

Education Law Today

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every child
matters

Educational Malpractice

Educators are aware of their duty to take reasonable care for children under their control. This duty most commonly comes to the fore in respect of claims for physical injuries sustained by students at school, during excursions or while undertaking sporting activities.

A successful negligence claim can arise where the student establishes the existence of the teacher – student relationship; there has been a breach of some aspect of the duty of care and where injury, loss or damage has been caused by that breach.

What is not as widely known is that teachers and schools are exposed to the risk of educational negligence claims (or “educational malpractice” claims as they are known in the United States) in certain circumstances. Such claims generally arise out of an allegation that the school authority or its teachers failed to identify or rectify a particular disability; place the student in an incorrect program; incorrectly assessed the student or taught the student the incorrect syllabus. Educational negligence claims may arise both by reason of acting incorrectly or failing to act at all. Such cases are relatively rare in Australia and the United States but there have been a number in the

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United Kingdom which have provided useful insight into this area. It must be remembered that Australian Courts often follow trends established in the UK and for this reason any case arising from the UK in the education sector is often of great interest to Australian educators.

The High Court of Justice in the UK revisited the question of educational negligence in the matter of *Crowley v Surry County Council & Ors* [2008] EWHC 1102 (QB). The case considered the duty of educational authorities responsible for the provision of public education and of the professional individuals for whom such an authority may be vicariously liable.

The case involved a 24 year old man, Anthony Crowley, who had a difficult and unhappy educational history. He went to a special needs school at the age of 12 and a half years. He was diagnosed with schizophrenia at an early age and had been under regular psychiatric supervision since an early age.

The evidence indicated that all the professional individuals involved in his care whilst at school were aware that Anthony required additional help. However, the degree and type of help Anthony required was either disagreed upon or not adequately communicated between his health professionals and the educational authorities at the time. Anthony had a number of special needs including a language disorder, speech disorder and the schizophrenia mentioned earlier.

The local educational authority, Surry County Council, categorised Anthony as requiring special educational needs.

Anthony sought damages for the alleged failure of the individuals (for whom the educational and health authorities were vicariously liable) to recognise and act appropriately in respect of his alleged learning disability. There was also an alleged systemic failure to identify his disability for which the local educational authority was responsible. Anthony alleged that, had

these failures not occurred, he would be better able to cope with and recover from his psychiatric condition and would have been able to lead a semi-independent life working in a sheltered environment.

The Court found that an educational psychologist who failed to test the plaintiff's reading and comprehension skills was not negligent because he exercised his professional judgment in a way consistent with how other professionals would have exercised that judgment at the time. The court also held in relation to one established breach that there was no causative link between that breach and Anthony's present circumstances. This was a negligent report prepared by the head of paediatric and language therapy of the local health authority which his Honour found was below requisite professional standards at the time. However, his Honour held that the report had no effective influence on Anthony's present circumstances because the report was not relied upon.

Moreover, his Honour found that the profile and tested data for Anthony at the time was not typical of someone with a specific language disorder. Therefore, the professionals looking after him were not negligent in failing to properly diagnose or assess him. Part of the reasoning on this point involved the level of knowledge of language disorders at the time. His Honour recognised that it would now be accepted that a language disorder can co-exist with cognitive deficit which impairs learning but at the time the distinction between these two conditions was not properly recognised.

In the end result, the UK High Court of Justice found that the educational and health authorities were not negligent on the facts of the case and ruled that Anthony was not entitled to any compensation.



The case confirms that educational negligence is determined by reference to the prevailing standards at the time the alleged breach of duty occurred. It is possible that a finding of breach of duty of care could occur on the same facts if they occurred nowadays. This is largely a result of improved diagnosis of learning disabilities which facilitates more effective recognition of a need for special support. In particular, it is now recognised that children with a specific language disorder can display symptoms of global learning delay and specific language disorder and that such children can benefit from placement at a special school. Further, systemic provisions for effective communication between health and educational authorities have improved.

The *Civil Liability Act* in most states of Australia endorses the test that the appropriate standard for such a duty of care is the standard expected of a reasonable professional educator. This is known as the "Bolam test" as it was first enunciated by the English courts in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118.

The *Civil Liability Act* 2002 of most states contains a provision along the lines of:

Standard of Care for Professionals

A professional does not breach a duty arising from the provision of a professional service if it is established that the professional acted in a way that (at the time the service was provided) was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice."

Therefore, in defending claims for educational negligence, it is incumbent on a school authority to call evidence establishing that the way in which it provided the requisite service for the student was widely accepted by respected educators in the field as comprising competent professional practice.

This test is likely to make it harder for claimants to successfully bring claims in negligence for educational negligence.

Duty of care owed during school excursions

If an accident occurs during an approved school activity such as an excursion, in general circumstances, the school will be held liable for such injuries upon the basis that the teacher-pupil relationship was then in existence.

This may be so in respect of excursions during school hours and also after school hours or on weekends. The consent of parents is generally obtained but such consent will not entitle a teacher to take a pupil on a trip fraught with danger.

A few cases handed down many years ago will illustrate the difficulty schools face in this regard. In *Munro v Anglican Church of Australia* (unreported, Supreme Court of NSW, 14 May 1987), the NSW Court of Appeal found in favour of a 15 year old pupil injured on a school excursion to the Macquarie River. The excursion involved going down the Macquarie River by canoe and coming ashore at a prearranged point. One teacher supervised the group containing the plaintiff and nine other students. The boys came ashore near a trailer which held their camping equipment and on top of which was a rack for holding canoes. The group was going to camp at a spot about 75 metres from the position of the trailer. The ground between the trailer and the campsite was steeply sloping down to the campsite and consisted of damp, soft earth covered by grass.



The teacher instructed the boys to move the trailer down to the campsite. Four boys (including the plaintiff) stood on each side of the trailer and the teacher took hold of the towbar. Shortly after the trailer started to move, it slipped sideways and a wheel of the trailer ran over the foot of the plaintiff. The plaintiff sustained a number of fractures of his ankle.

The Court of Appeal unanimously held that the school authority was under a duty of care at the time of the accident and that the risk of injury involved in moving a loaded trailer over steep, damp ground was foreseeable. By way of response to that risk, the Court said that the school could have insisted that the contents of the trailer be moved to the campsite by hand or the trailer could have been moved via a less steep route. It further held that the school was negligent in failing to give any instructions or warning of the risks involved to the boys before they began moving the trailer. The school was held vicariously liable for the actions of the teacher in this regard.

Of a similar vintage is the decision of the NSW District Court in *Musico v Trustees of the Christian Brothers* (unreported, NSW District Court, 17 November 1986) in which the District Court found in favour of a 16 year old pupil injured on a school excursion to an ice-skating rink. The plaintiff had never skated before and sustained a severe elbow injury whilst skating. The injury occurred when he tried to avoid collision with another pupil by slowing down and stopping. He was unable to do so and fell on the ice. All students had been warned by the teacher to "take it slowly if you have not skated before" and the students were well supervised by teachers and the employees of the ice-skating rink. No instructions or assistance, however, was given to novice skaters by staff at the rink or by the teacher.

Judge Wall held that ice-skating was an intrinsically dangerous activity: that the risk of injury to novice skaters was foreseeable and that the school authority

should have isolated novice skaters and arranged for them to be instructed in techniques of controlling movement whilst skating. His Honour found that the school was liable, despite the presence of experienced employees of the ice-skating rink, on the basis that at the time of the accident the school was under a duty of care which it could not delegate to another person or body such as the operator of the ice-skating rink.

The lessons to be learned from these decided cases include:

- Activities chosen for school excursions must be suitable for children of the age, experience and capacity of those participating.
- Appropriate warnings must be given before the activity commences; school teachers must carefully check out the site of the proposed excursion beforehand to ensure that it is reasonably safe and free from danger.
- Teachers must seek appropriate specialist assistance where appropriate in the safe conduct of the proposed activity.
- Appropriate warnings and instructions must be given before the activity commences.
- Students who are novices or do not fully understand the activity must receive thorough instructions and if appropriate a demonstration of how to conduct the activity properly and safely.
- Students must be carefully screened so that they are matched to suitable activities.
- The fact that the excursion takes place outside of normal school hours does not decrease the standard of care required at law to be discharged by the teacher.

Minimising risk for schools under the Occupational Health and Safety Act

For schools operating in New South Wales, the *Occupational Health and Safety Act 2000* (the Act) and its accompanying Regulation comprise some of the most important and far-reaching laws in New

South Wales over the past few decades. (If you operate in another State or Territory, there will be similar provisions in your Act and Regulations. However, you should check your local legislation so that you are appraised of the legal obligations which apply to you and your organisation.)

The objects of the Act are essentially to secure and promote the health, safety and welfare of people at work. Schools are workplaces within the meaning of the Act and bodies conducting those schools are considered "employers".

Many of the obligations under the Act are obligations of strict liability: in other words, a school must ensure that certain things are done; it is not enough that it merely showed that reasonable care was taken.

For example, section 8(1) of the Act¹ states that "An employer must ensure the health, safety and welfare at work of all the employees of the employer."

Similarly, schools must ensure that visitors (other than employees) are not exposed to risks to their health or safety arising from the conduct of their undertaking while they are on school premises.

The maximum penalties for a breach of these provisions are severe:

- in the case of an individual for a first offence – up to \$55,000;
- in the case of an individual for a subsequent offence – up to \$82,500;
- in the case of a corporation for a first offence – up to \$550,000;
- in the case of a corporation for a subsequent offence – up to \$825,000.

It is not widely known that the Act also imposes obligations on school staff whilst at work.

Section 20(1)2 of the Act provides that an employee must take reasonable care for the health and safety of people who are at the employee's place of work and

who may be affected by the employee's act or omission at work.

It is important to note the different standard of care required when compared with the duty owed by an employer: an employer must ensure the health, safety and welfare at work of all of its employees whereas an employee need only take reasonable care. This is an important distinction and results in far less proceedings for breach than those against employers.

Section 263 of the Act is an often overlooked section. Where a school breaches the Act, its principal, executive staff and possibly even education office directors can be held personally liable if they were in a position to influence the conduct of the school which gave rise to the breach.

There have been a number of prosecutions already against schools involving breaches of the Act. These prosecutions have arisen where someone on the school premises has suffered a serious personal injury. So far as we are aware, none of these prosecutions as yet has involved a claim against a school principal, executive staff or education office director but that possibility cannot be excluded.

There are a number of steps which can be taken by schools to minimise the risk of a WorkCover prosecution. These steps include:

- having in place an OHS committee as required by the Act;
- ensuring that the OHS committee meets regularly and discusses relevant issues and takes steps to minimise the risk of injury;
- ensure appropriate safety training programs are undertaken;
- ensure that proper instructions, training and supervision is provided;
- ensure use of safety glass and, in appropriate cases, safety clothing;
- ensuring that first aid kits are complete and well stocked;

- checking floor surfaces for slipperiness or uneven sections;
- remove sharp objects and structures from areas where they may cause injury;
- ensure that workplace policies include a prohibition on bringing dangerous items onto work premises.

Not only must these policies and systems be in place but they must also be implemented and properly supervised.

Risk management is an important facet of every school's undertaking—the significant penalties under the Act are a constant reminder of the consequences of not complying with the Act.

- 1 The equivalent sections in other States and Territories are as follows:

s21 of the *Occupational Health and Safety Act 2004* (Vic);

s28 of the *Workplace Health and Safety Act 1995* (Qld);

s19 of the *Occupational Health, Safety and Welfare Act 1986* (SA);

s19 of the *Occupational Safety and Health Act 1984* (WA);

s9 of the *Workplace Health and Safety Act 1995* (Tas);

s37 of the *Occupational Health and Safety Act 1989* (ACT);

s29 of the *Work Health Act 1986* (NT).

- 2 s25 (Vic); s36 (Qld); s21 (SA); s20 (WA); s16 (Tas); s40 (ACT); s31 (NT).

- 3 s144 (Vic); s167 (Qld); s61 (SA); s55 (WA); s53 (Tas); s211 (ACT); s180 (NT).

Race Discrimination in Schools

Educators are aware that racial discrimination by an educational authority on the grounds of race is contrary to anti-discrimination legislation in all states.

In New South Wales the relevant provisions are sections 7 and 17 of the Anti Discrimination Act 1977.

These provisions were considered by the Supreme Court of New South Wales in *A v Director General, Department of Education and Training* [2008] NSWSC 1091.

The names of the parties have been substituted with pseudonyms throughout the long history of the matter. In October 1999 ZG lodged complaints of racial vilification with the President of the Anti Discrimination Board on behalf of his three sons. He alleged that his sons had been discriminated against on the ground of their race in contravention of section 17(2) of the Anti Discrimination Act. The complaints related to treatment of the ZG's sons whilst enrolled as pupils at a primary school for which the Department of Education and Training was responsible. The complaints were in two broad categories:

- Complaints relating to disciplinary action taken by school staff involving the children.
- Complaints regarding racial remarks made to one of his children by other pupils at the school.



Proceedings were commenced in the Administrative Decisions Tribunal of NSW (ADT).

The ADT dismissed the first category of complaint however held that ZG was partly successful in relation to the second category of complaint.

ZG appealed to the Appeals Panel in respect of the first category of complaint and the Department of Education and Training appealed to the Appeal Panel in respect of the second category of complaint. The Appeal Panel dismissed all of ZG's complaints.

Under section 17(2) of the ADA it is unlawful for an educational authority to discriminate against a student on the ground of race by denying the student access or limiting the student's access to any benefits provided by the educational authority or by expelling the student or subjecting the student to any other detriment.

ZG, his wife and his three sons are Australian citizens of Chinese descent. ZG alleged that from June 1998 other students swore at his sons calling them derogatory racial names, bullying his children as well as teachers and other school staff treating his children unfairly.

The proceedings found their way through the appeal system to Justice Harrison in the Supreme Court of New South Wales. Justice Harrison noted that the ADT was satisfied that the school staff were well intentioned, dedicated professionals who generally had attempted to behave dispassionately for a long time in the face of ZG's allegations. Justice Harrison also accepted the ADT's findings that various statements made by teachers and other school staff to ZG were not made because of A's race and would have been made in the case of any child whether or not that child was Chinese, in the same or similar circumstances.

Justice Harrison held that the Appeal Panel was entitled to dismiss the complaint on the basis that there was no breach of section 17(2). The evidence was that ZG's sons would have been treated no differently had they been of any other race and therefore there was no direct or indirect discrimination.

Justice Harrison noted the extraordinary length of the proceedings (which commenced in 1988) and

concluded ten years later in 1998. The judge commented that it was regrettable that the proceedings did not come to an end many years earlier and that ZG's arguments alleging discrimination on the basis of race gained a momentum that was never warranted.

The case highlights pressures which schools are under in relation to legal complaints and in particular discrimination complaints. This particular matter occupied a lot of time and energy from the school's perspective in defending its position. Ultimately the school's position was vindicated but only after ten years of dispute and considerable effort and cost. Part of the problem was that ZG did not have legal representation throughout the matter despite the fact that it was offered to him on a number of occasions. He felt that the school's alleged conduct constituted discrimination whereas, in fact, it did not. The Department of Education and Training had no alternative but to continue to defend the complaint all the way through the court system. After a long and complex ten year battle the school's position was vindicated.



School's Duty of Care in Respect of Exposure to Asbestos

Wilmore v Knowsley Metropolitan Borough Council [2009] EWHC 1831 (Queen's Bench Division) (24 July 2009)

Facts

Knowsley Metropolitan Borough Council (defendant) conducted a school near Liverpool, England, known as Bowring Comprehensive School.

Dianne Wilmore (plaintiff) attended Bowring for her secondary schooling between 1972 and 1979.

She brought a claim for damages for negligent exposure to asbestos fibres while a pupil at Bowring. She did not develop any symptoms until 2006 when she began to experience breathlessness. In March 2007, she was diagnosed as suffering from malignant mesothelioma of the pleura. The disease is inoperable. At the time of trial her life expectancy was estimated to be less than six months.

The plaintiff and defendant agreed prior to the trial commencing that if the plaintiff is liable on the basis of the negligence, the defendant would pay the plaintiff the agreed amount of 240,000.00 (about \$500,000.00).

However, Bowring denied liability on the basis that it considered that it was not negligent.

Medical Evidence

The primary medical evidence in the case was given by Dr Rudd, a consultant physician and an expert on asbestos related diseases. He stated that mesothelioma is a rare tumour in people who have not been exposed to asbestos, occurring with an annual incidence of around one in a million of the population. In other words, it was almost beyond doubt that the plaintiff's mesothelioma was caused by asbestos fibre.

Dr Rudd also gave evidence the mesothelioma can be triggered by very small quantities of asbestos. Indeed, there is no threshold dose below which there is no risk.

What Aspects of the School could have Exposed the Plaintiff to Asbestos Fibres?

The mere presence of asbestos in building materials at a school is not sufficient to establish liability. The hazard arising from asbestos dust or particles, which generally arises from the disturbance of building materials which contain asbestos, for example if those building materials are broken or disturbed either through the actions of pupils, staff or construction works.

The plaintiff claimed that she was exposed to asbestos dust or particles in a number of particular ways whilst at Bowring:

- Tradesman were working on the ceiling tiles in a corridor when the plaintiff and other pupils were in the school and passing through that same corridor. Whilst the tradesman were working on the ceiling, the ceiling tiles (which had been proven to contain asbestos fibres) were placed in the corridor where it is likely that they were disturbed by pupils or staff until the works were complete.
- There was a suspended ceiling in the junior block which looked like compressed straw. This work took place while the pupils were in the school. From time-to-time the ceiling used to give off a deal of dust.
- The disturbance of ceiling tiles through pupils' misbehaviour. The plaintiff alleges that some boys of the school would seize blazers, coats and other items and would push them up through loose ceiling tiles and conceal them in the ceiling void from time-to-time. While this did not occur specifically to the plaintiff, she recalls being in the class room when this activity was undertaken by other boys who wanted to victimise a particular pupil.

- Ceiling tiles in the girls' toilets were vandalised and ultimately replaced. However, when they were taken down by the tradesman they were stacked in the corner of the toilet for a number of weeks. Some of these tiles were broken during the course of them being on the floor, either through deliberate actions of pupils or by accidental disturbance.
- Asbestos elsewhere in the school building. The evidence was that over the seven years at which the plaintiff attended Bowring, there was considerable other construction work throughout the school during which time the plaintiff was exposed to asbestos fibres during renovation work or general disturbance of building materials.

Judge's Findings

The defendant admitted that it owed a duty of care to the plaintiff to take reasonable care for her safety. However, it argued that it was not in breach of that duty because any exposure to asbestos, even if the trial judge found that the above events occurred, were so minimal that the plaintiff would not be able to establish that such exposure was the cause of her mesothelioma. The defendant argued that the extent and duration of any exposure was immaterial and did not increase the plaintiff's risk of contracting mesothelioma.

The trial judge held against the defendant on this point. He accepted the evidence of Dr Rudd that mesothelioma can occur after low level exposure and there is no threshold dose below which there is no risk. Each such exposure materially increases the risk of asbestos related disease.

The trial judge found that three of the situations referred to earlier exposed the plaintiff to a material risk and therefore amounted to a breach of duty on the part of the defendant:

- Work on the t-shaped corridor.

- Disturbance of ceiling tiles by students misbehaving.
- Damage to the ceiling tiles in the girls' toilets.

The trial judge found that the remaining claims of the plaintiff were not sustained but the three instances above were sufficient to result in a finding of negligence against the school authority.

Consequences for School Authorities

Most school authorities are well aware of the dangers of exposure to asbestos materials on school sites.

This case is a timely reminder of the many common ways in which building materials can be disturbed or damaged whilst on a school site thereby exposing pupils at a school to a material risk of contracting asbestos related disease such as mesothelioma.

Most schools have been aware since the mid to late 1970s of the dangers of asbestos fibres. Any building work or disturbance of building materials on a school site containing asbestos from that date may result in a finding of negligence against the school authority.

As can be seen from the above case, damages for breach of duty of care in relation to exposure to asbestos can be very significant.



Assistance

If we are able to assist you in any of these areas, or other education or litigation matters, please contact one of our Dispute Resolution Practice Group Team:



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