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Résumé de l'article

Sans conteste, certains incidents survenus lors de l'enseignement de plein air soulèvent des questions de légalité dans des circonstances où l'ignorance de la loi n'est pas une excuse. En recourant à une analyse d'études de cas axée sur la littérature juridique, nous employons le cadre des Sept Droits en y ajoutant deux droits supplémentaires pour en arriver à Neuf Droits. Dans notre article, nous décrivons d'abord la sortie organisée par le Toronto District School Board lors de laquelle Jeremiah Perry est décédé en présentant ce qui est disponible publiquement sur le sujet. Par la suite, nous évaluons la décision prise par la Cour supérieure de justice de l'Ontario lors du procès pour négligence criminelle qui a suivi le décès. Pour notre analyse et nos recommandations, nous nous fondons sur les Neuf Droits. Ceux-ci, en facilitant l'exploration de la terminologie juridique pertinente pour ce cas, servent à orienter l'analyse de risques pour la planification de sorties, l'évaluation de risques pendant une sortie, et la gestion de risques. Sous-tendant cette étude est l'idée malheureuse que, par rapport aux sorties éducatives faites au Canada, on ne pense à la loi qu'à la suite d'un incident malencontreux.

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Another Tragedy in Outdoor Education

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Abstract

The legalities around incidents in outdoor education (OE) are undeniable, and ignorance is not a defence. Using case study analysis specific to legal literacy, we extend this analysis to include the “7 Rights” framework and add two additional rights for consideration, referred to as the 9 Rights. This discussion organizes what is publicly available on the Toronto District School Board (TDSB) outing, and death of Jeremiah Perry, and draw insights from the decision of the Ontario Superior Court of Justice in the subsequent criminal negligence trial. We present our analysis and recommendations, based on the 9 Rights. By exploring pertinent legal terminology, relevant to this case, the 9 Rights guides risk analysis for trip planning, in-field risk assessment, and risk management. The unfortunate crux of this discussion, and many OE incidents in Canada, is that *the law* enters the learning equation only after something goes wrong.

Résumé

Sans conteste, certains incidents survenus lors de l'enseignement de plein air soulèvent des questions de légalité dans des circonstances où l'ignorance de la loi n'est pas une excuse. En recourant à une analyse d'études de cas axée sur la littérature juridique, nous employons le cadre des Sept Droits en y ajoutant deux droits supplé-

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mentaires pour en arriver à Neuf Droits. Dans notre article, nous décrivons d'abord la sortie organisée par le Toronto District School Board lors de laquelle Jeremiah Perry est décédé en présentant ce qui est disponible publiquement sur le sujet. Par la suite, nous évaluons la décision prise par la Cour supérieure de justice de l'Ontario lors du procès pour négligence criminelle qui a suivi le décès. Pour notre analyse et nos recommandations, nous nous fondons sur les Neuf Droits. Ceux-ci, en facilitant l'exploration de la terminologie juridique pertinente pour ce cas, servent à orienter l'analyse de risques pour la planification de sorties, l'évaluation de risques pendant une sortie, et la gestion de risques. Sous-tendant cette étude est l'idée malheureuse que, par rapport aux sorties éducatives faites au Canada, on ne pense à la loi qu'à la suite d'un incident malencontreux.

Keywords / Mots clés : outdoor education, teacher education, risk prevention, school P-12 / enseignement de plein air, formation des enseignants, prévention du risque, école P-12

Introduction

On July 6, 2017, news agencies across Canada began releasing details about a suspected drowning involving a Toronto high school student, Jeremiah Perry. As the day-long news cycle unfolded, it became clear that on July 4, 2017, Jeremiah drowned while participating in a school canoe trip in Algonquin Provincial Park. As teacher educators and researchers (outdoor education [OE] and education law), former teachers, and parents, our thoughts were racing as to how this could have happened in Canada yet again. In discussing this incident, from our unique perspectives, we cycled through a set of questions to which there were no concrete or justifiable answers. We turned to the internet, grasping at threads of information in the hopes that this would be explained, and trying to make sense of this loss of life. Over the coming years, we confirmed details and facts to make sense of another OE tragedy.

A summary of our initial discussions, steeped in what we describe as best-informed practices in OE, is captured in the following question: was this yet another example of a missed opportunity to practice prevention (Foran, Young, Kraglund-Gauthier et al., 2018; Heshka, 2006; Jackson & Heshka, 2011; Young, 2017) and abide by the legalities in leading youth outdoors? The teacher who led this canoe trip, Nicholas Mills, was charged with criminal negligence causing death—a first for OE in Canada. Ultimately, on October 6, 2021, Mills was found not guilty of this charge in the Ontario Superior Court of Justice, due to the higher onus of proof in a criminal trial. Still, despite the court's decision, this incident still creeps into our collective thinking and has formed a reference point in our ongoing analysis, scholarship, and courses in OE. Many of the students attending St. Francis Xavier University and Algonquin College OE programs still have questions concerning this tragedy. As expected, students were focused on risk management and risk assessment, the law, and school policies pertaining specifically to OE. The timing of this case is poignant because OE is growing across Canada, as more and more teachers and students are actively engaged outdoors. There is also the humanistic realization that

this is simply a tragedy—a death “unnecessarily” cutting short the life of a young man, accidental or not. Therefore, this discussion, forming a case study analysis, is a response situating this incident academically for other teachers, school administrators, and interested officials to understand responsible-safe OE practices in public schools. A critical facet in this case that has stayed with us from the beginning of this incident is the reactions of the education system. School officials, in efforts to make sense of this event, created ineffectual changes to ensure student safety and prevent such a tragedy from happening again. Thus, we offer our analysis, and commentary, with the greatest respect to the Perry family and to the many individuals impacted by this tragic event.

Case study analysis

As soon as somebody “takes charge of a group” in the outdoors, they have a legal responsibility toward that group. This is true of volunteer leaders, camp counsellors, and professional guides, but the specific focus in this discussion will be on teachers. If something goes wrong, there is always the reality and professional risk that the lead teacher (assuming there is a team of educators involved) of the excursion can face legal repercussions. It is believed by the authors that the Algonquin Park case is the first time a teacher in Canada has been criminally charged with criminal negligence causing death. The teacher was subsequently acquitted upon trial (Jackson, Priest, & Ritchie, 2022). The settlement reached between the Toronto District School Board (TDSB) and the family of the deceased precludes a further civil lawsuit (Jackson, 2021). Yet, being sued is always a looming threat due to society’s litigiousness as recourse to hold someone accountable. In the past, incidents involving teachers often defaulted to vicarious liability; thus, it was the school board that was sued (see *Moddejonge v Huron County Board of Education*, 1972, & *Hussack v Chilliwack School District No 33*, 2011). Therefore, most incidents in OE would see settlements, made outside the courts, where the insurance provider pays for incurred damages. By avoiding a potential lawsuit, insurance companies will seek to pay out those who are harmed, insulating the school board in a “we cover stupidity” fee for accidents involving students. This also tends to avoid any bad or unwelcome publicity that might follow from lawsuits of this nature.

The legalities around incidents in OE are undeniable, and ignorance is not a defence; thus, the key to minimizing legal exposure is to understand risk in-the-field and how those involved in education can better manage these complexities and be fully aware of the implications of their responses. As Mees and Collins (2022) put it, practical wisdom can be most advantageous in this regard. Building on our prior research, to gain a deeper understanding in teacher education, specific to legal literacy (Young, Kraglund-Gauthier, & Foran, 2014), we extend this analysis to include the 7 Rights framework (Foran et al., 2018). The following questions are designed to focus teachers and administrators to reflect continuously: “Am I in the *right* place, with the *right* group, at the *right* time, with the *right* equipment, using gear in the *right* way, and have I provided the *right* resources and supports, along with the *right* levels of instruction to ensure quality learning?” (Foran et al., 2018, p. 6). The purpose of this discussion is to organize what is currently publicly available in the TDSB

incident involving Jeremiah Perry and the decision by the Ontario Superior Court of Justice. We will present our analysis as implications and recommendations for educators and school officials based on the 7 Rights to help guide outdoor educators to keep risk management in focus. In addition, we will also expand on these rights to include two new lenses, which emerged in our deliberations specific to this case: the *right* rules (or policies) and the *right* oversight (supervision during the trip planning process and during the event in-field). The discussion will include legal terminology that is particularly relevant to this case, to inform and guide future risk analysis for trip planning and preparations, and in-field risk assessment and management in OE.

The TDSB case in question

News accounts formed our first impression of what appeared to have transpired. The decision of the court expands on the events leading up to and immediately preceding the drowning on July 4, 2017,¹ where several youths from a group of 30 plus teenagers from C.W. Jefferys Collegiate Institute in North York, Ontario, were swimming at Big Trout Lake, Algonquin Park. It was a warm and sunny day, and the group had arrived at their backcountry camp site after a day of canoe travel. The group was standing and playing in waist-deep water, supervised by one teacher, one adult supervisor, and a certified lifeguard. No one saw Jeremiah enter the water or go under. While the swimming activity was taking place, it was recognized he was missing. An immediate search of the area led to in-water rescue efforts by the teacher and supervisor, which proved futile, given the dark, tannin-stained water and open lake environment. On July 5, search and rescue divers recovered the body.

Nicolas Mills, the teacher implicated in this case, was charged with criminal negligence causing death in connection with the teen's drowning. Mills was the designated teacher and leader for Jeremiah's group. Jeremiah's father reported that his other son was also on the canoe trip. He also reported that Jeremiah was not able to swim. Media reports stated the TDSB revealed that Jeremiah was among 15 of the 32 students on the trip who had not passed a required swim test. Despite some participants not passing a mandatory swim test, an Ontario Physical Activity Safety Standards (2020) (OPHEA) safety guideline requirement for students participating in canoeing-related activities, the trip proceeded.

The court heard that it was not clear who did or did not pass the mandatory swim test, or who did or did not wear a Personal Floatation Device (PFD) during the test. Poor record keeping was partly the cause. In the end, the judge did not conclude who did or did not pass the required test, but that was only part of the story. Madame Justice Maureen Forestell, who presided over the case, concluded Nicholas Mills was not criminally negligent in the death of Jeremiah Perry and noted that there was evidence of negligence:

Individual decisions of Mr. Mills can be justified as reasonable in the circumstances ... However, the decisions, when considered cumulatively ... created a risk to the lives and safety of the students that would have been foreseen by a reasonable teacher in the same circumstances. (p. 61; para. 413)

Mr. Mills' failure to reassess the risk [of allowing students to swim without PFDs at that swim site] was an error in judgement. (p. 62; para. 416)

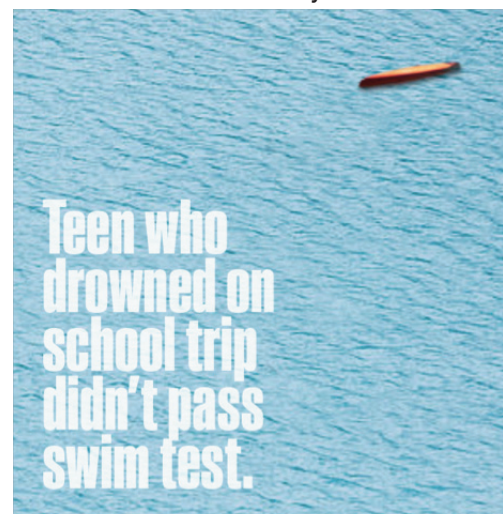
His decisions up to July 4th did not meet the standard of 'perfection or even optimum', but they were reasonable and fell within the standard of care. [However] At the point of the July 4th swim, he ought to have revisited his decision to allow Jeremiah in the water without a lifejacket [PFD] and he failed to do so. This failure brought his conduct to the level of carelessness ... and it resulted in the tragic death of 15-year-old Jeremiah Perry. [Still] The conduct did not approach the level of departure from the standard of care required for a criminal conviction. I therefore find Mr. Mills not guilty. (p. 61; para. 417-418) (R. v. Mills, 2021)

This discussion is not an analysis of the judge's decision. The purpose of this case study is to learn from the incident and to inform other OE teachers, academic scholars, and school-board officials of the evolving best-informed practices required for leading students outdoors safely.

TDSB. Following Jeremiah's death, the TDSB implemented new policies surrounding field trips, and they now require the swim test results to be sent to parents and students. However, the TDSB stated that policies surrounding field trips were not followed in this case, and that current safety requirements are sufficient, if followed. The TDSB response was reactionary when they deemed, based on best practice, that to uphold current policy, several students should not have been permitted to participate on the canoe trip because they did not pass the swim test. Failure should have rendered them ineligible. Regardless, The Ontario Ministry of Education initiated a review that govern field trips (The Canadian Press, 2018) and the TDSB decided to implement new policies, establishing the practice that all principals would play a direct role in reviewing all trip documentation including swim tests and other tests if pertinent to the excursion. According to the TDSB (2018), if a student cannot swim, students will not be participating in future canoe related trips.

Student Insurance Program. The Student Insurance Program (SIP), a non-profit national insurance broker, also responded to this incident, identified as a "portage-type of canoe trip" (McIntosh & Gibson, 2017, p. 3). This was expected considering its role as an underwriter insuring physical activities involving youth in Nova Scotia. In its cover story, *Tragic Trip*, SIP published the image in Figure 1. Most of the information within this article is comparable to the news accounts, but it did report that TDSB's revised policies will now require all students participating on "portage canoe trips" to "pass a canoe-specific swim test at a third-party facility on a lake. If they don't pass that test, they should have ... another opportunity to pass, with another test and one-on-one swim coaching at the C. W. Jeffreys' pool" (McIntosh & Gibson, 2017, p. 4). There is an important distinction between these two pass opportunities, explored later in the analysis. Furthermore, in this report, Mallory, another TDSB representative, is quoted

Figure 1: Image used in the Tragic Trip cover story



as saying, “outdoor education is still important, but we will not do this at the expense of student safety” (McIntosh & Gibson, 2017, p. 4). In its *RiskWrite* brief, SIP (2014) lists a series of activities that require informed consent. Yet, it is important to note that “consent forms will not insulate a school/campus from negligent supervision lawsuits; however, it will be useful in helping to convince the court that a school/campus was diligent in obtaining parental consent, thereby meeting an acceptable standard of care” (SIP, 2014, p. 9). This brief does list canoeing and swimming and associated risks involved in these activities as points that should be included regarding informed consent.

Risk and outdoor education

In their examination of risk management strategies and assessment of in-field hazards, Meerts-Brandtsma, Sibthorp, Rochelle, Leemon, and Gookin (2016) reported significant growth in public interest and involvement in being engaged outdoors. Heshka (2006) states, “Once every decade or so, an event occurs that is so horrible that it serves to crystallize the public consciousness: it acts as an agent of positive change in the arena of outdoor education and the law” (p. 221). According to Heshka (2006), one such event, the Strathcona Tweedsmuir School tragedy that resulted in the deaths of seven students in February 2003, has “unfortunately become a lightning rod for critics and a focal point for directing attention to the issue of the qualifications of outdoor educators” (p. 221). However, Heshka (2006) reveals that “the underlying, unspoken (and perhaps unpopular) reason why students continue to be hurt or killed in outdoor educational activities is because teachers are unqualified” (p. 222). The legal expectation, though, is that teachers are required to adhere to a professional standard of expertise in their practice that goes beyond the careful and prudent parent (Young, 2017). To standardize OE and promote safer practices, the Nova Scotia Department of Education and Early Childhood Development (EECD) recently updated and released the *Nova Scotia Physical Education Safety Guidelines* (the Guidelines) (2021).

The Guidelines address a wide range of outdoor pursuits and offer parameters around best practices in OE pursuits (see Salmon, Williamson, Mitsopoulos-Rubens, Rudin-Brown, & Lenné, 2009). According to Dickson and Gray (2012), risk management is an organizational approach; thus, our position is that schools and their respective boards should promote and foster a safety culture. The Guidelines is one such example contributing to informed prevention and our contention is that educators, across the institutional spectrum, should have a primary focus on safe OE practices. With prevention guiding OE practice in public schools, it would be reasonable to expect teachers to employ strategies aimed at preventing injuries via risk management and adhere to the expectation of due diligence (Delaney, 2007). Therefore, we position the Guidelines as an example that has the potential to move a teacher’s OE instruction to meet higher professionalized standards in OE. Substantiating our position, the Guidelines is based on best practices established by recognized outdoor related agencies across Canada (i.e., Paddle Canada, Outdoor Council of Canada, and Canadian Red Cross – Wilderness and Remote First Aid), unlike OPHEA. This important distinction is examined further later in this discussion.

Safety as best-informed practice

Some authors have pointed to the importance of focusing on developing a safety culture in relation to risk management (Andkjær, 2012; Andkjær & Arvidsen, 2012a; Andkjær & Arvidsen, 2012b; Attarian, 2012; Cooper, 2000; Guldenmund, 2000). Based on a cultural analysis of risk, Eichberg (2001) and Mindegård, Andkjær, and Svendsen (2014) argue that risk and safety practices can inform a safety culture and can be best analyzed with the participants. Based on our work (Foran et al., 2018), this collaboration would naturally include OE teachers, including relevant educational officials who have a “professional understanding” of OE practices (see Foran, Throop Robinson, Marshall, & Farrell, 2021, p. 21). The discussion of the TDSB incident is focused on safety, along with prevention, but for this to be effective, we urge the inclusion of OE teachers in defining and constructing a safety practice for their schools and respective boards based on best practices (see Department of Education and Early Childhood Development, 2021). A culture of safety should be responsive to ongoing improvements and developments and not merely a reactionary response to safety challenges that result in injury or, in some cases, more tragic results (Horgen, 2013). Furthermore, most critical is that this process governing OE across the field of education nationally should be evolving as a self-driven network of outdoor educators, in continuous collaboration, committed to advancing best-outdoor practices (Sole, Plangger, Woods, Rankin, Foran, McIntyre, Crowtz, & Sherrington, 2020). There is value in having OE professionals promote and contribute to a safety culture by including strategies based on best practices to minimize risk and maximize safety. This includes conducting risk assessments focused on pre-trip preparation, and modelling risk management practices to aid in making quality decisions in the field (Boyes, 2005; Brookes, 2011) and by executing emergency response plans when required.

Importance of understanding education law

Unfortunately, many teachers’ understanding of education law is built on matching past cases to current circumstances, and often without the proper legal context to make sense of case rulings and statutes. Further exacerbating the complexity of the legal-understanding issue is teachers trying to incorporate school board policies, official safety guidelines issued by departments/ministries of education, and guidelines that are inherent with many certification agencies (i.e., Paddle Canada, Outdoor Council of Canada, National Archery in the Schools Program). We argue this lack of understanding of educational law creates a limited and somewhat myopic view. When legal understanding, informing decision making, by-passes the teacher due to an internal approval process (usually a school board official that sanctions the outing), the teacher is left in a very vulnerable position, particularly when facing criminal charges. Arguably, many OE professionals are not, as Heshka (2006) states, qualified (see Foran et al., 2021). Therefore, when something goes wrong, the involved education officials often overreact to external pressures, which may include parents, the media, the injured party, and the lawyers. Unfortunately, the adage “we learn from our mistakes” provides an opportunity to learn from the incident despite the legal ramifications. At this point, our contention in this process is to provide a deeper understanding of assessing and managing OE risk, to make sense of pertinent facets of

the law that govern educational practice, and to analyze the decisions prior to, during, and after the event before these become crystalized in legal clarity resulting in the professional conclusion that this incident should have been prevented. A key professional learning is for OE teachers not only to discern risk assessment from risk management and make solid in-field decisions, but to understand how the law of negligence, and in particular, principles of what constitutes a breach or failure to meet the expected standard of care, should be part of their decisions from the outset.

The unfortunate layer that is central to this discussion, and many OE incidents in Canada, is that the law only enters the learning equation after something goes wrong. Thus, we contend that every teacher in OE should undergo a process of identifying potential risks as it pertains to grade level, activity, environment, and teaching location. In addition, this assessment should be undertaken in consultation with senior administrators as plans are finalized, drawing on an educational-legal lens in accordance with policies/guidelines that are understood by all parties. The primary purpose of informed planning, prior to approval, is to enforce safe learning experiences keeping teachers vigilant in their in-field risk management practices (Foran et al., 2018). We believe the potential findings from this case study analysis can: 1) improve the quality of legal understanding for current and future teachers participating in OE; 2) highlight the legal impacts that must become ingrained in future OE practices specific to risk management and student safety; and 3) provide recommendations and legal indicators for how teachers and administrators can better develop professional leadership capacity in OE considering the growth and formal adoption of OE in public schools. By drawing on a teacher-friendly reflection tool, The 7 Rights (Foran et al., 2018), the reader will have a starting point to better understand risk from a teacher's perspective when leading youth in OE, considering the findings in the TDSB case. Most significant, by adding two new rights (the *right* rules [or policies] and the *right* oversight [supervision during the trip planning process and during the event in-field]), the legal element, often missed or ignored, will now be part of this reflective process.

Legal risk management terminology

In thinking specifically about risk management, educator negligence, which is at the centre of this case study, and the following principles need to be considered (see Shanahan, 2017) in the TDSB case study:

- *Duty of Care*: a legal obligation to adhere to a certain standard while performing any acts that could foreseeably harm others.
- *Standard of Care*: the standard of care is determined by considering what would be expected of an ordinary, reasonable, and prudent person (or professional) in the same circumstances. The standard of care can vary depending on the circumstances. Most common variations, which will increase the level of care expected, include being a hired professional and/or leading a group with minors.
- *Breach of the Standard of Care*: a breach usually results from conduct that falls below the Standard of Care.
- *Damage*: a quantifiable harm that results from the breach of the standard of care.

- *Causation*: the harm or damages must stem from the breach of duty or standard of care.

Besides these negligence principles, the following are also noteworthy:

- *Vicarious Liability*: this is the liability for an injury to a person who did not cause the injury but who has a particular legal relationship to the person who did act negligently. The most common example of this in the educative context is an employer's responsibility towards their employee's on-duty behaviour.
- *Due Diligence*: reasonable verifications and precautions taken to identify or prevent foreseeable risks. Due diligence is often demonstrated through documented records.

Application. A teacher and their organization have a duty to care for their students and must provide this care up to a certain standard. Teachers and their organizations demonstrate due diligence by recording different steps in their planning and delivery of events, and regardless of the context, the standard of care of the teacher remains a constant professional imperative. Although each specific circumstance varies, the following broad categorizations can be made as it pertains to the different categories of adults potentially involved in the TDSB case study:

- *Professional guide*: the standard of care will be higher as it usually refers to professional standards.
- *Teacher*: the prudent parent has been set as the general standard to respect; however, various courts have modified this standard, especially in venues or situations where there is increased risk, holding educators to the standard of a skilled and competent practitioner (see Young, 2017).
- *Paid employee*: the standard of care will refer to other similar organizations with comparable practices.
- *Volunteer*: very few defined standards of care exist for volunteer leaders. Thus, the best description is the one found in the terminology section above. Some jurisdictions may provide additional guidance (e.g., the *Nova Scotia Volunteer Protection Act*, 2018).

Respecting the scope of practice as an OE teacher (following national/international standards) both enables you to refer to a standard of care and demonstrate due diligence (by completing listed documentation as per approved safety guidelines or school board policies). However, a teacher may want to abide by a higher standard of care in a school context, respecting that a standard of care does not eliminate the risk of being sued. Following established standards provides a stronger defense when in court, and reduces the risk of being sued, as lawyers evaluate the strength of a person's defense prior to going to court.

Important legal concepts. The main use of informed consent, permission forms, or parental consent forms is typical practice in many school programs often used to demonstrate due diligence. The value of this documentation is debatable and not central to understanding this case. However, as one part of a step-by-step risk management process, such documentation can help demonstrate the provision of adequate care by demonstrating careful consideration of potential risks and alerting parents and participants to these risks. For our analysis in this case study, our focus will include the following key terms:

- *Safety guidelines*: these are suggested practices and do not ensure the outing will not result in injury (Jackson, 2021).
- *Negligence*: to assign negligence, the following four conditions must be demonstrated (see MacKay, Sutherland, & Pochini, 2013, pp. 16–21):
 - *Duty*: the leader or the organization has a duty of care towards the student (as mentioned above, any teacher in this situation would meet this criterion).
 - *Breach*: the leader or the organization breaches that duty by failing to meet the expected standard of care, through an act or omission.
 - *Damages*: the act or the omission results in the plaintiff suffering an injury.
 - *Causation*: the injury is a reasonably foreseeable consequence of the act or omission.

Thus, when something goes wrong, it comes down to an examination of liability of each defendant to determine fault and identify where risk planning and supervision were deemed weak, faulty, non-compliant with an expected standard of care or failing to ensure the well-being of those under the care of an assigned professional, such as in this case where Nicholas Mills, the OE teacher, was accused and acquitted.

The 7 Rights

The 7 Rights is a risk assessment and planning tool that can provide teachers with guidance in trip planning and preparations and with immediate in-field student management when leading outdoor pursuits, field trips, and other general extra-curricular outings in a professional capacity (Foran et al., 2018; Foran et al., 2021). This framework for teachers provides a consistent relatable mechanism to examine the event in which they are involved. For this discussion, the 7 Rights will be used to analyze the TDSB case, to inform OE practice including environmental considerations and prevention strategies designed to promote student safety outdoors. Pragmatically, the 7 Rights is a simplistic set of questions that quickly raises issues that might be lurking within the complexities of the OE learning experiences making risk assessment and risk management strategies or practices difficult to implement. Several teachers and school administrators involved in crafting the 7 Rights supported this framework for the following reasons: it offered a simplified quick in-field check that is aligned with trip planning stages, and the framework did not get bogged down in complex risk management models that are not practitioner or field friendly (see Foran et al., 2018).

To improve risk-strategy implementation, the 7 Rights framework is designed to focus teachers and administrators to continuously reflect on the following questions: “Am I in the *right* place, with the *right* group, at the *right* time, with the *right* equipment, using gear in the *right* way, and have I provided the *right* resources and supports, along with the *right* levels of instruction to ensure quality learning?” (see Foran et al., 2018, p. 6). These questions are not expected to replace a detailed risk assessment plan but serve to keep teachers, administrators, and OE leaders actively engaged in planning and leading the outing, making links to what was properly planned for and approved and what is being experienced as part of the in-field reality.

Our commitment to continuing the conversation of risk, student safety, and the legal implications from the Algonquin case forms fundamental professional learnings for teachers to improve their legal awareness that needs to be a part of the planning and leading process.

Applying the 7 Rights specific to the TDSB case

The 7 Rights opens opportunities to build in specific legal references exploring how to best guide OE preparations. Thus, it became apparent to us that to make sense of the TDSB case, there was a need to expand the 7 Rights to include the *right* rules or policies and the *right* oversight. From publicly available information, the decision reached by the court in this case, and with input from our professional network with firsthand knowledge of the event, we venture to lay out the 9 Rights as they apply to this incident.

- **Right place.** Algonquin Park, Canada's oldest provincial park established in 1893, is a massive 7,653-square kilometre protected wilderness area. With over 1,500 lakes, it is a quintessential Canadian canoe tripping location. Big Trout Lake, deep in the heart of the park, is a classic five-day route that can be linked with dozens of other routes through the park. This area is a typical destination for kids' camps and commercial guided trips, with the lakes' two dozen backcountry camp sites typically booked months in advance. The route is suitable for novice or advanced canoers, and by all counts is considered the *right* place to take a school OE canoe trip by many professional canoe guides.
- **Right group.** Media attention and court transcripts focused on the suitability of Jeremiah Perry (and other students) to be on this trip in the first place, given that he did not pass the required swim test. At face value, this was not the *right* group and for the most part, they were doing the *wrong* activity. This specific *right* is considered in more detail below.
- **Right time.** The trip was scheduled for early July 2017, when Algonquin Park weather is warm and stable, with water temperatures comfortable for swimming, and the sun sets late. The event in question happened on the third day of the group's canoe trip, at camp in the evening (8 pm), with some of the students dipping in the lake to wash off before bed. From the perspective of a typical canoe trip, this was the *right* time but seemingly the *wrong* activity as the trip was not a sanctioned swimming event, but rather, a canoe trip.
- **Right equipment.** Little information is available regarding the details of equipment. We assume all the typical canoe trip equipment listed by Paddle Canada and required by Transport Canada was available, given the level of instruction (detailed below). Some news reports specifically stated that "lifejackets" (PFDs) were present on the trip, indicating the *right* equipment was available, but, according to the court transcripts, PFDs were not worn by every student while swimming or washing off.
- **Using gear in the Right way.** Some students wore PFDs to dip in the water, and others did not. Jeremiah Perry failed the required

pre-trip swim test—he apparently passed a later test—but he was not wearing a PFD at the time of his drowning. From this perspective, the available equipment was not used to its fullest potential.

- **Right resources and supports.** The TDSB has a long and successful OE program, which presumes that there is support behind the programs. Ontario's OPHEA (2020)² has established guidelines for the requirements and qualifications for school OE and canoe tripping. The lead teacher contracted a local canoe outfitter to provide guides and trip support. When the drowning took place, suitable rescue resources were mobilized, including police scuba teams. We can assume the *right* resources and supports were in place prior to the trip and were used soon after the tragedy.
- **Right levels of instruction.** The glaring media spotlight focused on the teacher in charge, with the implication (and criminal charge) that the level of instruction or supervision was insufficient. Six adults accompanied 33 students on the trip—a very large group by canoe tripping standards. The 2020 OPHEA guidelines indicate a staff to participant ratio of one to eight for this trip type, which indicates this group was well within prescribed ratios. The large group was divided into two smaller groups travelling independently (Fraser & Janus, 2017) (Algonquin Park regulations limit campsite occupancy to nine persons, and it is important to note that Big Trout Lake has several campsites in close proximity). The teacher supervisors and lifeguards were present and supervising at the time of the drowning. Rescue efforts were initiated immediately upon recognizing the student was missing. While the swimming activity itself was supervised, the judge took issue with decisions leading up to the activity, and more specifically, allowing certain students to participate without wearing a PFD, given their swimming ability. From this perspective, while the right instructor and supervisor components were present, they were found deficient or inadequate for the specific activity.

A systems-based risk management analysis

Given that most things were *right*, how could something go so horribly wrong? The utility of the 7 Rights is that it can point to deficiencies that can be covered with good safety and risk management practices (Foran et al., 2018). Potentially, this was not the *right* group considering the judge found several participants likely did not pass the required swim test² and, in all actuality, Justice Forestell was not clear as to how many students passed, and there was confusion as to who wore a PFD for the test, who did not, who passed, and who did not. Ontario Physical Activity Safety Standards (2020) guidelines require that canoe trip participants pass a swim test that includes treading water for one minute and swimming 50 metres “with or without a personal flotation device.” This is a pointless guideline considering Paddle Canada canoe tripping and canoeing programs always requires the use of a PFD in the canoe, on shore, or even on a dock. Swimming or treading water in a pool is no guarantee this skill will be possible if the canoe tips when on the lake. At any time, a swimmer's cramp could hinder one's ability in the water; a PFD provides better, safer assurances. Even

Transport Canada Guided Excursion regulations require all participants in led trips wear a PFD while in a canoe or any small watercraft (Transport Canada, n.d.).

Therefore, if this Paddle Canada standard was properly adhered to, we argue this tragedy could have been averted. However, with the *right* equipment not being used, the group deficiencies in not being able to perform certain skills, in this case the inability to swim, can be effectively covered simply using a PFD. PFDs protect those who cannot swim and those who can. For the case at hand, it could be construed that the interaction between the *wrong* group and not using the *right* equipment created a catastrophic gap. Succinctly stated, the group was approved to participate in a canoe trip and, as such, was swimming the *right* activity? For instance, let us focus on one detail concerning the *right* place when coupled with the *right* levels of instruction. We applaud the approval policy to ensure a lifeguard was onsite; however, due to naturally occurring tannic acid and sediment in the lake, the water would have been tea-like in colour, severely hindering visibility. We question the practicality of having a lifeguard on duty. In short, canoe tripping is not swimming, and if the guidelines of Paddle Canada's canoe tripping were being followed, all participants would have been wearing a PFD, and another tragedy in Canada would have been averted. Therefore, was the operator error in this instance policy driven?

9 Rights

Modern systems-based approaches in outdoor risk management force us to look beyond “operator error” (in this case, teacher error) and to instead look upwards into the “system” that governs and directs individual decision making (Jackson & Heshka, 2011). Expanding on previous work by Foran et al. (2018) on the 7 Rights, the TDSB case perhaps shows that when the law is factored in, there needs to be two more rights considered for a complete systems-based examination of risk and outdoors. These two rights are often stated and enshrined in the approval process that governs OE in public school but then retreat to the background when the adventure activity takes over: “the *right* rules (or policies) and the *right* oversight (supervision during the trip planning process and during the event in-field)” (Jackson et al., 2022). As stated above, the approval process also removes the teacher from this legalistic factoring by having a supervisor grant permission to proceed with the OE plan, assuming the plan is compliant, safe, and to standard.

An alternative interpretation of the TDSB case, based on the 7 Rights, is that it was not the group that was wrong, but rather, it was the rules and oversight that were wrong. It was not the teacher who made an error in judgement but a system that had no oversight or delivered conflicting messages with regards to decision making and following prescribed rules that do not fit the experiential context. For Ontario teachers, there is significant ambiguity regarding OPHEA guidelines. First, they are guidelines and not policy. Guidelines are to help in decision making, while policies are to be followed without question. The OPHEA is an external advising body with no authority—it is up to the school boards to devise policy. School boards (in some cases) have no policy and defer to OPHEA. When there is no policy, is a guideline a rule? How does the individual teacher working in this environment make sense of this cyclical logic?

Policy and oversight are intricately tied together. If a policy is regularly ignored by all, or supervisors are unaware of the rules or do not enforce them, one is left to believe the policy does not matter. Without clear and consistent supervision, individuals can be left to decide for themselves “what guidelines apply,” and when policy can be bent or broken. In the case at hand, the court heard that the teacher had been allowed to exercise discretion and professional judgement in the past. Is it not reasonable for the teacher to assume this would apply in the future? In the glaring spotlight of tragedy, the OPHEA guidelines are taken as fact, without the context of the extent of supervision and oversight surrounding its application based on standards in practice. A statement released by the TDSB (2018) indicated that its internal “checks and balances” were inadequate, and the judge found Mills’ school principal, Monday Gala, as “not credible or reliable” as a witness (Jackson, 2021). A provincial review of OE (considering the TDSB case) found that existing guidelines were adequate, but application and oversight was not, and changes were made to ensure this would not occur again (TDSB, 2018). Blaming the teacher for system errors is disingenuous versus blaming poor guidance and misaligned rules.

Risk management policy (rules) needs to be *right*, combined with the *right* oversight to ensure that it is consistently applied. When these two rights are in place, it is up to the teacher to line up the remaining 7 Rights. Individual judgement in a structured setting such as public education and OE requires oversight. The *right* oversight is not hypothetical, and if a teacher is given the freedom to make risk assessment decisions and their oversight/supervision does not intervene, there are consequences. However, we think this is only the starting point for OE leaders, and specifically teachers, as their practices need to be governed and informed legally.

Implications and recommendations

Providing children with the opportunity to develop a sense of independence while offering a degree of protection is a delicate balancing act. While teachers have a duty to deliver a rich curriculum, litigation paranoia can also inhibit the activities that teachers choose to engage in as part of their practice. Further complicating the issue is that it is likely quite advantageous for youth to be exposed to certain degrees of risk (see Ungar, 2007). Jackson (one of the authors of this article) had a first-year adventure guide student working as a canoe guide in Algonquin Park at the same time and on the same lake as the TDSB group. She and her group of children from a canoe tripping camp watched the whole scene unfold, without knowing exactly what was happening. She saw the search planes circling overhead, the police scuba rescue team, and as she paddled her group to the takeout (while all this was unfolding). She recounted how there was a line of parents along the beach, all with binoculars trained on her group, trying to see if their child was alive and coming home. Chilling. It shook her to the core. Fundamentally, though, what was the difference between her group coming home safely and the others experiencing loss of life? Is it as simple as wearing a PFD? In some ways yes, and in other ways, no.

Despite the central finding from these data sources, according to the mantra “prevent and prepare,” teachers still must meet an incumbent professional expectation, that is, the duty to care (Brown & Zuker, 1998; MacKay, Sutherland, & Pochini,

2013; Shanahan, 2017). Acknowledging choices and good decisions (Boyes, 2005; Brookes, 2011) a teacher makes before and during an outing is dependent on the clear understanding of why. The capacity of the teachers as outdoor educators to adequately prepare for trips in the context of this tragic event reveals the relevancy of Meerts-Brandtsma et al.'s (2016) findings: outdoor leaders must meet a higher standard because they instruct in the outdoors and engage in high-risk activities. However, there is also the realization that competent OE teachers, making good in-field decisions (Boyes, 2005; Brookes, 2011), can make key learnings captured through this case study, drawing on the 9 Rights to potentially guide future practice.

The implications from the TDSB case study identify key learnings that can be practically applied to the concept of due diligence (Delaney, 2007). Within the Outdoor Council of Canada (Sole et al., 2018), there is a nation-wide effort by an informed network of educators to collaboratively build capacity to promote safe practices and share learnings amongst OE teachers. Heshka (2006) reveals that “the underlying, unspoken (and perhaps unpopular) reason why students are hurt or killed in outdoor educational activities is because teachers are unqualified” (p. 222), despite the current legal expectation that would require teachers to exercise a degree of professionalism in their practice that goes beyond the careful and prudent parent standard. In fact, several courts have modified this standard, instead holding educators to the standard of a “skilled and competent practitioner” (Young, 2017, p. 104). To standardize OE practices in Nova Scotia, the DEECD recently updated the Guidelines (2021) to address a wide range of outdoor pursuits (see Salmon et al., 2009). The impact has been over 300 Nova Scotian teachers developing core competencies (certification) established by professional and recognized agencies across Canada to meet the standard of the skilled and competent practitioner (see Foran et al., 2021).

The missing factors

From a legal standpoint, it might well be time to recognize and accept that the careful parent standard is anachronistic when thinking about OE. The general education classroom is unlike teaching in an outdoor setting. In the latter, the risks and attendant potential for injury is increased, and, thus, adopting a higher standard such as the skilled and competent practitioner standard makes sense pragmatically. At the centre of the TDSB case study is that the *right* levels of instruction appear to have been absent, and, as such, Justice Forestell found the students to be poorly supervised at the swimming event, which proves that having the 9 Rights in place is essential. The TDSB case demonstrates the value of understanding education law, and these two additional rights must be considered for a complete systems-based examination of risk for teachers and their professional practice. Equally as important, these additional two rights draw in a high-level of professional engagement throughout the planning and delivery of OE programs. It is our position that this tragedy could have been prevented, and by exercising the *right* rules (or policies), the *right* oversight, and the 7 Rights throughout the canoe trip in Algonquin Provincial Park, the death of a young person and the dismantling of a teacher's career could have been averted.

Heshka (2006) states that the missing factor in OE and education is proper training and preparation for teachers: “Such a qualification could be legitimated if there

were real opportunities for teachers to access professional development, specialized resources and outdoor education specific teacher training programs” (p. 240). The education paradigm that teachers are the experts in their own classrooms is strained when the classroom moves outdoors into a high risk or wilderness environment. In such cases, extra training, planning, precautions, oversight, and policy are required, as the inherent risk changes notably from the classroom to the outdoors. The 7 Rights are the obligation of the teacher, while the two additional rights, the *right* policy and the *right* oversight, are the obligation of the system in which teachers work. Such oversight and policy are unclear in some jurisdictions and ambiguous in external guidelines, whether they be OPHEA, an activity certification body, or any other rule that lives outside of the school board itself. Upper-level decision making is often in the hands of supervisors (i.e., principals or superintendents) who often have less expertise than the teacher or OE teacher they are supervising.

Conclusion

The educational value of any activity must be assessed against its potential risk or harm to students. The Algonquin case demonstrates that risk assessment must be a continuous process based on diligent pre-trip planning and preparations, and, from our examination, this needs to be coupled with in-field management, that is, following the *right* rules and providing the *right* supervision. The more ambitious the OE activity, the more thorough the planning required and the more important the 9 Rights become to professional OE practices. A significant connection in this case may be teachers having a direct role in crafting safety guidelines and informing policy pertaining to OE. In short, teachers need to be part of the oversight mechanism that governs their work environment (indoors and outdoors) as an active participant navigating evolving policy and rules. This level of engagement provides for clear judgement, resisting a reactionary spontaneous changing of the rules and policy revisions as evident with the TDSB in response to the death of Jeremiah Perry, and is fundamental and key to the leadership aspect required for OE. Furthermore, contextualizing the careful parent standard with the skilled and competent practitioner standard, it becomes evident that the 9 Rights will show the deficiencies inherent in the former. OE requires a higher professionalized standard, and the demands of outdoor environments require teachers to be informed, certified, and supported institutionally. Educators cannot plead ignorance, and OE requires a professionalization that surpasses what parents would be expected to know or do. Therefore, teachers meeting a national and international certification standard means educators have assumed responsibility that exceeds what is expected of parents. The complexities and vastness of outdoors (environment/activity) often requires a teacher to have multiple areas of expertise to deliver OE and as such, the 9 Rights become a checkpoint grounding the teacher’s role leading students. In retrospect, these rights could have made a preventative difference in the Algonquin case.

Notes

1. The case summary provided here was obtained from the following news articles: Wilson, 2019; Shum, 2017; Sienkiewicz, 2017.

2. OPHEA Guidelines for canoe tripping and the swim test can be found here: <https://safety.ophea.net/elementary/curricular/outdoor-education-canoe-tripping> .

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