INTRODUCTION

In Part 1, it became evident that there could be no absolute guidelines that set clear boundaries for teachers and lecturers when dealing with students in the context of duty of care. While it is difficult to discuss every possibility that involves a teacher or an administrator, it is possible to look at some of the commoner teaching circumstances and to consider the legal precedents that arise from them.

Reading these judgments may prove to be helpful in determining some of the parameters of duty of care under the particular set of circumstances described in each case. It is important to keep in mind while reading them that each case is determined upon its own unique set of facts.

What follows is by no means comprehensive but should serve as series of signposts when considering contemporary issues in Western Australian schools and colleges.

Note that the School Education Act 1999 and its Regulations do not apply to the TAFE system. However, the duty of care, through the common law, applies as much to TAFE lecturers as it does to their colleagues in the schools.

PARTICULAR CIRCUMSTANCES AND THE DUTY OF CARE

Responsibility When Coming To And From School

The now repealed Education Regulations 1960 stated at Regulation 28 (2) that:

Subject to these regulations and any directions received from time to time from the chief executive officer, a teacher has authority to secure the good behaviour of his pupils both within the school and in the school playground and when a child comes to or returns from the school.
When this regulation was valid, it was suggested that it would be unwise to read it as a matter of choice. Rather, it should be considered to be a statutory requirement of teachers that they will secure the good behaviour of their students:

- Within the school.
- In the school playground.
- When they are coming to school.
- When they are leaving school.

The Education Department's view on the meaning of Regulation 28 (2) was as follows:

This regulation gives teachers the authority to secure the good behaviour of their students on school grounds and as students enter and leave school grounds.

[However] this regulation does not impose a common law duty upon a teacher to intervene in a fight taking place away from the immediate vicinity of the school grounds while that teacher is on the way to or from school. However, a teacher may feel a moral responsibility to intervene where those students are known to the teacher.

If a teacher witnesses a fight between students in the immediate vicinity of school grounds either before the commencement of the school day or in the course of the student leaving the school grounds at the end of the school day, then the teacher-student relationship will be in existence and the teacher will be under a duty of care to intervene.

Where the presence of students on school grounds is unknown and could not reasonably be known it is unlikely that a court would hold that there was a teacher-student relationship in existence. However, if a teacher were to hear a fight going on between students outside the teacher's classroom window before or after school, the teacher-student relationship would arise at that time and require action by the teacher.

A refusal to acknowledge the presence of students will not provide a defence against liability. Refusing to open school gates or forcing students to remain on the street verge will not remove a school’s responsibility.

The time at which a teacher's responsibility for their students ceases after the school day will be determined on the same principles as those operating to impose a duty prior to the commencement of the school day.
Some factors which should be taken into consideration when discharging a student from school include:

1. The age, health, physical and intellectual disabilities of the student.

2. Whether there may be dangers created by discharging a student early or late, such as crossings without a patrol and the absence of school buses.

Once a student has left the school grounds and has left the immediate vicinity of the school, the teacher-student relationship ceases and does not come back into play if the student returns to those grounds after the school has closed, that is, in the evenings or at weekends.

In the Canadian case of *Pearson v The Vancouver Board of School Trustees (1941) 3 WWR 874* it was held that teachers are not responsible for accidents that occur to students outside the school grounds.

The common law in Australia is, as usual, indeterminate on where the duty of care extends for teachers before and after school hours but it would be wise to be cautious about the removal of regulation 28(2) and its non-replacement in the new *School Education Regulations 2000*. There are Australian cases in the common law which make it clear that there can be occasions when the duty of care does exist before and after the formal school period.

The classic example of duty of care before the formal start of the school day is that of *Geyer v Downs* in 1977:

The case of *Geyer v Downs* was briefly discussed earlier. In this case, a girl of eight was accidentally struck on the head with a baseball bat by another little girl while on the school grounds ten minutes before the formal school day began.

The other girl was one of a number playing softball in the very small and relatively crowded playground of the school where no supervision was being exercised by any teacher. The departmental instruction headed "Playground Supervision" made it clear that the need to supervise children in the playground was well recognised.

There was also evidence that large numbers of children habitually played in the playground at this time of the morning, that is, for about an hour before school began.

The headmaster stated that he opened the school gates to allow the children to keep off the busy streets and because he knew that there were many families with both parents working. He saw it as a moral duty to allow this to happen.

He also commented that he had told the children who came early that they were to sit down in the playground and talk or read, or do some studying. They were expressly forbidden to play games before 9.00 am and they were not encouraged to arrive early. Teachers arriving early were asked to ensure that these instructions were complied with
and, as he believed that things seemed to be working, saw no reason for any regular supervision.

The Court agreed that his decision to open the school at 8.00 am was made from necessity and a commendable desire to provide a facility for the children. However, he had created a factual situation in which he was under a duty to ensure that there was adequate supervision in the playground before 9.00 am. The fact that this situation was created for commendable reasons, rightly believed to be in the interests of the children and parents, did not mean that the duty to use reasonable care did not arise.

The High Court therefore overturned the decision of the NSW Court of Appeal which, itself had overturned a jury decision to award the plaintiff $85,000.

A later case is that of Reynolds v Haines (Supreme Court NSW, Common Law Division, Master McLaughlin, 27 October 1993, unreported). At 8.10am, before school had formally begun, a year 9 student was struck in the eye by a piece of fruit thrown by a year 12 student who was celebrating his last day of school. The year 9 student had been approaching the school gates when the incident occurred so that not only was it before school had begun but he was also not on the school grounds. (The fruit thrower was hiding in a tree a few hundred metres outside the school grounds and it was 20 minutes before any formal playground supervision was due to begin.)

Nonetheless, Master McLaughlin found that the school was aware that these celebrations were likely to occur, although the school had attempted to deny that this was the case. The court found that the time of the incident was irrelevant as the Department of Education had recognised that a school could be responsible for injuries to students before and after the school day. Further evidence was seen in the fact that the year 12 coordinator banned any further throwing of fruit soon after the incident. The court also found that the school was under a duty, owed to all members of the public, to control its students. (Ramsey and Shorten, 1996, p. 177)

Supervision of Students After School Hours

Students who remain on the school grounds after school finishes are still owed a duty of care. This is particularly the case if teachers are aware of their presence and have consented to it. If they remain on the school grounds for no particular reason, they can be ordered to leave the grounds. However, if students are waiting for transport to take them home (either public or private) it seems that teachers will still be under a duty to exercise adequate supervision of those students.

In the case of Koffman v The Trustees of the Roman Catholic Church of the Diocese of Bathurst [1996] ATR 81-399, the Court of Appeal found, in a two to one decision, against the primary school and in favour of a 12 year old student. This was in spite of the facts which were that the student was struck in the eye by a stick thrown by a student from a nearby high school as he waited at a bus stop outside the high school, 20 minutes after his classes were over and some 300-400 metres away from his school entrance.
Appeal judge Sheller, in the majority decision, stated that the relationship between teacher and pupil did not begin when the pupil entered the school grounds and terminate when the pupil left the school grounds each day. Each case had to be individually considered in order to determine what duty a school owed students who were exposed to a foreseeable risk of injury outside the school grounds and outside of normal school hours. In this particular case, it was found that the primary school did have an obligation to supervise the student while he waited for his bus outside the high school. (This case will be referred to again in more detail under the heading of "After School Supervision (Buses, etc)" at page 22.)

However, it is recognised that there is no absolute duty that a school must safely return each of its students to the care of their parents. It will always be a case of assessing local and specific factors such as the age of the students; the physical and mental capabilities of particular students; what sort of traffic is around the school and other geographical factors of the area. (Kohn, 1997, p. 111)

Where students have left the school grounds and choose to return later or during the weekend for activities not related to the school, then no duty of care is owed to them.

**Supervision During School Hours**

The following are WADE's views on supervision.

The principal of a school owes a duty to take reasonable care for the safety of students while they are under the control and supervision of the school and its teachers.

(The now repealed) Regulation 30 states that:

*The principal of a school shall make proper provision for the supervision of the children attending the school when such children are at play both in the recesses during the school hours and in the recess for dinner.*

An assessment of whether supervision is adequate will depend on a number of factors including:

- Number, age and capabilities of the students.
- Normal practices within the school.
- The physical layout of the school grounds

The duty to provide adequate supervision includes the proper maintenance of discipline to prevent or minimise the risk of one pupil injuring another.

Note: Although regulation 30 has been repealed, it is replaced in the new Regulations by regulation 38 which states, *inter alia,* that:
A member of the teaching staff at a government school may take reasonable steps to ensure that a student at the school behaves in an orderly and disciplined manner in any of the following circumstances:

(a) when the student is attending the school or otherwise participating in an educational programme of the school.

(The now repealed) Regulation 33 states that:

A teacher on the staff of a school may take such physical action as is appropriate to prevent or restrain a child from acting in a manner which places at risk the safety of that child or member of the staff of the school.

Although this regulation empowers teachers to physically intervene, teachers are not required to physically endanger themselves. It is not a requirement of the law that any members of staff expose themselves to the risk of physical danger in an attempt to break up a fight. A teacher must do what is reasonable in the circumstances. A determination of what is reasonable in the circumstances would be determined by a range of factors including:

- The age, sex and apparent physical condition of the student.
- The age, sex and health of the teacher.
- The minimum amount of involvement required to defuse the situation.

A command may be sufficient in the circumstances, physical intervention may be appropriate or extra assistance may be called for. The aim of the aid given is to prevent harm being inflicted upon a student by another student and not to punish the aggressor.

[Note: Again, regulation 33 has been repealed but has been replaced by the new regulation 39 which states that:

A member of the teaching staff at a government school may take such physical action as is appropriate to prevent or restrain a student at the school from acting in a manner which places at risk the safety of -

(a) that student or any other person; or
(b) any property (whether or not vested in the Minister)]

As a general rule, teachers should avoid leaving students unattended in the classroom. If a teacher is required to leave a classroom or school-based activity outside the classroom then appropriate supervision arrangements should be made.
Supervision During School Recesses

The subject of playground duty was canvassed with WADE by the Union during the last set of negotiations for the current Certified Agreement 2000.

Subclause 18.6 of the Agreement states that:

The Parties also agree that teachers will continue to be required to undertake supervision of students outside official student instruction hours in order to fulfil each school’s duty of care to its students. The Parties will recommend strategies for school to better utilise staffing resources to meeting duty of care obligations of teachers to proved playground supervision.

The main argument the Union has with the Department is not that duty should occur but who should do it. The Union’s view, especially in this age of contracting out, is that it is not essential that teachers should be doing playground duty. However, if playground duty is being done by teachers, there is no money being saved by having others doing it. In fact, it will cost more. The Department therefore resorts to improbable arguments about how only teachers are able to perform playground duty because of the unique status of the teacher-student relationship.

The fact that in some other countries, playground duty is done by non-teachers falls on deaf ears in Western Australia.

So until some other arrangement is agreed to, it is clear that teachers and administrators have no discretion at all in the matter of playground duty. The new Act itself (not the Regulations) spells out the general need for supervision of students under Section 63 - Functions of Principal which states at subsection 63(1)(c):

that the principal of a government school is to ensure the safety and welfare of students on the school premises and away from the school premises but on school activities.

Section 64 - Functions of Teachers states at subsection 64(1)(e):

that a teacher in a government school is to supervise students and to maintain proper order and discipline on their part.

There is therefore a statutory duty for all teachers to do yard duty until an alternative arrangement is put in place. It is important, therefore, that all staff work to an agreed set of guidelines during recess and lunchtimes in order to protect themselves against any common law claims that could be initiated in the event of a student being injured during these times.

It is clear from this that a teacher who has been rostered for duty and fails to do that duty will be liable in the event of an injured child.
Note that it does not follow that if an accident occurs while a particular teacher is on duty, that he or she is necessarily negligent. It would have to be shown that the teacher was negligent in performing the duty and that the negligence caused or contributed to the injury. The following case demonstrates some of these points.

The Case of *Harvey v Pennell and Another*

The case of *Harvey v Pennell & Another (1987)* Aust Torts Reports 180-112, is a source of useful information on this topic. It is significant that, in this case, the age of the student (about 15 years old) and the existence of a substantial supervision program which was taken seriously by the staff resulted in the judges not finding against the school or the teachers concerned for lack of care. It was stated by the court that even if there had been an extra teacher on duty, the circumstances of the accident were such that it would not have made any difference.

More of the written decisions of the judges has been given here than usual because of the relevance of this information to administrators and teachers dealing on a daily basis with playground duty.

The facts of the Harvey case are as follows:

Harvey, the female plaintiff student brought an action in negligence against:

- Pennell, the student who caused her injury by flicking a car aerial at her.
- Pennell's teacher who had earlier confiscated the aerial from a student and had given it back to that student at the end of his class.
- The school for not properly supervising the playground during the lunchtime recess.

Pennell had flicked an extendible car aerial violently backwards and forwards in the same way as an angler casts a line. He had done this in an area which had a large number of children preparing to return to class after their lunch recess.

In so doing, the extendible end of the aerial came off, flew about 10 metres through the air and penetrated the temple of the plaintiff. The end of the aerial entered the girl's brain with severe consequences.

The Student

The case is interesting because not only a teacher and the school were sued but also the student responsible, Pennell. In his decision, Justice White stated that Pennell owed a duty of care to the other school children not to subject them to the risk of injury by what he was doing. In his opinion, it was reasonably foreseeable, even to a 15 year old youth, that repeated violent "casting" of the extendible aluminium aerial might cause injury to any one of the surrounding children one way or another, for example, by striking one of them in the eye or about the face, an injury which could occur whether the aerial remained in his hand or flew out of it.
In the court’s view, Pennell had a duty of care to all of the children within hitting or throwing or travelling distance of the aerial, once he started whipping the aerial in this fashion.

In Justice White's words:

I would hold that the duty of care existed and that the defendant Pennell was in breach of that duty. For these reasons I agree with the finding of Matheson J that Pennell was guilty of negligence in spite of his youthfulness.

The Teacher
The court did not find that the teacher who had returned the aerial earlier in the day was negligent.

The teacher had confiscated the aerial from another student (not Pennell) in another class earlier that day. The teacher had then returned it to the student at the end of that class.

Counsel for Pennell had argued that this action on the part of the teacher had ultimately caused the accident. This argument leads to a consideration of causation and the use of the "but for" argument. It was submitted that there was a causal link between the teacher's failure to retain the aerial and the ultimate injury to the student plaintiff. "But for" this thoughtless return of the aerial, it was submitted, the injury would never have been suffered.

In this argument, the question is asked "Would the plaintiff's injuries have been suffered but for the defendant's negligence? If the plaintiff would have been injured even if the defendant had not been negligent, then the defendant's negligence is not the cause of the plaintiff's injuries.

But, even if a defendant is found to have been negligent, it must also be established that the negligence led to the resulting injuries.

The court did not accept the submission that the teacher should have inquired as to why the student had the aerial, or that he should not have handed it back until the end of the day. It was also argued that he should have tried to establish if the aerial had been torn off a car in which case the teacher should not have returned it at all.

The suggested causal link between the teacher's possible lack of foresight at 10.00am as to possible adverse consequences to someone and the ultimate irresponsible use of the aerial by another student at 1.25pm was too tenuous for the court and an insufficient basis for finding a breach of any duty of care owed by that teacher to the plaintiff.
The School

Finally the question remained as to the culpability of the school. The high school had 700 students from year 8 to year 12. There were over 60 teachers on staff of whom between 50 and 60 were available for duty. Students were supervised before and after school and during the short and long recess periods. Fifteen teachers were rostered to supervise lunchtimes, seven during the first half hour of lunch and eight to do the second half hour. Nearly all teachers were rostered for some duty each week.

The first question at the trial and during the appeal was whether the roster system was adequate or reasonable in the circumstances. If it was not, the second question was whether the failure to provide such supervision "caused" the injury to the plaintiff.

In the area where the accident took place there were normally two teachers supervising. Justice White commented on this and the roster system generally as follows:

Rotation of roster duty after consultation with teachers and confining their lunch-hour duty to one-half of that period would tend, I think, to make the roster system more acceptable to staff and reduce the likelihood of resentment and careless disregard of their supervisory obligations. After all, it was a school of high school students. It was not a prison or a concentration camp. Those administering the school were called upon to maintain both teacher morale and student morale.

The latter required a fine balance between discipline and supervision on the one hand and freedom of action and inculcation of independence on the other. It was necessary that the students be encouraged to act in a reasonably disciplined way themselves and discouraged from looking upon their teachers as police or prison guards. Unnecessary intrusion by over-policing of student activities had to be avoided. The roster system had to make sensible use of teacher resources as well as provide adequate supervision.

The main argument against the school rested on the facts that, during the second lunch period, one of the two teachers in the area of the incident was required elsewhere leaving one only teacher to cover it. Then, the only teacher remaining was required to leave the playground in order to unlock several classrooms just prior to the end of the recess.

In spite of this, Justice White was of the view that there was an adequate system in place. He commented that:

The deputy principal divided the school into areas of reasonable size having regard to the likely concentration of the student population during recess periods. The areas and the names of rostered teachers and their duties were prominently published and well-known to the teachers. The roster system was reviewed annually by the deputy principal in consultation with senior staff. The teachers knew from both written and oral instructions that they were expected to act "as reasonable parents would" in carrying out their duties. They were expected to move about the open areas between buildings so that they might be seen by as many students as practicable as often as practicable.
The evidence shows that the deputy principal and the staff took the roster duties seriously. This school's supervisory system was a far cry from those which have been criticised in other cases in the past ... If a particular teacher was not available, a substitute teacher was found. Senior staff were available to ensure that the rostered teachers commenced their duties promptly at that beginning of each of the two lunch sessions. Conscientious performance of the letter and spirit of the roster system was thus ensured. The evidence showed that the staff of this school were alive and responsive to their legal and social responsibilities towards their students.

Justice White was of the view that, even with only one teacher on duty in that area, he or she could adequately supervise the area by walking up and down the avenues between the buildings. He argued that even if the second teacher had been there, Pennell would have kept the aerial hidden until the teacher had walked past. He stated that a school is not an insurer of the safety of the students. One extra teacher would need the eyes of Argus to see all students at all times.

He then posed the question - was the absence of supervision for the relevant few minutes evidence of breach of the duty of care owed by the school to the students in general and the plaintiff in particular, in the circumstances? Having asked the question, he then referred to various authorities or precedents that demonstrated that the constant supervision of students, particularly if they are older, is not essential to fulfil the requirements of duty of care.

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

From *Commonwealth v Introvigne (1982)* (see next), it was accepted that a school teacher's duty of care does not require that 15 year-old boys be kept under constant observation and supervision could be conceded.

In *Barker v The State of South Australia (1978) 19 SASR 83*, Jacobs J said that "a short absence of a teacher from a classroom (of 12 year-old girls) was not a breach of the duty of care which the school owes the children of that age group."

The earlier case of *Geyer v Downs (1978)*, was an example of there being no supervision at all.

In contrast to the cases of *Introvigne* and *Geyer*, the deputy principal in the *Harvey* case had prepared and was enforcing quite a substantial supervision program. It was rigorously enforced and reviewed from year to year. Although the allocation of duties resulted in a temporary absence of teachers, Justice White did not think that the school showed a want of care for student safety amounting to a breach of its legal duty.

Quoting Hodgson LJ in *Rich v London County Council (1953) 2 All ER 376:*
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.

Justice White stated that:

That, I think, is a very apt description for what happened here.

It is important to note here that the decision in Harvey was not unanimous. The decision was two to one with Justice Olsson dissenting. While agreeing about Pennell and the teacher who gave the aerial back, he was at odds over the duty of care in the playground.

The loss of one teacher and the requirement of the other to open the classrooms after lunch in the area of supervision where the accident took place resulted in the following comments from Olsson J:

I am deeply conscious of the fact that one should avoid exhibiting undue wisdom with the benefit of hindsight. Further, it is important that idealism should be tempered with reality so as to avoid exposing school authorities to unrealistic practical obligations.

Nevertheless, at the end of the day, I am driven to the conclusion that the learned trial judge fell into error in exonerating the school from liability to the plaintiff.

While it must be accepted that ... [there] was no absolute guarantee the presence of one additional staff member would have observed Pennell's conduct and intervened so as to prevent the accident, the facts remain that to leave a populous central quadrangle type area in the centre of the school virtually unsupervised was to invite the strong possibility of eventual disaster ... At the very least the total absence of effective supervision ... must be taken substantially to have increased the risk of dangerous conduct at the critical time.

Teachers and administrators will appreciate how close the decision was in favour of the school and draw a conclusion from that. Had the plaintiff appealed to a higher court, the decision may have been different.

The Case of *Commonwealth v Introvigne*

As indicated above in the *Harvey* case, the outcome was different in the *Commonwealth v Introvigne* (1982) 150 CLR 258. The case had been to the Full Court of the Federal Court which had found in favour of Roldano Introvigne. The decision was appealed and went to the High Court where the appeal was dismissed.

In the words of Justice Mason of the High Court, the facts of the case are as follows:
On 19 February 1971 the respondent, then a schoolboy aged 15 attending the Woden Valley High School, was skylarking with some of his friends in the school quadrangle before school was due to commence at its usual time of 8.30am. They seized the halyard (the rope) attached to a flagpole in the quadrangle, jumped off steps near the flagpole and swung on the halyard in such a way that the full weight of a boy's body was suspended by it as he moved through the air.

At the moment when the respondent was not swinging on the halyard, and without warning, the truck, which was fastened at the top of the flagpole, (usually a piece of wood through which the halyard runs) became detached from its position and fell, striking the respondent on the head and severely injuring him.

The flagpole was eleven metres or about thirty five feet high; the truck contained a shaft and pulley through which ran the halyard; the truck was cylindrical in shape and made of synthetic material known as "particle board" and was encased in copper and, together with the halyard, it weighed about seven kilograms.

Further factual information is found in the words of the judge of the Supreme Court of ACT. (It was heard in 1976)

The accident happened a few minutes before the time when classroom instruction was to begin, which was 8.30am. Many of the pupils were walking and playing outside the buildings. All members of the teaching staff except one were at a staff meeting called by the acting principal, to inform the staff that the principal had died in the early hours of that morning, and to mention the matter of arrangements for the funeral.

The meeting was called for 8.20am and lasted till about 8.25am during which time the accident appears to have happened ... The acting principal had expressly detailed one member of staff to be absent from the meeting and to be present in the school grounds for the purpose of maintaining supervision over the activities of pupils ... This supervision was normally exercised by the staff generally, without any roster or specific detailing of individuals, and the number of staff actually exercising supervision in the grounds at such a time was normally between five and twenty.

Justice Mason accepted that 15 year olds do not require constant supervision but that there had to be some supervision. The fact that the school usually had from five to twenty staff supervising was an indication of what the school thought to be appropriate under normal circumstances. He added that:

It [is] notorious that school pupils in large numbers, if left to their own devices in a recreation area, will on occasions engage in activities involving some risk of personal injury.
Justice Murphy took the view that the Commonwealth was liable for damage caused by any lack of reasonable care of students placed in its care. It had certain non-delegable duties which, he stated, were:

1. To take all reasonable care to provide suitable and safe premises. The standard of care must take into account the well-known mischievous propensities of children, especially in relation to attractions and lures with obvious or latent hazards.

2. To take all reasonable care to provide an adequate system to ensure that no child is exposed to any unnecessary risk of injury; and to take all reasonable care to see that the system is carried out.

The Commonwealth also became vicariously liable to pupils and parents for the acts and omissions of the teaching and other staff.

Discussing this case, Kohn (1997, p. 105) stated that:

It was really in relation to the school authority's non-delegable duty of care that the court found a breach - the court held that ... by providing only one teacher, the school authority failed to provide an adequate system of supervision to ensure that Introvigne was not exposed to an unnecessary risk of injury. The court also found that the injuries were attributable to the school's failure to provide for padlocking of the halyard of the flagpole. The flagpole and the halyard in particular were lures for children. The court held that such risks were foreseeable because they were not far-fetched or fanciful. (applying Wyong Shire Council v Shirt)

This was not a case of a school authority's vicarious liability for the negligent acts of a teacher. There was no evidence in this case that the one teacher provided to supervise the playground had failed to do so properly. The breach was in the failure of the school authority to implement a proper system of playground supervision at the time Introvigne sustained his injuries.

The contrast between these two cases could not be clearer. The first (Harvey and Pennell) was a school with an adequate system of playground supervision which was adhered to. The injuries to the student were not found to have been the fault of the teaching staff nor the school. The second (Commonwealth v Introvigne) was a school in which the system, which may or may not have been adequate, was ignored for only five minutes. The school was found to have failed in its duty of care.

Because of the wide differences between the layout of schools, the ages and abilities of the students and for a range of other variables, no court has attempted to define how many teachers is enough to supervise a school playground.
It remains a serious matter for all participants to determine. The Education Department, the individual schools, the administrators and teachers at each school and the State School Teachers' Union all have a role in determining how the duty of care in the school playgrounds of Western Australia should best be performed.

**Teachers Arriving Late**

Failure to adequately supervise a class during lessons will clearly put a teacher at risk of being negligent if an accident occurs during this time. Teachers should also note that this can also include any incident that happens while students are waiting for a teacher to arrive at the classroom if the teacher is not there at the normal or expected time. This can come down to matters of a very few minutes which is all it takes for an accident to happen.

The fact that old Regulation 31 - Duties of a Teacher, which required teachers to be present at least 15 minutes before the school commenced to secure good behaviour among his pupils, is now repealed does not mean that teachers should not be at their first class in the morning a little time before the class starts to ensure that students are well-behaved and ready for that class.

Teachers will know best which classes they can risk being late for, but there are probably better odds available at the TAB.

**Accidents Resulting From The Use of Tools And Hazardous Substances**

Part of the education of children is being taught how to use tools and various materials which may be hazardous if not used properly. Children must be taught to look after their own safety and that of other students working with them or near them.

A teacher will not be in breach of the duty of care in allowing the use of dangerous objects provided that the children are old enough to learn how to handle them safely and are properly supervised.

As in all accident cases, the liability of the teacher turns on the facts of the particular case. A court will hear all of the evidence and decide whether or not the teacher had exercised the required standard of care at the time.

With classes such as chemistry, woodwork, metalwork, domestic science extra care and planning is required of teachers. Some cases follow:

- **In Hole v Williams (1910) 10 SR (NSW) 638** the principal sent a pupil to fetch him a beaker from another room without warning him of the contents. The student, seeing some liquid in the bottom of the beaker and thinking it was water, tossed it out as he was returning. The liquid, which was dilute sulphuric acid, splashed into the eye of another student passing by. The master was found to be negligent for failing to warn the student of the contents.
In contrast, the case of *Crouch v Essex County Council* (1966) 64 LGR 240 saw the teacher found not to have been negligent. In this case a boy was injured by a strong caustic soda (sodium hydroxide) solution. The student had not been paying attention to the experiment and had asked two other students what it was about. They spontaneously squirted some of the liquid in the boy's face, thinking it was water. Although the beaker was unmarked and discipline was lax, the court found that the teacher had not been negligent as he had warned the class of the beaker's contents.

- In *Urquart v Ashburton High School Board of Governors* [1921] NZLR 164, a pupil was injured by an explosion during a chemistry lesson in a New Zealand secondary school. Charcoal had been incorrectly labelled "Manganese dioxide" due to the negligence of the science teacher and the explosion was caused by mixing the charcoal with potassium chlorate.

- In *Butt v Inner London Education Authority* [1968] LGR 379, a 16 year old apprentice injured his hand when trying to remove a sheet of paper while he was operating an automatic letter-press machine. The English Court of Appeal held the Camberwell School of Arts and Crafts, an institute the apprentice was required to attend, was liable for failing to provide a guard on the printing press.

- Scissors and knitting needles have caused accidents in needlework classes. In two reported cases, the teachers were found not to have been negligent in permitting their use in upper primary classes without special warnings.

- More care in the choice of equipment and supervision of its use are required in junior primary. In *Black v Kent County Council* (1983) it was held that it was foreseeable that there was greater risk of injury by the use of sharp scissors by 7 year olds in an art class than by using blunt scissors. However, in *Butt v Cambridge Council* (1969) 68 LGR 81, the teacher was not negligent for allowing 9 year olds to use pointed scissors.

- In *Fryer v Salford Corporation* (1937) 1 All ER 617 an eleven year old girl was injured when her apron caught fire while she was leaning over a gas stove in order to cook. The court found that the teacher had not been negligent but the school authority was liable for failing to provide adequate guards to prevent such foreseeable accidents.

- In *Oliver v Haines* (unreported, SC NSW, 1989) a plastic container, in which had been mixed chlorine and sulphur, exploded, setting fire to a student's clothing, causing severe burns which left residual scarring. The teacher was found to have been negligent and was required to pay $56 000 damages plus costs.

- In *Close v Minister for Education for Western Australia* (unreported, Supreme Court of WA, No 38 of 1967) an apprentice at Wembley Technical School was badly burned when splashed with molten aluminium in the course of a lesson on
metal moulding. The court found that the lecturer had not taken proper care for the safety of the apprentice and damages were awarded to the plaintiff.

From these cases it can be seen that the fact of an accident taking place does not necessarily make a teacher or an education authority liable. There must be unreasonable behaviour or lack of foresight or planning on the part of the teacher or the school or college.

Sporting and Athletic Activities

Teachers are not liable for injury caused to students through playing ordinary school games or sports if they are properly conducted. However, if the teacher knows or ought to know that the activity is being performed in a dangerous manner or in a dangerous place, he or she may be liable if steps are not taken to make the activity safe.

WADE’s comments on this topic are as follows:

Teachers managing and coaching school-based sporting activities whether during or outside standard school hours owe a duty of care to the participating students. Reasonable care in this context cannot guarantee that no injuries will ever occur. Certain team games inevitably involve body contact and some injuries will arise from normal participation.

The duty to provide adequate supervision involves a number of factors including:

- Reasonable attendance of a suitable supervisor or supervisors
- Reasonable instruction and demonstration
- Reasonable choice of location
- Reasonable choice of equipment and students for the activity in question

Supervision is required where schools allow students to use sporting equipment either before or after school. If a school establishes the rule of non-use prior to and after school and students injure themselves with their own equipment brought from home of which the school is not aware, then that school rule may provide a defence to liability.

One of the leading Australian cases is Watson v Haines (1987) ATR 80-94.

In this case a 15 year old boy became a paraplegic as a consequence of a rugby league game in which he was the hooker for his team. No teacher was found guilty of negligence but the education authority was guilty of negligence for a breach of the non-
delegable duty of care it owed to students. The student was ultimately awarded $2.2 million in damages.

The issue in this case was that the student had a long thin neck and was therefore of an unsuitable physique to be playing rugby league, especially as a hooker. His teachers had been unaware that the plaintiff's physique was not appropriate for this sporting code. On the other hand, the Department of Education should have known because, in 1980, the Royal North Shore Hospital had gone to some trouble to advise schools of this very fact. Their advice, in a video entitled "Don't Stick Your Neck Out" was aimed at exactly the sort of physique that the plaintiff had. It turned out that the Department of Education had never promoted the video and no schools had ever taken it out.

Other cases that have arisen due to sport or games at school follow:

In *Kretschmar v The State of Queensland* (1989) Aust Torts Reports 9[80-272, an intellectually handicapped boy aged 13 was seriously injured during a game of "Rob the Nest". The judges, although sympathetic to the plight of the boy, did not find in his favour. They accepted that the game had been well supervised and that the accident was most unusual and could not have been foreseen.

In *Thomas v State of South Australia* (unreported, SC SA, 1992) a year 11 student was struck on the head by a shot-put and was badly injured. Although the teacher had a well-planned system for a group of students to practice the shot-put, it was held that she was distracted during the training session. As a consequence, she failed to ensure that while the injured student was marking the spot where his ball had landed, another student took his mark and threw his ball. No contributory negligence was found.

In *Walsh v Minister for Education in Western Australia* (unreported SC WA 1969) a 14 year old girl from Kalamunda High School went to the Point Peron Physical Education Camp. She was badly injured when she fell off a trampoline. The teacher in charge had not issued any instructions about the unsupervised use of the trampoline and he was found to have been negligent by the court.

There are two other trampoline cases, *Bills v State of South Australia* (1985) 38 SASR 80 and *Shaw v Commonwealth of Australia* (1992) 110 FLR 379, both of which find against the teacher.

The case of *Moore v Hampshire County Council* 80 LGR 481 is important for the clear message it gives to teachers in the matter of trust. A 12 year old girl had been born with dislocated hips and had a limp. Her parents had advised the school that she was not to undertake any physical education because of her condition. The girl told her physical education teacher that she was now able to take the class because her doctor had allowed it. This was not true. As a result, the student broke an ankle doing an exercise and the matter went to court.
The teacher was found to have been negligent in not assessing the girl's ability to do the particular exercise that caused the injury and not checking to see if the parents' express wishes had been changed.

Finally, from Western Australia, under the sports heading, is the case of *Thomas v Minister for Education WA*.

A 12 year old student suffered several facial lacerations and fractured front teeth when hit in the face with a softball bat. The teacher had organised a game of softball and had warned the students of the dangers of standing too close to the batter. The teacher then went to supervise students training for the high jump about 20 metres away. The student injured was next in line to bat when the student batting swung at and missed the ball, striking the face of the waiting plaintiff.

The Minister for Education was held liable for the teacher's negligence in failing to adequately supervise and give effective instructions to the students. The judge said that the instructions given were likely to be forgotten during the excitement of the game. The teacher should have marked a clear line away from the batter and told the children they could not go beyond that line. This was an instruction which would have been easily understood and more easily enforced from a distance while supervising students at the high jump.

**Leaving School Early.**

It has been held that a school - in the absence of parental permission - has a duty not to release students before the normal end of the day. Parents may come to school to pick up their children at the normal time and may do this because they do not want their children walking home for a range of reasons.

There are several cases that deal with students who leave school before school has finished or who are dismissed early. A typical example is given here:

In *Barnes v Hampshire County Council* [1969] All ER 746 (House of Lords) a five year old girl was released from her school at 3.25 pm when the normal time was 3.30 pm. She was knocked down by a lorry trying to cross a busy road on her own. The school authority was found to have been liable for the accident and damages were awarded against it.

**School Excursions**

The general advice to SSTUWA members on the subject of excursions is to avoid them whenever possible. There are risks and hazards on excursions that teachers can well do without. Reading WADE's position on excursions (currently being reviewed) should be enough to make most teachers think twice about becoming involved. This is what the Department says:
Excursions away from school are part of a student's educational program. The teacher-student relationship applies for the duration of an excursion as it does to school-based activities.

However, greater dangers can arise when students are away from the school. The standard of care may be higher than that expected in the classroom and must respond to the behaviour patterns of the students. This higher standard of care is simply a reflection of the increase in potential danger and applies in the same way as it does to activities within the school which are more hazardous than normal.

Some factors to be considered in determining whether the duty of care has been discharged include:

- The age and number of the students.
- The purpose of the activity. (eg, the development of self-confidence and independence)
- The extent of careful planning where students are venturing into hazardous areas.
- Whether appropriate instructions have been given to students and supervisors.
- Whether safeguards are in place.

During overnight excursions teachers are not expected to remain awake all night long supervising students. However, one room or place should be nominated as an all-hours point of contact which can be accessed by students in emergencies and at night.

Teachers may also owe a duty of care towards other persons not connected with the excursion if the activities of the students under the supervision of the teacher might reasonably be expected to cause harm. For example, if during an excursion a student is throwing stones at pedestrians then the supervising teacher is under a duty to intervene to prevent any injury occurring.

Troublesome students may be returned home at parental expense provided that details of this course of action are given on the school excursion or camp permission advice signed by a parent or guardian. The teacher has the responsibility for ensuring that the student is returned safely into the care of the parent or guardian.

Non-physical education teachers who find themselves supervising a sporting activity off the school grounds such as ten-pin bowling or ice-skating on a sports afternoon will read the following case with interest.
In the case of *Musico v Trustees of Christian Brothers*, in the NSW District Court (1986), a 16 year old student was injured during a school visit to the local ice-rink. The student had never skated before and injured his elbow badly in a fall.

The students were warned at the start to take things slowly if they had not skated before and they were well supervised by both teaching staff and by the skating rink staff. However, no instruction or assistance had been given by anyone to those who had not previously skated. The judge found that ice skating was an intrinsically dangerous activity and that the risk to novices was foreseeable. It was therefore incumbent upon the school to have the beginners separated from the more experienced skaters and to be instructed in some basic techniques. In spite of the presence of skilled instructors on the ice-rink staff, the court found against the school as it was under a duty of care at the time of the accident and this could not be delegated to the ice rink.

Private schools are well documented in cases involving excursions, sporting accidents and school bus supervision. The next case occurred on an excursion to the Macquarie River.

In the case of *Munro v Anglican Church of Australia*, NSW Supreme Court (1987) a 15 year old pupil was injured when a trailer ran over his ankle. The court found that the school authority was under a duty of care at the time of the accident and that moving a loaded trailer over steep, damp ground could lead to a foreseeable accident. The court also indicated how the exercise could have been done safely and criticised the authority for not ensuring that the students had been given proper instructions and advised of the risks in what they were doing.

To remind the reader of the joys of excursions, look back at Part 1 (page 17) under the heading of "Defending Negligence" and the case of *Giliauskas v The State of Western Australia, The Minister for Education and The Acclimatisation Committee*. This was the excursion to the Perth Zoo at which a student at Hillcrest Primary School was mauled by a bear.

Note also that the trampoline cases (under Sporting and Athletic Activities) of *Walsh v Minister for Education in Western Australia* (unreported SC WA 1969) and *Shaw v Commonwealth of Australia* (1992) 110 FLR 379 were both incidents on school excursions.

Teachers and administrators should be aware that, although it is important to have written permission from a parent or guardian before a student goes on an excursion, there is little protection from having a parent sign that teachers are exempted from all liability during the excursion. Such a declaration would not survive a negligence case because a parent cannot remove a child’s common law right to sue if so advised.

However, the SSTUWA recognises that many teachers enjoy going on excursions and that for some teachers and TAFE lecturers, excursions may be part of the syllabus.
Clearly there are many benefits for students to go on excursions and teachers will continue to organise them. The Union's concern is for the welfare of its members while on these excursions because, as the Department makes abundantly clear, the level of duty of care is considerably greater.

For all excursions, the key word is PLANNING. If it is for the first time, planning should start a long way in advance of the event. All excursion sites should be visited before the event and foreseeable hazards and risks taken into account. Particularly useful is making use of the experience of other teachers and lecturers who have done excursions before or arranging to go on one with an experienced teacher. Teachers are strongly advised to read the Department's Excursion Policy document which should be completed by the time you next consider an excursion.

After School Supervision (Buses, etc)

There has been a long-standing requirement that members of school staffs supervise students waiting for school buses operating as a school transport service. But, the Union does not accept that the Director-General's authority in this regard should extend to a requirement upon teachers to supervise children waiting to board public transport.

However, past practice, parental expectation and student expectation may well impose the responsibility at common law for teachers to undertake bus duty. This will vary from school to school and from community to community and teachers should contact the Union for advice about specific situations.

There are a couple of cases that deal with students waiting for transport home.

*Stokes v Russell*

In the case of *Stokes v Russell (1983)* Tasmanian Supreme Court, a 9 year old boy left school at the end of the school day and walked to a bus stop about 180 metres from his classroom. A bus appeared and slowed down as approached the bus stop. The student ran towards the bus and tried to catch hold of the door handle so that he could be first on the bus before it reached the stop. He slipped on the wet road and fell so that the rear wheels of the bus passed over one of his legs.

The bus was contracted to pick up students from a nearby high school and had no formal connection with the student's primary school. But at the time of the accident, the bus was not acting as a school bus but as a normal passenger bus. However, the principal of the primary school knew that some of his students used this bus as he had spoken to them about their behaviour on more than one occasion.

The bus driver was found to have been negligent because he often gave the students sweets and the bus was often rushed by students so as to sit in favoured front positions. This meant clinging onto the door upright posts while the bus was still moving and entering the bus when the door was opened, often before the bus had stopped.

In regards to the school's liability, the judge said:
The distance was considerable, the bus was a scheduled public passenger bus, which the children's parents chose for their children to use, and to use unsupervised. The bus was unconnected with the school. It would be unreasonable to expect the school to supervise travel to the school from a debarkation point chosen by the pupils. So, where they or their parents chose an embarkation point which lies at some distance from the school, no duty arises in the school staff to supervise either the initial or ultimate pedestrian sections of their route from school. The headmaster was right to counsel the pupils about their behaviour when boarding the bus, and while travelling on it. So would he be correct to counsel them about their public behaviour at all times. The fact that he did so does not lead to any inference that he assumed control of their journey homeward. The fact that their attendance at a school was compulsory did not, in these circumstances, call for school supervision of their mode of conveyance or travel to and from school.

By way of contrast, consider now the case of Koffman v The Trustees of the Roman Catholic Church for the Diocese of Bathurst [1996] ATR 81-399.

Here the school authority was found to be liable for injuries sustained by a 12 year old student who caught a bus home twenty minutes after school was over and about 300-400 metres from the school entrance.

The plaintiff was struck in the eye by a stick thrown by a student from a nearby high school at a bus stop which was outside the high school rather than the primary school at which the plaintiff attended. The student had previously caught a bus right outside his school with his sister but had changed his address without the school being informed. His new address required him to catch the bus where the accident occurred outside the high school. The primary school finished its day at 3.10pm but his bus did not come until 3.30pm. A teacher from the primary school also caught this bus.

Because the primary school was unaware that any of its students caught this particular bus, there were no teachers on duty at that bus stop. The high school did have duty teachers but on the day of the accident, it appeared that no supervision was there.

Justice Studdert found against the high school for not adequately supervising its students for their own safety and also so that they did not cause harm to others while the duty of care still existed.

He also found against the primary school. He found that the teacher from the primary school waiting for the same bus was aware that the plaintiff and his sister caught that bus. Further, the school should have been aware that the plaintiff was no longer catching the bus outside the primary school. The judge stated that because the 12 year old and his sister were now waiting at a bus stop with older children from a different school, it was foreseeable that the plaintiff was exposed to a risk of injury and found that the primary school had an obligation to take reasonable care of him until he boarded the bus.
Continuing with his judgment, he went on to say that it would have been relatively simple for the primary school to have provided a teacher to accompany students to the bus stop outside the high school and to remain there with them until they boarded the bus.

On appeal in the Court of Appeal, this decision was upheld by a majority of two to one.

According to Kohn (1997, p. 111):

In order to limit the times during which the teacher-pupil relationship is in existence, it is necessary for the school authority to take clear steps which unequivocally establish that there is no express or implied attempt to accept responsibility for the action or safety of pupils. Steps which might limit the scope of the duty include the locking of school gates; the forwarding of regular circulars and notices during each school year to pupils and their parents advising of the times during which the school is open and during which supervision will be provided; and not attempting to control the behaviour of children outside times when the school authority will accept responsibility for their behaviour and safety.

Supervision of Students Being Transported by Teachers

Where a teacher is carrying a student as a passenger on an educational or sporting excursion, or taking a sick child home or to hospital, then, in the event of an accident, the teacher is in the same position in respect of negligent driving as any driver of a car who is conveying passengers and in respect of claims for damages will be protected by his/her compulsory third party insurance.

The normal criminal laws apply in respect of manslaughter, dangerous driving causing death and other offences.

Teachers should ensure that the number of students carried in a private vehicle does not exceed the number of passenger seats and seat belts in the vehicle.

Supervision of Students Out of School Hours (Functions, etc)

If a function arranged by students is held as part of the organisation of the school; takes place on school premises; is authorised by the principal; and is generally supervised by the staff of the school, then those teachers would have control and responsibility for those students attending the function. They would also be able to determine who could be admitted and who could be refused admittance to the function. (eg, a student who had been suspended from the school under Section 90 of the School Education Act)

Groups of students may also organise social functions, which are held out of school, in order to celebrate such events as the end of the academic year. Staff who have taught these students are often invited to attend.
Care should be taken to ensure that the school cannot be held responsible for students at such functions. If something goes wrong, the courts may see the teachers present as being in positions of responsibility and may hold them liable. In such a situation, the Education Department will not assume vicarious liability.

**Accident Reports**

In the event of an accident, a teacher may be required to provide a statement in relation to the accident, either by way of a report in the School’s Accident Register, or in response to a request from WADE.

If a teacher believes that he or she could in any way be held liable for the accident, the Union strongly advises that no statement be provided without first contacting the Union. In such cases, the Union will provide advice on the content of the proposed statement, to ensure the protection of the teacher's rights.

This procedure will not cause undue delay in the provision of a statement and the teacher should simply advise the Department that she/he is seeking legal advice before providing a statement.

If no statement is requested, it is advisable to keep a record of the circumstances of the accident so that any future claim can be dealt with accurately. Actions can be commenced some years after the event. Students have until the age of 21 to initiate a claim for damages.

David Balfour
(23 Nov 2001)
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