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WHEN IS A TEACHER OR SCHOOL LIABLE IN NEGLIGENCE?

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ABSTRACT

The law is increasing affecting the practice of education. The most likely reason a teacher or school will face legal action is in negligence where a student has been injured while under the school's protection. This may occur in a variety of settings. To satisfy the elements of the tort of negligence the student who becomes in law the plaintiff must prove that a duty of care was owed, that the duty was breached, by not maintaining the appropriate standard and that the injury was a reasonably foreseeable consequence of that breach of duty. It would be rare for a teacher to face criminal charges but it could happen if a teacher had an intention to harm or acted recklessly.

INTRODUCTION

Litigation is becoming more prevalent in all areas of society and education is no exception. Professionals generally are being held more accountable for their actions. Parents and students are more aware of their rights and it would seem by the increase in litigation more willing to pursue those rights through the process of litigation to recover compensation. A legal cause of action may arise in many instances. Litigation may follow breaches of the Education Act, negligence, breach of contract, defamation, assault and an emerging area of educational negligence or educational malpractice.

Negligence in terms of physical injury suffered by students is only one aspect of litigation, which a teacher may face. Nevertheless, it is suggested that it is the most likely reason a teacher will face legal action. It is therefore of great importance that teachers and school authorities are aware of how the law of negligence operates and what is acceptable and unacceptable practice.

Cotton (1995) writes that while physical educators in the United States have some basic knowledge of negligence most are unaware of how the law operates and the liability of teachers. The situation is similar in Australia. As litigation increases within the education sector and society in general it is the responsibility of schools and teachers, not only in an effort to reduce the risk of harm to students by a greater awareness of potential hazards but also by a knowledge of how the law of negligence operates.

The purpose of the paper is to identify and clarify the law of negligence, how it operates within a school environment and offer suggestions as to how litigation can be avoided or at least the potential for such an action reduced. Case law will be presented to represent the elements a plaintiff needs to prove in an action of negligence. Criminal negligence will not be addressed.

NEGLIGENCE

Negligence is part of tort law and deals with grievances between individuals where one party has suffered as a result of something the other party did or did not do. The purpose of negligence is to receive compensation for the injuries sustained.

Educational negligence or educational malpractice is an emerging area of litigation in the Great Britain and the USA. To distinguish this area of litigation from negligence where a physical injury is suffered by a student educational malpractice refers to a claim by a student that a school/teacher has failed to facilitate learning (Australian Professional Liability (2000) 2,206). The American courts have rejected educational malpractice as a basis for a claim however the English courts have been more willing to embrace the concept where it pertains to children with certain learning disabilities (Williams, 1996, p. 306). The English Court of Appeal in E (a minor) v. Dorset County Council & Other Appeals [1994] 4 All ER 640 stated that failure to identify and meet the educational needs of certain students with learning disabilities were not unarguable under English negligence law (Williams, 1996, p. 281). The position in Australia remains unclear but according to Williams, 1996, p. 306) it may only

be a matter of time before an Australian court accepts educational malpractice as a head of damage.

The more common injury suffered by a student who in law becomes the plaintiff is a physical injury as a result of an act or omission and liability will be determined according to whether a reasonable person or in this case the reasonable teacher would or would not have acted in the same way given the circumstances.

There are two aspects to negligence in schools.
1 The negligence of teachers to students.
Teachers have a duty of care to students to provide adequate supervision. This may occur in the playground, on the sports field, in the classroom or on an excursion. Under the doctrine of vicarious liability the school authority may be liable to pay the plaintiff for the negligence of teachers. It does not however, negate the personal liability of the teacher.
2 The negligence of school authorities.
Negligence of school authorities may arise where the grounds or equipment are unsafe and a student is injured. School authorities have a non-delegable duty to students to ensure that reasonable care is taken for the safety of children at school (Watson v. Haines (1987) ATR 80-094).

Negligence Defined

For an action in negligence to be brought against a teacher or institution it must be established that a duty of care existed, that it was breached by either an act or omission, that the student suffered damage and that damage or injury was a reasonably foreseeable consequence of the breach.

To be successful in a case of negligence the student as the plaintiff sues the teacher &/or the school authority as the defendant. As the child is a minor the parents bring the action on the child's behalf as the 'next friend'. An important point to note is that statute of limitations allows the parents of a child to bring an action until the child is 18 and then the child has the normal statutory period of six years in Western Australia, ACT and Victoria and three years in NSW, Queensland, SA and Tasmania in which to bring an action.

To be successful in an action of negligence the plaintiff must prove all elements of negligence according to the civil standard of proof, which is, on the balance of probabilities. This means the plaintiff must satisfy the court that his or her version of the events is more probable than not. The plaintiff must first prove that he or she was owed a duty of care. It would be extremely difficult for a defendant to successfully argue that a student was not owed a duty of care. Secondly, that a breach of duty care or the required standard of care was not met and finally that the injury was caused by the breach of duty. Each element of negligence will be presented with reference to appropriate case law.

1. DUTY OF CARE

Duty of care is the first element of negligence and is concerned with relationships between people. The celebrated case of Donoghue v. Stevenson [1932] 1 All ER 1 changed the law of negligence. Lord Atkin in Donoghue v. Stevenson, established who ones neighbour is in law and hence to whom a duty of care is owed. Lord Atkin asked the question, "who in law is my neighbour"?

The answer seems to be persons who are so closely affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question (Donoghue v. Stevenson [1932] at 11).

In other words a person must take reasonable care to avoid acts or omissions which would be likely to injury another person where it is foreseeable that such an injury could occur given the circumstances. A duty of care arises out of the relationship between the student and the school and is well established in education regulations and at common law.

[I]t is now clearly established by authority that in general a schoolmaster (sic) owes to each of his pupils whilst under his control and supervision a duty to take reasonable care for the safety of the pupil. It is not, of course, a duty of insurance against harm but a duty to take reasonable care to avoid harm being suffered (Richards v. State of Victoria (1969) VR 136 at 138).

The relationship between teachers and students imposes a duty of care on teachers. This duty is not absolute and only extends to protection from harm where the risk of injury is reasonably

foreseeable. The higher the risk or potential for danger the greater the duty imposed on the teacher.

The reason underlying the imposition [of a duty of care] would appear to be the need of a child of immature age for protection against the conduct of others, or indeed of himself, (sic) 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 over him and afford him in the exercise of reasonable care, protection from injury (Richards v. State of Victoria (1969) at 138-9).

Foreseeability

Foreseeability plays an important role in the determination of a duty of care such that if the consequences of the act or omission are likely then the teacher or school authority is liable. In high risk situations teachers have a higher duty imposed to supervise the activities of students more closely and to provide proper instructions to the students (Hammes, 1979). In other words the greater the risk the higher the duty. As Justice Carruthers in Warren v. Haines (1986) ATR 80-014 at 67,634 points out, a risk of injury is foreseeable so long as it is not far-fetched or fanciful.

The court in determining the liability of the defendants establishes whether the risk of injury was foreseeable, what the school or teacher could have done to reduce that risk being mindful of factors such as the magnitude of the risk, the age of the children and the cost of eliminating the risk. In many cases where the plaintiff has failed to prove their case the school or teacher have acted reasonably in the circumstances rather than the injury not being foreseeable (Edwards, Knott, Riley (1996) pp. 96-97).

The case Giliauskas v. the Minister for Education (1969) Unreported WA Supreme Court No 65/1969, 3 July 1969 illustrates foreseeability. A group of eight-year-olds were taken on a school excursion to the zoo. Following lunch, which the students ate, on a grassed area one of the teachers allowed them to wander around in pairs and view the animals. She had previously taken them around the cages and had spoken to them about the dangerous characteristics of many of the animals. The plaintiff and his friend were feeding the bears peanuts. There was some dispute as to how the plaintiff came to be in the safety area. The distance from the safety fence to the cage was 42 inches, which was too far for the bear to reach him had he not fallen or climbed over the fence. He had probably climbed over the fence to retrieve peanuts. The bear grabbed the plaintiff, pinned him against the bars and injured him. The resulting injuries consisted of severe facial injuries and injuries to his arm.

There is no question that the teacher owed the students a duty of care. The court had to establish whether the teacher had failed to take such precautions for the safety of the plaintiff as a reasonable parent would have done in the circumstances. The court found the defendant, the Minister of Education, was liable under the doctrine of vicarious liability for the injuries caused by its employees. Given the age of the children it was not sufficient just to warn them of the dangers. Adequate supervision should have been provided. The injuries suffered by the plaintiff were a reasonably foreseeable consequence of the breach of duty by the defendant.

The duty of care extends to children not only during school hours but also outside school hours where the students are on school property. The point is illustrated with the High Court decision in Geyer v. Downs and Another (1977) 17 ALR 408. The appellant an eight-year-old child was injured when she was struck on the head by a softball bat wielded by a fellow pupil. The incident took place at 0850 hours, 10 minutes prior to the commencement of school. The Blacktown Primary School in Sydney opened the gates to children at 0815 hours but the children were not under formal supervision until 0900 hours. The headmaster issued instructions that the students were not to play games during this period but were to sit in the playground and talk or read. The students were not actually supervised except as teachers passed through the grounds or as the headmaster looked out of his room.

The question for the court was whether a duty of care was owed outside school hours. The court found the headmaster owed the student a duty of care and that he should take such measures that were reasonable in the circumstances to prevent physical injury. By virtue of the fact the

headmaster had opened the gates, allowed the children in and exercised some authority over them established a duty of care such that the plaintiff was able to recover for the injuries suffered (Stephen J at 411-412).

2. BREACH OF DUTY

Once a duty of care is established the court determines whether a breach of duty has occurred. In other words, was the required standard of care met or did the defendant's conduct fall below the expected standard of care, on the occasion in question.

Standard of Care

Courts have in the past stated that the standard of care required of a teacher is that of a reasonable parent or *in loco parentis*. Nevertheless, difficulties emerge with applying this standard to a teacher. First, it is difficult to equate a school environment with that of a home. A teacher may be responsible for a large school or class and may be unable to act in the same manner as a parent on a one to one basis or with a small number of children. Secondly, teachers are required to undergo education and training in order to practise their profession indicating that a different standard of care should be applied to that of a teacher (Ramsay, 1992). Justice Murphy in Introvigne v. Commonwealth (1981-1982) 150 CLR 258 commented that the legal responsibility of a school may in many respects go beyond that of a parent and the duty of a school should not, be equated with a home. According to Justice Murphy a better analogy is with a factory or hospital. The school has the right to control what goes on just as an employer has a right to control what happens in its employment. The standard of care owed by a school or teacher is now said to be much higher than the previous standard of a reasonable parent (Edwards, Knott, Riley, 1997, p. 96).

In determining the standard of care the courts apply a notion of reasonableness against which the actions of the defendant can be judged. The standard is that of an ordinary reasonable practitioner in the defendant's position. In other words was the act or omission performed by the defendant negligent in the circumstances or was it an unfortunate accident for which no one is accountable. The standard of reasonable care requires the particular practitioner to act according to the standard of the ordinary reasonable practitioner of his or her profession. There is no actual 'ordinary reasonable practitioner' but it is a concept used by the courts to determine the standard of care expected according to the particular circumstances. Each case is assessed on its own merits. Expert witnesses are called by both the plaintiff and defendant to assist the court in determining whether the act or omission of the practitioner would or would not have been done by the ordinary reasonable practitioner given the circumstances. Previous cases will be considered in determining the standard of care. Various documents such as school policy, educational statutes and regulations may also be called into question to determine if a breach has occurred in the expected standard.

The case Introvigne v. Commonwealth (1982-1982) provides a useful example of a breach of duty by a school. A fifteen-year-old student was injured prior to classes commencing. A meeting of the school staff was called by the Acting Principal to inform the staff of the death of the Principal. All but one teacher attended the meeting. The meeting took place at 0825, lasted five minutes and school started at 0830. Prior to the accident several boys were swinging on the flagpole halyard although at the time of the incident the plaintiff was not one of them. The halyard broke and the 'truck' at the top of the flagpole hit the plaintiff.

The High Court of Australia found the Commonwealth was liable for the damage caused to the plaintiff. The school authority was in breach of its duty of care, by omission, on two counts.

1 By failing to provide adequate supervision of students in the period preceding the commencement of school and

2 By failing to ensure the halyard was padlocked to the flagpole and therefore failing to provide a safe premises.

Justice Murphy stated that the reason for the meeting did not preclude the discharge of the duty though it explains why the students were left with inadequate supervision (at 280). The case is now binding authority for future cases and provides a useful example of a breach of duty by a school authority.

Two aspects which need consideration in the determination of the standard of care.

1 The standard of care may go beyond that of a reasonable parent to one of an ordinary reasonable teacher in the same situation. For instance, would the ordinary reasonable teacher have acted in the same way given the situation?
2 The age of the children and their capacity to appreciate dangers is important. The more dangerous the situation and the younger the children the higher the duty of care owed by the teacher.

3. CAUSATION

To establish the final element of negligence the plaintiff must show a sufficiently close connection between the act or omission, in other words the breach of duty, and the damage. Causation has been the most difficult element to establish and even though the above elements may have been satisfied if the damage and the breach are too remote causation is not proven and the case fails. In Chappel v Hart (1998) 156 ALR 517 a case involving medical negligence the High Court by majority found that once the breach in the duty of care had been established it was relatively easy to find that the breach had caused the damage suffered by the plaintiff. In education terms once the breach of duty has been proven the plaintiff has a less onerous task of proving the breach caused the damage.

The plaintiff may suffer physical, psychological (nervous shock - which must show a recognisable psychiatric disorder) or financial damage. The latter would be uncommon in education.

In the case of Shaw v. Commonwealth (1992) 110 FLR 379 the plaintiff was 12 years old at the time of the accident which occurred on an eight day school camp at the Oenpelli school. Shaw and a friend were unsupervised while using a trampoline. The teacher gave instructions that four 'spotters' should be positioned at the four corners of the trampoline in order to catch the person should they fall. On one particular occasion the impact of the friend landing on the trampoline was sufficient to catapult the plaintiff off the trampoline onto the hard ground. She experienced a 'jarring' feeling in her knee and hip and grazed her knee. Following the incident the plaintiff informed the teacher who did nothing. The student then joined the other students on a hike but limped the whole way.

The court found the defendant was negligent in two ways. First, it was vicariously liable for the negligence of the teacher as an employee for not taking reasonable care of the child. There was inadequate supervision by the teachers. It was not sufficient to instruct students be to 'spotters'. Secondly, the defendant was also in breach of a non-delegable duty of care to students at a school it had established to ensure there was adequate supervision for the student at the time.

The risk of injury on the trampoline was reasonably foreseeable and it was not far-fetched or fanciful. There was a sufficiently close connection between the breach of duty and the injury to satisfy the elements of negligence and the plaintiff recovered for her injuries.

A standard defence to negligence is *volenti non fit injuria*, which means the plaintiff has willingly assumed the risk. The defence is narrowly interpreted and schools relying on exemptions clauses, even if signed by parents, to avoid liability are extremely unlikely to succeed. A school or parent cannot on behalf of a child contract out of a basic common law right to sue for an injury (Australian Professional Liability – Education (2000) 3,405).

IMPLICATIONS FOR EDUCATORS

Education authorities, individual schools and teachers need to understand the law of negligence and what must be proved against them to at least reduce the potential for successful litigation by plaintiffs. It is worth noting that about 99% of cases are settled out of court. The defendant accepts liability and agrees to pay the compensation conditional on the settlement remaining confidential. It in no way diminishes the fact that someone has been negligent and there may be employment repercussions even though the case was not heard in open court.

What to do if there is an accident

- Follow school policy.
- Document as many details as possible including, how the accident occurred, the nature of the injuries, who administered first aid, whether an ambulance was called, who was present at the time of the accident, the events leading up to and including the

incident, what happened subsequently and who was notified.

- The document must be signed and dated and a copy kept. Notes made contemporaneously have been shown to carry greater weight in court than a witness relying on memory. It is worth remembering the time limitations for negligence can be substantial. The quality of the documentation made at the time of the accident may be the difference between a successful defence of a claim and the plaintiff proving their case.
- If a teacher or school authority is sued that matter must only be discussed with the defendant's lawyer. An individual teacher may need his or her own lawyer if there is a conflict of interest between the teacher's liability and that of the school's. It is worth noting that no one wants to accept liability and if they can find someone else to blame they will.

Negligence is only one aspect of how the law impacts on the practice of teachers and their responsibilities to students. A knowledge of the elements of negligence is insufficient in an increasing litigious society. An understanding of the application of the principles in specific cases is essential. Each case will be assessed on its merits according to precedent. The law is constantly changing and developing and with the High Court prepared to develop negligence law to the level seen in the Chappel v. Hart (1992) decision professionals who do not stay abreast of recent changes do so at their peril. Legal issues should be a core unit in undergraduate programs and an essential part of ongoing and professional development. Evidence in the USA would indicate that school administrators rather than teachers have programs in school law (Sullivan, Zirkel, 1996). While this is important it is the classroom teachers who are in contact with students and responsible for their safety on a day to day basis. Programs need to be designed to provide teachers with knowledge of the standard of care demanded by the law and to be informed of developments in common and statutory law that affect the practice of education.

Litigation in the medical arena has burgeoned in the past decade and it may only be time before a similar increase is witnessed in the education sector. Nevertheless, a balance needs to be found between the demands of the law to take reasonable care to avoid injuries and acceptable activities for students at schools and on excursions or a great number of activities will be eliminated from school curricula.

CONCLUSION

While it may be unlikely that a teacher or school will be sued there is sufficient case law to indicate that it can and does happen. To successfully sue in negligence the plaintiff must prove all elements of negligence. If one element is missing, the plaintiff fails to prove their case. Teachers and educational institutions need to be cognisant of their legal responsibilities to students. Whether as a teacher in the classroom, on the playing field or on a school excursion a duty of care is owed to students. This manifests itself as a duty to protect students from injuries that are reasonably foreseeable. To avoid injuries which are reasonably foreseeable teachers and school authorities should at all times maintain an acceptable standard of care given the circumstances. The consequences for failing to meet the standard of a reasonable practitioner and in the event a student suffers damage, the teacher and/or institution could face an action in negligence. The law and its impact on education cannot be ignored and should not only be part of undergraduate programs but part of ongoing professional development.

Teachers have legal responsibility for the safety of their students. They are expected to act with caution, sensible leadership, and wise guidance. Their legal brief is to assess the foreseeable dangers, to guard against risk, to take reasonable precaution against injury and, above all, to generally behave as superior parents would be expected to act in the nurture and training of their own children (Tronc 1996, p. 19).

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