Dr Tronc gives a comprehensive review of recent developments in the liability of schools for the safety and welfare of their students. A major focus is on the responsibilities arising during excursions and outings, especially to places where potential dangers abound. The full version of this article can be found at http://www.apla.com/member/plaintiff/index.htm

SCHOOLS and

Some backdates, updates & mandates

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"BACKDATE" NO. 1 – THE LEGAL DANGERS OF OUTDOOR EDUCATION

Taking inexperienced schoolchildren into obviously dangerous areas

The tragic deaths of a number of Australian adventure holiday tourists, in a canyoning accident at Interlaken in Switzerland, make it appropriate to reconsider the 1985 case of *Nicholas v Osborne and Ors* (unreported, Victorian Cty Ct, Lazarus J, 15 November, 1985).

The case involved a claim for damages by a pupil of the Nunawading High School against three teachers at the school and against the State of Victoria. The claim arose out of events which had occurred two years earlier in the course of a school excursion to the Cathedral Ranges in Victoria.

The plaintiff, then 14, went on an excursion with class members who had studied a subject called "Bush Craft and Camping". Part of the course was a three-day, end-of-term camp. One of the teachers prepared a submission which the Victorian Education Department formally approved.

While the plaintiff and twenty fellow students, accompanied by the three teachers, were hiking in single file up a narrow track, she fell onto some rocks. Although she was not seriously injured, the plaintiff was shocked when another

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the law

class member had a serious fall soon after. The teachers were of the view that the head injuries which the student had suffered in his fall called for specialist medical attention. Two teachers returned with the majority of the students, to arrange a rescue mission, leaving the plaintiff and the other teacher with the injured boy.

The weather deteriorated, and during the night, the boy with the head injuries died, and his body could not be moved until sunrise. The plaintiff suffered nervous shock, as a result.

His Honour held that the teachers' duty was to take reasonable care for the safety of the students and, where the failure to take the right course could very easily lead to death or serious injury, the standard of care required was very high. His Honour held that permitting a number of the children, and in particular the plaintiff and the boy who had died, to take a higher branch of the track, which was much more dangerous, had amounted to negligence on the part of the three teachers.

His Honour said:

"In my view, if this walk was to be undertaken at all, the ratio of teachers to students and the overall number of teachers in itself were both inadequate. It is said that Departmental guidelines at that time stipulated a ratio of at least 1 to 10. Here was a ratio of 1 to 7. The requirement laid down by the guidelines is of course a factor to be considered, but it is no more than one factor. In my judgement the dangers inherent in the walk in question were such as to render it necessary that more than three teachers be present."

His Honour also held that it was negligence on the part of the relevant officer of the Victorian Education Department to approve of the excursion with only three teachers. The State of Victoria was therefore vicariously liable for the negligence of each of these four persons.

That would have been sufficient to ▶

Photo from the Taylor Collection.

dispose of the issue of liability, but the case had been pleaded on a much wider basis, namely that it was negligent for the walk to be undertaken in the prevailing climactic conditions, or at all, and His Honour therefore dealt with the wider grounds.

His Honour emphasised the fact that:

"It was virtually inescapable that if one was injured in the middle reaches of the walk in the afternoon and rendered incapable of walking out, then adequate medical attention would not be available until morning, a period of in the vicinity of eighteen or twenty hours. If the injury were such that it would not permit survival for that period if untreated, then death must necessarily ensue".

While the excursion had required the consent of the parents of the participants, he was not satisfied that the consent had been an informed consent, because the parents had not been informed of the rugged and hazardous conditions.

It was also found that there was at least a real and substantial risk of serious injury being sustained in the particular circumstances, including the degree of supervision possible, the inexperience of the children, their age, the weather conditions and in particular the amount of recent rain and the likelihood of further rain.

In His Honour's judgment:

"There was extraordinarily little to be gained by this day's exercise, a great deal to be lost by it, and a wealth of far preferable alternatives".

Mountain death by hypothermia

In what can now be seen in hindsight as a significant precursor to the *Nicholas v Osborne* case, and also involving a bushwalking death in the mountains, with badly planned and ill-advised outdoor education activities in foreseeably dangerous circumstances, was the coronial inquest held upon the body of Glen William Matters, (unreported, Hicks SM, inquest No. 60 of 1973, 27 March 1973).

The setting for this tragedy was a bus trip and 8-day hike around Cradle Mountain Tasmania, by 20 students of the Footscray Institute of Technology, aged 15 to 18 years, and led by two teachers.

The salient points uncovered by the inquest were: a general belief that clothing worn by the students was sufficient for "bad weather", when, unfortunately, rain, wind, intense cold, snow, darkness, and heavy sleet instead overwhelmed the party; a lack of adequate prior inspection by the leaders of each student's equipment and clothing; and a realisation that inappropriate footwear, which repeatedly comes off in snow and slush, can tragically lead to hypothermia and death.

The buck stops here - it's not the bus company's total responsibility

Another coronial inquest, concerning Tanya Helen Hewet, (unreported, *Ahern* SM, 22 December 1980) investigated the drowning death of a fifteen year old schoolchild touring Kangaroo Island in South Australia. The deceased girl, with two others, was wading in the ocean, when she and the other children were caught by an undertow and swept out to sea.

At the entrance to the beach, there was a sign bearing the words, "Swimmers - Beware of Undertow".

It was clear from the evidence that teachers followed the children to the beach from the bus and that some of the children entered the water without any teacher being present on the beach itself. Teachers, giving evidence, claimed that the fatal outing was not a school "excursion", where the activity was organised by themselves, but a school "tour", where they delegated the organisation to a private company. On this basis, there was an attempt to fix responsibility for the accident on the driver of the bus.

The Coroner rejected this submission, saying:

"One can certainly have some sympathy for the teacher or teachers organising this trip, but in my view a teacher as such cannot totally delegate all responsibility to another person or persons, or albeit a company such as Quest Tours. I think the plain fact of the matter is that the children were under the immediate control or supervision of the teachers who were employed by the Education Department. Further to this, at least one of the teachers did read the warning notice to which I have referred. This, in my view, should have alerted the teacher or teachers to the possible dangers of the particular beach".

Equipment supplied to children must be safe

In *Sinclair v State of Queensland* (unreported, Qld District Ct, O'Sullivan J, 12 March 1999) a student was awarded damages for personal injury suffered when she fell from a bicycle on a forestry track at a school camp, breaking her shoulder. The fall had resulted from the bicycle supplied by the Ewen Maddock Dam Environment and Recreation Centre having no brakes and the girl's loss of control over the bicycle when she ran into loose sand and gravel. The Recreation Centre was held 80% liable for the accident and the State of Queensland 20%. O'Sullivan J said:

"Schools should be able to trust that activities organised by school camps are safe. The camp authorities should have at least warned students what to do if they found themselves in circumstances similar to those of the plaintiff."

"BACKDATE" NO. 2 – THE EDUCATION AUTHORITY'S NON-DELEGABLE DUTY OF CARE

The most common situation

A child is injured and a teacher is held to be negligent and liable (duty of care, breach of duty, foreseeability, the breach causes the injury).

The teacher is indemnified by the employer, because he/she was acting in good faith in the course of employment.

The educational authority becomes vicariously liable for the negligence of its teacher/servant.

Sometimes, the teacher is found to

be not negligent, but the educational authority is still held to be liable, because it has breached its overarching, total, non-delegable duty of care. (This is direct liability, not vicarious liability.)

Non-delegable duty of care — the standard authorities

1. *Commonwealth v Introvigne* (1982) 150 CLR 258
2. *Watson v Haines* (1987) Aust Torts Reports 80-094
3. *Warren v Haines* (1986) Aust Torts Reports 80-014

A recently decided ACT case, where the teachers and principal were held not to have been negligent, while the educational authority was held to have been in breach of its non-delegable duty of care, was *Romel El-Sheik v Australian Capital Territory Schools Authority* (unreported, [1999] ACT Sup Ct 90, Miles CJ, 27 August 1999). In this case, it was alleged that there had been a failure to ensure reasonable supervision of a high school playground, during the lunch break.

The plaintiff was kicked by a fellow student, with disastrous effect, because of his congenital condition of thrombocytopenia, whereby serious lasting injury can result from relatively minor initial trauma. The plaintiff had failed to inform school staff of his hypersensitivity, the seriousness of which he and his parents had failed to appreciate. One of the six teachers assigned to playground supervision had become aware of some sort of incident and had investigated, but by the time that teacher arrived on the scene, scuffling had ceased. However, the cessation of the incident was only temporary and after the teacher moved on, the scuffle recommenced.

Miles CJ said:

"There was nothing specific in my view to put the teacher on notice, that, unless he or she did something further or remained in proximity for a further length of time, a fight was likely to break out once he or she had moved away. In precise terms I do not find established any negligence by way of failure to supervise on behalf of that particular teacher or any other teacher on playground duty, for whom the first defendant is vicariously responsible."

Nor was the school principal held to be negligent. He had established a system of supervision which was reasonable in the light of available personnel resources:

The duty of care owed by the ACT School Authority was not of the same nature as that owed by the principal and teachers. The Authority's duty of care was a non-delegable one. Its duty was not to take reasonable care, but rather to ensure that reasonable care was taken, with respect to the plaintiff's safety during the time he was subject to the Authority's supervision.

On appeal, the decision was overturned. It was held that the necessary causal relationship had not been established between the injury and the alleged lack of supervision. However the primary judge's general reasoning on non-delegable duty of care was not disturbed.

Miles CJ applied the principles established in *Introvigne's* case, in particular relying on the judgment of Mason J. ▶

In *Introvigne*, Mason J (with whom Gibbs CJ agreed) said at 269:

"The liability of a school authority in negligence for injuries suffered by a pupil attending the school is not a purely vicarious liability. A school authority owes to its pupils a duty to ensure that reasonable care is taken of them whilst they are on the school premises during hours when the school is open for attendance".

After referring to *Carmarthenshire County Council v Lewis* [1955] AC 549, his Honour continued at 270:

"...The duty is not discharged by merely appointing competent teaching 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".

The duty imposed on a school authority was held to be akin to that owed by a hospital to its patients. The "notorious immaturity and inexperience of school pupils and their propensity for mischief" thus imposes a special responsibility on a school authority to take care for the safety of its pupils, a responsibility "that goes beyond a mere vicarious liability for the acts and omissions of its servants".

Murphy J made the following comment on non-delegable duty of care in *Introvigne's* case at 275:

"It is enough that Introvigne's injuries were due to the inadequate system of supervision and care. The system did not provide for sufficient staff to exercise proper supervision over the children in the playground. As well, there was a failure to ensure that the system was carried out. The departure from the system by the teachers was understandable because of the death of the school principal, but this does not excuse the breach by the Commonwealth of this non-delegable duty".

In *Kondis v State Transport Authority* (1984) 154 CLR 672, Mason J further explained the basis of non-delegable duty of care:

"The element in the relationship between the parties which generates a special responsibility or duty to see that care is taken may be found in one or more of several circumstances. The hospital undertakes the care, supervision and control of patients who are in special need of care. The school authority undertakes special responsibilities in relation to the children whom it accepts into its care ... In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or [their] property as to assume a particular responsibility for [their] safety, in circumstances where the person affected might reasonably expect that due care will be exercised."

The most significant part of the judgment by Miles CJ, and one which sums up succinctly the whole situation in relation to duty of care and school supervision is as follows:

"It may be doubted, with respect, that, since *Introvigne*, where the plaintiff sues the school authority, it is not correct, or at least it is not enough, to look at the claim solely as a question of vicarious liability for some act or omission on the part of some member of the school staff or some person for whose act or omission the school authority is responsible. Particularly where the plaintiff relies on lack of supervision, not only of himself and of the situation in which he was placed, but also on lack of supervision of another pupil or other pupils who injure the plaintiff in foreseeable circumstances, it is not incumbent upon the plaintiff to show lack of reasonable care on the part of any particular person. It is enough if the inference can be drawn, as it was drawn in *Introvigne*, that the school authority could have supplied a teacher to do the supervising which would have minimised the risk to the plaintiff."

"BACKDATE" NO. 3 – EDUCATIONAL ISSUES FOR EDUCATORS, NOT THE COURTS

Education is to make children self-disciplined and independent

In *Wyong Shire Council v Shirt* (1980) 146 CLR 40; 54 ALJR 283, it was held at CLR p 47; ALJR p285 that:

"the perception of the reasonable [person's] response calls for consideration of the magnitude of the risk ... along with expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have".

A defendant teacher or school authority, will only be in breach of duty if a reasonable teacher or school authority in the same position, after considering the risk, the value of activity or inactivity, and the cost or practicability of eliminating the risk, would have done more than the defendant did.

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 rigid authority.

Courts have accepted that such educational/philosophical attitudes are appropriate (*Jeffery v London County Council* (1954) 52 LGR 521 at p 523, *Wright v Cheshire* County Council [1952] 2 All ER 789, *H v Pennell and State of South Australia* (1987) 46 SASR 158 per King CJ at p 164, *Camkin v Bishop* [1941] 2 All ER 713 at p 716, per Lord Goddard, *Richards v State of Victoria* [1969] VR 136 at p 142).

Judicial consideration has also been given to the appropriateness of using the courts to challenge managerial and administrative decisions within the school's internal operations. In *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 478, a school principal punished a primary school boy in relation to his involvement in a playground fight. The parents withdrew their child from the school, then brought a case against the principal and the school board. Williams J had this to say about the role of judges in educational disputes, and the unsuitability of judicial review in relation to the managerial role of a school board:

"... except in rare cases, it would be wrong for the Court to intervene too readily in cases brought against Boards of Trustees in relation to purely managerial or administrative matters not seriously affecting the rights of students... If such matters become contentious they should be negotiated, mediated and resolved at the local level".

"UPDATE" NO. 1 – NO FIDUCIARY DUTY IN TEACHER-STUDENT RELATIONSHIP

Civil action following criminal action in sexual impropriety cases

One form of assault by teachers upon students, which is increasingly leading to court action, is sexual assault, indecent assault, or indecent dealing. In most instances, the matter is pursued by criminal charges. In this regard, it is apparent that vindictive false allegations may sometimes be made by child complainants - see, for example, *R v McPaul* (unreported, Qld Dist Court, Brisbane, Newton J, 11 May 1994).

It is also possible for a civil suit in damages to follow a successful criminal prosecution, either in substitution for, or in addition to, a claim for criminal compensation.

Where the successful criminal prosecution refers to allegations of a very old act by the offending teacher, many years in the past, an action for negligence or breach of contract will usually fail, because of the relevant Statute of Limitations. Some litigants have attempted to get around this problem of a time-bar, by relying on pleadings alleging the teacher's "breach of fiduciary duty". This equitable avenue is not generally applicable to educational cases anyway, because of the "analogy principle".

It is true that there can be damages awarded for breach of fiduciary duty - (see M. J. Tilbury, *Civil Remedies*, Butterworths, 1990 at para 1014, and also the authorities *Coleman v Myers* [1977] 2 NZLR 225, 359 and *Re Leeds and Hanley Theatres of Varieties Ltd* [1902] 2 Ch 809, 825). However, authors such as Tilbury point to the inapplicability of "equitable compensation" in cases where there is no question of "restitution" or "restoration" in the sense of returning the plaintiff to a former financial position. Rather, says Tilbury, equitable compensation corresponds largely with common law tort damages, being intended to compensate for harm done. In other words, what the plaintiff is usually claiming in an equitable action against an offending school teacher is analogous to common law damages. (See Tilbury at paras 3247 - 3249.) The availability of equitable damages depends on the court's discretion, which is more likely to be exercised, if damages are unobtainable or impossible at law, or where equitable damages are more advantageous than legal damages. [Tilbury 3258 - 3260]. Normal equitable discretionary considerations such as laches would also apply, so that the very long delay in bringing the action would further weaken the plaintiff's case.

In relation to time-bars, Meagher, Gummow and Lehane say at para 3401 of *Equity: Doctrines and Remedies* (Butterworths 1975), that "a suit in equity can be barred by the operation of a statute of limitations, either directly or by analogy".

The maxim is that "equity follows the law". This was explained in *Knox v Gye* (1872) LR 5 HL 656 at 674:

"Where a court of Equity frames its remedy upon the basis of the common law, and supplements the common law ▶

extending the remedy to parties who cannot have an action at common law, there the court of equity acts in analogy to the statute; that is, it adopts the statute as the rule of procedure regulating the remedy it affords. Where the remedy in equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the Statute of Limitations, a court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation."

The binding of equity by acts of parliament was also discussed by Isaacs J, in the High Court of Australia, in *R. v McNeil* (1922) 31 CLR 76 at 100:

"Where a court of Equity finds that legal right, for which it is asked to give a better remedy than is given at law, is barred by an Act of Parliament, it has no more power to remove or lower that bar than has a court of Law. But where equity has created a new right founded on its own doctrines exclusively, and no Act bars that specific right, then equity is free."

Equity refuses relief to claimants whose equitable claim is analogous to a common law claim for which a statutory limitation period has expired, by applying the statutory limitation period to the equitable claim.

Two types of cases in which equity applies a statutory limitation period by analogy were identified by Lord Westbury in *Knox v Gye* (1872) LR 5 HL 656. The first includes cases in which the equitable remedy sought corresponds to a legal remedy. In *Metropolitan Bank v Heiron* (1880) 5 Ex. D. 319 the liability of a fiduciary to account for bribes received by him was held analogous to his liability at law in an action for money had and received and thus subject to a six-year limitation period. In *Peek v Gurney* (1873) L.R. 6 H.L. 377 equitable proceedings for damages for misrepresentation were regarded as analogous to an action for the tort of deceit and time ran accordingly.

In *Paramasivam Roger v Vincent John Adams Flynn*, (unreported Fed Ct, ACT, Miles, Lehane and Weinberg JJ, No. 1711, 23 December 1998) the Full Court of the Federal Court of Australia put an effective end to attempts at using equity for avoiding time-bar limitations, by claims of breaches of fiduciary duty on the part of teachers.

It was held as follows:

"In Anglo-Australian law, the interests which the equitable doctrines invoked by the appellant, and related doctrines, have hitherto protected are economic interests". (See para 68 of the judgment).

"All those considerations lead us firmly to the conclusion that a fiduciary claim, such as that made by the appellant in this case, is most unlikely to be upheld by Australian courts. Equity, through the principles it has developed about fiduciary duty, protects particular interests which differ from those protected by the law of contract and tort, and protects those interests from a standpoint which is peculiar to those principles". (At para 79).

"Here, the conduct complained of is within the purview of the law of tort, which has worked out and elaborated principles according to which various kinds of loss and damage, resulting from the intentional or negligent wrongful conduct, is to be compensated. That is not a field on which there is any obvious need for equity to enter, and there is no obvious advantage to be gained from equity's entry upon it. And such an extension would, in our view, involve a leap not easily to be justified in terms of conventional legal reasoning."

In reaching these conclusions, the court drew on statements made by the High Court of Australia in *Breen v Williams* (1996) 186 CLR 71.

"UPDATE" NO. 2 – UPDATING PLANT AND EQUIPMENT WITH CHANGING BUILDING CODES AND STANDARDS

It may have been ok then, but —

In *Cardone v Trustees of the Christian Brothers* (1995) 130 ALR 3435; (1995) 57 FCR 327, a boy suffered severe lacerations to his arm, when he tripped and fell through a glass door at his school. He suffered permanent injury that seriously limited his future employability. The glass door had been installed in 1966, at a time when safety glass was not a requirement of glass doors in schools. In 1972, the relevant building code changed, to make it mandatory for such doors to incorporate safety glass.

It was held that the school authority had been negligent in not replacing the glass doors with safety glass, because it should have become aware of the improved safety standards, and because the costs of improving those standards were relatively modest, by comparison with the risk of injury if safety glass was not installed. The implications of this judgment are that school authorities cannot feel complacent in the knowledge that their premises and equipment comply with standards previously applicable. They must keep themselves informed of changing building codes and standards, and undertake regular "risk audits".

"UPDATE" NO. 3 – NEGLIGENT FAILURE TO INTERVENE IN TEASING BULLYING

Don't take risks - bullying can escalate

A case involving both emotional bullying by teasing, together with a physical assault by a violent aggressive student upon a slow learning student, both enrolled in a "last chance" high school, was *Stephens v State of Victoria* (unreported, County Court of Victoria, Ostrowski J, No. 99207719, 2 June 1998). The State of Victoria was held vicariously liable for negligence by a teacher who had failed to act decisively and authoritatively to intervene in an aggressive student's teasing, which preceded his assault upon another student. The teacher had failed to appreciate the potential risk in the situation and had thought there was no possibility of it escalating into violence.

The judgment also queried how the actual conduct of the teacher on the spot measured up against that of a reasonable teacher in the same circumstances.

By failing to act authoritatively and immediately, and failing to appreciate the seriousness of the situation, "he deprived himself of the opportunity of taking the final step of separating the plaintiff from his attacker" and was in breach of his duty of care towards the plaintiff. In obiter, Ostrowski J was of the view that the school principal could also be said to have been in breach of his duty of care and had

deviated from the course of conduct of the reasonable principal, by accepting violent or aggressive students to the school, without properly checking on their past histories and obtaining their records from schools previously attended.

It was also held that "by common sense and common experience", injury resulting from a blow with the hand to the face, is foreseeable in every school where there are 17 and 18 year olds, but particularly in a "school of last chance" catering for students with behavioural problems.

The lack of sufficient available teacher supervision or intervention, in situations where a volatile and aggressive student was known, on past experience, to have been a threat to his/her colleagues, was also seen to establish the necessary foreseeability for negligence, in:

- *Dunn v State of Victoria* (unreported County Court of Victoria, Dove J, No. P103912/1995, 27 May 1997)
- *Gray v State of New South Wales* (unreported, NSW Sup CT, Grove J, No. 191/94, 27 February 1998).

"UPDATE" NO. 4 – IGNORING MAKESHIFT POTENTIALLY DANGEROUS PLAY MATERIALS CAN BE NEGLIGENT

That's not cricket

A case where teachers were held not to have taken the necessary precautions against the foreseeable risk of injury commensurate with the degree of risk, was *Vandescheur v State of New South Wales* (unreported [1999] NSWCA 212, Giles, Fitzgerald JJA and Cole AJA, No. 41066/98, 1 July 1999).

It was held by a majority of the New South Wales Court of Appeal (Cole JA dissenting), that there had been a "substantial risk" associated with a particular game of schoolyard cricket being played at recess time.

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 gaps and bars in the metal grille were at right angles to the path. The players frequently slid the bat across the grille as they ran towards the crease.

The bat was a 60 cm long broken slat from a dilapidated seat, with a sharp, jagged end for a handle. There was an obvious risk of the bottom end of the bat being caught in a gap in the grille, and the jagged handle causing injury to a player, as did happen to a boy, who was seriously injured.

This activity, which the boy and his schoolmates had engaged in for a couple of weeks, was known to, and approved by, teachers. One teacher was watching the game when the boy was injured.

The trial judge held that "... the risk of serious injury in the course of playing the game was not far-fetched or fanciful and was therefore foreseeable", but that "... it simply did not occur to any of the teachers that the game constituted a risk of serious injury". However, his Honour considered that what occurred was "a freak accident ..." and that "... the magnitude of the risk was so slight and the degree of the probability of its occurrence so small, that a reasonable [person] in the position of the supervising teachers would not have acted to prevent the game continuing". However, the Court of Appeal rejected the trial judge's finding:

"In my view, the trial judge's critical conclusion that a reasonable person in the position of the supervising teacher would not have acted to prevent the game continuing was incorrect. I am satisfied that there was a substantial risk associated with the activity, and that the teachers breached their duty of care to the appellant when they permitted him to continue." (Per Fitzgerald. JA.)

"UPDATE" NO. 5 – PREVENTING UNSUPERVISED USE OF SCHOOL PLAYGROUND EQUIPMENT IN NON-SCHOOL HOURS

If you invite them in - there will be a duty of care and supervision is needed

A case involving injury during "non-school hours" was *Strath v State of New South Wales* [1999] NSWSC 391 (unreported, Master Malpass, No. 17586/1985, 30 April 1999), where a child with pre-accident intellectual deficits fell from playground equipment, (a log fort in a school playground), after returning to the school grounds following the end of the school day and gaining access to the playground by scaling a brick fence. In the fall, the plaintiff child, then aged 8 years of age, suffered severe head and hip injuries, and further intellectual retardation. While duty of care was not in issue, breach of the duty of care was in issue.

The evidence showed that the school-grounds were regularly used for play by children in non-school hours. Access to the grounds was easily had by climbing over the brick fence. The school authorities knew that children were playing on the grounds in non-school hours, (there could be up to thirty children on the grounds when several soccer matches were played in the tennis court area), and steps were taken to prevent this happening. There had been oral instruction to leave the school grounds given to particular students found there during non-school periods (including to the plaintiff shortly before the incident). The matter had been the subject of comment at school assembly and newsletters were sent to parents informing them that the school was out of bounds during non-school hours. There was a patrol of the perimeter of the school buildings made at the end of each school day. The court found that the defendant education authority was not liable in negligence, there having been no breach of the duty of care.

Photo from the Taylor Collection.

"UPDATE NO. 6 – IN ANTI-DISCRIMINATION CASES, FOCUS ON A COMPARISON WITH OTHER STUDENTS, NOT A COMPARISON WITH THE IDEAL

In *"A" School v Human Rights and Equal Opportunity Commission & Anor* [1998] 1437 FCA (Fed Ct, Adelaide, Mansfield J, 11 November 1998), the issue of "direct discrimination" was considered. A student with Perthe's disease, involving a hip disability and a consequent inability to negotiate steps to upstairs lessons and equipment, had claimed to have suffered personal distress, a breakdown in psychological health and a lack of achievement, because the school had treated her less favourably than other students, and was unresponsive to a "desperate cry for help" from her father that she should have received more assistance. The claim was based on an alleged breach by the school of s5 of the *Disability Discrimination Act* 1992.

The Commission, in the primary finding of the case, held that direct discrimination had been substantiated and the school "could and should have striven to do more" for the student, in a general context of "a lack of ongoing pastoral care". It was further held that "a more sympathetic and relevant response ... should have been made".

The Federal Court overturned the Commission's finding of direct discrimination, on the grounds that an incorrect comparison had been made in terms of s 5, between the actual treatment of the student and what ideally she might have received, rather than how the student's treatment was different from that which would have been accorded to other students without her disability, in the same or similar circumstances.

"UPDATE" NO. 7 – VICARIOUS LIABILITY EVEN FOR NEGLIGENCE OF STUDENT SPOTTERS

In *Duncan v Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn* (unreported, ACT Sup Ct, Higgins J, SC101/1995, 14 October 1998), a teacher was held negligent for failing to reinforce safety rules and ensure that students fully understood their instructions in a gymnastics class involving handstands. The school authority was held vicariously liable not only for the teacher's breach, but also for the breach by another student acting as "spotter", when a girl fell and injured herself during a handstand, as a result of not being properly supported.

"UPDATE" NO. 8 – INADEQUATE LEVEL OF SUPERVISION CAN BE NEGLIGENCE

Assault by one student upon another, usually accompanied by allegations of inadequate levels of teacher supervision, may also be the subject of court action.

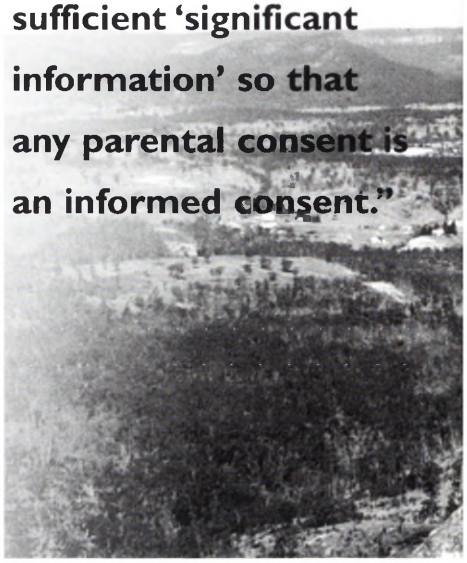
In *Miller v Sotiropoulos* (unreported, NSWCA, Mason P, Meagher and Powell JJA, No. CA 40615/96, 18 August 1997), having witnessed an exchange of words and a misdirected Karate kick between two boys, one of two teachers on duty supervising the area immediately intervened and began to move one of the protagonists from the scene. As the boys were being separated by the teacher, there was a further exchange of angry words between the boys, a push and then a heavy punch in response. The trial judge had concluded, and his decision was not disturbed at appeal, that the staff at the school had taken all such steps as ought reasonably to have been taken by them in order to prevent injury to the pupils.

In *Gray v State of New South Wales* (unreported, NSW Sup Ct, Grove J, No. 191/94, 27 February 1998) during a rainy lunch period with inadequately supervised students eating lunch inside a double-demountable school building, a child known to be given to harassment shattered the knee of an already disabled child. The principal and teachers were held negligent on the basis of insufficient supervision.

"UPDATE" NO. 9 – NORMALLY, THERE MUST BE PROOF OF "CAUSATION", IN CLAIMS OF NEGLIGENT SUPERVISION

DUTY OF CARE	usually easily provable
BREACH OF DUTY	not so easily provable

"Parental consent forms must provide sufficient 'significant information' so that any parental consent is an informed consent."



FORESEEABILITY	usually almost a foregone conclusion
PROXIMITY	usually easily provable
CAUSATION	often a major stumbling block for plaintiffs - has it been satisfactorily proven that more supervision, or any supervision at all, would have prevented the injury? Situations where incidents happen suddenly, "out of the blue", pose a difficulty for proving causation, and such cases often fail.

By contrast with the above cases in Update No. 8, where, on reading the judgments, it would appear that there was apparently little judicial consideration given to the line of "no causation" cases in relation to allegedly inadequate levels of teacher supervision, Gallop J, in the appeal *Commonwealth of Australia and Australian Capital Territory Schools Authority v Stokes*, (unreported, ACT Sup Ct, Gallop J, No. SCA 38/1996, 15 November 1996) overturned a magistrate's decision that there had been a breach of the duty of care arising from inadequate teacher supervision of a lunch-hour table tennis game at the Wanniassa Primary School. An attempted takeover of the game by students who had not been given permission to play, led to a boisterous swinging of a table tennis bat and subsequent injuries to the

mouth and teeth of a student who was struck by the bat, which flew through the air out of the hand of its user.

Gallop J considered the authorities of *Rich, Richards, Bills, Geyer, Bryar, Beaumont, Introvigne, Williams, Edgecock, Jeffery, Lewis,* and *Clark* and held that no causal connection had been established between the injury and the level of teacher supervision. His Honour, quite unusually, began his judgment with a figurehead quotation:

"One can supervise as much as one likes, but one will not stop a boy being mischievous when one's back is turned. That, of course, is the moment he chooses for being mischievous." (*Rich v London County Council* (1953) 1 WLR 895 per Hodson L.J. at 903.)

"UPDATE" NO. 10 – CONSENT IN PARENTAL PERMISSION NOTES MUST BE INFORMED CONSENT

Uninformed consent is no consent

Parental consent forms for students' participation in away-from-school activities such as excursions, camps, and educational visits and inspections must provide sufficient "significant information" so that any parental consent is an informed consent. In *Nicholas v Osborne and Ors* (unreported, Victorian Cty Court, Lazarus J, 15 November 1985), a case where a student died as a result of a fall during an outdoor education bush-walking camp, it was held that the parental consent form for student participation had been inadequate:

"It was asked of Mrs Osborne whether the information given to parents informed them that the route traversed rugged and difficult terrain, where one slip could well lead to head injury, and that if that occurred in given conditions, the area was so inaccessible and even communication so difficult, that survival was not reasonably to be expected. None of this information was given. This, of course, means that the consent was not an informed consent. More importantly for present purposes, it is reasonable to suppose that no parents would have consented."

"UPDATE/BACKDATE" NO. 11– THE LEVEL OF AVAILABLE RESOURCES IS A SIGNIFICANT FACTOR IN DETERMINING ADEQUATE LEVELS OF SUPERVISION

Make It Stretch, Make It Do

Courts have shown a sympathetic understanding for the real-life situation of resource availability, and have been prepared to take this into account, when considering the adequacy of teacher supervision.

In *Barker v The State of South Australia* (1978) 19 SASR 83, Jacobs J, declining to find the necessary proof of causation between a twelve-year-old child's injury, and a short absence from the classroom by the teacher, said about educational resources:

"To assert that the school must accept liability for any hurt suffered by a child during the temporary absence of a teacher from the classroom and that the school must have a communication system and stand-by staff to cover any such absence, is to demand a standard of absolute perfection, at least with children beyond primary school age. Different considerations may of course apply to very young children."

In *Keen v State of Queensland and Dwan* (unreported, Qld Sup Ct, Stable SPJ, 21 July 1978), a pupil had been blinded in a lunchtime playground accident at a one-teacher school, while playing a prohibited game called "Around the World", which involved the throwing of sticks. Dwan, the teacher/principal, had previously caught the children playing the game, warned them not to play with sticks and had burnt the sticks in the incinerator.

On the day of the accident, Dwan went to his teacher's residence next door, to eat lunch. While having his lunch, he looked out of the window three times to check on the children. It had been suggested in cross-examination that Dwan could have walked around the playground while eating his lunch. Stable J said:

"Such a proposition seems to me to be somewhat unreal, as would a suggestion that a teacher in sole charge of such a school could go to the lavatory only at his peril, between the arrival of any children at the school, and their departure."

"UPDATE/BACKDATE" NO. 12 – DON'T LET THEM GET EATEN BY THE BEARS

Excursions are a popular part of primary school learning, used for broadening the first-hand experiential background of young children. But because the educational excursion involves a movement away from the known predictable environment of the school, out into "foreign territory", a higher standard is set for the duty of care. Excursions to zoos and animal parks are particularly popular, but potentially very dangerous for young children, if adequate supervision is not provided. Teachers planning such outings need to bear in mind the high foreseeability of accidental injury to young children because of their inexperience, wilfulness, curiosity and inability to foresee dangerous consequences.