intuition in strategic decision making: Friend or foe in the fastpaced 21st century. *Academy of Management Executive*, 19, 19-30.
- Neuman, W. L. (1991). *Social research methods: Qualitative and quantitative approaches*. Boston, MA: Allyn & Bacon.

- New Zealand Outdoor Assembly Incorporated (2000). Risk Management in Education. In *Newsletter of Outdoors New Zealand*, April. Wellington, NZ: Outdoors New Zealand.
- O'Donnell, G. (2003). A key role in corporate governance. In *National audit office annual report 2003*. United Kingdom: National Audit Office.
- Pablo, A. L., Sitkin, S. M., & Jemison, D. B. (1996). Acquisition decision-making processes: The central role of risk. *Journal of Management*, 22 (5), 723-746.
- Parry, G., & Clarke, L. (2004). Risk assessment and geography teachers: A survey. *Education and the Law*, 16 (2-3), 115-131.
- Prosser, W.L. (1971). *Handbook of the Law of Torts* (4th ed.). St. Paul, MIN: West Publishing Co.
- Reid, K. (2000). *Risk-e-business: A framework for legal risk management developed through an analysis of selected legal risks in Internet commerce*. A dissertation (Ph.D.) submitted to the University of New South Wales, Australia.
- Reyna, V. F. (2004). How people make decisions that involve risk: A dual –processes approach. *Current Directions in Psychological Science* 13 (2), 60-66.
- Roach, J. E. (1994). *Education and the law: Case and materials*. Ottawa, ON: Faculty of Law, University of Ottawa.
- Robbins, M., & Smith, D. (2001). *BS PD 6668:2000-Managing risk for corporate governance*. London, UK: British Standards Institution.
- Robertson, R. D. (1980). Small group decision making: The uncertain role of information in reducing uncertainty. *Political Behavior*, 2 (2), 163-188.
- Schein, E. (1985). *Organizational culture and leadership*. San Francisco, CA: Jossey-Bass
- Shubik, M. (1958). Studies and theories of decision making. (Special issue on decision making). *Administrative Science Quarterly* 3, 289-306.
- Simon, H. A. (1977). *The new science of management decision*. New Jersey, Prentice-Hall.
- Simon, H. A. (1997). *Administrative Behaviour*, (4th ed.). New York, NY: Free Press.
- Slattery, J. P., & Ganster, D. C. (2002). Determinants of risk taking in a dynamic context. *Journal of Management*, 28 (1), 89-106.
- Slovic, P. (1987). The perception of risk. *Science* 236, 280-285.

- Standards Australia/Standards New Zealand (2004). *AS/NZS 4360:2004-Risk management*. Sydney, AUS: Standards Australia International Ltd./Standards New Zealand.
- Starr, C. (1969). Social benefit versus technological risk. *Science* 165, 1232-1238.
- Sternberg, R. J., & Wagner, R. K. (1986). *Practical intelligence: The origins and nature of competence in the everyday world*. New York, NY: Cambridge University Press.
- Sternberg, R. J., Wagner, R. K., & Williams, W. M. (2000). *Practical intelligence in everyday life*. Cambridge, UK: Cambridge University Press.
- Sullivan, R. (1997). *Statutory Interpretation*. Concord, ON: Irwin Law.
- Tesch, R. (1990). *Qualitative research: Analysis types and software tools*. New York, NY: Falmer.
- Tourangeau, R.E. (1996). *Ontario College of Teachers Act, 1996: A study of the creation and implementation of a self-regulatory body for Ontario teachers and its impact on the education system*. Master of Laws dissertation. University of Ottawa, 1998.
- Treasury Board of Canada Secretariat (Apr. 2001). *Integrated risk management framework*, Ottawa, ON: Government of Canada.
- Valverde, M., Levi, R., & Moore, D. (2002). Legal Knowledges of Risk. In Law Commission of Canada (Ed.), *Law and Risk* (pp. 86-120). Vancouver, BC: UBC Press.
- Volz, K. G., & von Cramon, D. Y. (2006). What neuroscience can tell about intuitive processes in the context of perceptual discovery. *Journal of Cognitive Neuroscience*, 18(12), 2077-2087.
- Waye, V. (2002). Judicial fact-finding: Trial by judge alone in serious criminal cases. 27 *Melb. U. L. Rev.* 423-457.
- White, D. (1995). Application of systems thinking to risk management: a review of the literature. *Management Decision*, 33 (10), 35-45.
- Wildavsky, A. (1979). No risk is the highest risk of all. *American Scientist*, 67(1), 32-37.
- Wright, C. A. & Linden, A. M. (1975). *Canadian tort law: Cases, notes and materials*. (6th ed.). Toronto, On: Butterworths.
- Yin, R. K. (1989). *Case study research: Design and methods*. Newbury Park, CA: Sage.

APPENDICES

Appendix 1 – Risk Management Process (Standards Australia / Standards New Zealand)

Appendix 2 - Steps in the Q850 Risk Management Decision-Making Process
(Canadian Standards Association)

Appendix 3 – Risk Management: Management or Administrative Process

Appendix 4– Principal Background Form

Appendix 5 – Interview Protocol

Appendix 6 – Social Sciences and Humanities Research Ethics Board Approval

Appendix 7 – Risk Management Matrix

Appendix 1

Risk Management Process

(Standards Australia/Standards New Zealand (2004). *AS/NZS 4360:2004-Risk management*. Sydney, AUS: Standards Australia International Ltd./Standards New Zealand.)

The risk management model of Standards Australia / Standards New Zealand (2004) involves the following five steps:

- Establish the context
- Identify the risks;
- Analyse the risks;
- Evaluate the risks; and
- Treat the risks.

The risk management process involved with this model is iterative and includes “monitoring and review” and “communication and consultation” at each step of the risk management process.

Appendix 2

Steps in the Q850 Risk Management Decision-Making Process

(Risk Management: Guideline for Decision-makers: A National Standard of Canada -
CAN/CSA-Q850-97 - Canadian Standards Association, October 1997)

As used in the standard, the “Steps in the Q850 Risk Management Decision-making Process – Detailed Model” (p. 7) comprises “six steps that follow a standardized management or systems analysis approach” (p. 4) – “initiation, preliminary analysis, risk estimation, risk evaluation, risk control, and action/monitoring” (p. 7). Associated with each of these steps are a number of matters that, for the purposes of this study, were taken into consideration in the decision-making process. In the study, these matters are referred to as factors. The text relating to these factors (based on matters taken into consideration in the Q850 standard) is set out in brackets after each of the steps with which they are associated:

- initiation (defining the problem or opportunity; identifying the risk management team; assigning responsibility, authority and resources; and identifying potential stakeholders and beginning to develop the consultation process);
- preliminary analysis (defining the scope of the decision; identifying hazards using risk scenarios; beginning stakeholder analysis; and starting the information library);
- risk estimation (defining methodology for estimating frequency and consequences; estimating frequency of risk scenarios; estimating

consequences of the risk scenarios; and refining stakeholder analysis through dialogue);

- risk evaluation (estimating and integrating benefits and costs; and assessing stakeholder acceptance of risk);
- risk control (identifying feasible risk control options; evaluating risk control options in terms of effectiveness, cost, and risks; assessing stakeholder acceptance of proposed actions; evaluating options for dealing with residual risk; and assessing stakeholder acceptance of residual risk); and
- action/monitoring (developing an implementation plan; implementing chosen control, financing, and communication strategies; evaluating effectiveness of the risk management decision process; and establishing a monitoring process).

The Q850 standard addresses “the needs, issues and concerns of the stakeholders” (p. 13) and uses an iterative process in which “risk communication with stakeholders is an important part of each step in the decision process” (p. 7).

Appendix 3

Risk Management: Management or Administrative Process

(Head and Horn, 1997)

Head and Horn (1997) have gone a step further in defining risk management. As a management or an administrative process, they describe risk management as involving “the four functions of all management: planning, organizing, leading, and controlling”(Head and Horn, 1997, p. xviii). Head and Horn (1997) also provide a description of the specific requirements associated with each of these four management functions. First, the planning function requires a manager to identify activities that must be completed for the purpose of protecting both the organization and its personnel from the adverse effects of risks. Second, the organizing function requires a manager to ensure that adequate resources, including personnel, are available and properly organized to carry out the necessary activities. Third, the leading function requires a manager to assume a leadership role for the purpose of motivating personnel in a manner such that they become willing participants in carrying out the responsibilities associated with the management of risk issues. Finally, the controlling function requires a manager to assume control of the organization’s risk management program. This involves a requirement to evaluate both the effectiveness of the risk management program and, if necessary, identifying activities that enable substandard performance to be corrected.

Appendix 4

Principal Background Form

Name:

Title:

As a principal or Vice-Principal:

Administration Level (Experience in Years):

- ☐ Principal
- ☐ Vice-Principal

School Levels:

- ☐ Elementary
- ☐ Secondary
- ☐ Other

Present School Level:

As a teacher:

School Levels (Experience in Years):

- ☐ Elementary
- ☐ Secondary
- ☐ Other

Related Outside Experience:

--
Signature:

Date:

Appendix 5

Interview Protocol

Prompts for Interviewer: Checklist related to research questions (steps and factors)

Risk Management Patterns – Steps and Factors

Initiation

- Problem Recognition
- Risk Management Team
 - Responsibility
 - Authority
 - Resources
- Stakeholders
 - Identification, communication and consultation
 - colleagues/administrators/students/specialists

Preliminary Analysis

- Hazard Identification
 - Information gathering steps
- Risk Estimation / Risk Evaluation
 - Risk Identification / Risk Issues
 - Probability / Frequency
 - Consequences / Magnitude

Risk Control

- Canvassing of Alternatives - benefits and costs, scenarios
- Factors Affecting Decision
 - Contribution of present or past knowledge, skill or experience
 - Existing policy
 - Existing process and procedure for implementing policy
 - Availability of resources and personnel
 - School involvement – reduction of risk and protection of students, teachers, principals and the board of education

- Selection of Alternatives - benefits and costs, scenarios
- Implementation of Decision

Monitoring of Decision

- Reflection
- Evaluation
- Sharing
- Change
 - Policy, process, procedure, practice
 - Training
 - Documentation
 - Communication
 - Consultation

Case Law Patterns – Steps and Factors

Duty of Care

- “in loco parentis”
- Special relationship

Standard of Care

- Careful and prudent parent
- Reasonableness

Breach of Standard of Care

- Reasonableness
- Foreseeability / Probability / Frequency
- Consequence / Magnitude
- Vicarious Liability

Causation

- Cause in Fact
 - Proximate
 - Remoteness

Damage and damages**Defences**

- Contributory Negligence
- Voluntary Assumption of Risk

Appendix 6
Social Sciences and Humanities
Research Ethics Board Approval



Université d'Ottawa University of Ottawa

Service de subventions de recherche et déontologie Research Grants and Ethics Services

SOCIAL SCIENCES AND HUMANITIES RESEARCH ETHICS BOARD

CERTIFICATION OF ETHICAL APPROVAL

This is to certify that the University of Ottawa Social Sciences and Humanities Research Ethics Board (REB) has examined the application for ethical approval for the research project **An Investigation of Risk Management, the Law and Risk Issues in the Context of Ontario Education (File # 09-06-01)** submitted by Robert Tourangeau and supervised by Raymond Leblanc of the Faculty of Education. The members of the REB found that the research project met appropriate ethical standards as outlined in the Tri-Council Policy Statement and in the Procedures of the University of Ottawa Research Ethics Boards, and accordingly gave the research project a Category Ia (Approval).

This certification is valid for one year from the date indicated below.

Catherine Paquet

Protocol Officer for Ethics in Research

For the Chair of the Social Sciences and Humanities REB

Richard Clément

November 10, 2006

Date

550, rue Cumberland 550 Cumberland Street
Ottawa (Ontario) K1N 6N5 Canada Ottawa, Ontario K1N 6N5 Canada

(613) 562-5841 • Téléc./Fax (613) 562-5338

<http://www.uottawa.ca/services/research/rge/index.html>

Appendix 7
Figure 4 - Risk Management Matrix
Risk Assessment

Source: Robert E. Tourangeau, 2008

L I K E L I H O O D O F O C C U R R E N C E				S E V E R I T Y O F A D V E R S E C O N S E Q U E N C E S		
High > 75%	High (7)	High (8)	High (9)	Manage/Monitor/Conditions	Not Acceptable	Not Acceptable
	Risk	Risk	Risk			
	Not Acceptable	Not Acceptable	Not Acceptable			
Medium 25 to 75%	Medium (4)	Medium (5)	High (6)	Monitor	Acceptable Risk	Risk
	Acceptable Risk	Acceptable Risk	Risk			
	Monitor	Manage/Monitor/Conditions	Not Acceptable			
Low < 25%	Low (1)	Medium (2)	High (3)	Monitor	Monitor/Conditions	Not Acceptable
	Acceptable Risk	Acceptable Risk	Risk			
	Minor	Moderate	Major			

End Notes

^a The definition of risk used in this study represents a synthesis of the various definitions of risk used by various authors and organizations referred to in this study. For example, Canadian Standards Association (October, 1997); Emblemavag, J. & Kjolstad, L. E. (2002); Hefce, (2001); Hill, S. & Dinsdale, G. (2001); Reid, K. (2000); Reyna, V. F. (2004); Robbins, M. & Smith, D. (2001); and Standards Australia (1999).

^b “God is, or He is not. But to which side shall we incline?”Fast Company, April 2002
Quoting Blaise Pascal, 17th century French Intellectual

This quote, in the form of a wager, conjures up questions such as: What are the odds? What are the risks? As noted by Keith Hammonds, the stakes for the wager set out in this quote are staggering – “On the one hand, eternal happiness. On the other hand, infinite damnation.” Hammond goes on to quote the contention by Ian Hacking, a professor of philosophy at the University of Toronto, that Pascal’s dilemma was the first apparent attempt to combine theology and mathematics and arguably the birth of what has become known as decision theory. In the article, Hammond notes that, for Pascal, betting on the side of God’s existence – even if uncertain – is the better choice, since if God does not exist all that you would have lost is so many years of unbridled raucousness. Also, as Hammond puts it, the wager represents perhaps the first scientifically grounded argument in support of playing it safe: “If one outcome seems overwhelmingly preferable, take it – even if it is not certain.”

^c The precautionary principle refers to the German principle of Vorsorgeprinzip or ‘foresight-planning’, a term used in relation to German environmental policy in the early 1970s. The precautionary principle was defined in Principle 15 of the Rio Declaration (UN 1992): “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Essentially, this means that governments are to err on the side of caution when uncertainty and complexity must be addressed and decisions must be made without the benefit of complete scientific knowledge in order to prevent harm from potential or well-defined risks to life, health, or the environment. However, this does not mean that the focus should be on zero risk; the focus should be on minimizing risk for society through the development and implementation of measures that are proportional to the risk unless there is some statutory requirement providing otherwise. While scientific evidence should, as much as possible, be used in the management of risk, risk managers must also ensure that their decisions reflect the values and norms of the society they serve, the acceptability of the risk by the members of that society, and other political and economic considerations. In short, the two parts of risk definition (empirical and magnitude of consequences) and risk perception are important parts in the management of risk. In some respects, the zero tolerance policies of school boards with respect to violence and weapons are examples of risk managers (educators) adopting a precautionary approach.

^d The case law makes reference to the conceptual expression “reasonable man” and, as such, this expression is a term of art in the realm of the law. Therefore, the use of this expression in this study is not intended to express gender bias but is used in its historical context as a fictitious person created by the law. It would not be appropriate or correct to refer to the concept of a “reasonable man” as that of a “reasonable person.”

^e For ease of reference, the use of the term ‘steps’ in this study is a reference to the six steps of the risk management process or the six elements of a cause of action in negligence or to both, unless otherwise dictated by the context. The use of the term ‘factors’ is a reference to the actions involved with each of the six steps of the risk management process (see Appendix 1) or to the matters taken into consideration by the courts in making decisions relating to the six elements of a cause of action in negligence. Also, the use of both terms (steps and factors) includes the concepts and principles associated with them.

^f In the fire case, Gerry indicated that, at about the same time of the unexpected incident, he had received training in risk management once a year by some risk management specialists, but he indicated that the goal of the training was to increase perception of risk management rather than the provision of a formal risk management training program.