Court File No. 13-SC-125572

ONTARIO
SUPERIOR COURT OF JUSTICE
SMALL CLAIMS COURT

BETWEEN:

VANIA KARAM and WINSTON KARAM

Plaintiffs

- and -

OTTAWA CARLETON DISTRICT SCHOOL BOARD

Defendant

PLAINTIFFS'

FINAL SUBMISSIONS

Phoenix Paralegal & Advocacy Services
64 Moresby Drive
Kanata, Ontario K2M 2J3

Telephone 613-294-4380
Facsimile 613-254-5835

Tami Cogan
LSUC # P06910
PhoenixParalegal@gmail.com

Legal Representative for the Plaintiffs

Your Honour on behalf of the Plaintiffs we will try to keep our final submissions under 45 minutes in duration, subject to any questions Your Honour may have.

Cause of Action

The case before the Court is based in negligence.

Legal Test

The Plaintiffs will demonstrate the following elements on which their claim is based:

1. The Defendant has a Standard of Care to be met,
2. The Defendant was negligent in meeting its Standard of Care,
3. 'But for' the Defendant's negligence, the Plaintiff would not have suffered damages.
4. The harm to the Plaintiff was foreseeable.

Agreed Facts

The facts which are not in dispute are as follows:

The Plaintiff, Winston Karam was at all material times a student at Broadview Avenue Public School in the Ottawa Carleton District School Board, he is a minor, and is financially supported by his mother.

The Plaintiff, Vania Karam was at all material times and remains Winston's mother and sole provider and in the case before the court, his litigation guardian.

It is agreed that in the 2011/2012 school year James Hadley and Liam Alvarado were classmates with Winston in Grade 7. The Superintendent of Instruction was Frank Wiley, the Principal was Mr. Phillip Davies, the Vice Principal was Rebecca Carver, their Homeroom teacher was Fabio Cattelan, and their math teacher and guidance counsellor was Florence Verret-Borsos.

It is further agreed that the Ottawa Carleton District School Board was in compliance with the Ministry of Education guidelines for policies and procedures regarding the *Education Act*, R.S.O. 1990, c. E.2, regarding anti-bullying curriculum, Code of Conduct for behaviour, and progressive discipline and safety. Meaning that it is agreed these policies and procedures existed.

It is also agreed that the Standard of Care to be met by the Defendant was established in **1895**, in the case of *Williams v Eady* (1985), 10 T.L.R. 41.

For Your Honour's reference that can be found in the Defendant's Book of Authorities, at Tab 2, *Patrick v St. Clair Catholic District School Board*, 2013 ONSC, 4025, at page 29, paragraph 210.

> The standard of care to be exercised by school authorities in providing for the **supervision and protection** of students for whom they are responsible is that of the careful or prudent parent.

Failure to meet the Standard of Care

However, it is the Plaintiffs' submission that the Defendant did not implement the available strategies under the policies and procedures that were necessary to protect the Plaintiff from aggressive behaviours of identified high risk students, specifically James Hadley and Liam Alverado, and thus failed to meet its Standard of Care as a careful and prudent parent in the supervision and **protection** of this child. And as a result of the failure to meet this standard of care, the Plaintiff was subjected to theft of personal property, name calling, racial slurs and assault, over the course of 7 months. The numerous reports to several staff members, by Winston, Ms. Karam and Ms. McKeown, should leave no doubt that the Defendant was aware of the behaviours Winston was being subjected to.

And with several staff members receiving these numerous reports, the foreseeability of harm ought to have been obvious.

Judicial Notice

Before we proceed further, the Plaintiffs will ask this Honourable Court to take Judicial Notice of two facts.

The 1st one being, that bullying can cause psychological harm. This is a fact recognized by Government and educators alike, having brought about the development and implementation of changes to the *Education Act,* and School Board policies and procedures to reflect intolerance for bullying. Anti-bullying training is provided at both the staff and student levels for prevention and support in efforts to avoid such harm.

The 2nd fact we ask this Honourable Court to take Judicial Notice of, is that racial slurs cause psychological harm to an individual's dignity, and is a verbal assault to a victim's self-worth.

Witness Credibility

Winston – This court heard the testimony of Winston Karam, that at the start of the school year he made new friends with James and Liam. However, after their inappropriate behaviour at his home and Ms. Karam reporting to the school what had occurred, the boys began to distance themselves from Winston because they had gotten into trouble.

After the spotlight was off, the boys began to retaliate, and began taking his scooter from school property. This was supported by email correspondence between Ms. Karam and Mr. Cattelan. The correspondence also supported Winston's testimony that he was being called names. Winston struggled, as many children do, to arrange their memories in a chronological order. His memories were anchored in the things like the weather. This does not make his testimony less credible, only less organized.

Winston went on to testify that he had been subjected to physical aggression in the form of being shoved into the lockers, having basketballs taken from him and thrown at him, having his face pushed into a drinking fountain, and being placed in choke holds. They made fun of his laugh, and used racial slurs, to upset him. All the while isolating him socially.

He testified that he had reported these incidents to Mr. Davies, Ms. Carver and Ms. Borsos, each at various times. And that the most helpful advice he was given, was to find new friends and stay away from James and Liam.

When he was unable to do so, and the aggressive behaviour continued, he reported again, and again. But the answer never changed.

Ms. Karam testified to the numerous times she herself reported to Mr. Cattelan, Mr. Davies, Ms. Carver, and Ms. Borsos. She even offered them suggestion as to what could be done to support Winston to establish healthy relationships with new friends.

But to no avail. The support did not happen.

It was testified to by Winston and Ms. Karam that Sandra McKeown attended the school and spoke to Mr. Davies about the inappropriate thefts of property.

And yes, his property was returned Winston. But even this did not persuade Mr. Davies to reconsider his determination of the nature of the relationship between Winston, James and Liam.

Mr. Cattelan had testified that he was aware of the unhealthy relationship between the three boys. The email correspondence confirms that he had attempted to make his colleagues aware that this was a relationship that required above average attention.

What is not known, is why even Mr. Cattelan's warning were ignored.

It was testified to by Mr. Cattelan that he had spoken to Ms. Borsos and directed her to speak to Winston. It was testified to by Mr. Davies that he requested Ms. Borsos to speak to Winston. It was testified to by Ms. Borsos that Ms. Carver asked her to speak to Winston. It was testified to by Ms. Karam that she had spoken to Ms. Borsos. Yet, from her account, she had only spoken to Winston once.

Winston testified he had spoken to her two or three times. But that she kept asking questions about home, when he had wanted to see her about what was going on at school. She did not make a referral to the OCDSB psychologist.

Mr. Davies testified that Ms. Carver was present at a meeting with Ms. Karam and that Ms. Carver took notes.

Ms. Karam testified that she had contacted Ms. Carver with her concerns about James and Liam.

Winston testified that he had reported to Ms. Carver, and her advice was to not hang out with James and Liam. Except for the time that she gave him detention for swearing in class in response to the racial slur.

Mr. Cattelan had given evidence as to how often James and Liam were in trouble. These were kids known to have social issues.

Yet, the staff claim they were unaware that Winston was being bullied.

Culmination of 7 months of harassment

After 7 months of torment and harassment. Winston had a panic attack in class.

Failure to meet the Standard of Care in protecting a child

Trained and experienced educators, ought to have recognized the plea for help from a 12 year old child. A careful and prudent parent would not merely look-on or supervise as their child was being subjected to verbal and physical assaults. A careful and prudent parent would take action to protect their child from the

aggressors. A careful and prudent parent would assist the child to develop healthy relationships and strategies to avoid the harm caused by bullying. This Court heard from Superintendent Wiley that these opportunities can be developed. That these opportunities existed at Broadview Avenue Public School. Yet not one staff member at Broadview Avenue Public School put forth the effort to aid Winston and support him.

It was the testimony of Mr. Davies that the boys were friends. Yet no consideration was given to the nature of the relationship between these three youth. No consideration was given to Winston's complaints, or Ms. Karam's complaints, or Ms. McKeown's complaints about the way Winston was being treated:

No consideration was being given to the theft of his property. Is a friend someone who steals from you?

No consideration was given to the characterisation of the names he was being called. Does a friend intentionally make you feel badly about yourself?

No consideration was given to the completely inappropriate racial slurs. Does a friend demean and demoralize you, just for fun?

No consideration was given to the purpose of the physical aggressions. Does a friend isolate you from other peers?

No reason was given as to why the reports were not documented.

No reason was given as to why the reports were not investigated.

No reason was given as to why Winston was not believed.

No reason was given as to why Winston was not given strategies for successful development of healthy peer relationships.

No reason was given for why the OCDSB policies and procedures for dealing with bullying were not followed.

No reason was given as to why the staff failed to meet their standard of care to protect a child.

But for

In the case of *Clements v Clements*, 2012, SCC 32, the Supreme Court explores the causal link required to meet the burden of negligence, "but for" the Defendant's actions or lack thereof.

For the Court's reference this can be found in the Plaintiffs' Book of Authorities at Tab 3.

> [8]The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury – in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.
>
> [9] The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. See *Wilsher v Essex Area Health Authority*, [1988] A.C. 1074 (H.L.). at p.1090, per Lord Bridge; *Snell v Farrell*, [1990] 2 S.C.R. 311.

Chief Justice McLachlin, goes on to discuss the alternative to the "but for causation test, which is the "material contribution to risk".

> [14] "But for" causation and liability on the basis of material contribution to risk are two different beasts. "But for" causation is a factual inquiry into what likely happened. The material contribution to risk test removes the requirement for "but for" causation and substitutes proof of material contribution to risk. As set out by Smith J.A. in *MacDonald v Goertz*, 2009 BCCA 358, 275 B.C.A.C. 68 at para. 17:
>
>> … "material contribution" does not signify a test of causation at all; rather it is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation. In such cases, plaintiffs are permitted to "jump the evidentiary gap": see "Lords a'leaping evidentiary gaps" (2002), Torts Law Journal 276, and "Cause-in-fact and the Scope of Liability for Consequences" (2003), 119 L.Q.R. 388, both by Professor Jane Stapleton. That is because to

> deny liability "would offend basic notions of fairness and justice": *Hanke v Resurfice Corp.*, para. 25.

> [15] While the cases and scholars have sometimes spoken of "material contribution to the injury" instead of "material contribution to risk", the latter is the more accurate formulation. As will become clearer when we discuss the cases, "material contribution" as a substitute for the usual requirement of "but for" causation only applies where it is impossible to say that a particular defendant's negligent act in fact caused the injury. It imposes liability not because the evidence establishes that the defendant's act caused the injury, but because the act contributed to the risk that injury would occur. Thus this Court in *Snell* and *Resurfice Corp. v Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, raised the possibility of a material contribution to risk approach...

> ...

Chief Justice McLachlin continues on at paragraph 45:

> [45] The Court of Appeal reached a similar view of the law to that here proposed. It pointed out that the material contribution to risk exception to "but for" causation is not a test for proving factual causation, but a basis for finding "legal" causation where fairness and justice demand deviation from the "but for" test. It correctly identified the critical element for application of a material contribution to risk approach – the impossibility of proving which of two or more possible tortious causes is in fact the cause of the injury. And it correctly suggested that the approach could apply to situations where, as in *Walker Estate*, a defendant attempts to defeat "but for" causation by pointing the finger at the hypothetical negligence of a third party that might have caused the loss in any event. It was unnecessary, in my view, to hang the analysis on "circular causation", and "dependency causation", which may complicate the matter rather than simplify it. However, in broad terms, the Court of Appeal correctly

identified the circumstances where a material contribution to risk approach may exceptionally be imposed.

[46] The foregoing discussion leads me to the following conclusions as to the present state of the law in Canada:

> (1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.
>
> ...

It is the Plaintiffs submission that had the Defendant implemented support strategies for the Plaintiff to foster new and healthy relationships with positive peer groups, the risk of injury would have been significantly reduced. And, if the Defendant had imposed disciplinary measures toward the aggressors in the case at hand, the deterrent would have further reduced the risk of injury to the Plaintiff.

That is after all the purpose of these policies and procedures for dealing with bullying and breaches of the code of conduct.

Therefore, the Plaintiffs submit that "but for" the Defendant failing to apply the policies and procedures for anti-bullying and progressive discipline, the Plaintiff would not have suffered psychological and physical harm at the hands of the James Hadley and Liam Alvarado.

Foreseeability

In today's society the harm caused to individuals victimized by bullying is well known, and recognized. From suicides to school shootings, the impact of bullying has scared our educational institutions and all who attend them. Bullying is not just a buzz word, but a widely recognized social condition. The training for staff and students is vast. The policies, procedures, strategies and resources are plentiful.

So the question still lingers.... Why did 4 experienced educational professionals ignore the reports, complaints and pleas of this family to help Winston in dealing with the unhealthy relationship he was trapped-in.

The foreseeability of the harm that would result from this relationship was plain to anyone who took the time to listen, and believe.

This was not a one-time incident.

This was a build-up of unhealthy, inappropriate behaviours which occurred over a period of 7 months. 7 months of psychological torment.

The culmination of those 7 months happened on April 27th, 2012, in the resultant panic attack.

Continuation

So, a child has a severe panic attack on Friday. A seizure like event.

The child's mother reports to you that this was due to the bullying he (and she) have been reporting.

The child returns to school, and within a day he reports that the same kids are calling him names, again. What do you do? Do you let him call his mother? Or do you harshly tell him to return back to the same environment to continue to endure? Is that what a careful and prudent parent does?

Does a careful and prudent parent leave the bully alone and propose to move the victim to a different class with new kids in the middle of the year? Because that was the solution the OCDSB proposed. And they believe that Ms. Karam was being unreasonable for not accepting the resolution.

In fact the OCDSB took the whole incident so seriously, that the following year Winston would have been returned to the same class as his tormenter once again.

Not to mention the inappropriate comment on his report card, and a false medical diagnosis on his student record. Both evidence that the OCDSB placed the blame on Winston, and not the bully who was relentlessly tormenting him. How are those the actions of a prudent parent protecting a child?

How could the OCDSB possibly foresee the harm, when they were blaming the victim?

Liquidated Damages

It is the submission of the Plaintiffs that the causation between the Defendant's failure to meet the standard of care to protect this child, and the harm that he suffered is clear.

As a result of the OCDSB staff failing to take appropriate action to protect Winston, Ms. Karam- a careful and prudent parent was left with no choice but to remove Winston from the school, and provide him with home schooling. As a single parent, it was a reasonable action to recruit her mother, Sandra McKeown a former teacher, to take on the responsibility to teach and supervise Winston. The fact that these individuals are related, should not negate the need for

compensation for Sandra McKeown's time and fuel. The expense was reasonable at $50/day plus fuel. The total expense was $2730.00.

It was also the appropriate action of a careful and prudent parent to obtain psychological services for Winston to deal with the harm he suffered. This service was not offered by the OCDSB during the 7 months in which he was being bullied. Only the services of a social worker were offered, after the panic attack of April 27th. Had psychological services been offered during the school year, while the bullies were being appropriately disciplined, Ms. Karam would not have had to suffer this expense. This total was $700.00.

Ms. Karam also incurred legal costs for cease and desist letters to be drafted and served to the parents of the bullies. Had the OCDSB staff dealt with these two children with progressive discipline, notified the families and halted the aggressive behaviour; Ms. Karam would not have had to take such action on her own. The expense being claimed is $565.00.

Finally, the lack of protection provided to Winston by the OCDSB, left him subjected to torment and assaults. The need for self-defence lessons to teach him how to protect himself, and repair the self-esteem of this child is a natural and reasonable response. This is a reasonable expense incurred by the Plaintiff

due to the harm resulting from the negligence of the Defendant. The amount was $336.00.

The total liquidated damages being claimed are: $4331.00

Oyston v St Patrick's College 2013 – New South Wales, Australia.

While there is currently no Canadian precedent on valuation of general damages in bullying, the Plaintiffs rely on the Australian precedent of Oyston v St Patrick College. All of the related cases available have been provided for your reference. Unfortunately, the original decision was not reported.

The Australian case awarded $21,875.00 on Appeal for non-economic loss, which by definition is equivalent to general damages.

The Plaintiffs are seeking $20,669.00 in general damages for Winston, and $1000.00 for Ms. Karam.

As previously identified, the Plaintiffs are seeking $4331.00 in liquidated damages.