THE DUTY OF CARE OF SCHOOLS

Introduction

There is no doubt that a duty of care to take positive action towards students in their charge exists for school authorities and teachers. The legal debate however, arises when focus is placed on the extent of this liability. Does this liability extend to activities that occur outside the school realm? For example, outside school hours or outside school grounds.

1. DUTY OF CARE 'WITHIN' THE SCHOOL

1.1 General Principles

All people owe a duty of care to other people not to injure another as a result of his or her negligent acts or omissions. This duty does not usually extend to preventing injury (a positive duty to take certain preventative steps) from occurring to another person, where one has not caused or contributed to the risk of injury.

For some, however, a special duty exists giving rise to more onerous duties. The relationship between school authority and pupils gives rise to one of these special duties.


The reason for this duty was discussed by Winneke J in Richards v Victoria:

A child is in need of protection against the conduct of others, or indeed of himself, which may cause him injury when he is beyond the control and protection of his parent and the school master is in the position to exercise the authority over him and afford him, in the exercise of reasonable care, protection from injury.

The duty of care of the school authority is non-delegable. In Commonwealth v Introvigne, Mason J stated that:

The duty is not discharged by merely appointing competent teaching staff and leaving it to the staff to take appropriate steps for the care of the children. It is a duty to ensure that reasonable steps are taken for the safety of the children, a duty the performance of which cannot be delegated (at 270).

1.2 Foreseeability of Risk

In order to establish a duty of care, the plaintiff must prove that the defendant ought to have foreseen that the negligent action of the defendant might endanger the plaintiff. It is not enough to establish that the defendant knew or ought to have known of the potential hazard. It must be shown that a reasonable person in the position of the defendant would have foreseen that the situation constituted a real risk to the plaintiff or to a limited class of persons of which the plaintiff was a member: Wyong Shire Council v Shirt (1980) 146 CLR 40 at 47.

Below are some case examples that discuss the degree of supervision a school owes to a pupil due to the foreseeability of risk. The extent of the general duty to supervise pupils
does not extend to constant supervision: *Barker v South Australia* (1978) 19 SASR 83; *Johns v Minister of Education* (1981) 28 SASR 206; *Harvey v Pennell* [1986] Aust Torts Reports 80-052 (SC SA). To a large extent, however, the question of degree of supervision will depend on the individual facts and circumstances of a case. Most of these situations involve either actual or constructive knowledge of a potentially dangerous situation:

(a) In *Johns v Minister of Education*, a teacher discovered the pupils had catapults and so was thus alerted to a potentially dangerous situation. It was held that the degree of supervision which she exercised was adequate to discharge the duty of care, and so was found not to be negligent.

(b) *Johns* case was distinguished from *Victoria v Bryar* (1970) 44 ALJR 1745. In this case, the teacher actually knew that a fight was in progress and this knowledge made the duty more onerous. The fight involved the discharge of pipe pellets fired by elastic bands. The danger was clear and the teacher failed to stop the fight. The teacher was found to have breached her duty of care.

(c) In *Vandescheur v State of NSW* [1999] NSWCA 212 (1 July 1999), a 13 year old boy was injured whilst playing schoolyard cricket during recess. The pitch was a concrete path, the wickets were garbage bins, and the crease was a drain with a metal grille over it across the path. The plaintiff was seriously injured by the jagged handle at the end of the grille when the bottom of his bat was caught in the gap of the grille. The court found that:

(i) the bottom of the bat being caught in the grille was an 'obvious risk';

(ii) the activity was known to and approved by teachers;

(iii) a teacher was watching the game when the plaintiff was injured;

(iv) 'the teachers had a duty to take reasonable care for the safety of the appellant, which required them to take precautions against the foreseeable risk of injury commensurate with the degree of risk';

(v) 'there was a substantial risk associated with the activity, and… the teachers breached their duty of care to the appellant when they permitted him to continue.'

(d) An additional element of danger also increases the onus of supervisory duty. In *Bills v South Australia* (1982) 32 SASR 312, a teacher was found to have breached her supervisory duty by failing to ensure that trampolining equipment was put away after instructions to put the equipment away were given and for failure to supervise any trampolining after that point.

(e) The Long Thin Neck case - in *Watson v Haines* [1987] Aust Torts Reports 68, 553 (SC NSW), a state school authority received medical advice concerning the hazards of playing rugby when players have long thin necks. The expert medical authority had offered to make 300 kits available to schools to educate teachers and students of the risks of a boy with a long thin neck playing hooker. The school authority placed only a third of kits in resource centres and did not advertise their availability. In this case, the plaintiff had a long thin neck and was rendered quadriplegic while playing hooker. Not one kit was borrowed at the date of this accident. The school authority was held liable for failing to take appropriate steps to implement an adequate system of reducing
the risk of injury in rugby, thus allowing the pupil with a long thin neck to play in the front row of a rugby scrum.

1.3 Insurance

The duty of care does not necessarily extend to a school's duty to insure or advise parents to insure against personal accidents. The Long Thin Neck case should be contrasted with the English case of Van Oppen v Clerk to the Bedford Trustees [1990] 1 WLR 235; [1989] ALL ER 389 (CA), where it was held that the school had no duty of care to insure boys against rugby injury or to advise parents to take out insurance. In this case, the plaintiff suffered a serious spinal injury in 1980 when playing rugby. It was not in dispute whether the school had a duty to take reasonable care for the health and safety of the pupils at its charge. Instead, the plaintiff claimed that the school was also under a duty to him:

(i) to inform his parents of the risk of serious injury caused by rugby. Such information was necessary to enable parents to make an informed decision about the need for insurance. The school should have a general obligation to have regard to the economic welfare of the pupils in its care;

(ii) to advise parents that players should be covered by personal accident insurance; and

(iii) to effect personal accident insurance for the benefit of the plaintiff and other pupils.

With regards to (i), Balcombe LJ found that in the circumstances it would be 'neither fair nor reasonable' to impose such a duty upon the school.

Connor LJ forcefully rejected the second argument by stating that 'there is no duty on parents to take out personal accident insurance policies in favour of their children', and 'there is no general duty on schools to take out accident policies in favour of their pupils and quite plainly it is no part of a school's function to advise parents or anybody else on insurance matters.'

As for argument (iii), it was found that the school had neither voluntarily assumed the responsibility to advise parents of the need for personal accident insurance nor explicitly accepted the task of insuring in a carefully phrased letter from the Headmaster of December 1979. But even if the school had voluntarily assumed the responsibility to advise or insure, the argument would still fail as there was no evidence that any parent actually relied on the school either to advise or insure.

1.4 School Sports Facilities

Insurance aside, it is clear that a school and its teachers have a duty to ensure that its fields and sporting equipment pose no danger to its students. A school also has a duty to ensure that any fields upon which its students play (whether owned by the school or by some other authority) are fit and safe for that purpose.

If students play inter-school competitions, then the issue of shared responsibility may arise. Just as a school cannot delegate its duty to its teachers, it cannot abdicate that duty to another school. If, therefore, a school knew that its students, under the charge of an employee of another school, were being exposed to the risk of injury, it would be negligent not to take steps to intervene to protect its students.
Conversely, a school owes a duty of care to the students of another school playing upon its premises. A school must ensure its fields are safe for all who play on them.

1.5 Causation

It is necessary to establish that the negligent action caused the injury giving rise to the proceedings. As Murphy and Aicken JJ noted in *Geyer v Downs*:

…it is of course necessary that the breach of duty of care must be causally related to the injury received….plaintiffs have often failed because they have been unable to prove that the exercise of an appropriate degree of supervision would have prevented the particular injury in question.

The necessary causal link was unable to be established in *Getani v The Trustee of the Christian Brothers* (1988) Aust Torts Reports 80-156. In this case, a pupil was injured when, running through the corridor, he tripped over a school bag. This was despite the fact that the school had instructed students to leave bags on top of lockers and not in the corridor, and pupils were also instructed not to run. Disciplinary measures were taken when pupils breached these instructions. The court held that although the accident was foreseeable, the plaintiff failed to prove that taking preventative steps such as better supervision or alternative storage facilities would have prevented the risk of his injury.

2. DUTY OF CARE 'OUTSIDE' THE SCHOOL

- **Before and After the School Bell, Travelling To and From School, Excursions, The Bus Stop**

The duty of care owed by school authorities and staff is normally confined to school hours. However, more and more exceptions seem to have been developed recently, and the law is shifting to a stricter approach when it come to liability outside the school hours and grounds. The general rule is that once children have left the school premises, no duty of care exists on the part of the school authority or its teachers unless it has been voluntarily assumed.

So when is a duty of care voluntarily assumed? The law seems to be less than certain in this area and often cases will turn on their own particular facts.

2.1 Outside School Hours

(a) **Before or After School Hours**

As *Geyer v Downs* illustrates, a duty of care may even arise before the morning bell has rung or before the first teacher is on morning playground duty if children have been allowed to congregate on the school playground with the knowledge of the headmaster. In this case, a pupil was injured when she was struck on the head by a softball bat. The accident occurred at 8.50am, ten minutes before the commencement of the school day. Teachers were not rostered on for school duty until 9am, but the headmaster had elected to open the school gates at 8.15am to allow children early access to the playground. The headmaster unsuccessfully discouraged the early arrival of children, but decided that opening the grounds was a better alternative then children playing outside on the busy street. He expressly forbade children from playing games and instructed them to talk, read or study.

The Court found that a relationship between headmaster and pupil existed at the time of the accident and that the headmaster had 'created a factual situation...
in which he was under a duty to ensure that there was adequate supervision of the girls in the playground before 9.00am.’

The existence of the duty of care is therefore not necessarily governed by official school hours, particularly if the usual practice of supervising children is deviated from.

Deviation from usual practice is what led to the establishment of a duty of care in *Barnes v Hampshire County Council* [1969] 1 WLR 1563. In this case, the plaintiff, aged 5, was released from school five minutes early and was injured in a traffic accident. The usual practice was to release pupils at 3.30pm, after which if they were not met by parents, children would be sent back to school. In this case, the child was released at 3.25pm, and so began walking home when she was injured 4 minutes later. The school was held liable in departing from its usual practice. A five year old child is clearly not capable of protecting him or herself if released onto a busy road without adult supervision. The outcome may be different, however, if the child is older, say 12 yrs, in which case it might be reasonable to expect that the child can look after itself.

**(b) Travelling To and From School**

The growing number of dual income families and the increase of hours in the average working day has led to ‘a corresponding decrease in the number of children being transported to and from school in the relatively safe family car.’ This has made the question of the duty a school owes its pupils as they travel to and from school one of increased importance.

It is not a new concept that when the school provides the means of transport, a liability may arise. In *Shrimpton v Hertfordshire Shire Council* (1911) 75 JP 201, a 13 year old girl fell off the step at the back of the school bus which was unsupervised. The Court found that as the school authority had provided the transport, it was responsible for the safety of children using it. The school authority had breached its duty of care by failing to provide adequate supervision such as a conductor.

What about when pupils catch a public bus?

In *Stokes v Russell* (Tas SC, Cosgrove J, 18 January 1983, unrep):

- The pupil was 9 years old and each day walked with a group of 15 other pupils to a bus stop 150 metres away from the school entrance.
- The pupil caught a public bus each day.
- The plaintiff was injured when he ran towards to open door of the bus and tripped while attempting to grab the handles near the door.

Cosgrove J held that the school-pupil relationship did not exist at the time of the accident because the bus stop was a ‘considerable distance’ from the school grounds and ‘the bus was a scheduled public passenger bus, which the children’s parents chose for their children to use, and to use unsupervised.’

---

1 See Stanley Yeo, ‘A School's Liability to Pupils Journeying To and From School’ who discusses this topic generally (1997) 5 *Torts Law Journal* 276
A more recent case involving pupils travelling to and from school, adopting a different approach from that taken in Stokes, is the case of Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman (1996) Aust Torts Reps 81. In this case, a school authority was found liable for an injury suffered by a pupil travelling home from school. The facts of Koffman are as follows:

- The plaintiff was a 12 year old pupil of the Assumption Primary School. He travelled home from school each day by catching a school bus at a bus stop situated outside the Bathurst High School and about 350 metres from his own school.

- The plaintiff was taunting several high school students from the top of a tree.

- In retaliation, they threw sticks and rocks at the plaintiff, injuring his left eye.

- The plaintiff sued the school for failing to provide supervision at the bus stop.

- The defendants claimed that they did not owe a duty of care to the plaintiff at the time and place of the accident. They claimed that the school-pupil relationship terminated once school for the day was over and the plaintiff had passed out of the school grounds.

The New South Wales Court of Appeal rejected the defendants' argument, and held that the school-pupil relationship was then still in existence so that the school owed the plaintiff a duty of care. They agreed with the trial judge that the school had actual or constructive notice that some of its pupils were catching the school bus from that bus stop. The large group of pupils congregating at the bus stop created a risk of 'propensity for mischief' such that it was reasonably foreseeable that a primary school pupil might be injured.

The majority (Priestly and Sheller JJA) found that the school-pupil relationship existed throughout the entire journey. In fact, the court went further to say that a duty exists throughout the whole period when the pupils are enrolled with the schools. However, while the duty of care owed by schools to pupils exists at all times it only extends to preventing injury to pupils in limited cases. For instance, it generally, and obviously, does not extend to preventing injury to pupils when they are under the control and supervision of the parents or guardians at home. A distinction is, therefore, drawn between whether a duty exists and the extent of that duty at any particular time and place.

Sheller JA drew an analogy between an employer/employee relationship and a teacher/pupil relationship, stating that:

the relationship of employer and employee imposes duties of care upon the employer to the employee. The relationship exists from the day the employee is 'employed' to the day the employee is dismissed or terminates the employment. Ordinarily the employer will owe a duty to the employee in the workplace and not for accidents occurring in the employee's home. This is not because the relationship ceases when the employee leaves work for the day but because the duty does not extend to ensuring, for example, that the floor in the employee's
bathroom at home is not slippery. Similarly I do not think the relationship of teacher and pupil begins each day when the pupil enters the school ground and terminates when the pupil leaves the school ground...(p13)

Sheller JA went on to say that the extent of the duty of care of the teacher to the pupil is not necessarily 'measured or limited by the circumstance that the final bell for the day has rung and the pupil has walked out the school gate….school buses and parents may arrive late. Major streets have to be crossed and so on. Moreover as happened at Bathurst High School, high spirited children congregate outside the school waiting to be taken home' (p13).

In summarising whether the duty extended to the journey on the bus or in the case of other pupils during the time they spent walking from the school to their homes, Sheller JA confirmed that:

the answer must be that this depends upon the circumstances. Ordinarily I would not expect the duty to be so extended. But if the school were aware that a particular bus driver, who transported its children, was a dangerous driver or that on a particular journey older children habitually and violently bullied younger children, the duty may well extend so far as to require the school to take preventative steps or to warn parents. This duty would be founded in the relationship of teacher and pupil (p14).

Of course, the difference between the approach of the majority in Koffman and that taken in Stokes may easily be exaggerated. In terms of application, saying that, in certain circumstances, a school owes a duty of care to pupils travelling to and from it, and saying that the duty of care a school owes to its pupils at all times, in certain circumstances, will extend to protecting them from injury while travelling to and from school, are the same thing. The differences between those approaches are of language, and (arguably) of legal theory, but no more.

The important thing is that, in some cases, the law requires that schools take certain precautions for the safety of their pupils journeying to and from school. The court in Koffman gave several examples of this, such as when the school knows:

- there is a busy and dangerous road outside the school;
- that the route taken by pupils travelling to and from school is heavy with traffic: see Horne v Queensland (1995) Aust Torts Reps 81-343 below;
- that a pupil has been habitually molested at certain place along the route to school;
- that a particular bus driver is a dangerous driver; or
- that on a particular journey children are being bullied by older children.

To summarise, whether the duty of care a school owes to its pupils extends to preventing injury to them as they travel to and from school will depend on all the circumstances of each individual case, and in particular the school's
knowledge of any relevant danger to its pupils, as well as the pupil's physical proximity to the school and circumstantial proximity to school activities.

(c) **Excursions**

The duty of care principles enunciated in *Geyer* extend to school camps and excursions. In *Munro v Anglican Church of Australia, Diocese of Bathurst* (unrep, 14/5/1989, CA NSW, 490 of 1985), a 16 year old plaintiff attended a canoeing/camping excursion on the Macquarie River. A trailer contained the necessary camping equipment at the site. The teachers directed a group of boys to move the trailer over a steep, damp and grassy mound of earth but provided no instructions on how to go about the task. After pushing the trailer for several meters, the trailer got out of control and the plaintiff’s foot was caught underneath the front wheel. Priestley J found that a duty of care existed and had been breached, particularly considering the convenient alternative of emptying the trailer and transporting its contents by hand could have been employed. There was a reasonably foreseeable risk of injury which was not far fetched or fanciful.

The duty of supervision also extends to making travel arrangements for students between the school grounds and nearby tennis courts for an organised school activity: *Horne v Queensland* [1995] Aust Torts Reports 62,425 (81-343)(SC Qld). In *Horne*, a pupil was injured when she fell from her bicycle and was run over by a semi-trailer while journeying from her school to tennis courts as part of school-organised activities. The court found that the school was liable.

The court however has acknowledged that 'accidents do happen'….

In *Brown v Nelson* (171) 69 LGR 20, no liability was found when a pupil was injured at an Outward Bound camp after a rusty cable supported by rope broke. The school had sent its pupils on courses run by Outward Bound for many years prior to the accident. Unbeknown to the school, the Outward Bound organisation had ceased operating the course but an instructor continued to run the course on the old site. It was held that the school was not liable as the equipment was apparently safe and was used by the pupils under the supervision of an apparently competent and careful person. The school had no duty to inspect the equipment and satisfy itself as to safety.

Similarly, in *Nobrega v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (No.1) [1999] NSWCA 75 (23 March 1999), the appellant was injured in 1994 when he was a student in Year 9 at the De La Salle College, Ashfield. It was common practice for the students to attend the Cataract Scout Park camp. Whilst on the camp, the appellant was injured on a water slide when as he approached the slide he slipped and fell forward onto the slide and down into the water. As a result, his teeth were badly damaged. The group of 15 pupils were accompanied by two school teachers at the time, but they were not given any detailed instructions as to how to use the slide. The Court held that the school authority was not liable as:

- 'the slide was not inherently dangerous if used in the fashion in which it was';
- there had been previous repeated use of the slide;
the Trustees could not have taken any other action than that which they already had taken, particularly as they were not the owner of the site;

even if a teacher had been placed at the head of the queue to seat pupils properly on the slide, the injury may still not have been prevented.

Priestley JA summarised by stating that what happened to the appellant was 'an accident rather than the result of anybody's negligence.'

2.2 Volunteers

The issue of vicarious liability and volunteers is an uncertain one.

*Duncan by her next friend Duncan v Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn* (unreported, Supreme Court, ACT, 14 October 1998, Higgins J), concerns the liability of a school for the actions of pupils carrying out tasks on behalf of a teacher. The facts are as follows:

- the plaintiff was a 13 year old girl who was attending a physical education class;
- the class consisted of 25 other girls;
- the class was being taught how to perform handstands;
- the teacher appointed several 'spotters' - assistants 'selected to help or aid a balance, vault or routine';
- the plaintiff was injured when she fell on her back after her spotter let go of her legs, or lost balance (the facts are uncertain here).

The court held that it was reasonable to use students as spotters. However, it was, as a result, essential to ensure that the 'correct message' was understood by each spotter. The teacher was not required to assume that there would be a deliberate disobedience of her instructions. The risk was of a lack of comprehension or application of her instructions, particularly as year 7 girls need 'constant reinforcement'. It would have been easy to reduce the risk of not understanding the task the spotters needed to perform by taking a few minutes to explain it. The failure to ensure this comprehension was found to be negligent.

Furthermore, it was clear that the spotters were being used as assistants to aid the school in teaching the handstand exercise. The spotter did not act otherwise than as authorised by the school's agent, Ms Roberts (the teacher). The spotter was not acting merely on her own behalf. The court stated that 'vicarious liability does not attach only to the actions of paid employees and agents. It applies also to volunteers.'

In this case each spotter was carrying out the instruction of, and acting on behalf of, the teacher and, hence, the defendant. So whether or not a lack of proper instruction led to the spotter failing properly to support the pupil, the defendant was liable for her lack of care.
2.3 **Effect of Parent's Consent**

A parent's consent to a child's participation in excursions or sporting activities will not protect the school from liability if it has been negligent. A parent consents only to participation of their child in the activity, NOT to negligent acts or omissions on the part of the school.

Even if a parent did consent to the negligent acts or omissions of a school, such a consent would not waive the rights of the child or release the school from its responsibilities. A child cannot be prevented from commencing an action against the school and the time for the commencement of such an action does not start to run until the child has reached 18 years.

A school would need to obtain an indemnity if it wishes to protect itself. If parents indemnify the school from any damages awarded to the child against the school, the school could seek to recover the amount of the damages from the parents pursuant to the indemnity. Apart from the risk that a court would find such an indemnity void on grounds of public policy, the school would find enforcement practically difficult if they do not have adequate assets to cover the amount of damages.

3. **INJURIES TO THIRD PARTIES**

In *Camarthenshire County Council v Lewis* (1955) AC 549, a 4 year old boy at a nursery school was left unsupervised while the teacher attended an injured child. The boy wondered out of the class room onto the highway through a gate which was either open or possible to be opened by a child. A lorry driver swerved to avoid the child, crashed into a telegraph pole and was killed.

The school was found to be liable to the lorry driver's widow for allowing the child to escape through a gate which should have been fastened. The court rejected the argument that the school owed no duty to road users, its duty being only to the children in its care. The fact that the school was near such a busy highway made it foreseeable that an injury might occur and placed the school under a duty to ensure that the pupils neither became involved in nor caused traffic accidents.

Similarly, in *Haines v Rymeister* (1986) 6 NSWLR 529, the President of the Ladies Auxiliary was injured when four twelve year old boys were helping to erect a catwalk for a fashion show. The boys had been acting rather boisterously, and the NSW Court of Appeal found that the teacher who selected the boys to help, owed a duty to take reasonable care to select well behaved boys, but also to take reasonable care to ensure that the boys would not cause harm to the plaintiff and others. The activity upon which the boys were engaged was one in which there was a reasonable foreseeability risk of injury to the plaintiff and to others.

The cause of the injury was the failure to instruct the boys to be careful when putting the boxes down. Had that instruction been given then the injury would not have occurred.

4. **PREVENTATIVE STEPS**

Considering the nature of children to injure themselves and the limited benefit of parental indemnity, what can schools do to protect themselves?
(a) Creating A Safe Environment

Schools and teachers should be meticulous about ensuring that the environment is a safe and danger-free one. School grounds and buildings should be properly maintained, safety checked regularly, and be free of spillages and dangerous toys. Dangerous toys and implements should be discouraged and confiscated if found to be present. Dangerous chemicals should be clearly labelled and locked away.

(b) Supervision

Children should be supervised as continually as possible. Teachers must be competent (particular in relation to science and physical educational activities) and must provide appropriate supervision of students. Any safety manuals or guidelines should be carefully followed.

(c) Insurance

Unfortunately, even with the best preventative measures, injuries will happen. It is not possible to prevent claims, but adequate insurance will ensure that the interests of the school, the teachers and its pupils are protected.

It should also be mentioned that schools are vicariously liable for the negligent actions of teachers. It is rare that a teacher is sued personally.

5. CONCLUSION

All of the above legal principles and exceptions to these principles could understandably leave a teacher confused at best and clinically neurotic at worst. This is particularly so considering that in some cases, a teacher may have a duty of care which is higher than a parent's duty of care. However, if schools and their teachers act in a careful and diligent manner, then the school authority should be able to successfully defend a negligence claim as he or she would probably have done more than a reasonable teacher would have done in a particular set of circumstances. Neurosis is not necessary - only astuteness and responsiveness to dangers and always providing the appropriate supervision.

6. ACKNOWLEDGMENT

I gratefully acknowledge the assistance of Amanda Greenfield, and Matthew Darke of Minter Ellison, in the preparation of this paper.

Charles Alexander
15 July 2000
YEAR 2000 NCISA CONFERENCE

THE DUTY OF CARE OF SCHOOLS

CHARLES ALEXANDER BA LLB (ANU)
PARTNER
MINTER ELLISON, SYDNEY

15 JULY 2000