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SHIBLEY RIGHTON LLP
Barristers & Solicitors
www.shibleyrighton.com

Toronto Office:
250 University Avenue
Suite 700
Toronto, ON M5H 3E5
Tel.: (416) 214-5200
Toll free: 1-877-214-5200

Windsor Office:
2510 Ouellette Avenue
Suite 301
Windsor, ON N8X 1L4
Tel.: (519) 969-9844
Toll free: 1-866-422-7988

Education and Public Law Group

John P. Bell
john.bell@shibleyrighton.com

Brian P. Nolan
brian.nolan@shibleyrighton.com

Diane M. Abbey
diane.abbey@shibleyrighton.com

Sheila M. MacKinnon
sheila.mackinnon@shibleyrighton.com

J. Paul R. Howard
paul.howard@shibleyrighton.com

Thomas McRae
thomas.mcrae@shibleyrighton.com

Gaynor J. Roger
gaynor.roger@shibleyrighton.com

Bryce Chandler
bryce.chander@shibleyrighton.com

Megan Marrie
megan.marrie@shibleyrighton.com

Adequate Supervision and Liability of Students at School

The Ontario Supreme Court of Justice released a decision on July 13, 2009, which is significant for school boards in terms of their duty of care to students as it relates to adequate supervision and liability should a student be injured or harmed at school.

In *Rollins v. English Language Separate District School Board #39* [now the St. Clair Catholic District School Board], the parties agreed that the damages arising from a school yard incident alleged to have occurred in May, 1990, amounted to $4.6 million.

At issue was whether or not the school board and the principal were liable for those damages: had either or both been negligent in terms of the supervision provided, or had they properly and reasonably discharged their duty of care owed to the injured student?

In a detailed and well reasoned decision, Justice Edward Ducharme found that the school board and the principal were not liable for the injury and subsequent damages that befell the student from complications allegedly caused by the injury, a blow to the head during recess when the plaintiff was allegedly struck by a rollerblade skate swung by another student.

The plaintiff contended that the Board and the principal breached the duty of care to the student and were jointly and severally liable for failing to provide any, or adequate, supervision in the schoolyard on the day of the incident, and for failing to investigate and report on the student's circumstances adequately, or at all, after the alleged injury.

Justice Ducharme stated that a school board's duty of care has three sources:

- the common law
- the *Education Act*, which requires the duty of the "careful or prudent parent"
- the *Occupiers Liability Act* which imposes a positive duty "to take such care as in all the circumstances of the case is reasonable to see that persons on the premises … are reasonably safe while on the premises."

Justice Ducharme held that neither the Board nor the principal breached the duty of care imposed by any of the sources.

Significantly, Justice Ducharme stated:

> In such a case as this, involving allegations of negligence against school authorities, it is good to remember that, while school boards and principals have a high standard of duty and care, the duty is not of an insurer or guarantor. Not every accident or injury in a school or on school property can be averted.

In this case, there was evidence there was one teacher on yard duty. The judge found that in this small school of about 150 students at the time, with a yard with unobstructed sight lines, this was a reasonable level of supervision. He commented: "Here Lindsey was struck in the vanishing moment, suddenly and without warning. The striking would not likely have been prevented, even if two or more teachers were present in the schoolyard."

Significant to the decision, although the actual records no longer existed by the time of the trial, was the principal's testimony that there were supervision schedules for teachers to do yard duty on pre-set schedules, that the board and the school had policies on the supervision of students, and that the school handbook and board policy restricted certain activities (skate boards, roller skates) in the school yard, and the policies were followed.

The case reinforces the legal principle that the standard against which the actions, policies and measures of a school board and its principals will be measured is one of reasonableness in all the circumstances. The fact that an accident occurs, no matter how tragic, does not automatically create liability on the part of the school authorities.

CASES

The Alberta Court of Queen's Bench upheld a decision by the Alberta Information and Privacy Commission which found that the University of Alberta had breached the Freedom of Information and Protection of Privacy Act by publishing and circulating a Statistical Summary which consisted of information relating to the performance of academic staff. *University of Alberta v. Alberta (Information and Privacy Commissioner)*, [2009] A.J. No. 211 (Q.B.).

The British Columbia Court of Appeal held that a teacher's claim alleging defamation against his vice principal and school board was not ousted by the collective agreement. *Stuart v. Hugh*, [2009] B.C.J. No. 551 (C.A.).

The Ontario Superior Court dismissed a civil action alleging negligence, intentional infliction of emotional damage, defamation, breach of fiduciary duty and the novel tort of "grooming" against a defendant teacher and school board brought by plaintiff family members after the defendant teacher befriended one of his students to facilitate meeting her older sister, who he eventually married. *Giroux v. Doré*, [2009] O.J. No. 690 (S.C.J.).

Court Finds that Board Employee Has No Objectively Reasonable Right to Privacy Re: School Computer

It is generally thought that an employee has little or no right to privacy regarding computers owned and provided by an employer. However, on May 12, 2008, the Ontario Court of Justice released a decision which placed this belief in question. Fortunately, that decision was reversed on appeal, in a decision by the Ontario Superior Court of Justice, recently released in April 2009.

In *R. v. Cole* (2008), 175 C.R.R. (2d) 263, a secondary school teacher was charged with the possession of child pornography and obtaining a computer service fraudulently, pursuant to the *Criminal Code of Canada*. Cole, the defendant, was a science teacher who also had supervisory duties with respect to the operation of the school's computer network. Those supervisory duties provided Cole with domain administration rights that enabled him to access to the server and all computers making use of the server within the school.

During routine server maintenance, a school board information technologist noted that there had been a significant amount of activity on Cole's computer. Upon investigating a hidden file on Cole's computer, the information technologist found pornographic images of a student that attended Cole's secondary school, which Cole had obtained from her boyfriend's account. Ultimately, the file was copied by the school board and seized by the police, without a warrant. Cole subsequently brought a *Charter* application alleging that although the laptop had been provided by the employer, he had a reasonable expectation of privacy in the laptop on the basis that he had exclusive use of the laptop and it had been password secured. At the *voir dire*, Cole argued, therefore, that the warrantless seizure of the file violated his *Charter* right to be free from unreasonable search and seizure.

At trial before the Ontario Court of Justice, the court stated that the information technologist's exploration of Cole's computer might not have been appropriate from an employment rights perspective, but that *Charter* rights were not engaged by that search. However, the court held that Cole's *Charter* rights had been breached when the police seized the laptop on the assumption that the school board's proprietary interest in its property trumped Cole's expectation of privacy in the contents of the computer. The court held that the breach was egregious, and that the evidence was to be excluded from trial.

This decision was appealed by the Crown, and on April 28, 2009, the Ontario Superior Court held that Cole may have had a subjective expectation of privacy in the data stored in the laptop and the school's server, but that this subjective expectation of privacy was not objectively reasonable. The accused's s. 8 Charter right to privacy in the data he stored in his employer's computer had to be considered within the context of the employer-employee relationship, and the employer's need to protect both its data and the operational integrity of its computer systems. In this case, Cole had signed an Acceptable Use Agreement with respect to his use of the laptop as terms of his employment with the school board. Through this agreement, it was obvious that Cole clearly knew that the data and information on the computer and drives assigned to him were not private. Further, Cole knew, by virtue of his own supervisory role and domain wide privileges, that the data on his computer drives was accessible by employer representatives, such as himself. That Cole had a right to limited personal use and exclusive possession of a password protected laptop were not privacy indicators, especially in light of the Acceptable Use Agreement. The accused was well aware that the hardware and software in and connected to the laptop belonged to the employer; the court therefore held that Cole did not have an objectively reasonable expectation of privacy and the appeal was allowed.

Although the issues above arose in the context of criminal charges, the above decision highlights the importance of creating acceptable computer use guidelines and ensuring that employees understand and appreciate those guidelines. When appropriate policies and in place, it becomes very difficult for any employee to argue that he or she had an objectively reasonable expectation of privacy in a computer or other electronic device assigned to him or her.

We welcome your comments and questions. Send them, and any updated contact information, to bryce.chandler@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to unsubscribe@shibleyrighton.com.

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