

SAFETY, LIABILITY, AND INSURANCE

OUT-of-Class Activities

School-Based:

Safety is of particular concern in planning and implementing physical education. For IN-class and OUT-of-class activities that are organized by the school (i.e., school-based activities), the primary responsibility and legal liability* for ensuring safe practices rests with the school division and its employees. Schools must develop safe routines and procedures, and teachers need to be knowledgeable about the best safety practices, regardless of whether the teaching, learning, and assessment take place in the classroom, gymnasium, playground, or alternative environments.

Teachers are responsible for providing students with a wide variety of challenging movement experiences in physically active settings and must anticipate hazards and minimize the inherent risks in physical activity. Expertise in physical activity management is essential. For some specific physical activities/programming, such as aquatics and cardio-pulmonary resuscitation (CPR), it is recommended that certified training be required.

As a general rule, teachers will be held to the standard of care of a careful or prudent parent. The application of this standard of care will vary from case to case and will depend upon the following factors:

- 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 the students have received in connection with the activity
- the nature and condition of the equipment in use at the time
- the competency and capacity of the students involved
- a host of other factors that may be widely varied but may also, in a given case, affect the application of the prudent-parent standard to the conduct of the school staff

* **Liability** is the legal responsibility for one's actions or for one's failure to act. A person or other entity that fails to meet this responsibility is vulnerable to be sued (i.e., be a defendant) in a lawsuit by a body that feels somehow wronged by this failure to meet this responsibility (i.e., a plaintiff). The plaintiff must prove the legal liability of the defendant in order to receive a court order for the defendant to pay damages or to otherwise remedy the situation (such as by fulfilling the terms of a contract). To prove liability the plaintiff must present evidence that the defendant had a responsibility failed to fulfill that responsibility, and the plaintiff suffered harm or injury as a result of this failure.

Canadian courts have held that school staff members who are responsible for a subject area that requires expertise will be held to a higher professional standard of care. For example, a physical education teacher may be presumed to know more about the dangers inherent in artistic gymnastics than would a careful parent. Accordingly, he or she will be held to the standard of a physical education specialist with training and experience in artistic gymnastics. Sections 86, 87, and 90 of The Public Schools Act address exemption from liability in areas of physical education, and may provide some degree of exemption from liability and negligence*. However, it is important that school divisions be aware that it is their primary responsibility to ensure safe practices when planning and implementing physical education. As mentioned above, Canadian courts have found physical education teachers to be negligent in several cases involving students who were injured during physical education classes, and, in doing so, have rejected the lower “careful- and prudent-parent” standard of care when assessing negligence and adopted instead the higher “physical training instructor” professional standard of care. This is because many physical education activities require specialized knowledge, training, and experience from the teacher. For example, where students are engaging in archery activities, the teacher and school authorities will be required to act as a careful or prudent parent having the specialized expertise demanded of an archery instructor.

The Supreme Court of Canada has said that to determine whether a physical education teacher has not been negligent or in breach of the necessary and appropriate standard of care, the following criteria must be considered:

1. Is the activity suitable to the mental and physical condition, as well as the age of participating students?
 2. Have the students been progressively taught and coached to perform the activity[ies] properly and to avoid the dangers inherent in the activity[ies]?
 3. Is the equipment adequate and suitably arranged?
 4. Is the activity being supervised properly in light of the inherent danger involved?
- (Myers v. Peel County Board of Education [1981], D.L.R. [3d] 1 [S.C.C.])

It should be noted, however, that this list is not all-inclusive and other considerations may be relevant in determining negligence: Is the activity sanctioned by the school administration and school authority, and have students been informed of the risks and responsibilities (e.g., safety procedures, behaviour expectations, and consequences) of participation? (YouthSafe 7–8)

Non-School-Based

For OUT-of-class activities that are not organized by the school (i.e., non-school-based activities), the primary responsibility and legal liability for ensuring safe practices rests

* **Negligence** is a breach of the legal duty to take care which results in harm or injury, undesired by the person who is negligent, to the person who is harmed or injured.

with the students, parents, and community organizations that organize and provide the coaches/instructors for the activity. It is intended that the OUT-of-class activities will be conducted using risk management measures based on this document. It is advisable for schools/divisions to prohibit and not consider eligible under any circumstances some very high-risk activities that are inherently dangerous, such as motorcycle jumping. It is also advisable for schools/divisions to place restrictions on other very high-risk activities that are known to be associated with a higher rate of injury or more severe injury when unsupervised, or require that these sorts of activities be directly supervised by a qualified instructor or coach to be eligible for credit. The physical activity safety checklists provided in this document can be used to guide students/parents so as to minimize, to the greatest extent possible, the risk of preventable accident or injury and promote safe participation practices for those activities.

Safety and Liability

School-Based

There is always a risk that a student will be injured while (or as a consequence of) participating in a school program or course and the school division, trustees, teachers, or principals will be sued on the basis that their negligence was a cause of the student's injury or death.

As mentioned, a person is negligent when he or she (the defendant) breaches his or her legal duty to take care, resulting in injury to a person (the plaintiff). In determining whether or not there has been a breach of duty, the courts consider the actions of the defendant and measure them against the court's concept of how a reasonable adult would have acted in similar circumstances. To establish liability, the courts require the plaintiff to show:

- (i) he or she was owed a duty of care by the defendant;
- (ii) the defendant should have met a particular standard of care in order to fulfill that duty;
- (iii) the defendant breached his/her duty of care by not meeting the relevant standard of care;
- (iv) the breach of duty caused injury to the plaintiff; and
- (v) the injury was not too remote a consequence of the breach so as to render the defendant not liable for its occurrence. (Fridman)

Therefore, to prove negligence, a student would have to prove, among other things, that the school board, teacher, or trustee failed to follow the standard of care that would have been reasonable in the circumstances. In general, as previously mentioned, the courts have said that the standard of care for teachers is that of a careful or prudent parent. However, the courts have also said that the standard of care for physical education teachers is a higher standard, namely that of a prudent and careful parent having the supra-parental expertise demanded of a physical education teacher. The application of

this standard of care will vary, depending on the facts of each case, and will depend on the age of the students, the training the students may have received in the activity, and many other matters. Moreover, to prove negligence, a student must prove that failure to take such care caused harm to the student – that is, “but for” the breach of the relevant standard of care, the harm would not have occurred. So, there are rigorous hurdles that would have to be met by a student in order to prove negligence.

Non-School-Based

With respect to OUT-of-class PE/HE activities that are not organized by the school (i.e., non-school-based activities), statutory protection from liability is not considered to be required because the departmental policy relating to the program suggests that parents be responsible for investigating whether the instructor of the non-school-based OUT-of-class program is competent to instruct and has the facility and equipment that provide reasonable safeguards against death or injury.

While the school may provide general guidance and safety information for students, the OUT-of-class component of the course will require the parents (if the student is under 18 years of age) to review the recommended safety guidelines for the physical activity chosen by the student, and to discuss them with their child in order to approve their child’s participation in the OUT-of-class activity. This approval helps ensure the parents understand that they and not the school are responsible for assessing the risks involved in the non-school-based activity.

The parent approval form (i.e., Parent Declaration and Consent & Student Declaration Form) also suggests that parents investigate the facilities, the equipment, and the level of instruction and/or supervision to be used by their child in the chosen activity to ensure that they meet the safety standards recommended for that activity. This could include investigating whether there is evidence of general liability coverage for facilities and personnel, as well as requirements for personnel to undergo criminal record and child abuse checks. It also asks parents to encourage their child to abide by the recommended safety guidelines and any more-stringent safety standards imposed by the coach or instructor. For students who are 18 or older, the student declaration contains similar requirements as the parental consent form, but the student completes the form (see Appendix B for sample forms).

Liability Insurance

The Manitoba Association of School Trustees (MAST) provides liability insurance protection of \$30,000,000 per occurrence to all public school divisions in Manitoba for legal liability arising from a claim against a school division resulting from bodily injury to persons or damage to property of others that is alleged to be the responsibility of the division. This protection extends to include the division’s trustees, employees, and volunteers who are acting within the scope of their duties in those capacities. Coverage includes all operations of the school division, including OUT-of-class components of school courses and extracurricular activities. In the case of non-school-based activities,

parents (or students 18 years of age and older) are responsible for investigating whether the community organization or group shows evidence of current general liability insurance for the facility and its personnel.

Group and Personal Accident Insurance

MAST also provides an option to school divisions to purchase universal first-party student accident insurance. Every student within a division that chooses this option is covered without regard to fault, 24 hours per day, every day of the year, for all school activities, including OUT-of-class activities that have been approved as part of the Personal Physical Activity Plan in Grades 9 to 12 PE/HE courses. It is assumed that this coverage would not apply to other activities unless the student's Personal Physical Activity Plan is revised prior to the occurrence of an accident. This would include having any new activities accepted by the PE/HE teacher, obtaining the recommended safety guidelines for these new physical activities, and receiving the consent of the parent (students under 18 years of age) to participate in the new activities (see Forms B2 and B4 in Appendix B). As a precautionary measure and to prevent unnecessary revisions to the student's plan, students should be encouraged to add more activities to their original plan to avoid having to add them later. Families may also obtain first-party student accident insurance coverage (e.g., Reliable Life Insurance Company program), which provides insurance coverage for students without regard to fault for any activity, whether school-related or not, 24 hours per day, every day of the year.