

October 14, 2020

OUR FILE NO. EDUC-525

[LAURA LUCAS-30010327, MARIE PATMORE-0174270, SOPHIA THRAYA-30023143]

*Via Email*

Insurance Company

Attention: Adjuster

[adjuster@insurancecompany.-  
com](mailto:adjuster@insurancecompany.-com)

To whom it may concern:

**Re Insured: Cowtown Board of Education**  
**: Plaintiff: Dakota (Guardian ad litem of)**  
**Claim No.: EDUC-525**

Thank you for referring this matter to our office. I have now had an opportunity to review the file materials and provide my assessment in this letter.

You asked me for an assessment of the liability of your insured, the Cowtown Board of Education (the “CBE”) and its employee, Ms. Morgan, in relation to injuries suffered by the child Plaintiff, Dakota, on CBE property, along with the child Plaintiff’s contributory negligence.

On your instructions, I will not address the quantum of damages or apportionment of liability at this time.

**FACTS**

Ellen and Dakota are Grade 2 students at Western Canada Elementary School. Over the past year, Ellen has had incidents of bullying, which had been dealt with in accordance with the school and Cowtown Board of Education's disciplinary policies. The most serious incident between the two students involved Ellen drawing blood as a result of scratching Dakota's arm. Ellen was disciplined accordingly with a one-day suspension and the two students were placed in separate classrooms for the Grade 2 school year.

One day, all of the Division I (Grade 1-3) students were outside for recess. There was only one teacher on supervision that day as per the CBE guidelines. The supervisor, Ms. Morgan, had taught neither Ellen nor Dakota, so she was unfamiliar with the bullying issues from the year prior. The students were playing a game of Grounders, the most popular game at Western Canada Elementary School. Grounders is like a normal game of "tag", except the person who is "it" is confined to the ground, while the other players must remain on the playground structure ("Grounders"). According to the rules of Grounders, if the person who is "it" wants to venture onto the playground structure to try and "tag" someone, they have to keep their eyes closed while doing so. Dakota was "it", and abiding by the "closed eye" rule she had her eyes closed while on the playground structure, near the top of the 8-foot tall slide. While grasping the crossbar at the top of the slide with only one hand, Ellen ran up behind Dakota and shoved her in the back with intention. As a result, Dakota let go of the crossbar and fell from the top of the slide striking her head on the ground. Ms. Morgan saw the incident as she was attentively watching from 20 feet away. She rushed to attend to Dakota and Ms. Morgan immediately provided her with appropriate emergency medical care in full compliance with Western Canada Elementary School and Cowtown Board of Education policies. Dakota was transported by ambulance to the hospital, where she was treated for a concussion. Shortly thereafter, Dakota was diagnosed with a traumatic brain injury.

Prior to the incident neither the Cowtown Board of Education nor Western Canada Elementary School had a policy or rule prohibiting Grounders. However, another student in Oilertown, Alberta was catastrophically injured while playing Grounders about two months prior to Dakota's incident. The Cowtown Board of Education banned Grounders shortly after Dakota's incident.

## **ISSUES**

You asked me to address the following issues:

1. Whether Ms. Morgan was negligent;

2. If so, whether the CBE is vicariously liable for Ms. Morgan's negligence;
3. Whether the CBE was negligent independent of any act or omission by Ms. Morgan; and
4. Whether the child Plaintiff, Dakota was contributorily negligent.

## ANALYSIS

### *[Ms. Morgan's negligence]*

#### **For:**

Ms. Morgan owed a duty of care to Dakota as her recess supervisor at school, during school hours<sup>1</sup>. Ms. Morgan's act fell below the standard duty of care of a careful and prudent parent<sup>2</sup>. Ms. Morgan should have attentively watched the game at closer proximity, knowing the risks associated with the game of Grounders. But for Ms. Morgan's inability to supervise the game of grounders at closer proximity, Dakota would not have been injured<sup>3</sup>. Dakota suffered a traumatic brain injury as a result of her fall from the playground. Therefore, Ms. Morgan is liable in negligence.

#### **Against:**

Ms. Morgan owed a duty of care to Dakota as her recess supervisor at school, during school hours<sup>4</sup>. Ms. Morgan was acting in the manner of a careful and prudent parent<sup>5</sup>. Ms. Morgan was attentively watching the game of Grounders. At the time of the incident, there were no rules or policies prohibiting the game of Grounders at either the school or board level<sup>6</sup>. Due to this, Ms. Morgan allowed the game to be played. When she saw the incident occur she reacted quickly and provided medical care when she saw that Dakota was injured. Therefore, Ms. Morgan is not liable for negligence.

### *[Cowtown Board of Education's vicarious liability]*

#### **For:**

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<sup>1</sup> McEllistrum v Etches, [1956] SCR 787 at para 9 (M v E)

<sup>2</sup> Myers v Peel County Board of Education, [1981] 2 SCR 21 at 31 (M v P)

<sup>3</sup> Hanke v Resurfice, 2007 SCC 7 at para 21 (H v R)

<sup>4</sup> M v E para 9

<sup>5</sup> M v P

<sup>6</sup> Deo v Vancouver School District No 39, 2018 BCSC 133 para 129 (D v V)

The Cowtown Board of Education is vicariously liable for Ms. Morgan's tort because Ms. Morgan was negligent in carrying out her supervision responsibilities during school hours and on school property as an employee of the Cowtown Board of Education. Ms. Morgan was carrying out her duties as a supervisor under the School Boards guidelines, which included only one supervisor and no restriction around the game of Grounders. The Cowtown Board of Education created a risk that materialized the tort of Ms. Morgan by failing to provide more supervision staff during recess and failing to ban the game of Grounder's knowing the associated risks, and the possible outcomes such as those in the Oilertown incident. Therefore, the Cowtown Board of Education is vicariously liable.

**Against:**

The Cowtown Board of Education is not vicariously liable for Ms. Morgan's tort because Ms. Morgan was not negligent in carrying out her supervision responsibilities during school hours and on school property as an employee of the Cowtown Board of Education. Therefore, the Cowtown Board of Education is not vicariously liable.

***[Cowtown Board of Education's negligence]***

**For:**

The Cowtown Board of Education owed a duty of care to Dakota as a student in their care, during school hours<sup>7</sup>. Additionally, under the Occupier's Liability Act RSA 2000 c O-4 under s.5 & s.6, they owed Dakota a duty of care to be reasonably safe as a visitor on their premises. The Cowtown Board of Education's actions fell below the standard duty of care as they should have acted in the manner of a careful and prudent parent by providing more than one supervising staff member during recess and banning the game of Grounder's as a result of knowing the associated risks of the game, and the possible outcomes such as those of the Oilertown incident<sup>8</sup>. But for the Cowtown Board of Education failing to provide more supervision staff and allowing the game of Grounders to be played on school property during school hours, Dakota would not have been hurt<sup>9</sup>. Dakota suffered a traumatic brain injury as a result of her incident<sup>10</sup>. Therefore, the Cowtown Board of Education is independently liable in negligence.

**Against:**

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<sup>7</sup> D v V

<sup>8</sup> M v P

<sup>9</sup> H v R para 21

<sup>10</sup> Mustapha v Culligan of Canada Ltd, 2008 SCC 27 at para 13

The Cowtown Board of Education owed a duty of care to Dakota as a student in their care, during school hours<sup>11</sup>. Additionally, under the Occupier's Liability Act RSA 2000 c O-4 under s.5 & s.6, they owed Dakota a duty of care to be reasonably safe as a visitor on their premises. The Cowtown Board of Education did not breach their duty of care owed to Dakota. The Cowtown Board of Education was acting in the manner of a careful and prudent parent by applying the same supervision policy for all of its schools, which states there must be one teacher directly supervising the playground area at all times and they must circulate and be highly visible. The Cowtown Board of Education was not breaching their duty of care in failing to ban the game of Grounder's as "a careful and prudent parent would not expect the school officials to develop a playground supervision system predicated on rules designed to address every conceivable risk of schoolyard injury"<sup>12</sup>. Therefore, the Cowtown Board of Education is not liable for negligence.

***[Dakota's contributory negligence]***

**For:**

In accordance with the standard of care for children, "what would a reasonable child of like age, intelligence, experience, general knowledge, and alertness be reasonably expected to do and foresee under those particular circumstances? (McEllistrum v Etches, [1956] SCR 787 at para 9), Dakota should have known the risks associated with the game of Grounders and in particular the risks of hanging off of an 8-foot tall slide. Dakota should be held 20% liable for her injuries.

**Against:**

For a child of Dakota's age "intelligence, experience, general knowledge, and alertness", Dakota was very knowledgeable about the layout of the playground and comfortable navigating it even with her eyes closed<sup>13</sup>. She had played the game of Grounder many times without getting injured. Dakota is only in Grade 2, and has yet to develop the full rationale for determining what is a dangerous activity and what is not. A child of Dakota's age relies on guidance from adults regarding what is deemed unsafe conduct on the playground. Dakota is not liable for her injuries.

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<sup>11</sup> D v V

<sup>12</sup> D v D para 129

<sup>13</sup> M v E para 9

## CONCLUSION

Given the foregoing, if this matter were to proceed to trial, I find it likely that a court would not find Ms. Morgan liable in negligence as she maintained her duty of care owed to Dakota as her recess supervisor and responded in a timely and appropriate manner outlined by the Cowtown Board of Education. It is probable that the court would find the Cowtown Board of Education independently liable for Dakota's injuries due to their failure to implement policies to prevent injury resulting from the playground game Grounders. Lastly, I find it likely that the court would hold Dakota 20% liable as a child of Dakota's age "intelligence, experience, general knowledge, and alertness" should have known the risks associated with the game of Grounders, and in particular the risks of hanging off of an 8-foot tall slide<sup>14</sup>.

Once you have reviewed this letter, please call me to discuss at your convenience.

Kindest regards,

Laura Lucas, Marie Patmore, Sophia Thraya

[Laura Lucas] [Marie Patmore] [Sophia Thraya]

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<sup>14</sup> M v E para 9

## Appendix

*Deo v Vancouver School District No 39*, 2018 BCSC 133

*Hanke v Resurfice*, 2007 SCC 7

*McEllistrum v Etches*, 1956 SCR 787

*Mustapha v Culligan of Canada Ltd*, 2008 SCC 27

*Myers v Peel County Board of Education*, [1981] 2 SCR 21

*Occupier's Liability Act RSA 2000 c O-4*