Volenti in Higher Adventure Education

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Introduction

The pedagogical and philosophical underpinnings of adventure to education are nearly as old as recorded history. Plato wrote in the Republic that youth should learn the cardinal virtues of wisdom, bravery, temperance and justice through adversity and adventure. Plato argued that young people could learn lessons about virtue best by impelling them into adventurous situations that demanded that virtues be exercised.2 Kurt Hahn and Paul Petzoldt carried the concept further and fathered Outward Bound and the National Outdoor Leadership School respectively in the mid-twentieth century and which, in turn, begat outdoor and adventure education.

Post-secondary outdoor education and campus recreation programs exist throughout the world from Norway to New Zealand and Cornell to Colorado. Further, many respected universities recognize outdoor pursuits as a legitimate intellectual endeavour and confer advanced degrees.

Canadian courts have recognized the value and worth of outdoor or adventure education. Virtue J. in Bain v. Board of Education (Calgary) wrote that, “Properly planned outdoor recreation programs are, in my view, one of the best ways to develop these essential attributes [self-worth and self-reliance] in people of all ages, and they should be encouraged.”3

Evergreen State College in Olympia, Washington is not unusual in its offerings of outdoor pursuits programming but was blessed to have had William Unsoeld as a faculty member. Unsoeld is a near-mythical figure in the field of American adventure education. He was the first ascensionist of Mt. Everest’s West Ridge in 1963, and was a scholar as well with a degree in theology from UC Berkeley and a PhD from Washington. Unsoeld had famously said, “Risk is at the heart of all education.” Further, he was once asked by a fearful mother if he could guarantee her son's safety; no, he told her. But by sheltering her son from risk, he added, he dramatically stated that she would guarantee the death of his soul.4 It’s also worth pointing out that Unsoeld died, along with Evergreen student Janie Diepenbrock, in an avalanche on Mt. Rainier in 1979 while descending from their high camp at an area poignantly and prophetically called Cadaver Gap.5

This tragic event is not out of the ordinary and it has plenty of company in the annals of adventure education or guiding. One need look no further than the deaths of 12 students and one leader during a canoeing trip on Lake Timiskaming in Quebec in 1978 with St. John’s School, the deaths of seven students and two adults during an ascent of Mt. Hood in Oregon in 1986 with the Oregon Episcopal School, the deaths of 9 heli-skiers with Canadian Mountain Holidays Inc. in an avalanche in 1991, the deaths of 14 students from Tai Poutini Polytechnic in New Zealand in 1995 when a viewing platform collapsed, the drowning and trauma deaths of 19 people in a canyoneering incident in Switzerland in 1998, the deaths of seven students in an avalanche in

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British Columbia in 2003 from Strathcona Tweedsmuir School, and the deaths of two University of Alaska students during a mountaineering course on Ptarmigan Peak. These seven mass casualty incidents, which killed 70 and played out on the front pages and in the court rooms are admittedly isolated – most outdoor pursuits programming occur incident-free - but serve to highlight the dramatic and dangerous essence to adventure. This, in turn, has naturally put adventure in the glare of the media spotlight and deservedly under the microscope of universities’ legal affairs departments.

This paper discusses the challenge of adventure education and examines the role of *volenti* in post-secondary outdoor pursuits focusing specifically on the Canadian experience. It explores the relationship between the troika of inherent risk, standard of care and *volenti*.

**Irony of Adventure Education**

The irony and challenge of adventure education is that risk is inherent and essential to the activity. Adventure may be broadly defined as a bold undertaking in which hazards are to be encountered and the issue is staked upon unforeseen events and educators are somehow left to manage and mitigate those risks. Risk, of course, means the possibility of suffering harm or loss and the nature of that loss may be physical, psychological, financial and reputational. Colin Mortlock suggests that “Risk is as basic to adventure as competition is to sport, but the stakes are normally higher.”

Integral to adventure are the notions of unpredictability and that everything cannot be controlled. Various risk management practices are invariably employed to reduce those risks.

The irony is that the mystique of outdoor education is what makes it attractive. The allure is the risk. Like moths to a flame, students and staff participate in these activities precisely because they are risky and because they believe these risks can be reasonably managed. Eliminate the risk and the adventure is eviscerated. The crux then is to minimize the possibility of injury and eliminate the likelihood of death in such activities as climbing, canoeing and skiing without killing the essence of the adventure.

If it is accepted and premised that conduct is negligent if it creates an unreasonable risk of harm, then it behoves the outdoor educator to create a learning environment free of unreasonable risk. The challenge, however, is compounded and complicated by the environment in which students are intentionally situated. Yvonne Jacobs astutely notes in *Education and the Law* that “adventure activities are perhaps unique in that the inclusion of risk is an essential and desirable part of the activity.”

This distinguishes adventure education from other extracurricular activities or field trips. Not only is the risk inherent, it is essential or integral to the activity and is sought after as an end onto itself. Unlike other activities where inherent risks are ameliorated, clients intentionally seek them.

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out in adventure with the significant caveat that people do not want to die; they just want to think that they could.

“Modern courts typically consider foreseeability to be a major consideration in the duty / liability calculus.”\textsuperscript{10} In \textit{Conway v. O’Brien}, Learned Hand J. stated that, “The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk.”\textsuperscript{11} Hand later expressed these variables in an algebraic equation suggesting that the formula provides perspective on unreasonable risk: “If the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P; i.e., whether B<PL.”\textsuperscript{12}

While instructive in the debate regarding duty and offering an economic analysis of the negligence concept, it does not specifically address the adventure dilemma. Canadian courts have recently weighed in on the balancing act of purposefully situating people in hazardous situations against unnecessarily exposing them to unnecessary risk. Taylor J. of the Court of Appeal for British Columbia in \textit{Scurfield v. Cariboo Helicopter Ltd.}, in a case involving two clients killed in an avalanche, captured the tension between intentionally situating people into a risky arena and the duty to safeguard them. “It is not contended that the defendants had a duty to ensure that their guests were kept away from all places where avalanches could occur – in the context of helicopter skiing that would be impossible.”\textsuperscript{13}

Taylor J. ruled that trial judge erred in finding that Cariboo Helicopter Skiing Ltd. and the guide, Erich Schadinger, ought not to have taken Ralph Scurfield to the slope where the incident occurred because the avalanche risk that day was rated high and the slope in question was considered unsuitable under such conditions. The Court of Appeal of British Columbia made it clear that the risks to which Mr. Scurfield assumed included avalanches even when the avalanche risk is high and that the company’s and guide’s duty of care was “not to expose their guests to risks regarded in the business as unreasonably high.”\textsuperscript{14}

Despite the worth of adventure education and the apparent willingness of the courts to sanction such activities when properly conducted, there is still the ethical bridge to cross which is sign-posted, “How can we do what we do when it kills people?”

To reiterate, intentionally putting a person into an area which is known to be hazardous is acceptable in the adventure arena. To underscore the adventure paradox, a little bit of risk is good, more is better but more still is bad. Where precisely is the line in the sand drawn which delineates conduct which is reasonably risky from behaviour whose risk is unreasonable? And, further, who draws it? And given the Rubic’s Cube complexity of differentiating reasonable risk from unreasonable risk, what risks should a student legally and ethically consent to assume in an adventure activity?

\textsuperscript{13} \textit{Scurfield v. Cariboo Helicopter Skiing Ltd.} (1993, 74 B.C.L.R. 225) at p.3.
\textsuperscript{14} Supra, note 13 at p. 3..
Standard of Care

The common law duty of care owed by teachers to their students arises from the application of the *in loco parentis* doctrine, whereby the school or its teachers are given a temporary delegation of parental authority.\(^\text{15}\) The duty arises more generally from the “special relationship” that exists between a teacher and student.\(^\text{16}\) It is noteworthy that the Supreme Court of Canada used the same expression in a 2006 case to define the relationship between a professor and a student.\(^\text{17}\)

It is the widely accepted position in education law that the standard of care required of a teacher to a student is unquestioningly and unfailingly that of a careful parent.\(^\text{18}\) The strength of this position in Canada has been tested by recent events. The Rogers Pass avalanche which killed seven 14 and 15 year olds triggered a series of internal, provincial and federal reviews in addition to a coroner’s inquest. Together with another incident whereupon a student was paralyzed while on a school sponsored outing in which courts judgement altogether ignored the prudent parent, there is a potential seismic shift in standards towards a competent leader.

The courts are reluctant to depart from the careful parent standard introduced in *Williams v. Eady*.\(^\text{19}\) This narrow or confined legal interpretation of teacher responsibilities does not, however, account for the explosion of extracurricular activities outside the school and the expertise necessary to adequately supervise them. It is not out of the ordinary for teachers to lead groups of students on such extraordinary field trips as rock climbing, backpacking, ocean kayaking, canoeing, cross-country skiing and downhill skiing. These activities have, until recently, been largely ignored by the educational establishment insofar as establishing operating standards, guidelines or certifications which have flourished in the guiding and recreational industry. Given the growth of outdoor and adventure education, its appeal to teachers, its benefits to students and the unquestionable likelihood of future but preventable accidents, it is argued that an enhanced standard of care is required.

Due to a lack of specialized training and background, it is natural to expect a teacher, compared to a prudent parent, not foreseeing those probable risks associated with outdoor education. As schools have enlarged their classrooms and broken down their walls to incorporate excursions and expeditions into the backcountry, the expectations have remained that a teacher need not know more than a prudent parent. What this dictum has not accounted for is the host of factors not usually considered by someone either unfamiliar or somewhat familiar with leading groups in the outdoors.

This ranges from the subtle to the sublime, from students getting lost to getting frostbite, from students breaking bones to breaking stoves (how many people have actually dismantled and reassembled a campstove?) or from close encounters with bears, lightning, storms, bees or poison ivy. Teachers untrained in outdoor education are unaware or oblivious to danger, underestimate

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\(^{17}\) *Young v. Bella* [2006] 1 S.C.R. 108 at p. 33.


\(^{19}\) (1893), 10 T.L.R. 41 (C.A.)
the risk inherent in the activity and do not comprehend that errors in judgement can be tragically amplified. It is not simply a matter of erasing a mistake on the blackboard and correcting it.

Laura Hamson Hoyano critically wrote in the UBC Law Review that “Universal acceptance … cannot obviate the fact that a doctrine narrow in conception and wrenched from its historical setting has been unthinkingly applied in a new context in which it retains little if any validity.”

The courts have been reluctant to depart from the prudent parent standard. Instead, they have chosen to issue caveats or delimit conditions as to the applicability of the standard. Qualifiers issued from Thornton et al. v. Board of School Trustees of District No. 57 Prince George et al. and Myers et al. v. Peel County Board of Education et al. have included:

- the larger-than-life family size of the class
- the supraparental expertise required of the instructor
- the nature of the activity
- the age and competency of the students
- the degree of skill and training received in conjunction with the activity
- the nature and condition of the equipment
- “a host of other matters which may be widely varied but which, in a given case, may affect the application of the prudent parent-standard to the conduct of the school authority in the circumstances”

This potpourri of preconditions has been dismissed by the dissenting judges in both the leading cases of McKay et al. v. Board of Govan School Unit No. 29 et al. and Thornton et al. v. Board of School Trustees of District No. 57 (Prince George) et al. whereby a professional standard of care rather than one of a prudent parent was recommended. The careful parent test originally enunciated by Lord Esher in 1893 in Williams v. Eady and subsequently reinforced by the Supreme Court of Canada in Myers et al. v. Peel County of Education has alternatively been characterized by critics as being an elastic yardstick, which has outlived its usefulness, illogical, requiring mental gymnastics and exercises in circular reasoning, reducing the prudent parent standard to a sham, possessing dangerous ambiguity and as being so vague as to lack any substance at all. Furthermore, it has been disregarded by the courts as wide and unenlightening, unrealistic, not particularly helpful and presenting difficulty in application.

21 [1978] 2 S.C.R. 267
22 Supra, note 18.
26 Supra, note 20 at p. 7, 24, 25, 37 and 38.
27 Langham v. Wellingborough School Governors and Fryer (1932) 147 L.T. 91 (C.A.)
30 Schade and Schade v. Winnipeg School District No. 1 et al. (1959), 28 W.W.R. 577, 19 D.L.R (2d) 299 (Man. C.A.)
Despite such unflattering praise and characterization assassination, the courts remained fixated on
the notion that the standard of care is appropriate.

The seminal statement most often quoted by present-day judges describing the standard of care
was carefully stated by Lord Esher in *Williams v. Eady* in 1893 as “the schoolmaster was bound
to take such care of his boys as a careful father would take care of his boys, and there could be no
better definition of the duty of a schoolmaster.”

The gravity of the *Williams v. Eady* decision is such that trial and appellate courts in the common
law provinces of Canada have on the whole unquestioningly considered the ruling to be of
binding authority. The consequences of this application are that it has become entrenched as the
definitive standard.31 The English prudent parent standard has withstood the test of time and has
proven to be of sufficient mettle that it has been adopted in school accident cases by courts in
Canada and the United States.

In discussing the evolutionary quality of the standard of care issue, a useful midway marker
bracketing *Williams v. Eady* and *Thornton* is the interesting case of *McKay et al. v. Board of the
Govan School Unit No. 29 et al.* It illuminates the reasoning and rationalizations behind the
judgements to either support or refute the prudent parent test.

Ian McKay was an athletically inclined student who, along with a group of twelve to eighteen
others, had volunteered to put on a gymnastic display during a school sanctioned activity under
the guidance and supervision of Mr. Molesky. Mr. Molesky had “some experience in teacher’s
college but … was not a qualified instructor in gymnastic work on the parallel bars.”32
Gymnastics progressions were performed and practised by the students primarily on tumbling
mats prior to the disabling accident. Parallel bars were then introduced. With only a few days
practise and with the assistance of student spotters, Ian McKay attempted a difficult dismount
manoeuvre which had been described but not demonstrated by Mr. Molesky. Ian McKay broke
his back.

MacPherson J. instructed the jury at the original trial that “the standard by which the conduct of
the defendants should be measured was that of a careful father of a large family.”33 On appeal,
Woods J. of the Saskatchewan Court of Appeal took exception with the prudent parent test and
noted that “the standard of the careful parent does not fit a responsibility which demands special
training and expertise.”34

On appeal to the Supreme Court of Canada however, Ritchie J. lent his support behind the
prudent parent test, though not without some reservations while also expanding the criteria
associated with assessing negligence. Referencing Lord Esher’s ruling in *Williams v. Eady*
whereby a “schoolmaster was bound to take such care of his boys as a careful father would take
of his boys”, Ritchie J. was “nevertheless of the opinion that a small group, such as that which
Molesky had in his charge in the improvised gymnasium, is one of which Lord Esher’s words do
apply.”35

31 Supra, note 20 at p. 1.
32 Supra, note 23.
33 Supra, note 23 at pp. 503-504.
34 Supra, note 23 at p. 512.
35 Supra, note 23 at p. 594.
It is noteworthy that Ritchie J. had reservations regarding the universality of the careful parent test. In this 1968 ruling from the Supreme Court of Canada, the judge wrote that “I am not satisfied that this definition is of universal application, particularly in cases where a school-master is required to instruct or supervise the activities of a great number of pupils at one time ….” and that the duty owed was that of ‘“a careful parent’ rather than the duty which would have been owed by a ‘physical training instructor’.”

Broad judicial consensus was seemingly reached in Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George), et al. when Carrothers J. of the British Columbia Court of Appeal ruled that the:

> Common law duty to take care … [is] in the manner of a reasonable and careful parent taking into account the judicial modification of the reasonable and careful parent test to allow for the larger-than-family size of the physical education class and the supraparental expertise commanded of a gymnastics instructor.

Paradoxically, ‘supraparental expertise’ is not defined or explicated in such a way as to maintain the integrity of Lord Esher’s ‘careful father’ standard without making it lose its clarity or rendering the standard hollow. In an effort to further safeguard students’ welfare, it seemed that the courts were willing to expand and enhance the expertise required of a reasonable and careful parent relative to a teacher but not at the expense of bursting the bubble and having to apply a new standard. Furthermore, the uncertainty around the definition of ‘supraparental expertise’ by extension means that students (parents and staff) are unclear about the qualifications of the supervising teacher and their capacity to anticipate reasonably foreseeable events plus their ability to mitigate those inherent and created risks. This illustrates the difficulty in a student assuming those inherent risks when the line demarcating what is reasonably safe from what is unreasonably safe shifts depending on the experience and expertise of the teacher.

In Myers et al. v. Peel County Board of Education et al., McIntyre J. of the Supreme Court of Canada affirmed the notion “that 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, described in Williams v. Eady.” Notwithstanding this confirmation, McIntyre J. also commented that the standard’s application will depend on “a host of other matters which may be widely varied but which may affect the application of the prudent parent standard to the conduct of the school authority in the circumstances.” Given this open-ended caveat, it would appear that adventure education may be such an instance which affects the prudent parent standard.

The 1993 court case of Bain et al. v. Board of Education (Calgary) represents a watershed of sorts in that Virtue J. did not rely upon the prudent parent test in rendering his decision. Instead, the Alberta Court of Queen’s Bench judge seemingly referred to a standard of care reminiscent of the one recommended by Woods J. in McKay et al. v. Board of the Govan School Unit No. 29 et al.

36 Supra, note 23 at p. 594.
37 Supra, note 23 at p. 595.
38 Supra, note 21 at p. 265.
39 Supra, note 18 at p. 279.
40 Supra, note 18 at p. 279.
41 Supra, note 3.
Kevin Bain was on a school-sponsored field trip when he fell from atop a cliff sustaining severe injuries. In determining whether the defendant teacher Douglas Streibel met the standard of care required, Virtue J. noted that:

The relationship between the Defendant teacher and the students was one that required the Defendant to take positive steps to avoid potential injury to the Plaintiff. The defendant was required to take all reasonable measures to see that the Plaintiff did not, while he was under his care and control, engage in a pursuit which had an unreasonable risk of injury, or failing that, this duty was to supervise and control the activity so as to reduce the risk to a reasonable level.42

Without reference whatsoever to the careful parent test, Virtue J. noted that the defendant “failed to take the steps which a leader would be expected to take”43 and suggested a non-exhaustive list of specialized skill sets for an outdoor leader in the circumstances that included the duty to familiarize himself with the terrain and to plan a route that would avoid the dangers. This is the first instance of a court prescribing skills of any sort to a teacher leading groups in the outdoors.

Bridging risk management principles with standard of care, Virtue J. observed that:

[This] is a case which depends upon its own particular facts and is concerned only with whether or not in these particular circumstances, the teacher’s judgements met the standard of care which the circumstances required, when one relates the probability and the gravity of injury to the burden that would have been imposed on the teacher in taking avoiding measures.44

Virtue J. concludes his discourse regarding duty of care in the context of a teacher-student relationship thus: “[t]hat right of control carries with it a corresponding duty to take care for the safety of, and to properly supervise the student, whether he or she is a child, an adolescent or an adult.” 45

The ruling in Bain indicates an attempt to uplift the anchor which has secured the standard of care to that of a careful parent. It seems to confirm an international movement away from the dictum enunciated by Lord Esher in 1893. “The Australian High Court … prefers to describe the duty owed by a teacher to each of his pupils in terms of the fundamental principle of foreseeability.”46

The court ruled in Geyer v. Downs that:

The duty of care owed by [the teacher] required only that he should take such measures as in all the circumstances were reasonable to prevent physical injury to [the pupil]. This duty not being one to insure against injury, but to take reasonable care to prevent it, required no more than the taking of reasonable steps to protect the plaintiff against risks of injury which … should have [been] reasonably foreseen.47

Geyer v. Downs presciently forecasted what would become legislated in the United Kingdom’s Children Act 1989 which defined the meaning of ‘parental responsibility’ as doing “what is

42 Supra, note 3 at p. 43.
43 Supra, note 3 at p. 43
44 Supra, note 3 at p. 51.
45 Supra, note 3 at p. 38.
46 Supra, note 20 at p. 28.
47 Supra, note 28.
reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare.\textsuperscript{48}

The cumulative effect of these rulings suggests that perhaps the tide is turning in the standard of care debate. If the door is open even just a little, then it warrants revisiting the dissenting judge’s ruling in \textit{McKay et al. v. Board of Govan School Unit No. 29 et al.}\textsuperscript{49} Woods J. of the Saskatchewan Court of Appeal in \textit{McKay} rationalized his argument of broadening or building upon the standard of care stating that an:

\begin{quote}
Instructor in directing or supervising an evolution or exercise is bound to exercise the skill and competence of an ordinarily competent instructor in the field…. \cite{Hals3rdEd19}
\end{quote}

Woods J. further held that an instructor “should bring to his task and responsibility, skill, ability and experience reasonable under the circumstances but not necessarily equivalent to that possessed by experts”\textsuperscript{51} and that the “standard of a careful parent does not fit a responsibility which demands special training and expertise.”\textsuperscript{52}

Justice Woods’ dissenting opinion is consistent with the United Kingdom’s abandonment of the prudent parent doctrine in 1968 whereby Geoffrey Lane J. dismissed it as “somewhat unrealistic, if not unhelpful.”\textsuperscript{53}

The standard of care required of a professor in Canada is slightly less confusing and inconsistent than teachers. Echoing Bain and Woods J. in \textit{McKay}, The Nova Scotia Supreme Court, Appeal Division rejected the prudent parent standard for universities in \textit{Acadia University v. Sutcliffe}.

\textsuperscript{54} The court ruled that “the university does not stand \textit{in loco parentis} to its students” and that it was “entirely unrealistic to apply a principle invoked for the better disciplinary control of children at school to the large institutions which universities are today and where much the greater number of students have reached the age of majority.” In \textit{Michalak v. Dalhousie College & University}\textsuperscript{55} where a student was injured while participating in a university sponsored ‘Tarzan Swing’ as part of a course, the same court ruled without referencing the prudent parent test that “the trial judge properly instructed the jury that in a dangerous situation, such as the one created by the appellant that the university had a duty to exercise reasonable care and skill in both the construction of the rope course, the equipment used and, as well, the supervision and instruction provided so as to avoid the danger.”

\begin{thebibliography}{9}
\bibitem{ChildrenAct1989} Children Act 1989 (c.41)
\bibitem{McKay1967} (1967) 60 W.W.R. 513, 62 D.L.R. (2d) 503 (Sask. C.A.)
\bibitem{Hals3rdEd19} Supra, note 49 at p. 521.
\bibitem{Hals3rdEd20} Supra, note 49 at p. 522.
\bibitem{Hals3rdEd21} Supra, note 49 at p. 521.
\bibitem{Acadia1978} (1978), 30 N.S.R. (2d) 423 (S.C.A.D.)
\bibitem{Michalak1983} (1983), 61 N.S.R. (2d) 374 (S.C.A.D.)
\end{thebibliography}
The situation, however, is different with regard to colleges. Courts in Ontario and Saskatchewan have both recently applied the prudent parent standard to students without regard to the student’s age.56

The last word regarding the standard of care goes to the Supreme Court of Canada which concluded last year in Young v. Bella57 that professors and students have a “special relationship” but the court was careful not to couch the relationship in terms of a prudent parent. In the wake of Bain, Acadia University, Michalak and now Young where courts were not anchored to the prudent parent standard, it appears that the standard has less to do with in loco parentis than it does with the proper skill set required to mitigate risk and prevent foreseeable harm.

Volenti in Adventure Education

The voluntary assumption of risk doctrine in Canada has undergone an evolution away from volenti and siding with the doctrine of contributory negligence that liberalizes the apportionment of fault. Volenti still represents a complete defence in Canada; if properly used, it will act as a complete bar to recovery.58 The Supreme Court of Canada, however, has considerably narrowed the application of this defence. Gerald Fridman explains in The Law of Torts in Canada that “Volenti is a rarely accepted defence. Before a plaintiff is held to have been volens as regards to the risk which resulted in his injury he must be shown to have accepted that risk freely, completely, and unreservedly.”59

The Supreme Court of Canada precisely prescribed in the landmark 1986 case of Dube v. Labar the applicability of the volens defence.

The burden is on the defendant, in each case, to prove that the plaintiff, expressly or by necessary implication, agreed to exempt the defendant from liability for any damage suffered by the plaintiff, occasioned by the defendant’s negligence. In every case the question is whether the plaintiff gave an express or implied consent to accept or assume the risk without compensation. In other words, did the plaintiff really consent to absolve the defendant from his common law duty of care, saying or implying, in effect, ‘I am prepared to take the risk of your negligence and if I am injured you will not be legally responsible for my damages.’ The question is not simply whether the plaintiff knew of the risk, but whether the circumstances were such as necessarily to lead to the conclusion that the whole risk was intentionally incurred by the plaintiff.60

Estey J. extrapolated upon Lehnert v. Stein61 and, in essence, redefined the relationship between plaintiff and defendant.

57 Supra, note 17.
Thus, *volenti* will arise only where the circumstances are such that it is clear that the plaintiff, knowing of the virtually certain risk of harm, in essence bargained away his right to sue for injuries incurred as a result of any negligence on the defendant’s part. The acceptance of risk may be express or may rise by necessary implication from the conduct of the parties, but it will arise, in cases only where there can truly be said to be an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to.62

This appears to have the effect or illusion of the defendant not owing a duty to the plaintiff. This is a precipitous bridge to cross. Allen Linden in *Canadian Tort Law, 6th Edition* (1997) argues against no-duty.

First, the duty concept is already overloaded, being used to decide disparate issues like the extent of liability, the unforeseeable plaintiff, the standard of care, and other matters. More clarity would be possible if we kept the duty notion uncluttered by volenti. Second, tort obligations should be constant so that actors will understand what is expected of them. To say that a driver owes a duty to drive carefully to one passenger but not to another is anomalous. A driver should owe the same duty of care to all passengers. However the driver should not be liable when one of the passengers agrees to accept the risk, but this is because of the plaintiff’s own conduct, not because of lack of duty.63

In the context of higher education, Robert D. Bickel and Peter F. Lake have noted that “there are strong sentiments in the university community that anything greater than ‘no-duty’ represents a return to in *loco parentis.*”64 In light of the ongoing reconceptualization of the university-student relationship in tort law, Bickel and Lake argue in favour of a new legal paradigm whereby the university is responsible to facilitate student education and moral development.65 This image coincidentally mirrors the purpose of adventure in education.

The relationship between *volenti* and inherent risk may be defined by standard of care. The duty between defendant and plaintiff is the bridge that acts as a qualifier, muting or amplifying the effects of risk. Viewed as a Venn diagram, the spheres of *volenti* and inherent risk are independent and whole yet intrinsically connected. Where they meet and overlap may be conceptualized by standard of care. A higher standard of care would indicate a greater degree of overlap meaning less inherent risk with a consequent de facto reduction in the risks assumed. Conversely, a lower standard of care would indicate a lesser degree of overlap meaning more inherent risk with an attendant increase in the risks assumed.

In the context of higher adventure education, the risks associated with higher adventure education have a ‘bandwidth’ dependent on the qualifications of the supervising faculty. The range of risks ordinarily or normally associated with climbing or skiing, for example, will be narrower if a higher standard of care is employed; conversely, a lower standard of care will broaden the base of risks to be encountered. Having a fixed list of risks to be assumed by the student without regard to the qualifications of faculty would inconsistently apply the principles of *volenti*. The quandary

62 Supra, note 60.
64 Supra, note 10 at p. 900.
65 Supra, note 10 at p. 899.
of a student in such a bizarre scenario would be to know in advance the background of faculty and then somehow estimate how it would affect the range of risks to be assumed.

Given that gravity is a fundamental force and the risks of a climber falling and falling rock or ice are inherent and integral to climbing, it may be argued that all accidents arising from a fall are inherent and that the risk of falling therefore should be assumed by the student. This analysis, however, misses the mark insofar as not making allowances for the effect of the standard of care to be employed. To reiterate, a heightened standard reduces the degree of unreasonable risk; a lower standard increases it.

Once the spheres of volenti and inherent risk are separated and allowed to go into their own orbits, the risk relationship is governed by the laws of contract and occupiers liability rather than by negligence. This could lead to what Tim Kaye critically calls ‘the spectre of consumerism’ in higher education. Indeed, in dismissing in loco parentis, Cooper J. in Acadia University v. Sutcliffe ruled that the relationship governing the university and the student was based in contract.

The case of Zaba v. Saskatchewan Institute of Applied Science & Technology grounded volenti, in a teaching setting. “The defence of volenti generally does not apply to a student-teacher relationship …. Where the teacher has approved the activity, the student by participating does not agree to absolve the teacher of legal liability.”

To countenance concern over adventure programming, Canadian universities are increasingly administering releases of liability embedded with assumption of risks. These normal risks may include drowning, sweepers, rip tides, hypothermia, rock fall, climber falls, avalanche, wildlife attacks, vehicle rollovers, etc. Most significantly, negligence on the part of other students, contractors, instructors, guides and faculty may be included in the list of inherent risks.

Inclusion of institutional negligence amongst the list of risks to be assumed by a participant is arguably ethically disconcerting. If a university kills or injures a student, it may be counter-argued, there is a moral obligation to compensate, particularly as the university has deep pockets. An expeditious out-of-court settlement reduces the reputational loss of a university and avoids adverse publicity. Hence, it is posited, it is both practical and ethical that negligence not be included in the release of liability or assumption of risk documents.

Reb Gregg argues, however, that “there’s a gap between the drop-dead right answer and a reasonable answer. [A] decision may ultimately prove to be wrong, but that doesn’t mean it was unreasonable. And being wrong is not the same as being careless or negligent.” The dilemma with higher adventure education is that students are intentionally situated into risky situations where their safety cannot be guaranteed and where even the most highly qualified people can make reasonable mistakes. Including instructor misjudgement or negligence in the lists of risks to be assumed would serve to protect the longevity of these programs as insurers would be reticent to accept that kind of financial exposure once they are compelled to pay costly settlements; such an inclusion, however, would increase the likelihood of adverse publicity arising from an incident and cost the university in terms of loss of reputation.

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67 Supra, note 54.
68 Supra, note 56.
It may be further distressing that for university programs which provide training intended to develop professional guides, the list of inherent risks may also include continuing with an activity when it may not be considered reasonable by commercial guiding or recreational standards (for example, when fatigued, in inclement weather, or in high hazard conditions).

The notion of applying volenti to higher adventure education is further complicated when the course curriculum demands participation in inherently dangerous activities. The two University of Alaska students and seven Strathcona Tweedsmuir School students who were separately killed by avalanches were on courses where their participation was being evaluated and ‘backing out’ was difficult to do. In this high octane environment of unstable snow conditions, duress caused by a desire to perform under pressure for the instructor, and peer pressure in general, it is difficult to envisage how a student could voluntarily assume the risks associated with mountaineering or backcountry skiing.

**Conclusion**

College and university adventure education programming can teach environmental stewardship, develop students’ self-reliance and facilitate moral development. It is unique in that risk is not only inherent and integral to the activity but is also essential and desirable. The challenge facing higher education is how best to balance the pedagogical benefit of adventure education against the cost of suffering and lawsuits. “University liability law is in a state of transition from a parental / custodial model to new paradigms.”70 The Canadian experience suggests that courts are not as inclined to abandon the *in loco parentis* doctrine in favour of a no-duty model but rather complement it in terms of foreseeability and an enhanced standard of care.

Volenti is affected by the centrifugal concepts of risk and standard of care. Fewer risks are assumed when a higher standard of care reduces more inherent risk. Universities must safeguard students from unreasonable harm with prudent risk management practices yet also protect their own interests using waivers and assumption of risk documents. Neither option alone offers a silver bullet in adventure education but each has its Ptolemic place in the universe of law and higher education.

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70 Supra, note 10 at p. 915.