Teachers and the Duty of Care (1)

INTRODUCTION

The School Education Act 1999 (WA) states, at sections 6 (Definition of Compulsory Education Period) and 9 (When Enrolment Compulsory), that there will be a Compulsory Education Period for children in Western Australia and that parents of children whose ages are within that period must enrol their children in an educational programme.

If these children were not required to attend school, they would remain under the supervision of their parents. It follows from this requirement of attendance by Government, that there is a responsibility towards the care of these children by those charged with their education.

In the case of Geyer v Downs (1977) 138 CLR 91 at page 93, it was stated by Justice Stephen that:

Children stand in need of care and supervision and this their parents cannot effectively provide when their children are attending school; instead it is those then in charge of them, their teachers, who must provide it.

The Western Australia Department of Education (WADE) states that it is the Department's policy that teachers owe to the students under their control and supervision a responsibility to take reasonable care for the safety of those students.

The basis for this responsibility, therefore, lies in both the School Education Act and under the common law from court cases such as the one quoted above. (See the notes entitled The Australian Legal System for details on the Common Law and Statute Law)

The commonly used term for this responsibility for the safety of children at school is the Duty of Care. The term is not unique to teachers and students but also applies to employers and employees, doctors and patients and a range of other situations prescribed by law.
**Key Terms**

There are some words and expressions that are commonly used in this chapter which have particular meanings and importance. These include:

- Tort
- Negligence
- Liability
- Reasonable
- Foreseeable
- Proximity
- Neighbour
- Standard of Care
- Vicarious Liability
- Non-Delegable Duty

**The Duty of Care - What EDWA Says**

WADE states (Education Circular June 1994, p. 69) that:

> It is Education Department policy that teachers owe to their students under their control and supervision a responsibility to take reasonable care for the safety of those students......

This duty is to take reasonable care for the safety of the students while they are under the teacher's control and supervision. Reasonable care means that a teacher must respond to all elements of foreseeable risk and take reasonable steps to ensure that a student does not risk injury and that the health of the student is not put at risk......

However, no matter how careful a teacher may be, accidents will happen. Where an accident occurs, the question of liability will always rest upon the individual facts of the case.

Presenting these responsibilities in more detail, WADE continues:

> Teachers owe to each of their students under their control and supervision a duty to take reasonable care for the safety of those students. This duty includes the responsibility to take reasonable action to prevent students from suffering injury from equipment or the actions of other students using equipment.

> It is not a duty to ensure that no harm will ever occur but a duty to take reasonable care to avoid harm being suffered.

> Teachers, in carrying out their duty of care responsibility, need to consider how to achieve a balance between the meticulous supervision of students and the desirable objective of encouraging students' independence.
The Department's use of certain terms and phrases in its policy document is not randomly chosen. Words and expressions such as "reasonable care"; "foreseeable risk"; "It is not a duty to ensure that no harm will ever occur ..." and "how to achieve a balance between the meticulous supervision of students and ...." have all appeared in the decisions of common law cases involving duty of care. WADE uses them because judges have written their decisions in negligence cases using these words and in future duty of care cases, these forms of words will be referred to when new decisions are being made.

[The Department's Duty of Care policy is currently under review and it has developed a draft replacement. However, the old policy is still current.]

THE COMMON LAW AND THE DUTY OF CARE

Torts

Matters relating to the duty of care can bring teachers into the common law world of torts. This is not a comfortable place to be since a teacher is much more likely to be defending a tort than initiating one.

The word "tort" is French for "wrong" or "fault". The law of torts (or civil wrongs) is extensive and its boundaries are indistinct. "Torts" have been described by the American legal writer, William Prosser, (Luntz and Hambly, 1995, p. 84) as:

A term applied to a miscellaneous and more or less unconnected group of civil wrongs other than breach of contract for which a court of law will afford a remedy in the form of an action for damages.

The law of torts is concerned with the compensation of losses suffered by private individuals in their legally protected interests, through conduct of others which is regarded as socially unreasonable.

In essence, what a tort is designed to do is to find who is at fault and to apportion blame accordingly. To quote Luntz and Hambly again:

The law of torts determines whether a loss that befalls one person should or should not be shifted to another person. Naturally this is impossible in any literal sense in the case of personal injury or death, but some of the consequences of injury or death, such as medical expenses incurred or loss of wages or support sustained, can be made good by payment of sums of money, called "damages".

Damages can also include payment to compensate for such matters as pain and suffering and for loss of enjoyment of life.
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It is not a duty to ensure that no harm will ever occur but a duty to take reasonable care to avoid harm being suffered.

Teachers, in carrying out their duty of care responsibility, need to consider how to achieve a balance between the meticulous supervision of students and the desirable objective of encouraging students' independence.
[The present field of motor vehicle accidents and the consequent litigation is enormous. To quote Judge Thorley (of the NSW District Court) in the case of Nazir v Hertz of Australia Pry Ltd (15 June 1979):

The existence of the motor car in the post-World War II era has been of great value to the legal profession. The recovery of damages for persons injured by the motor car has been, and still is, the largest single source of work available to the profession.]

**Negligence**

Negligence, or neglect, is simply a failure to exercise care; and the failure to do something is only a legal wrong if the law imposes a duty to do it.

The duty of care is therefore breached if a person fails to act in accordance with the required standard of care.

In the 1750s, in an influential treatise attributed to Lord Bathurst, he suggested for the first time that:

> Every man ought to take reasonable care that he does not injure his neighbour; therefore, wherever a man receives hurt through the default of another, though the same were not wilful, yet if it be occasioned by negligence or folly the law gives him an action to recover damages for the injury so sustained. However, it is proper in such cases to prove that the injury was such as would probably follow from the act alone. (Baker J H, 1979, p. 347)

The concept of the "reasonable man" was developed further and, in the case of Blyth v Birmingham Waterworks Co (1856) 11 Ex 781, Alderson B stated, at 784, that:

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

[Notice how terms such as "reasonable" and "neighbour" became part of the vocabulary of the tort of negligence. Because the common law operates through the concept of precedent, a judgment of a higher court can be cited as an authority for deciding a similar set of facts in a case in a lower court. Hence these terms can pass from one case to another when the facts allow for it.

There are always going to be gender problems with decisions made many years ago. The concept of the "reasonable man" is a typical example. While we can obviously speak about the
"reasonable person" generally, when citing a case, we are stuck with the actual words. The "reasonable man" will be dealt with in more detail later in this chapter.

The Case of Donoghue v Stevenson

The neighbour principle was redefined in the famous speech of Lord Atkin in the case of Donoghue v Stevenson [1932] AC 562. In part of his decision, he said that neighbours in the law of torts are:

Persons who are so closely and directly 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 ..... I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used ... to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.

This defining case concerned a woman, Mrs Donoghue, who had gone into a cafe in Scotland with a friend. The friend bought her a ginger beer in an opaque bottle. The cafe owner opened the bottle and poured some of the ginger beer over an ice-cream in a glass which was consumed by Mrs Donoghue. Her friend then poured the rest of the ginger beer into the glass at which point the decomposed remains of a snail emerged from the bottle.

Mrs Donoghue claimed to have suffered severe shock and gastro-enteritis as a consequence. She sued the manufacturer (Stevenson) in tort for negligence and the decision (by the House of Lords) established that a manufacturer has a duty of care towards consumers. Further, the judgment was broad enough to cover all careless or negligent actions, where the law required that care be exercised, and hence Western Australian teachers in the twenty first century.

The dissenting view of Lord Buckmaster sounds strange today but, until this decision, was the status quo at the time. He said that:

In the case like the present, where the goods of the defenders (Under Scottish law, a defendant is a defender and a plaintiff is a pursuer) are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works. It is obvious that, if such responsibility attached to the defendants, they might be called on to meet claims of damages which they could not possibly investigate or answer.

The Duty to Act

There is no general duty to take positive steps for the safety of others. If someone is drowning in the sea as an observer walks along the beach, there is no legal obligation to save the drowning person even if the onlooker is a good swimmer.
It is an individual's actions as they affect other people that brings her or him to account. The driver of a vehicle, has an obligation to drive carefully. Failing to do so, and injuring someone, results in a legal liability.

Watching someone drown is not an offence because it is not a consequence of any negligence on the bystander's part. The moral consequences may be significant, but not the legal ones.

This is the dilemma for people when they find an accident victim and attempt to give first aid. Ignoring the victim attracts no risk of legal consequences, while assisting and possibly making them worse may result in a court case.

However, that dilemma does not exist for teachers. There are certain groups of people for whom not interfering positively can result in the tort of negligence. That is, the law imposes a duty to act.

Such groups include teachers because there is a special relationship between students and teachers that requires teachers to take positive action to ensure their students' safety.

Similarly, teachers also have a special relationship between themselves and any third party who may be injured in some way by the actions of their students. Again, there is the need for positive action on the part of teachers to ensure that this does not happen.

This special relationship will be explored through some of the leading cases on the duty of care by teachers.

**Proving Negligence**

There are three criteria required by a student in establishing a claim for the tort of negligence against a teacher. These are as follows:

- The teacher owed the student a duty of care.
- The teacher did not meet the standard of care required in the particular circumstances.
- The student suffered damage or injury as a result of action or lack of action by the teacher which could reasonably have been foreseen.

Each of these criteria will now be considered in more detail.

**DUTY OF CARE**

There is no room for escape in terms of duty of care between a student and a teacher. Indeed, a teacher may also owe a duty of care towards other teachers and visitors to the school. A teacher may also be responsible for any injuries to people outside the school grounds if caused by the activities of children while under their care.
The relationship between a student and a teacher is seen by the Australian courts to be so significant that in the case of Richards v Victoria [1969] VR 136, Chief Justice Winneke said that:

There are other cases in which the existence of the requisite duty of care may properly be considered to exist prior to and independently of the particular conduct alleged to constitute a breach of that duty. One such class of case in which such a pre-existing duty may be considered to exist is that derived from the relationship of employer and employee. ... 

Similarly, we think that the relationship of schoolmaster and pupil is another example of the class of case in which the duty springs from the relationship itself.

In the Richards case, a 16 year old schoolboy (Graeme Richards) was severely injured as the result of a fight in the classroom having been struck on the temple by an 18 year old classmate (Gary Lubach). The blow ruptured the meningeal artery which allowed blood to escape and build up pressure on the brain with the result that the plaintiff developed spastic paralysis.

The students were all of post-compulsory age and were in a class of about 30 doing an arithmetic lesson which was taught by a Mr Traill.

The teacher in the classroom at the time took no steps to stop the fight and the plaintiff sued the State of Victoria as the teacher's employer and the principal, Mr Fleigner, because he had allowed the incident to occur by not removing Traill from the class earlier. This was because Mr Traill had failed to maintain discipline in his class for some months preceding the incident.

The court found that the principal had not been negligent but that Mr Traill had been negligent and that Richards was guilty of 10% contributory negligence.

On behalf of the Government, the Solicitor-General argued that, from the evidence, Traill was under no duty of care to Richards.

Winneke CJ then said that:

We are of opinion that it is now clearly established by authority that in general a schoolmaster owes to each of his pupils while 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 ... As the duty is one to take reasonable care, foreseeability of harm arising from particular conduct is of course relevant to the question whether there had been a breach of the duty, but it is not, in our opinion, relevant to the existence of the duty itself which arises from the relationship of schoolmaster and pupil.
In the later case of the *State of Victoria v Bryar* (1970) 44 ALJR 174, Chief Justice Barwick of the High Court endorsed the findings of *Richards*, stating that:

It is accepted, and rightly, that the school teacher owed a duty to the pupil and to his father to take reasonable care for the safety of the pupil. This duty arose out of the relationship of teacher and pupil. The duty is well described by the learned Chief Justice of Victoria in the judgment of the Full Court in Richards v Victoria.

This relationship was endorsed yet again in the case of *Geyer v Downs* (1978) 52 ALJR 142 by the High Court:

A teacher owes a duty of care to a student whenever and wherever the student-teacher relationship exists.

The question for teachers then, is not whether a duty of care exists between themselves and their students but rather when does the student-teacher relationship begin and when does it end because this is clearly synonymous with the beginning and ending of the duty of care.

In respect of when duty begins and ends, the facts of the *Geyer* case are highly significant to teachers and administrators. In this case, an eight year old girl at Bankstown Primary School was injured at 8.50 am, ten minutes before the official school day began.

The principal was aware that large numbers of students arrived at the school well before 9.00 am and had made provision for this. However, his provisions were considered to be inadequate and the High Court found against the NSW Government and the principal.

In other words, even although the official starting time of the school was 9.00am, under the particular circumstances of Bankstown Primary School, duty of care began before that time.

[See this case in more detail in Part 2 of these notes under Responsibility When Coming To And From School ]

Now all teachers and administrators know that children often come to school well before the school officially begins and do not necessarily leave the school grounds at the end of the school day. Students may also arrive and leave during the day at different times.

Some schools are separated from the community by walls and fences; some are not. Some schools have purpose built playing fields; others have to share them with the community; and others have no recreational space at all. The physical layout of a school can present hazardous situations that do not exist at the school in the next suburb.

In other words, without having to think too hard, it is possible to come up with a multitude of variables that make each school and each set of circumstances different.
A failure to:

- Engage sufficient staff to safely conduct a school.
- Send sufficient numbers of teachers away with a group of pupils on a school excursion.
- Devise a safe system of playground supervision.
- Properly train staff.
- Purchase and maintain safe playground equipment.
- Prevent pupils from undertaking activities which are inherently dangerous.

In each example, the individual teachers conducting the activities should not be responsible. These are all system breaches for which the authority ought to be responsible. However, nothing is black and white in a courtroom and if a school authority convinced a jury that it had not breached its duty of care, it may well be the individual teacher who ends up as having not met the required standard of care.

Most importantly, if teachers believe that the Department is failing in its non-delegable duty of care, they should draw this to the attention of the relevant administrator (in writing if necessary or as a Union Branch motion) and to the SSTUWA.

STANDARD OF CARE

If a teacher is being sued for negligence, the injured student must be able to show that the teacher's actions fell below the required standard of care in this particular instance. This, from the precedent of earlier cases, means that the court has to establish two things:

- What, as a matter of law, is the required standard of care that the teacher is expected to comply with?
- Based upon the facts of the case, did the teacher meet this standard?

Here is what WADE has to say about the Standard of Care in the Education Circular (June 1994, p. 70):

A student must be adequately supervised. What constitutes adequate supervision will depend on the particular circumstances and will vary according to the circumstances.

- The following factors, although not exhaustive, should be taken into consideration when a teacher considers the standard of care required:

  - The student's age, experience and capabilities - the standard of care is a high one where young students are concerned but may be lower in the case of mature post-compulsory students.
  - Physical and intellectual impairment.
  - Normal practices within the school.
• Administrative directions and regulations.

The unusual susceptibility of some students - for example, students afflicted with haemophilia, asthma, heart condition, brittle bones or epilepsy.

• Special care must be taken to protect such students if the condition is known or ought to be known and exposes them to a special risk of injury. However, if no injury could have been foreseen to a person of normal sensitivity and the student’s abnormal sensitivity is unknown to the teacher, then there is no breach of the duty of care.

• The degree of risk involved with certain school activities - for example, sporting activities, cooking and chemistry experiments involve some degree of inevitable risk.

It is important to note that, although written by WADE, these words are an interpretation of what the Department believes the standard of care means, based upon its understanding of previous cases in common law. Some of these cases will be briefly considered here.

The earliest case in determining the standard of care expected of teachers is that of Williams v Eady (1893) 10 TLR 41 (UK). Here, it was stated that a teacher:

Was bound to take such care of his boys as a careful father would take care of his boys.

[Given the gender ratio of teachers, the language of the older cases is hopelessly flawed. Some later decisions have referred to the "reasonable parent".]

In the case of Ramsay v Larsen (1964) 111 CLR 16, reference to the reasonable parent led to the notion of a teacher standing in loco parentis (in the place of a parent) as regards students under the care of a teacher.

In Geyer v Downs (1978) 52 ALJR 142, the High Court again spoke of the reasonable teacher and stated that:

The teacher should take such measures as in all the circumstances were reasonable to prevent physical injury (to the pupil). This duty, not being one to insure against injury, but to take reasonable care to prevent it, required no more than the taking of reasonable steps to protect the plaintiff against risks of injury which ex hypothesi s (the teacher) should reasonably have foreseen.
A significant decision for the standard of care debate was made in the case of *Kretschmar v The State of Queensland* (1989) Aust Torts Reports 180-272 by the Full Court of the Supreme Court of Queensland.

An appeal for damages was dismissed by the Full Court because it was held that the supervision of the children had not been negligent. Reference during the case was made by Derrington J to the High Court case of *Geyer v Downs* in which Derrington J paraphrased:

> It is not of course a duty of insurance against harm but a duty to take reasonable care to avoid harm being suffered ... in the present case, because the number of children under immediate supervision was small, the standard of care was that of a reasonable parent, but certainly not that of an insurer.

Teachers should not be confused by the use of the term *in loco parentis*. The term is not legally significant. The reference on page one of these notes to the *School Education Act 1999* is the source of West Australian teachers' legal obligations to students:

> The basis of the school-student relationship is not that the school is acting as a temporary guardian, but arises by virtue of legislation which initiates the relationship by compelling students of a certain age to attend school. (Ramsay and Shorten, 1996, p. 175)

Remember that the Common Law only prevails when there is no Statute Law covering the same field. The *School Education Act* not only requires that children of the appropriate age attend school (section 23) but imposes sanctions (section 38) against parents who fail to ensure that their children attend school. There are similar penalties imposed upon employers who employ children of school age during school hours (section 29).

The Reasonable Man

The courts decided in earlier cases that the "reasonable man" would behave as objectively as possible. That is, the personal idiosyncrasies of a particular individual would not be taken into consideration. Performing a task to the best of one's ability is not considered by the courts because this is a subjective measure.

However, it is taken that the "reasonable man" has the same occupation as the defendant in question. If a chemistry teacher is in court for negligence, the "reasonable man" for this particular case is a chemistry teacher.

In the High Court case of *Rogers v Whitaker* (1992)175 CLR 479, the defendant was an ophthalmic surgeon. At page 483, the judges said that:
The standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill, in this case the skill of an ophthalmic surgeon specialising in corneal and anterior segment surgery.

While this is a helpful approach, it is still impossible to achieve consistency in all cases and there are many examples that defy logic. The case of *Cook v Cook (1986) 162 CLR 376* may cause beginning teachers some concern.

The plaintiff, an experienced driver, asked the defendant, who was an inexperienced and unlicensed driver to drive her car with the plaintiff as a passenger.

An accident occurred, the plaintiff was injured and sued for damages on the basis of negligence.

The High Court held that the inexperienced driver should be judged against the standard of the reasonable learner driver, because the plaintiff knew of the defendant's inexperience but chose to be driven by her.

On the facts of the case, the Court held that the defendant had been negligent because she had failed to live up to even the standard of the reasonable learner driver. (While trying to avoid a parked car, she had accelerated instead of braking and had hit a concrete pole)

The conclusion to be drawn from this case is that the conduct of an unskilled, inexperienced or untrained defendant is judged according to the standard of the "reasonable man" with skill, experience or training, unless the plaintiff knows and accepts that the defendant cannot be reasonably be expected to live up to that standard. (Davies, 1995, p. 18)

So even although the Court accepted that the defendant was inexperienced, it still expected that she should have the standard of a "reasonable learner driver" and not accelerate when she should have braked - the very thing one might expect a learner driver to do. A beginning teacher would, therefore, be expected to have the skills of a "reasonable beginning teacher" and until there is a case that sets out what a senior court might think that means, beginning teachers will have to hope that they meet that elusive skill level.

Further, following "a recognised and general practice" by a particular occupation or profession may not be a defence if the court determines that the accepted practice does not achieve the standard of reasonable care. Remember that the court decides on the basis of the hypothetical "reasonable man" and not on the behaviour of others.

Importantly for employees, this matter applies to the systems put in place by employers as much as it does to an individual's performance. It is crucial that WADE has comprehensive guidelines for its employees in areas where duty of care is likely to become an issue.
Forseeability
From what has been said so far, the standard of reasonable care is based upon the knowledge that a defendant has or ought to have. It is this knowledge that allows a defendant to understand what sorts of risks or hazards may be foreseen and to take the necessary steps to prevent such foreseeable events occurring.

An important judgment was made by the High Court in the case of Wyong Shire Council v Shirt (1980) 146 CLR 40. In this case, an inexperienced water-skier fell off his skis while skiing in shallow water in a lake for which the Wyong Shire Council was responsible. His head struck the bottom of the lake, resulting in quadriplegia.

The shire had been dredging the lake and had put signs up to show where the deep water was. The skier found the signs ambiguous and had incorrectly believed that he was skiing in deep water when in fact it was shallow.

In its decision, the Court found the council to have been negligent, even although the risk of someone misunderstanding the signs was very small. The Court said:

A risk of injury which is quite unlikely to occur ... may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable ... [A] risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable.

Expectations of the Courts
Given that the care to be given by teachers to students is that which is reasonable in the circumstances, it is not unreasonable to look for some guidance from the courts as to what this means in practical terms. As explained earlier, it is not easy to identify what exact steps a teacher would take in order to comply with the required standard of care. The best that can be done is to look at cases where teachers were found to have breached the required standard and list the variables that the courts found to be significant. Some of these variables are listed here:

- The foreseeability of risk involved in the activity and the cost (educational or otherwise) of eliminating the risk.
- Student characteristics (e.g., age, intellectual and physical capabilities, skill levels, the mischievous tendencies of young persons)
- The seriousness of injury likely to occur in the circumstances.
- The environment within which an activity takes place (e.g., classroom, playground, excursion)
Conformity with common practice and administrative/legislative guidelines.

The weight given to any one of, or to any combination of, these factors depends upon the nature of the activity or situation in which the plaintiff student was involved. Some activities, such as excursion or physical education lessons or science lessons, may require a different level of care on the part of a teacher than other activities or situations, such as silent reading lessons in the classroom. A court will sometimes be required to consider competing factors in order to determine whether a particular defendant teacher has done what was required in the circumstances. (Law Relating to Education in Western Australia, Curtin University, 1998, p. 5.7-5.8)

DAMAGES

In order to succeed in a negligence claim, the plaintiff must establish that:

- Damage to person or to property has occurred.
- The damage or loss was a direct consequence of the breach of duty.

In such cases, the defendant is only liable for damages that were foreseeable and not for any damages that may have flowed on from the original cause.

Damages for personal injuries are awarded in a single amount - a lump sum. This includes losses that may occur in the future as well as those current and past. There are two kinds of damages that may be awarded. These will be totalled and form any lump sum awarded:

- **Special Damages** - These are monies which have actually been spent and can be readily calculated. Included here are medical expenses, damage to property or clothing, loss of earnings, etc.
- **General Damages** - These are based on losses which are more difficult to quantify accurately. The court has to make an estimate of what they are worth. They can include loss of future earnings, pain and suffering, likelihood of a shortened life or loss of enjoyment, etc.

Defending Negligence

There are two defences for negligence under normal circumstances. These are:

- The voluntary assumption of risk. (ie, prior consent of the injured party)
- Contributory negligence.

There appears to be no Australian cases in which the defence of voluntary consent (volenti non fit injuria - that to which a man consents cannot be considered an injury) has been upheld for a teacher. After all, the whole point of having a duty of care towards students assumes that they are less able to make informed decisions about their own welfare than their teachers.

The courts will accept that an adult choosing to bungy jump or stand in the front row at a motor car race or enter a boxing ring has voluntarily consented to do so and any injuries
that result cannot be claimed as someone else's negligence. They will not accept these kinds of decisions being made by school students while under the care of a teacher.

The contributory negligence has had a limited success for teachers for the same reason as the defence of voluntary consent. However, there are cases where costs have been reduced on these grounds. Such an example, in fact, occurred in Western Australia.

The case of Giliauskas v The State of Western Australia, The Minister for Education and The Acclimatisation Committee took place in 1969 before a single judge of the WA Supreme Court. Elmars Giliauskas, an eight year old student at Hillcrest Primary School, was mauled by a bear at the Perth Zoo during an excursion from the school. (The actual incident took place in 1963 but was not heard in the Supreme Court until 1969 when Elmars was 14)

In spite of the young age of the student concerned, Mr Justice Lavan determined that the damages he awarded should be reduced by a factor of 25% because he was "satisfied that the infant plaintiff was guilty of a degree of contributory negligence."

**STATUTE LAW AND THE DUTY OF CARE**

Statute Law is what is legislated for in Parliament. Parliamentary bills, when passed by both Houses of Parliament, become acts or statutes and hence the law. In the case of compulsory education in Western Australia, the legislation is the *School Education Act* 1999 and the Regulations that come from the Act.

As indicated earlier, the Act states that children whose ages fall within the Compulsory Education Period are required to be at school. From this it follows that whoever is responsible for their education must also be responsible for their safety during the hours of tuition.

**The Education Act Regulations**

In the *Education Regulations* 1960 of the previous *Education Act* 1928 (now both repealed as per section 246 of the new *School Education Act* 1999) there was some information about how teachers are to deal with students within the school day. However, these regulations were by no means comprehensive and left a great deal to be determined by WADE policy and by the rules formulated at individual schools. The new *School Education Regulations* 2000 appear to be even less helpful than the repealed regulations, offering even less guidance for teachers in the very difficult area of duty of care.

Because of this, the common law, as it affects teachers in duty of care matters, will continue to play a significant role in their lives.

On some matters, the Act rather than the Regulations, now deals with them. For example, the attendance of children at school and issues of absenteeism are now dealt with by sections 23 to 31 (Attendance) and sections 32 to 45 (Absenteism) of the Act.
The following are the sections of the Act and of the Regulations that are most relevant to teachers and administrators with respect to duty of care. Those that are most significant will be written out in full.

1. FROM THE ACT

   Section 23 - Attendance
   (1) A student must on days on which the school is open for instruction -
       (a) either-,
           (i) attend the school at which he or she is enrolled; or
           (ii) otherwise participate in an educational programme of the school
                whether at the school or elsewhere,
                as required by the principal; or
       (b) comply with an arrangement under section 24.

   Section 24 deals with alternative arrangements to attendance;
   Section 25 considers non-attendance at school for reasonable cause;
   Section 26 allows a principal to take a non-attendance issue to a School
   Attendance Panel.

   Section 27 - Principal may Require Non-Attendance for Health Reasons
   (1) The principal of a school may require that a student -
       (a) not attend school; or
       (b) not participate in an educational programme of the school,
   during any day on which the student or any other student at the school is suffering
   from a medical condition to which this section applies.

   (2) This section applies to a medical condition that, on advice from the Executive
       Director of Public Health or a registered medical practitioner, the principal
       considers may be infectious, contagious or otherwise harmful to the health of
       persons who are at the school or participating in an educational programme of
       the school.

   (3) A requirement under subsection (1) is to be in writing given -
       (a) to a parent of the student;
       (b) in the case of a student who has turned 18 or who is a prescribed child, to
           the student; or
An adult who is notified of a requirement under subsection (1) is to ensure that it is complied with by the student.

Section 28 deals with attendance records.

Section 29 - Employment During School Hours

A person must not employ or permit to be employed a child of compulsory school age during the hours when the child is required to -

(a) attend school; or
(b) otherwise participate in an educational programme of a school.

A child is employed within the meaning of subsection (1) if the child is engaged in work for the purpose of gain by a person even if the child is not paid for the work done.

Subsection (1) does not apply if the employment of the child -

(a) is authorised by an arrangement under section 24; or
(b) is included in the educational programme applicable to the child and is consistent with the terms and conditions of the programme.

2. FROM THE REGULATIONS

Regulation 28 - Specialised Health Care Needs

If a student at a government school has a medical condition that needs attention when the enrolee is attending school or is otherwise participating in an educational programme of the school the principal may seek such advice from the Executive Director of Public Health or a registered medical practitioner as will assist -

(a) the principal in deciding whether any member of the staff of the school is to give attention to the student's medical condition; or
(b) a member of the staff of the school when giving attention to the student's medical condition.

Regulation 29 - Head Lice Inspections

(1) The principal of a government school may authorise a member of the teaching staff or another officer at the school to examine the head of any
student at the school for the purpose of ascertaining whether head lice are present.

Note: Section 27 (of the Act) applies in the case where a student is found to be suffering from a contagious medical condition.

(2) If a student refuses to be examined under subregulation (1) the principal may direct the student -

(a) not to attend the school until such time as the student is examined under subregulation (1) or by a registered medical practitioner and not found to have head lice; or

(b) not to participate in an educational programme of the school until such time as the student is examined under subregulation (1) or by a registered medical practitioner and not found to have head lice; or

Note: Under section 337(1) of the Health Act 1911, a child attending a school is required to submit to a medical or physical examination by a medical officer or any nurse authorised by the Executive Director, Personal Health, and the parents or guardians of the child are required to permit such examination as the medical officer of nurse deems necessary.

Regulation 30 - Clothes, Hair Styles or Adornments that might be a Hazard

(1) The principal of a government school may prevent a student from participating in a school activity if the student's participation in the activity would constitute, or would be likely to constitute, a hazard to the student, or to other students or members of staff at the school, as a result of -

(a) the clothing worn by the student including headwear or footwear;
(b) the length of the student's hair, or the student's hair style; or
(c) the jewellery or other adornment worn by the student including any ring, stud or other thing attached to the student's body.

(2) A principal may take action under subregulation (1) whether or not the student is complying with the school's dress code.

Regulation 31- Students to be Clean

If the state of hygiene of a student at a government school is likely to adversely affect the capacity of other students or members of the teaching staff at a school to participate in a school activity, the principal of the school may require the student to cleanse himself or herself or to return home for that purpose.

Regulation 32 - Parent etc to be Informed of Action Taken

If a principal takes action under regulation 29(2), 30 or 31 the principal is to take reasonable steps to advise a parent of the student or a person responsible for the
student (unless the student is an adult student or an independent minor) of the action and the reasons for the action and seek that person's assistance in dealing with the situation if necessary.

Regulation 33 deals with matters which may be provided for in a dress code.

Regulation 34 looks at information about dress codes.

Regulation 35 considers exemptions from dress codes.

Regulation 36 is concerned with non-compliance with a dress code.

Regulation 37 deals with school codes of conduct.

Regulation 38 - Supervision of Students etc

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;

(b) when the student is attending a school camp or activity conducted by the school;

(c) when the student is on his or her way to or from a school camp or an activity conducted by the school, under the supervision of a member of the teaching staff;

(d) when the student is engaged in a school activity involving students at the school or another school.

(2) A member of the teaching staff at a government school may take reasonable steps to ensure that a student at another school behaves in an orderly and disciplined manner when the student is engaged in a school activity with the teacher's school.

Regulation 39 - Preventing or Restraining Student from Injuring persons or Damaging Property

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).

(2) The power referred to in subregulation (1) may be exercised in any of the following circumstances -

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

(b) when the student is attending a school camp or school activity conducted by the school;

(c) when the student is on his or her way to or from a school camp or an activity conducted by the school, under the supervision of a member of the teaching staff;

(d) when the student is engaged in a school activity involving students at the school or another school.

In matters of discipline and exclusion, there are relevant sections from the Act and from the Regulations. These are:

3. FROM THE ACT

Section 88 - Definition

In this Division -

(a) reference to attendance in relation to a school include participation in an educational programme of the school; and

(c) references to an educational programme include an arrangement to which section 24 applies.

Section 89 - Breach of School Discipline

For the purpose of this Division a breach of school discipline is any act or omission that impairs the good order and proper management of the school.

Section 90 - Suspension for Breach of School Discipline

The principal of a government school may wholly or partially suspend from attendance at the school a student who, in the principal's opinion, has committed a breach of school discipline but the principal cannot suspend a student for longer than the period prescribed by the regulations.

(2) The power conferred by subsection (1) is to be exercised in accordance with the regulations.
The power referred to in subregulation (1) may be exercised in any of the following circumstances -

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

(b) when the student is attending a school camp or school activity conducted by the school;

(c) when the student is on his or her way to or from a school camp or an activity conducted by the school, under the supervision of a member of the teaching staff;

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For the purpose of this Division a breach of school discipline is any act or omission that impairs the good order and proper management of the school.

Section 90 - Suspension for Breach of School Discipline
The principal of a government school may wholly or partially suspend from attendance at the school a student who, in the principal’s opinion, has committed a breach of school discipline but the principal cannot suspend a student for longer than the period prescribed by the regulations.

(2) The power conferred by subsection (1) is to be exercised in accordance with the regulations.
If an order is made under subsection (1) (a), (b) or (c) the chief executive officer is to consider making, and if necessary make, an order under subsection (1)(d) in conjunction with the other order.

An order under subsection (1) -

(a) may be expressed to have effect for a specified period; and

(b) may at any time be revoked or amended by further order made by the chief executive officer.

Section 95 - authorises principals to exclude students above the compulsory age

Section 96 - allows decisions under section 95 to be reviewed

4. FROM THE REGULATIONS

Regulation 40 - Powers of Principals as to Discipline of Students

Subject to Part 3 Division 5 of the Act, regulation 36 and this Division, the principal of a government school may determine -

(a) the ways in which students at the school may be disciplined for breaches of school discipline; and

(b) the breaches of school discipline that are to be dealt with by -

(i) the principal; or

(ii) any other member of the teaching staff.

(2) A student at a government school is not to be disciplined by way of corporal punishment.

Regulation 41- Affecting Educational Programme, Breaks or Activities

(1) If a student at a government school commits a breach of school discipline a school administrator at the school may -

(a) withdraw the student from any class or classes of instruction;

(b) alter any of the student's recess or lunch periods; or
A student is not to be withdrawn from any class or classes of instruction for more than 5 consecutive school days.

Action taken under subregulation (2) is not to affect any requirement of the student to attend the school.

Regulation 42 - Detention

If a student at a government school commits a breach of school discipline a member of the teaching staff at the school may detain the student after school for a period of time approved by the principal of the school.

Before a student is detained the principal of the school or a person authorised by the principal to do so is to take all reasonable steps -

(a) to contact either -
    a person who at law has responsibility for the day to day care, welfare and development of the student; or

(ii) a person responsible for the student,
    as is relevant to the case; and

(b) to ensure that an arrangement is in place for the student to get home.

A student must not be detained for more than 30 minutes unless -

(a) a person referred to in subregulation (2)(a)(i) or (ii) has been informed of the detention; and

(b) the principal or the person authorised by the principal ensures that

(i) an arrangement is in place for the student to get home; and

(ii) the arrangement has been agreed to by a person referred to in subregulation (2)(a)(i) or (ii).

Regulation 43 - Maximum Period of Suspension For Breach of School Discipline: s.90(1)

The period prescribed for the purposes of section 90(1) -

(a) is 5 consecutive school days unless paragraph (b), (c) or (d) applies;
(b) is 10 consecutive school days if the student commits a serious breach of school discipline;

(c) is 10 consecutive school days if the principal makes a recommendation under section 92(1)(a) that the chief executive officer exercise a power under section 94; or

(d) is such further period as is authorised by the chief executive officer if -

- the principal has made a recommendation under section 92(1)(a) that the chief executive officer exercise a power under section 94;

(ii) the chief executive officer has not made a decision based on the material and information referred to in section 92(6);

(iii) the period of suspension imposed by the principal has expired; and

(iv) the student and, unless the student is an adult student or an independent minor, a parent of the student or a person responsible for the student have been given a reasonable opportunity to show that the suspension should not continue.

(2) If a student is either wholly or partially suspended from attendance at a school for a period of suspension referred to in subregulation (1)(a), (b), or (c), the period terminates at the end of the school term in which the term was imposed.

Nothing in this regulation prevents a student who has been suspended for a period referred to in subregulation (1) from being suspended for a breach of school discipline that occurs after that period if the periods of suspension are not consecutive.

Regulation 44 - Suspension for Breach of School Discipline: s.90(2)

If a principal proposes to suspend a student under section 90(1) the principal is to provide written advice about the duration of, and reasons for, the proposed suspension to -

(a) the student; and

(b) unless the student is an adult student or an independent minor, a parent of the student or a person responsible for the student.
The principal is to give a person who is given advice under subregulation (1) a reasonable opportunity to give reasons for not suspending the student.

A principal is not to suspend a student under section 90(1) without having first complied with subregulations (1) and (2) unless the student commits a serious breach of school discipline that adversely affects or threatens the safety of a person at the school.

If a principal suspends a student under section 90(1) because the student has committed a serious breach of school discipline that adversely affects or threatens the safety of a person at the school then as soon as practicable after the suspension takes effect the principal is to provide written advice about the duration of, and reasons for, the suspension to -

(a) the student; and

(b) unless, the student is an adult student or an independent minor, a parent of the student or a person responsible for the student.

The principal is to give a person given advice under subregulation (4) a reasonable opportunity to show that the student should not have been suspended or that the suspension should not continue.

A student who is suspended under section 90(1) remains subject to the school's code of conduct during the period of suspension.

Regulation 45 - Consultation

If a student is suspended under section 90(1) for a total of 10 or more days in a school year the principal is to take reasonable steps to arrange a consultation with a parent of the student or a person responsible for the student (unless the student is an adult student or an independent minor) for the purposes of discussing the student's behaviour and educational programme with the parent or responsible person, with a view to avoiding any further breaches of school discipline by the student.

Nothing in subregulation (1) prevents the principal from arranging consultations referred to in that subregulation for students other than those referred to in that subregulation.

Regulation 46 - Educational Instruction for Suspended Students: s.90(3)

If a student is suspended under section 90(1) -

(a) for 3 or more consecutive school days; or

(b) for a total of 5 or more school days in a school year,
the principal of the school is to ensure that educational instruction is made available to the student.

For the first time, statute law has attempted to define the roles of principals and teachers as found at sections 63 and 64 of the Act. For the purposes of duty of care, the most important subsections are 63(1)(b) and (c) for principals and 64(1)(e) for teachers.

5. FROM THE ACT

Section 63 - Functions of Principal

(1) The functions of the principal of a government school are -

(a) to provide educational leadership in the school;

(b) to have responsibility for the day to day management and control of the school, including all persons on the school premises;

(c) to ensure the safety and welfare of students -

(i) on the school premises; and

(ii) away from the school premises but on school activities,

so far as that can reasonably be done;

(d) to see that instruction provided in the school is in accordance with the requirements of -

(i) the Curriculum Council Act 1997; and

(ii) any determination under section 67;

(e) to establish a plan for the school in consultation with the Council and the school's teaching staff setting out its objectives and how the objectives and priorities will be achieved;

in consultation with the Council and the school's teaching staff to monitor and report on the school's performance in relation to the plan referred to in paragraph (e);

(g) to promote cooperation with the local community;

(h) to encourage innovation in educational practice; and

(i) to perform any other prescribed function assigned to the principal by the chief executive officer.
The principal of a government school has the powers necessary for the performance of his or her functions.

The functions set out in subsection (1) -

(a) do not affect any other function given or delegated to a principal by or under this Act; and

(b) have effect -

(i) within the limits of the powers vested in the principal; and

(ii) subject to this Act and the direction and control of the chief executive officer.

Section 64 - Functions of Teachers

(1) The functions of a teacher in a government school are -

(a) to foster and facilitate learning in students;

(b) to give competent instruction to students in accordance with -

(i) the curriculum;

(ii) standards determined by the chief executive officer; and

(iii) the school's plan referred to in section 63 (1)(e),

and to undertake the preparation necessary to do so;

(c) to undertake regular evaluation and reporting of the progress of students within the terms of the school plan referred to in section 63 (1)(e);

(d) to be answerable to the principal for the educational achievement of students under his or her instruction;

(e) to supervise students and to maintain proper order and discipline on their part;

   to carry out administrative duties to meet organisational requirements relevant to the teacher's functions; and

   to perform any other prescribed function assigned by the chief executive officer.

(2) The functions set out in subsection (1) have effect subject to -

(a) this Act;

(b) the instructions of the chief executive officer; and
(c) the direction and control of the principal.

Section 65 - Functions not to be Inconsistent with Certain Industrial Arrangements

Nothing in section 63(l)(i) or 64 (1)(g) or section 64(2)(b) or (c) enables the chief executive or a principal to assign a function or give an instruction or direction that is inconsistent with a term or condition of service referred to in section 236 (3).

Section 236 - Provisions Applicable to Teaching Staff, other Officers and Wages Staff

Part 3 of the PSMA does not apply to the teaching staff, other officers and wages staff.

(2) The powers to engage, transfer, promote and otherwise manage the members of the teaching staff, other officers and wages staff are vested in the chief executive officer.

(3) The terms and conditions of service of members of the teaching staff, other officers and wages staff are to be -

(a) in accordance with any relevant industrial award, order or agreement; and

(b) not less than those provided for by the Minimum Conditions of Employment Act 1993.

(4) Members of the teaching staff and other officers may be engaged -

(a) on a full-time or part-time basis; and

(b) for an indefinite period as permanent officers, or for a period not exceeding 5 years.

(5) Nothing in this section affects the operation of the Workplace Agreements Act 1993.

(5) For the avoidance of doubt it is declared that members of the teaching staff, other officers and wages staff are employed for and on behalf of the Crown.

There are other important sections which deal indirectly with duty of care to be found under Division 7 - Other Management Provisions, of the Act. (Note that section 123 is a very important enabling authority.) Briefly these are:

Section 119 - which deals with the management and control of school premises.
Section 122 - refers to the way in which the principal or a teacher may deal with a parent of a student.

Section 123 - allows regulations to be made for the general management of government schools and refers to the discipline of students and the powers of principals in that respect.

How the School Education Act and the Regulations Affect Teachers

The first thing to say about the Act and the Regulations as they refer to duty of care is that there is very little detail. They are very general statements that need some policy guidelines to assist teachers in dealing with the diverse circumstances that have been looked at so far.

But most of WADE’s policy on duty of care has already been quoted in this Part or will be in Part Two. And again, it tends to generalise and refer to the terminology of the courts.

What teachers and administrators need to assist them - and to protect them - are clear and comprehensive guidelines covering as many of the possible situations as the Department is prepared to write or agree to. The evidence is there that the common law courts will look favourably on any teachers or administrators who were following departmental guidelines at the time of an incident if the guidelines are deemed to be adequate by the courts.

The best way to ensure that guidelines reflect reality and will be seen as adequate is for teachers and administrators to sit down together write them.

David Balfour
(23 Nov 2001)
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