How many teachers is enough?

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School playground supervision at a glance

1. There is no fixed and predictable teacher-student supervisory ratio: *Commonwealth of Australia v Introvigne* (1981) 150 CLR 258. It is an "each on its own merits" situation.
2. Factors in determining the appropriate teacher-student supervisory ratio are:
   a) the age of the children
   b) the total number of the children
   c) the activity/activities in which the children are participating
   d) the intellectual capacity and/or handicaps of the children
   e) the potential hazards of the activity
   f) past experience of the behaviour of the children.
3. The biggest hurdle facing plaintiffs is the causation factor, proving that an increased level of teacher supervision would have prevented the injury.
4. If children are "invited" into a schoolground, there is a duty of care situation established; and some level of supervision becomes necessary: *Geyer v Downs* (1977) 138 CLR 91.
5. If special circumstances of risk are known to the school authorities, then duty of care and the need for supervision will extend beyond the schoolground and the school day: *Trustees of the Roman Catholic Church for the Diocese of Bathurst v. Koffman* (1966) Australian Torts Reports 81 - 399.
6. There have been cases where the courts have found no breaches of duty in the supervision of school students, despite the absence of all teachers at the time of the accident:
   a) *Barker v. State of South Australia* (1978) 19 SASR 83.
   b) *Warren v. Haines* (1987) Aust. Torts Reports 80 - 115.
   c) *Clark v. Monmouthshire County Council* (1954) 52 LGR 246.
   d) *Ricketts v. Erith Borough Council* (1943) All E.R. 629.

No teacher on playground supervision duty- is this a plaintiff "easy win" situation?

School playground accidents are common.

School injuries are common.

It is often believed that if a child is injured in a school playground accident, an easy action will automatically lie against the educational authority, on the basis that there was no supervision by the teachers, or that there was an inadequate level of teacher supervision. Is this assumption sustainable in the field of educational litigation?

Is a school and its staff an easy target for the plaintiff lawyer?

The short answer is, "It ain't necessarily so".

Will the defendant employing authority and/or insurer rush to settlement?

The short answer is, "Don't kid yourself!"

Foreseeability is usually easily proven in litigating schoolplace injuries

Courts are rarely surprised any more by the almost unbelievable permutations of circumstances in which students sustain injuries at school or at school-related activities.

Because school pupils are usually children, and consequently often inept, curious, clumsy, young, uncoordinated, inexperienced and wilful, broad parameters usually exist for what is reasonably foreseeable in the arena of schoolplace injuries.

The fact that young children are often walking disaster areas has been judicially observed in a number of cases:

a) *Williams v Eady* (1893) 10 TLR 41: the teacher "was bound to take notice of the ordinary nature of young boys, their mischievous acts, and their propensity to meddle with anything that came in their way".
b) *Reffell v Surrey C.C.* (1964) 1 WLR 358: "Even if they (girls) do not fight like small boys and generally behave with more decorum, they nevertheless have been known to chase each other and to run in corridors" (at 363).
c) *Ramsay v Larsen* (1964) 111 CLR 16, per Kitto J: "... rash little boys who stay alive by luck and Heaven's favour in this world of tears ..."
d) *Edgecock v Minister for Child Welfare* [1971] 1 NSWLR 751: "Children are mischievous not only in their tendency to do mischievous things deliberately, but also in their inability to fully comprehend the consequences of what they do".
e) *Horne v State of Queensland* (1995) Aust Torts Reports 81-343: "... it was incumbent on the school authority ... to take reasonable steps to prevent the very foolish sort of decision that the plaintiff ... made".

When does the duty of care operate?

In *Richards v State of Victoria* (1969) VR 136, the Full Supreme Court of Victoria confirmed that it was "clearly established by authority that in general a schoolmaster owes to each of his pupils whilst under his control and supervision, a duty to take reasonable care for the safety of the pupil". That judgment also had much to say about the reason for the imposition of a duty of care upon teachers, as a result of:

"... the need of a child of immature age for protection against the conduct of others, or indeed of himself, which may cause him injury coupled with the fact

that, during school hours the child is beyond the control and protection of his parent and is placed under the control of the schoolmaster who is in a position to exercise authority over him and afford him, in the exercise of reasonable care, protection from injury."

So, what is the meaning of that phrase "during school hours"? When does the teacher-student relationship commence? It arises at that time of day when the principal or teacher asserts authority over the pupils [see *Geyer v Downs* (1977) 138 CLR 91]. There is no automatic "home gate to school gate" responsibility or duty of care, although, by comparison, "discipline over" can be a "home gate to school gate" matter [See *Cleary v Booth* (1893) 1 Q.B. 465 (fighting in the street); *R v Newport Justices, ex parte Wright* [1929] 2 KB 416 (misconduct on the way to school); *Craig v Frost* (1936) 30 QJPR 140 (galloping horses en route to school).

If a school authority provides transport to and from the school, it assumes some responsibility for that transportation. [See *Shrimpton v Hertfordshire County Council* (1911) 104 LT 145.]

The teacher-student relationship and the duty of care would certainly seem to exist between teachers at a school *and* any of the students at that school, whether or not those students were the direct educational responsibility of the particular teachers.

It is also probable that if students from a number of schools were gathered in the one place (for example, a sports carnival), then all the teachers would have a collective responsibility for the safety of not only their own students, but those from other schools as well.

The conventional wisdom

As a general rule, it used to be thought that the duty of care required of teachers, principals and schools started and ended at the school gate, and operated only within the time frame of the "school day". It was said that whatever happened outside school hours and outside the school premises was not a matter of legal responsibility for school personnel, but rather one of moral, ethical and professional concern.

Changes in the reach of duty of care

In *Geyer v Downs* (1977) 138 CLR 91, it was held by the High Court of Australia that if school authorities invited children to enter into schoolgrounds before the time for the normal operation of official playground duty, then a duty of care was created earlier than might otherwise have been the case. (The *Geyer v Downs* case is of particular significance for those schools experiencing problems with "latch-key children" arriving early). When this case was heard previously in the earlier appeal before it went to the High Court, one judge foreshadowed in 1975 what was to be a 1996 change in the common law. He said: "It may be that there are grades of supervision required and that a teacher outside school hours or school premises, has duties of a lesser order" (See *Geyer v Downs* [1975] 2 NSWLR 835 at 840.)

Previous principal's prerogatives

Principals had always had the power to extend duty of care outside school ▶

hours and beyond the school gate. Under the Education Acts and Regulations of a number of States, it has always been possible for principals to make reasonable requirements that teachers would extend their hours of duty. The most common illustration of this authority to voluntarily extend the school's duty of care is the fairly general practice of assigning school staff to a rostered duty of supervising the loading of children onto school buses at the end of the school day and outside the school premises.

The 1996 view: an extra duty of care if the school knows of "special circumstances"

In 1996, the New South Wales Court of Appeal re-heard the case *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* (1996) Aust. Torts Reports 81-399.

In this case, a 12-year-old primary school student was struck in the left eye with a stick when he was waiting to catch the bus home from school in December 1983. (Note the long time period of 13 years between the accident and the court hearing. Injured children can wait until they are adults, before the three year statute of limitations applies.) The boy and his friend had been playing in a tree near the bus stop when they were pelted with sticks and rocks thrown by high school students. The bus stop was situated outside the high school about 300 to 400 metres away from the plaintiff's primary school. In 1992, Studdart J entered judgment for the boy against the Nominal Defendant and the Trustees who operated, controlled and supervised the primary school the boy was attending. His Honour Judge Studdart held that if the school authorities had provided proper supervision on the day in question, the boy's injury would have been avoided. The school system was also held to have been negligent in failing to provide supervision for the boy until he entered the bus, even though the bus stop was some distance from the primary school. The Trustees appealed.

Their appeal was based on two grounds. First, it was said that the school owed no duty of care to the boy at the time and place where he suffered the injury. Alternatively, it was argued that the boy's injury was not caused by any breach of duty of care owed to him by the school. The boy's case was that the school was under an obligation to care for his safety, or alternatively, that there were special circumstances which imposed such an obligation on the school.

Justice Mahoney (dissenting) said that:

"A school is not obliged to provide a staff member to supervise children who are waiting at a bus stop 300 or 400 metres from the school, except in special circumstances. The law does not require a school to provide supervision for the journey home to avoid possible dangers encountered on the way. Although dangers are foreseeable there is a limit imposed on a school's obligation. The boy's injury was beyond that limit."

The other two majority judges (Sheller and Priestley JJ) however, dismissed the appeal and took the view that the school did have an extended duty of care in the circumstances.

Their judgment, which has far-reaching implications for Australian schoolplace injury litigation, was as follows:

1. If a student is injured while a school is supervising, or should have been supervising, that student's activities, the duty of care owed by the school authority depends on the relationship of "proximity" which derives from the fact that the injured person is a student. Other factors determining the extent of the duty are whether the risk of injury is foreseeable to a reasonable person in position of the school authority and the failure to do what a reasonable person in that position would do, by way of response to the risk.
2. The relationship between teacher and student does not begin each day when the student enters the school ground nor end when the student leaves the school ground. The extent and nature of the duty of the teacher to the student is dictated by particular circumstances including whether the school is located on a busy highway or whether particular dangers are present in the immediate vicinity of the school.
3. The original trial Judge was correct in his conclusion that the school was in breach of its duty of care to the boy when he was injured. When a school authority is aware of particular dangers including older children habitually bullying younger children, the duty extends so far as to require the school to take preventative steps or to warn parents.
4. The breach of the school authority's duty was causally related to the student's injury, in that appropriate supervision would have either prevented the high school children from throwing sticks and rocks at the student, or would have resulted in the student being told to remove himself from the area.

The present legal situation in relation to how far a school's duty of care extends, after school hours and beyond school premises, was summed up by His Honour Justice Sheller, who referred to the Counsel for the appellant school system having asked rhetorically, 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. His Honour said: "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."

Is it negligence if the bully isn't disciplined? Maturation, sublimation or deterioration

The literature on schools and teachers from *Tom Brown's Schooldays to Blackboard Jungle*, almost inevitably contains a stock character - the schoolyard bully.

For the real life schoolyard bully, the problem is solved in some cases when one of the worms turns and administers a salutary thrashing. In some cases, the schoolyard bullies change their ways, mature and become upright adult citizens. Some other bullies sublimate their childhood aggressive feelings and find satisfaction as soldiers, police officers and school principals. The rest never learn self-respect and regard for others, and graduate instead to being juvenile thugs and apprentice hooligans,

who spend a great deal of their time in court or juvenile correction centres, as a prelude to a life of serious crime.

So, what is the legal position when one pupil, who is a bully, injures another pupil? Is the teacher negligent because the bully's actions have not been prevented by adequate levels of imposed discipline?

No, not necessarily. In *State of Victoria v Bryar* (1970) 44 ALJR 174, Chief Justice Barwick spoke of the debatable effect of "a reprimand or a threat of punishment or of actual punishment as a deterrent of indiscipline on the part of a teenage boy, encouraged perhaps by his fellow pupils, or motivated by bravado or sheer intransigence".

In other words, a cause-effect relationship for teacher negligence is not always provable. As Barwick CJ put it:

"Where the breach of the duty of care is founded on evidence of a failure to maintain discipline, it is particularly important, in my opinion, to examine closely the material placed before the jury to ensure that there is a basis in fact for the conclusion that the action on the part of the teacher which it is thought he ought to have taken to maintain discipline would more probably than not have prevented or minimised the injury to the injured pupil. The jury must not be left to speculation in this connection but must have the evidence before them from which a logical and reasonable inference can be drawn of the causal connection between the step they are entitled to think the teacher ought, in performance of his duty of care, to have taken, and the injury of which the plaintiff complains."

Alfonso and the broken tail bone

Australia's best known "school bully case" was *Warren v Haines* (1986) Aust Torts Reports, 80-014. Here the school bully, Alfonso, picked up a 15-year-old schoolgirl in the playground, carried her onto a cement slab and dropped her on her tail-bone causing her to suffer a serious back injury. Alfonso would spit at, push and fight with other pupils, both male and female, about twice a week but the school had apparently done little in the past to effectively discipline or supervise him. At the time she was picked up by Alfonso, the girl was sitting in an area off the quadrangle, where there was no ▶

Photo by Ken Irwin, The Age

teacher on playground duty. It was during the morning recess. There was, however, a teacher positioned in the canteen area supervising the quadrangle. The plaintiff girl successfully sued a "nominal defendant" representing the State of New South Wales, and was awarded extensive damages. By reason of the regularity with which Alfonso's aggressive conduct took place, the teachers at the school knew or should have known of it. It was reasonably foreseeable that unless Alfonso was disciplined and supervised he would cause significant physical injury to a fellow pupil. Carruthers J held that the school was in breach of its duty to the plaintiff in failing to restrain Alfonso's behaviour by discipline and supervision. The school had had ample time to follow a course of firm disciplinary action which would have made it clear to Alfonso that violent conduct would attract serious consequences. If there had been an adequate system of supervision during the morning recess, Alfonso would have been aware that any aggressive conduct would not have gone unnoticed. The failure of the school to discipline Alfonso in the past gave him the impression that he was free to do as he chose, and discipline and supervision would have prevented or minimised the risk of the plaintiff being injured in the way she was.

This decision was subsequently overturned on appeal. Although the appeal judges agreed that "reasonable care demanded supervision of the off-quadrangle area", it did not extend to detaining Alfonso in the classroom during recess. The major reasons for the reversal of the decision were that the incident took place very quickly, so that teacher intervention probably would not have prevented the injury, and also that what Alfonso did was not seen to be inherently dangerous but only became so, when the girl struggled to free herself.

The *Warren v Haines* appeal judgment thus centred on *not* "establishing that the presence of a teacher, or the implementation of prior disciplinary measures would have prevented the injury.

Impracticability of eliminating all risks

It is simply not practicable for teachers to watch all their students every second of the school day. Nor would that be in accordance with the philosophy of education, where the aim is to foster independence in a spirit of self discipline, rather than through imposed authority.

Courts have accepted that such educational/philosophical attitudes are appropriate:

a) *Jeffery v London C.C.* (1954) 52 LGR 521 at 523
   Teachers "must strike some balance between the meticulous supervision of children every moment of the time they are under their care and the very desirable object of encouraging the study independence of children as they develop".
b) To implement a system of education which sought to exclude every possible risk of injury would exclude much valuable and real education. *Wright v Cheshire C.C.* [1952] 2 All ER 789 — "only inactivity and inanition could be planned", per Morris LJ at 796.

c) *Hudson v Governors of Rotherham Grammar School* (1938) Yorkshire Post, March 24: "If boys were kept in cotton wool ... they would choke themselves with it", per Hilbery J.

d) *H v Pennell and State of South Australia* (1987) 46 SASR 158 per King CJ at 164.

The degree of supervision by teachers requires "a fine balance between discipline and supervision on the one hand, and freedom of action and inculcation of independence on the part of students on the other".

The big problem for plaintiffs: supervision and causality

In deciding the standard of care which teachers should appropriately display in supervising their young charges, the factors of age, capacity, intelligence, handicap, inherent risks in the situation and the teachers' past knowledge and experience of the students' behaviour are all relevant.

A well-known case which illustrates the operation of these very factors is *Barker v The State of South Australia* (1978) 19 SASR 83. In this case, a teacher was absent temporarily for only a short time from the classroom. She had left certain work to be done by her group of 14 and 15 year old students, who were of bright intellectual standard in an academic strand. There was no inherent danger in the tasks the pupils were left to do, and no past experience of misbehaviour which should have alerted the teacher to any risk in leaving them to their own devices. She also took the precaution of asking the teacher in the next room to keep a general eye upon her class while she was out of the room. During her absence, horseplay occurred. One girl tilted back on her seat and was pushed over by another pupil with resultant damage to her spine. It was argued that the teacher was negligent and should not have left the class by themselves, but rather should have stayed in the classroom exercising continuous supervision over all the students. The action by the injured pupil for damages against the school authority was dismissed by Jacobs J, who said that the short absence from the classroom did not amount to a breach of the teacher's duty of care, particularly given the age and capacity of the students concerned and the lack of any evidence of past unreliability on their part. The evidence also did not establish that if the teacher had been present the incident would not have occurred.

If the Plaintiff cannot show that the supervision which allegedly should have been provided would more probably than not have prevented the injury, the action will fail either on the ground that no causal link between the alleged breach of duty and the injury has been shown, or on the ground that there was no breach of duty in the circumstances. Thus, in *Barker v State of South Australia* it was held that not only was there no breach of duty, there was also no causal link between the alleged breach and the injury sustained. The evidence satisfied Jacobs J that the teacher can do little or nothing to stop a student pushing another off a chair, or pulling a chair out from underneath, unless he or she "by chance saw it about to happen", although his Honour thought that it was less likely to happen if the teacher was present rather ▶

than absent. This kind of reasoning is especially applicable where the injury is the result of a spontaneous act, or an isolated mishap, or a sudden incident occurring unexpectedly.

In a number of other cases, including *Warren v Haines* (1987) Aust Torts Reports 80-115; *Gaetani v The Trustees of the Christian Brothers* (1988) Australian Torts Reports 80-156; *Ward v Hertfordshire County Council* (1970) All ER 535 and *Bills v State of South Australia* (1985) 38 SASR 80, it was held that the Plaintiff must fail because of an inability to prove that increased supervision would have prevented the injury. So, the biggest hurdle facing plaintiffs is usually having to prove that an increased level of supervision would have prevented the injury.

There can be no "ratio" of safe supervision. It is very much an "each case on its own facts" situation.

The argument of a fixed and predictable teacher-student supervisory ratio was dismissed in *Commonwealth of Australia v Introvigne* (1981) 150 CLR 258.

In *Turner v Somerset County Council* (1974) CLY 2581, a physical education teacher divided the boys and girls up into two groups during a physical education lesson. The girls were playing non-stop cricket in the playground and the boys were playing on a football field 30 yards away. The teacher was not able to see both groups at the one time, so he walked backwards and forwards between them, dividing his time equally between the two groups. When a girl suffered an injury to her back and claimed negligence, it was held that the decision to divide the class was a reasonable one. Teachers must make whatever reasonable use of whatever resources they have. The children were 11 years of age and leaving them unsupervised for brief periods did not constitute a major danger, in terms of the activities they were pursuing.

There have been other cases where the courts have found no breaches of duty in the supervision of sports or playground activities, despite the absence of all teachers at the time of the accident. See, for example *Clark v Monmouthshire County Council,* (1954) 52 LGR 246, where a schoolboy aged 13 was accidentally stabbed in the leg by another boy in the course of a scuffle during the morning break in the playground. There was no teacher present at the time. The Court of Appeal held that there was no negligence on the part of any member of the staff in not knowing that one of the boys was in possession of a knife; nor was there negligence in the total lack of supervision. Denning J stated: "It was said that in the playground on this occasion there was no prefect, whereas usually there were two prefects. Apparently the two prefects had been sent out to mark points on a cross-country run. I do not think that was negligence. The master on duty passed through the yard twice during the break. The duty of a school does not extend to constant supervision of all the boys all the time; that is not practicable. Only reasonable supervision is required ... Furthermore, the incident happened in a flash. There was just a scuffle between two boys trying to get a knife from a third boy. It was the sort of scuffle which would pass unnoticed in a playground in the ordinary way. The incident would take place in the fraction of a second which the presence of prefects, or indeed of a master, would not have done anything to prevent at all."

In *Ricketts v Erith Borough Council* (1943) All ER 629, a boy of 10 left the school playground during the midday recess and bought a bamboo bow and arrow at a nearby shop. (Children, with permission, were able to leave the playground through an unlocked gate to buy sweets or to go home for lunch.) On returning, the boy fired the arrow in the playground, where some 50 children were playing, and it struck the six-year-old plaintiff. There was no teacher continuously in the playground but from time to time a teacher would go into the playground to check that everything was all right. Tucker J held that the system of supervision was reasonably adequate in all the circumstances. "I find it impossible to hold that it was incumbent to have a teacher, even tender as were the years of these children and bearing in mind the locality of this school, continuously present in that yard throughout the whole of this break; and that nothing short of that would suffice. Unless that is their duty, nothing less is any good, because small children, or any child, can get up to mischief if the parent's or teacher's back is turned for a short period of time."

There is therefore no categorical duty to provide constant supervision.

In *Carmarthenshire County Council v Lewis* (1955) AC 549, Lord Oaksey stated that "to hold that education authorities are bound to keep children under constant supervision throughout every moment of their attendance at school ... is to demand a higher standard of care than the ordinary prudent schoolmaster or mistress observes".

The plaintiff will have a better chance of success if it can be shown that there was a known hazard with foreseeable risks, particularly if there had been previous incidents, or unenforced rules, or lack of action by the authorities in the face of obvious danger.

In general, it seems to be the judicial view that intermittent supervision may suffice.

The school with a demonstrable "system" of care is a difficult plaintiff target

In the light of the earlier comments on difficulties of proving causation when alleging negligent and inadequate levels of supervision, plaintiff lawyers should be aware of a secondary factor that sometimes makes proof of liability even more difficult.

If a school can show that it had a generally well-designed, well promulgated, well audited, and well implemented system of supervision, covering reasonably foreseeable eventualities and providing "Plan B's" for contingencies, then proving a breach of duty by that school can be an uphill battle.

"Conscientious performance of the letter and spirit of the roster system was thus ensured. The evidence showed that the staff of this school were alive and responsive to their legal and social responsibilities towards their students." [See: *H v Pennell and State of South Australia* (1987) 46 SASR 158 at 164.]

Plaintiff lawyers might therefore seek, as a matter of strategy, to crack such armour by showing that the conduct of the teacher flew in the face of well-established and well understood expectations. ■

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