Harm Without Damages? A School's Liability for Personal Injury in New Zealand

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Introduction

In New Zealand the ability of students (and parents on their behalf) to sue a school for negligence is severely limited by the accident compensation legislation which bars claims for compensatory damages for personal injury other than mental injury not suffered as the result of physical harm. As a result of this legislative framework, the issue of a school's liability for personal injuries suffered by students is rarely discussed in New Zealand case law. Nevertheless, there are circumstances in which a school could find itself liable for personal injuries suffered by students in its care. In recent years, for example, particularly in the context of workplace accidents, the courts have displayed a willingness to fashion a remedy that will go some way to compensating victims and sanctioning conduct which is negligent in the absence of the right to sue for compensatory damages. It may only be a matter of time, given the increasingly rights based and seemingly litigious society we live in, that analogous cases of negligence in the education sector begin to surface.

In New Zealand despite the bar on claims for compensatory damages for personal injury, the right to sue for exemplary damages remains. Exemplary damages serve to punish those who cause harm (by acting in an irresponsible way) rather than to compensate the victim. This means that exemplary damages are not caught by the no-fault accident compensation legislation. The courts, however, are alive to the issue of exemplary damages being used as a 'backdoor' method of obtaining compensation for personal injuries.

There is also the potential for a school to be prosecuted successfully under the *Health and Safety in Employment Act 1992 (NZ) ('HSEA')* if a court finds that a school did not take '*all practicable steps*' to eliminate, isolate or minimise '*hazards*' in the school environment that may have caused the personal injury. Sentencing provisions in the *Criminal Justice Act 1985 (NZ)* enable a judge to order the whole or any part of a fine awarded under the HSEA be paid to the victim of the accident. A prosecution under the HSEA does not preclude a subsequent (or concurrent) claim for exemplary damages in respect of the same conduct giving rise to the harm. Further, it is not inconceivable that a school could be held criminally responsible under section 156 of the *Crimes Act 1961 (NZ)* for the safety of students, by failing to discharge the duty to take reasonable care when in charge of dangerous items, such as outdoor education equipment.

This paper examines the personal injury regime in New Zealand and the potential (if any) for cases to be brought against schools that have been negligent, and caused personal injury.

Establishing Negligence – General Principles

Duty of Care

It is well established that a school owes a student a duty of care not to cause injury to the student if, in the circumstances, a reasonable person would have foreseen that the school's actions or failure to act might result in the student being harmed. In England and Canada, the duty of a school teacher has often been expressed as the duty '*to take such care of the children in his charge as a careful parent would take of his own children,*'[1] based on the assumption that a teacher/school is acting *in loco parentis* (in place of the parent) and is therefore expected to act like a diligent and prudent parent.

In a decision of the High Court of Australia, *Commonwealth of Australia v Introvigne*[2] (a case of a negligent omission by a school authority to take reasonable steps to ensure the safety of students), Murphy J said:

> The notion that a school teacher is *in loco parentis* does not fully state the legal responsibility of the school, which in many respects goes beyond that of a parent. A better analogy is with a factory or other undertaking such as a hospital … the school has the right to control what happens at school, just as an employer has the right to control what happens in its undertaking.

Putting aside the issue of accident compensation, in order for an injured student to succeed in general terms in a claim of negligence against a school, the student must establish that:

1. the school owed the student a duty of care;
2. the school was in breach of that duty;
3. as a result of the school's breach of its duty, the student suffered damage/harm;
4. the damage/harm suffered was not too remote from the school's breach of its duty.

A school's duty of care arises from its acceptance of a child as a student in the school. In *Ramsay v Larsen*[3] Kitto J described the duty in the following way:

> The relationship of teacher and student involves a situation where the duty of care arises as a consequence of the relationship itself. A teacher owes a duty to take care not to cause injury to a student, if, under the circumstances, a reasonable person would have foreseen that the teacher's action or failure to act might result in the student being harmed.

It is sometimes said that the fact that education is compulsory imposes on teachers/schools a far greater duty of care to students than the duty of care that ordinary members of the community owe to others.

New Zealand Legislative Duty

In New Zealand, school boards of trustees have the ultimate legal responsibility for students in their care. This responsibility continues even when outside helpers, parents or instructors are involved

and when students participate in course packages offered by commercial operators. Schools have a statutory duty to look after their students' safety and wellbeing while they are at school and to maintain a safe and effective learning environment. The National Administration Guidelines, which are deemed to be incorporated into every school charter, specifically direct schools to *'provide a safe physical and emotional environment'*.[4]

Duty Owed by School Authorities

A school may be vicariously liable for acts of negligence performed by its employees and volunteers acting within the scope of their employment. *Commonwealth of Australia v Introvigne*[5] is a leading Australian case on the liability of school authorities for negligent acts and omissions of teachers at schools maintained on the authority's behalf. In *Introvigne*, a 15 year old student was severely injured when the truck that was fastened to the top of a flagpole became detached, striking him on the head. The truck fell because a group of boys, including Introvigne had been swinging from the halyard, which ran through the pulley on it. The accident occurred in the schoolyard shortly before school started. At the time of the accident, all the teachers, except one, were attending a staff meeting called by the acting principal to inform staff that the principal had died in the early hours of that morning. Usually there would have been between five and twenty teachers supervising the school grounds at the time the accident happened.

Introvigne established that, in addition to its vicarious liability, school authorities owed a separate duty of care similar to that owed by teaching staff/schools to students. The High Court of Australia held:

> The liability of a school authority in negligence for injury suffered by a pupil attending the school is not purely vicarious liability. A school authority owes to its pupils a duty to ensure that reasonable care is taken of them whilst they are on the school premises during hours when the school is open for attendance.[6]

The Court found that the Commonwealth of Australia was liable for the acts and omissions of its teaching staff. Under sections 8 and 9 of the *Education Ordinance 1937 (ACT)* parents are obliged to have their children aged between six and 15 years enrolled at a school in the Territory '*maintained by or on behalf of the Commonwealth*' or a school registered under the Ordinance. By establishing a school that was '*maintained*' on its behalf, the Commonwealth came under a duty of care to students attending the school.

In finding that such a duty existed, Mason J referred to a House of Lords decision, *Carthmarthenshire County Council v Lewis*[7], which he said proceeded on the footing that:

> … the duty is not discharged by merely appointing competent teaching staff and leaving it to the staff to take appropriate steps for the care of the children. It is a duty to ensure that reasonable steps are taken for the safety of the children, a duty the performance of which cannot be delegated.[8]

Mason J went on to say that in the instant case:

> The fact that the Commonwealth delegated the teaching function to the State, including the selection and control of teachers, does not affect its liability for breach of duty. Neither the duty, nor its performance, is capable of delegation. It is not enough for the school, to leave it to the State to take care for the safety of the children attending the school …The Commonwealth does not cease to be liable because it arranges for the State to be liable on its behalf.[9]

Standard of Care

Murphy J further defined the duty in *Introvigne*:

> (1) To take all reasonable care to provide suitable and safe premises…[taking] 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.[10]

Notwithstanding the above, the courts have generally refused to accept the proposition that a school is an 'insurer' of its students. A school's duty to provide supervision and protection is generally fulfilled if the school exercises reasonable skill and care in seeing that its students are kept reasonably safe.[11]

Richards v Victoria[12] involved a negligence claim brought in relation to injuries suffered by a 16 year old boy as a result of a classroom fight. Richards was in a classroom maths lesson when an argument developed between him and another student which escalated into a fight. There was evidence that the teacher took no steps to quell the argument before it developed into the fight and did not intervene to stop the fight. The fight ended when Richards was struck by a blow from the other student which hit him on the left side of his temple and ruptured the meningeal artery. Blood escaped from the artery, which in turn built up pressure on the brain and resulted in a condition of spastic paralysis.

The Supreme Court of Victoria held that:

> [T]he duty of care owed by [the teacher] required only that he should take such measures as in all the circumstances were reasonable to prevent physical injury to the pupil. This duty is not being one to insure against injury, but to take reasonable care to prevent it, requiring not more than the taking of reasonable steps to protect [the student] against the risk of injury which *ex hypothesi* [the teacher] should reasonably have foreseen.[13]

The leading Canadian case on the standard of care is *Myres v Peel County Board of Education et al.*[14] *Myres* concerned an accident suffered by a 15 year old boy when he attempted to dismount from the rings in a gymnastics class at his high school. At the time of the accident, Myres was practising his routine in the exercise room with six or seven other students, without

supervision. The supervising teacher was in the gymnasium with about 30 other students. From that position the teacher could not see the students in the exercise room.

The Supreme Court of Canada upheld the findings of the trial judge, that the school board and the teacher had not provided the requisite degree of supervision, and there was insufficient protective matting placed beneath the rings at the time of the accident. The Court affirmed that the test for the standard of care is, as described in *Williams v Eady,*[15] *'that of the careful or prudent parent'* but that the test is *'…somewhat qualified in modern times because of the greater variety of activities conducted in schools, with probably larger groups of students using more complicated and more dangerous equipment than formerly'*. McIntyre J emphasised that the standard of care is not the same in every case and will vary from case to case and may depend on the following considerations:

- the number of students being supervised at any given time;
- the nature of the activity or exercise in progress;
- the age and degree of skill and training which the students may have received in connection with such activities;
- the nature and condition of the equipment in use at the time;
- the competency and capacity of the students involved; and
- a host of other matters which may be widely varied.16

Generally, the courts impose a higher standard of care where the situation is more hazardous. Where the activity is considered inherently dangerous closer supervision is required. It is common sense that if a situation is potentially more hazardous, or the students are particularly vulnerable on account of their age or mental capacity, then a school has to be more vigilant and more ready to take precautions. The courts also generally recognise that the greater the number of students, the less direct supervision each student will receive on an individual basis. In general, the younger the students, the higher the standard of care required and the greater the likelihood that negligence will be found. The lower the age and level of experience of the students compared with the sophistication of the activity, the greater the expectation of close supervision.

In *Richards*[17], the Court considered the argument that students of a relatively mature age (16 years in the *Richards'* case) must be regarded as competent to protect themselves against injury and thus not be in need of special protection:

> Impulsiveness, lack of fear, or full appreciation of risks and inhibitions are characteristic of such adolescents. True it is that an age will be reached when it would seem quite inappropriate to regard a teacher as under a duty of care to his pupil merely arising out of the relationship as, for example, a University Professor and a student of mature years and status. That, however, is not the case of a schoolboy subject to the control and discipline which the 'school' and the teacher as an integral part of it, are in a position to exercise over him and his classmates.[18]

In the case of *Williams v Eady*,[19] a boy was badly scarred from chemical burns when another student took a bottle of phosphorus from the science cupboard and put a match to it causing an explosion. The boy sued his teacher for negligence. The Court did not accept the teacher's defence that the chemical cupboard had been locked:

> … if a man keeps dangerous things, he must keep them safely, and must take such precautions as a prudent man would take and to leave such things about in the way of boys would not be reasonable care.

Williams v Eady illustrates that if students breach the school's safety rules, the teacher/school must intervene immediately. If a teacher or school does not enforce their existing safety rules, there is more likely to be a finding that the teacher or school was negligent for failing to take the necessary precautions to prevent the foreseeable injury.

The case of *Close v Minister for Education*,[20] however, demonstrates that a school does not discharge its duty of care merely by setting up a safe system and giving warnings. Positive action must be taken by the teacher/school in order to prevent harm. A student was severely injured when he was splashed by molten aluminium during a practical demonstration by a metal workshop teacher. The teacher had directed the students to remain at a safe distance away from the pot containing the molten metal. However, the court held that the teacher knowingly allowed his safety rule to be ignored and permitted the students to come in close to watch the demonstration.

Foreseeability of Harm

As a general principle, a defendant is not liable for negligence if his or her conduct does not give rise to a foreseeable risk of damage to the plaintiff. If no harm at all is foreseeable, there is no duty and if the particular damage is not foreseeable, it is too remote.[21] However, if a foreseeable risk exists, the likelihood of damage must be taken into account in deciding what, if anything, the defendant ought to do about it.

In *Introvigne*, Mason and Murphy JJ rejected the lower court's *'overly stringent test'* for foreseeability and applied the Court's previous decision in *Wyong Shire Council v Shirt*[22] that a risk of injury is foreseeable so long as it is '*not far-fetched or fanciful, notwithstanding that it is more probable than not that it will occur*'. The Federal Court in *Introvigne* found that there was no unusual danger. However, the High Court did not see that this finding was inconsistent with a finding that the school was negligent because of inadequate supervision.

Remoteness

In establishing negligence, the student must be able to show that, as a result of the school's action or inaction, he or she has suffered harm. Not only must the student be able to prove that the harm was the result of negligence, but also that the harm was not too remote from the actions or inactions of the school. It is important to remember that an injury is not too remote merely because it turns out to be much more severe than could have been expected.

The reasonable person is not expected to guard against every conceivable risk. The danger must be of a significant magnitude to justify precautions. In *Bolton v Stone*[23] a leading case on

remoteness of harm, the plaintiff was struck by a cricket ball when standing on a road adjoining a cricket ground. The ball travelled a distance of about 100 metres and cleared a fence, which was more than five metres above the level of the pitch. The evidence was that it was extremely rare for a ball to go over the fence, although it had occasionally happened. The Court held that although the possibility of an accident might reasonably have been foreseen, the cricket club was not liable for failing to guard against, what, in the circumstances, was a very remote risk. Lord Reid said the test to be applied was whether the risk of damage was so small that a reasonable man (sic) in the defendant's position considering the matter from a safety point of view would have thought it right to refrain from taking steps to prevent the danger.

In any situation that is potentially hazardous for students, a teacher must adopt the Court's test to decide if it is safe to proceed. In other words, the teacher must look at the situation objectively to foresee if there is any likelihood of injury.

Accident Compensation Scheme

Since 1972, accident compensation legislation has prohibited proceedings being brought in any New Zealand court for damages arising directly or indirectly out of personal injury covered by the Accident Compensation Scheme. It remains the position today that an action for compensation may not be brought in New Zealand courts for death or personal injury arising out of an accident occurring in New Zealand. The bar does not operate with respect to claims made in overseas jurisdictions. If an accident victim can bring a suit in some other jurisdiction and persuade the courts of that jurisdiction that some other law should apply, then the accident compensation legislation in New Zealand would not necessarily bar the claim.

The trade off for losing the right to sue was intended to be a comprehensive no fault compensation scheme for all persons who suffered personal injury and were covered by the relevant accident compensation legislation. In the intervening years the Scheme has moved a long way from the initial principles up on which it was based. For example, in 1972, the right to sue for damages for compensation was exchanged for adequate weekly compensation based on what the person had suffered arising from the injury. This could include removal from one's chosen occupation. Now the work rehabilitation assessment test means that entitlement to compensation ends after three months if the accident victim is assessed as having capacity for any sort of work.

Under the *Accident Insurance Act 1998 (NZ) ('AIA')* compensation is paid by the Accident Compensation Corporation ('Corporation') to those who suffer personal injury, or persons who are spouses, children, or other dependents of a person whose cover under the Act is for death or for physical injuries from which they die. The Corporation generally pays accident victims' medical/surgical and rehabilitation support expenses. In cases of serious injury where a claimant is prevented from working, he or she may be paid weekly income compensation of up to 80% of gross income earned (up to a certain limit) before the injury occurred. Other allowances available to cover an accident victim's funeral costs and survivor benefits if the accident results in death.

Section 29(1) of the Act defines '*personal injury*' as meaning:

1. the death of a person; or
2. physical injuries suffered by a person; or

3. mental injury suffered by a person because of physical injuries suffered by that person; or
4. mental injury suffered by a person in circumstances caused by certain criminal acts.

Section 30 of the AIA defines '*mental injury*' as a '*clinically significant behavioural, cognitive or psychological dysfunction'*. Only mental injuries which are the outcome of physical injuries come within the statutory definition of '*personal injury*'. Mental injury alone falls outside the definition, and therefore damages actions for mental injury are not barred.

Exemplary Damages

In *Donselaar v Donselaar*,[24] the New Zealand Court of Appeal established that accident compensation legislation did not prevent an award of exemplary damages in personal injury cases, given that such damages arise out of the conduct of the defendant not from the injury to the plaintiff. The Court held that, although the *Accident Compensation Act 1972 ('ACA')* precluded the recovery of compensatory damages *'arising directly or indirectly out of'* a person's injury or death, there was good reason to retain exemplary damages since compensation under the ACA had no punitive element.

Cooke J (as he then was), warned in Donselaar,[25] that the courts would have to keep a 'tight rein' on such actions 'with a view to countering any temptation, conscious or unconscious, to give exemplary damages merely because the statutory benefits may be felt to be inadequate'. In hindsight, Lord Cooke's warning appears prophetic. In the twenty years since Donselaar, compensatory claims under the guise of exemplary damages have increasingly come before the courts to combat inadequate entitlements.

A major legislative overhaul of the Accident Compensation Scheme in 1992 culminated in the enactment of the *Accident Rehabilitation and Compensation Insurance Act 1992*, which removed lump sum compensatory payments. The erosion of benefits payable under the Scheme has meant that exemplary damages have increasingly been used as a vehicle for persons suffering a personal injury to circumvent the legislative barrier to compensation imposed by the Accident Compensation Scheme and receive a lump sum award or settlement. This is evidenced by the fact that the majority of cases where exemplary damages are sought involve some form of physical harm to the claimant.

It is important to note that in New Zealand, no action for exemplary damages may be brought by the estate of a deceased person in respect of his or her death. The Law Reform Act 1936[26] excludes exemplary damages from those which may be brought by the estate of a deceased plaintiff. Claims for exemplary damages are personal to, and die with, the victim. This position was reaffirmed in the case of *Re Chase*.[27]

Exemplary damages are also now available in New Zealand in circumstances where there may have been a criminal prosecution and/or conviction for the act(s) giving rise to the harm for which exemplary damages are sought.[28] For example, a student who has been sexually abused by a teacher or employee of the school, may in a separate civil trial, claim exemplary damages against the teacher/school even though the teacher may have been dealt with by the criminal law. The fact that the teacher has received a sentence in the criminal courts would be taken into account by the

Judge in the civil trial when he or she determined the level of exemplary damages necessary to sanction the teacher's conduct.

Having said that, the courts have continued to echo Lord Cooke's warning in *Donselaar* that claims for exemplary damages ought not be used to gain compensation. Master Thompson, in *Akavi v Taylor Preston Limited*,[29] stressed the '*danger*' that *'the [c]ourts could be flooded with common law claims for damages for personal injury disguised as claims for exemplary damages'*. In *McLaren Transport v Somerville*,[30] Tipping J recognised that it is:

> not a proper function of the [c]ourts to develop the law of exemplary damages so as to remedy any perceived shortcomings in the statutory scheme.

A new piece of accident compensation legislation, the *Injury Prevention and Rehabilitation Act 2001*, was passed in September 2001 and provides that lump sum compensation payments be restored. However, lump sum payments are restricted to compensation for actual loss of bodily function, as measured by American Medical Association guidelines. An accident victim would have to be severely incapacitated to receive the maximum payout of $100,000. Most of the Act came into effect on 1 April 2002, with some provisions to come into effect on 1 April 2003. It will be interesting to see whether the Act has any effect in curbing the expansion of exemplary damages claims for personal injury.

In *Bottrill v A*,[31] a claim for exemplary damages brought by a patient against her former pathologist who misread and misreported results of cervical smears, the New Zealand Court of Appeal considered whether exemplary damages might be awarded in negligence cases, in the absence of an intention to harm or put the affected person at risk and in the absence of conscious disregard for the plaintiff's interests. The Court held that:

> Exemplary damages for negligence causing personal injury may be awarded if, but only if, the negligence is at such a level and is of such a kind that it amounts to conscious, outrageous, and flagrant disregard for the plaintiff's safety, meriting condemnation and punishment. The concept of conscious disregard means that the defendant consciously appreciated the risk to the plaintiff's safety caused by his or her conduct but nevertheless deliberately chose to run that risk.

The Court also stated that considerations of principle and legal policy underlying exemplary damages in New Zealand weigh heavily in favour of confining the remedy to those cases where the defendant is subjectively aware of the risk to which his or her conduct exposes the plaintiff and acts deliberately or recklessly taking that risk.[32]

In New Zealand, awards of exemplary damages are rare given that the level of negligence required to sustain such an award is particularly high. The Court noted in *Ellison v L*[33] that because negligence is an unintentional tort, cases where exemplary damages are awarded are likely to be rare. The Legal Services Board has reported an increase over the last two to three years of the number of legal aid applications for exemplary damages cases. The Board says that, based on past awards for exemplary damages, it expects that future damages awards will not exceed $50,000 with average payments between $15,000 to $20,000.[34]

In *L v Robinson,*[35] the plaintiff claimed compensatory damages of $200,000 (psychological emotional trauma) and exemplary damages of $150,000 arising from professional misconduct by her psychiatrist. The defendant admitted that he engaged in sexual misconduct with the plaintiff while she was his patient and also admitted writing sexually explicit letters and engaging in sexual intercourse with the plaintiff after she ceased to be his patient. He also acknowledged breaching his duty of care. The Court awarded compensatory damages of $50,000 and considered that the case justified an award of exemplary damages as the defendant's conduct was outrageous and deserving of condemnation of the Court. An award of $10,000 was considered to be sufficient to reflect the Court's condemnation of the defendant's conduct.

In the case of *B v R,*[36] the plaintiff sought exemplary damages of $225,000 for physical, sexual and emotional abuse allegedly inflicted upon her by her uncle when she was aged between seven and sixteen years old. The Court found that the uncle's actions were an outrageous abuse of his position vis-a-vis the plaintiff and awarded exemplary damages of $35,000.

In the case of *McLaren Transport Ltd v Somerville,*[37] a customer suffered a serious personal injury after an employee of the company over inflated a tyre contrary to warnings on the tyre itself and on the nearby wall. The tyre burst, causing the customer serious injury. The Court found that the employee's conduct was reckless and that the level of negligence was so high that it did amount to an outrageous and flagrant disregard for the respondent's safety, meriting condemnation and punishment. The respondent was awarded $15,000 in exemplary damages, upheld on appeal as a reasonable amount in the circumstances.

The offensive conduct must be high handed, reprehensible, or illegal. In the case of a school, it would be necessary to show that the school's failure to take care amounted to outrageous and flagrant disregard for the student's safety, meriting condemnation and punishment. It is likely that a degree of recklessness would need to be involved to sustain an award of exemplary damages.

Mental Injury, Not Arising From Physical Injury

As noted at the outset, the legislative bar to compensatory claims for personal injury does not apply to claims for mental injury that is not the result of a physical injury covered by the Accident Compensation Scheme. A common law action for damages for mental injury, which is not the result of physical injury, would be based on the ordinary principles of negligence.

In *L v Robinson,*[38] the plaintiff was a patient of the defendant psychiatrist. A sexual relationship developed between them and the plaintiff became attached to and dependent upon the defendant. The plaintiff terminated the relationship and laid complaints against the defendant with the Medical Council. The plaintiff claimed compensatory and exemplary damages for psychological and emotional trauma. The Court held that the plaintiff had not suffered a '*personal injury*' within the meaning of the prevailing accident compensation legislation and that as she was never entitled to cover under the scheme, she was not barred from pursuing a claim for damages. The Court also found that the plaintiff suffered a recognisable psychological and/or psychiatric injury as a result of the defendant's breach of duty of care. Further, the defendant's sexual misconduct had a profound impact on the plaintiff's already troubled mind. The plaintiff was awarded compensatory damages of $50,000 and exemplary damages of $10,000.

By analogy a case involving sexual misconduct by a teacher could well fall into this category of case. As well as suing the teacher personally, there could be grounds for suing the board of trustees, if the board had been negligent and/or failed to take any steps to prevent harm to students in circumstances where, for example, the school had information about a particular teacher's inappropriate conduct and turned a blind eye, with the result that a student or students suffered the type of harm in *L v Robinson.*[39]

Other instances come to mind where there is the potential for mental injury, for example, where students are exposed to objectionable material or harmful consequences causing mental injury as a result of using the internet at school, or suffer mental injury as a result of non-physical bullying. In the case of the internet it would be necessary to show that the school breached its duty of care to students (for example, by providing unlimited access – without a 'filter' programme in place, or no or inadequate supervision or even encouraged students to view material that could cause them emotional harm). Again, a mental injury (more than mere shock and disgust) would have to be proven. A Court would take into account the student's age and maturity in considering the effect viewing the material may have had on him/her. The increased use of the internet in schools raises the potential for damages claims based on mental trauma suffered by students exposed to objectionable material, harassment by email, and the like.

Liability for mental trauma as a result of non-physical bullying was considered recently by the English Courts in *Bradford-Smart v West Sussex County Council.*[40] A student claimed that the defendant Council was liable for psychiatric injury caused by bullying when she was a student at a local school. Evidence was given that the student suffered post traumatic stress disorder as a result of severe bullying at school. The conduct complained of took place outside the school (on the estate where the student lived and on the public bus going to and from school). However, the Court reiterated that:

> I would regard the duty as going no further than to prevent bullying actually happening within the school, in other words, to table effective, defensive measures… In my judgment a school cannot reasonably be expected to do more than to take reasonable steps to prevent a child being bullied while it is actually at the school.

The Court found that the school did take reasonable steps to safeguard the student while she was actually at a school, most importantly by having an effective anti-bullying policy in place.

Injury or Death of Another/Nervous Shock

There may also be grounds to claim damages for mental injury suffered as a result of witnessing the death or personal injury of another person. Notwithstanding the Accident Compensation Scheme, an action for damages may be brought by a person who observes the death or injury of another, if he or she suffers mental injury as a result of witnessing the death or physical injuries suffered by the primary victim.

In the case of *Queenstown Lakes District Council v Palmer,*[41] Mr Palmer suffered mental injuries (including post traumatic stress disorder, depression and a speech impediment) after

witnessing his wife's death from drowning in a river rafting accident. Mr Palmer brought proceedings under the *Accident Rehabilitation and Compensation Insurance Act 1992 ('ARCIA')* against the rafting company and the local authority as the second defendant, alleging negligence and claiming compensatory and exemplary damages.

Under section 14(1) of the ARCIA, no proceedings could be brought arising *'directly or indirectly out of personal injury covered by the Act'*. The Court of Appeal found that section 14(1) did not exclude Mr Palmer's claim for compensatory damages since his claim did not arise indirectly out of his wife's death. Mr Palmer was not seeking damages for his wife's death but for his own mental injuries arising from the rafting company's negligence in which his wife's death was part of a sequence of events. The Court said:

> If Mrs Palmer had survived and not suffered any personal injury, Mr Palmer's cause of action, had he still suffered nervous shock at the sight of his wife being thrown into the turbulent water, would remain intact.

The Court found that because the ARCIA expressly provided cover for mental injury resulting from physical injury, the corresponding common law right to sue for mental injury not arising out of physical injury was revived. The Court observed that the purpose of the ARCIA was to produce a statutory compensation scheme, not to proscribe common law claims arising out of accidents. The Court went on to say that to the extent that cover is withdrawn or contracted, the right to sue at common law is revived.

The law of negligence has always allowed nervous shock claims. Where a claim of nervous shock can be made out, it is actionable in New Zealand so long as it is not the result of physical injury, for example, where a close family member witnesses or sees the aftermath of horrific injuries to a loved one.[42] Liability has also been found in cases where employees have witnessed horrific injuries to fellow employees[43] and rescuers become involved in and traumatised by horrific accident scenes.[44]

In New Zealand there are limits on the types of compensatory claims that may be brought for mental trauma suffered as a result of witnessing an accident caused by a third party's negligence. In *Prince v AG*,[45] for example, Anderson J observed that in order to claim for nervous shock the plaintiff had to show a temporal and geographical proximity to a traumatic, dangerous, or fatal accident in respect of the primary victim. The English cases *McLaughlin v O'Brian*[46] and *Alcock v Chief Constable of South Yorkshire*[47] were cited for this proposition.

In *McLaughlin v O'Brian*[48] *the* plaintiff was at home when she was told of a road accident involving her family which had happened about 5kms away and about two hours earlier. She was driven to the hospital where she saw her injured husband and two of her children in an injured state, awaiting treatment. She heard that one child had been killed. Her claim for nervous shock succeeded. The House of Lords held that there needed to be '*a direct perception of some of the events which go to make up the accident as an entire event, and this includes seeing the immediate aftermath*'.[49]

In *Alcock*[50] the plaintiffs were relatives of victims of the Hillsborough football stadium disaster when 95 people were killed as a result of negligent over-crowding of a spectator area at a football match. None of the plaintiffs actually witnessed the death or injury of their relatives. Some

had witnessed the disaster from elsewhere in the stadium while others had seen or heard about the accident through the news media. All the plaintiffs alleged that the impact of what they had seen had caused them severe shock resulting in psychiatric illness.

All the claims in *Alcock* were dismissed. The Court found that in order to establish a claim in respect of psychiatric illness resulting from shock it was necessary to show not only that such injury was reasonably foreseeable but also that the relationship between the plaintiff and the defendant was sufficiently proximate. The class of person to whom a duty of care was owed as being sufficiently proximate was not limited by reference to particular relationships such as husband and wife or parent and child, but was based on ties of love and affection, the closeness of which would need to be proved in each case. More remote relationships would require careful scrutiny. A plaintiff also had to show propinquity in time and space to the accident or its immediate aftermath.

In the New Zealand case *Legge v AC,*[51] the deceased had hanged himself in prison. A claim was brought by his estate and his mother for nervous shock. The Court referred to the tests in *McLaughlin* and *Alcock*, and considered that there was insufficient proximity as the mother only learned of the death afterwards. Master Venning considered that a recognised mental or psychiatric illness was still required for a nervous shock claim at common law. The Master considered that some mental or psychiatric illness in the nature of post traumatic stress disorder or psychological grief disorder was necessary to sustain a claim. General feelings of grief and bereavement, even if severe, would be insufficient.

In the recent case of *Van Soest & Ors v Residual Health Management Unit & Anor*,[52] the New Zealand Court of Appeal considered the circumstances in which a secondary victim, who was not him or herself physically injured or in danger of such injury, might claim damages for mental suffering caused by the death of, or injury to, a primary victim. To put it another way, in what circumstances does the defendant owe a duty of care to such a secondary victim? In this case, a claim for compensatory damages was brought by the next of kin of patients (primary victims) who died as a result of negligently conducted medical procedures. However, none of the next of kin was present at the hospital during or immediately after the relevant operation. All heard of the death of their relative from an employee of the hospital and, some days or weeks later, learned of the circumstances which they alleged amounted to gross shortcomings in the hospital's systems, including the manner in which the operation had been performed.

Having determined that their claim was not barred by the relevant accident compensation legislation, the Court stated that in considering whether the secondary victim plaintiffs could maintain a common law action against the defendant, three matters need to be considered:

1. the nature of the secondary victims' mental suffering;
2. the physical proximity of the secondary victims to the primary victim's accident or misadventure; and
3. the relational proximity (the closeness of the relationship) of the primary victim and secondary victims.

The Court referred to the English cases, *McLaughlin v O'Brian* and *Alcock.*

The Court was 'not convinced' that it should '…depart from the position established in England' '…that a claim by a secondary victim for mental suffering caused by awareness of death or injury to a primary victim through the negligence of the defendant will not lie unless the effect on the mind of the secondary victim has manifested itself in a recognisable psychiatric disorder or illness.'[53]

The New Zealand Court of Appeal in *Van Soest,*[54] noted that Alcock did not seek to limit the claim of persons to whom a duty may be owed by reference to a particular relationship such as husband and wife or parent and child. Having said that, the Court of Appeal did not consider that relational proximity was an issue in Van Soest. Blanchard J said:

> It seems to us that the position on this question taken by the House of Lords in Alcock, … can preserve sufficient flexibility. Provided the particular relationship, whether family (de jure or de facto) or friend, is proven to be close and loving, there will be sufficient relational proximity.[55]

It is not inconceivable that parents and/or students could sustain an actionable nervous shock claim against a school if, as a result of witnessing, in the case of parents, a son or daughter and/or in the case of students, a brother, sister, classmate or friend being killed or severely injured in an accident for which the school was responsible, the witness suffered a mental or psychological illness, such as post traumatic stress disorder or severe depression. The relationship between the parties in the instances mentioned above would likely be sufficient to establish the precondition of a close relationship with the victim. It is likely that the witness would have to see the accident or the immediate aftermath in order to establish the temporal proximity required. It is unlikely that feelings of grief or bereavement (falling short of a mental injury) would be actionable.

Health And Safety in Employment Act 1992

The *Health and Safety in Employment Act 1992 (NZ) ('HSEA')* places responsibility for health and safety of employees, students and other visitors to the school with school boards of trustees as employers, or '*persons who control places of work'*. The HSEA imposes on employers and/or persons in control of a workplace, duties in relation to the prevention of harm to employees at work. Under the HSEA school boards (as employers) are required to take *'all practicable steps'* to ensure the safety of employees while they are at work, and other people who are not employees, but may be at, or in the vicinity of, the workplace or work site. Employers must ensure that they have in place effective methods of identifying new and existing '*hazards*'. Where the hazard is '*significant*', the employer must take all practicable steps to eliminate it or, if that is not possible, to isolate the hazard or at the very least minimise it.

Employers may be fined up to $100,000 and/or sentenced to imprisonment for up to one year for breaches of section 49 where they act/fail to act, knowing that such act/failure to act is likely to cause serious harm to any person. The maximum penalty for a breach of section 50 (where failure to comply with the HSEA has caused a person serious harm) is a fine of $50,000 and/or imprisonment for up to three months.

The Minister of Labour has introduced a bill to amend the HSEA. If enacted, maximum fines for breaches of section 49 will be increased from $100,000 and/or one year's imprisonment to $500,000 and/or two years imprisonment. It is proposed that the maximum penalties in section 50 be increased from fines of $50,000 to $250,000 and/or three months imprisonment. Currently only Occupational Safety and Health ('OSH') inspectors may prosecute employers for breaches of the HSEA. The bill removes the OSH monopoly on prosecutions under the HSEA by allowing the Prime Minister to designate a Crown agency to administer the HSEA for a particular industry, sector or type of work. This provision may enable the Ministry of Education to be designated to administer the HSEA in respect of the education sector. The Government has also indicated that a union may be able to prosecute an employer for a breach of the HSEA, where OSH decides not to prosecute in a particular case. The bill also extends the definitions of 'harm' and 'hazard' so that they include mental harm and hazards arising through physical or mental fatigue respectively.

Section 15 of the HSEA requires employers (ie boards) to take all practicable steps to ensure that no harm comes to people who are at the place of work (the school) but are not employees, including members of the school community, the public and other visitors to the school. This provision is not specifically designed to protect students, but rather should be seen in the context of something arising in the workplace or while at work, to ensure that an employee undertaking that work activity does not harm any other person.

Section 15 of the HSEA provides:

> **Duties of employers to people who are not employees**- Every employer shall take all practicable steps to ensure that no action or inaction of any employee while at work harms any other person.

While section 15 prescribes duties of employers to people who are not employees, it is not the stated intention of the Occupational Safety and Health Service to become directly involved in any harm to students or any harm arising from playground equipment or sporting activity, unless the harm is attributable to non-compliance by an employer (school board of trustees) or others responsible under the HSEA. An example of non-compliance under the HSEA could arise where equipment is not safely or properly installed or maintained. A school could also face liability under section 15 of the HSEA where a teacher fails to intervene in the prevention of an accident or fails to provide adequate supervision of an activity at school or away from the site on a school trip.

An accident at school or on a school trip could result in an investigation by an OSH inspector. As noted above, OSH prosecutions under the HSEA can result in fines of up to $100,000. Further, a prosecution by OSH does not preclude the possibility of the school also being liable for exemplary damages. In the case of *Caldwell v Croft Timber,*[56] an employee's arm was amputated at his workplace as a result of an accident with a square pile saw. He claimed exemplary damages of $500,000 against his employer for negligence, breach of statutory obligations under the HSEA and breach of fiduciary duty. The Court held that the employee/victim was entitled to claim exemplary damages against his former employer, even though the employer had already been ordered to pay a fine under the HSEA.

Under section 28(1) of the *Criminal Justice Act 1985 (NZ)*, where a party is convicted of an offence arising out of any act or omission that occasions physical or emotional harm to any other

person and a court imposes a fine, it must consider whether it should award, by way of compensation to the victim, the whole or any part of any fine as it thinks fit. This is another means by which the courts can compensate a victim of a personal injury over and above the allowances payable under the Accident Compensation Scheme.

The courts' ability to award the whole or part of a fine to the victim of a criminal offence predated the abolition of lump sum compensation from the Accident Compensation Scheme (with the enactment of ARCIA on 1 July 1992). Through the award of fines, victims of personal injury are compensated on essentially a fault-basis, where as the Accident Compensation Act 1972 was enacted to introduce lump sum compensation on a no-fault basis in exchange for the loss of the right to sue for damages.

Department of Labour v De Spa & Co Ltd & Ors[57] involved three appeals of the level of fines by the Department of Labour for offences under section 50 of the HSEA. The *De Spa* cases indicate the level of fines imposed under the HSEA and the types of injures sustained, in light of the maximum fine under the section ($50,000). In one case, an employee was killed when trapped in a wool bale elevator and his neck was crushed. The District Court imposed a fine of $6,500. Another employer was fined $2,000 where an employee suffered an amputation to part of a finger and lacerations to a thumb. In the third case, an employer was fined $5,000 where the employee had died as a result of a workplace accident. In each case the Department's appeal to increase the level of fines failed.

In 2000 a 10 year old boy suffered concussion, neck injuries, chipped teeth and a bitten tongue when he struck a chain placed at the bottom of a waterslide to prevent trespassers using the slide, while on a school trip. The child had used the slide before adult supervisors had removed the chain in accordance with the camp operator's instructions. The organisation which operated the slide pleaded guilty to a charge under the HSEA of failing to ensure the boy's safety while he was at the camp. A District Court judge fined the camp $30,000 for a breach of section 16 of the HSEA[58] and, pursuant to section 28 (1) of the Criminal Justice Act, awarded the entire amount of the fine to the boy. The judge's sentencing notes said that the boy's school could have been made a second defendant.[59] On appeal to the High Court, the amount of the fine was reduced to $6,500.[60] Justice Morris considered that the fine imposed by the District Court judge was $5,000 more than the maximum awarded under section 16 of the HSEA where death resulted.[61] His Honour stated that this accident did not cause death or significant injury, nor did it involve a dangerous work environment.

Section 156 Crimes Act 1961 – Duty to Take Reasonable Care

Section 156 of the *Crimes Act 1961 (NZ)* places a duty on people to take reasonable care when they are in control of anything that, in the absence of precaution or care, may endanger human life. Under this section there is potential for a school board to be held to be criminally responsible for the safety of its students, by failing to discharge the duty to take reasonable care when in charge of dangerous things.

Under section 150A of the *Crimes Act 1961*, a person is criminally responsible for omitting to discharge or perform the duty under section 156 only if, in the circumstances of the particular

case, the omission or neglect is a major departure from the standard of care of a reasonable person to whom the standard applies in those circumstances.

Section 156 prescribes that a person is '*criminally responsible for the legal consequences of omitting without lawful excuse to discharge that duty*'. '*Criminal responsibility*' here means liable to punishment for an offence. Where a person dies as a result of the breach of the duty in section 156, a person may be charged with manslaughter. (This is generally when the section is invoked.)

In the case of *R v Hare*[62], Hare was charged with manslaughter arising out of the legal duty created by section 156 of the *Crimes Act*. A High Court judge sentenced Hare to 18 months imprisonment for manslaughter arising out of a fatal accident between a jet ski he was driving and a runabout boat driven by the deceased. Hare was an inexperienced jet skier, using a friend's jet ski. He failed to read a notice on the jet ski that the machine could not be turned off, except when the throttle was in use. Hare was unable to avoid a collision with the runabout when he tried to turn the jet ski, without the throttle switched on.

In the case of *R v Crossan,*[63] the New Zealand Court of Appeal upheld a sentence of three months' imprisonment for manslaughter in relation to the owner of a car who was a passenger in the vehicle while it was being driven by a person who was drunk. The vehicle mounted a kerb and crashed into the front yard of a house, through a fence, killing a child playing there. The charge was laid against the defendant as the owner of the car, on the basis that it was in his charge and under his control and he failed to take reasonable precautions against and use reasonable care to avoid danger to human life. In *R v Edmounds*[64] a father charged with manslaughter under section 156 was discharged. His daughters had died from carbon monoxide poisoning suffered while inside the vehicle which the accused was driving. Gasses had entered the vehicle in an unusual way. However, there was no evidence that the accused knew how the gasses had entered the car.

Although there is no case law where a school or teacher has been prosecuted for a breach of the statutory duty imposed by section 156 of the *Crimes Act*, it is not inconceivable that a school could find itself liable where, for example, students are involved in an extracurricular activity involving dangerous equipment (such as a water sliding activity), and the school fails to discharge the duty to take reasonable care in circumstances, with the result that a serious accident occurs causing death.

Status of Notices of Parental Consent

As a general principle, a defendant may exclude his or her liability in tort by contract or by non-contractual notice. Where there is no contract between the parties, the defendant can attach a condition to a service, excluding his or her liability for negligence. However adequate steps must be taken to bring the condition to the plaintiff's attention.[65] Does this mean that in order to avoid liability, a school can rely on the fact that a parent has been made aware of the risks associated with a particular activity and agreed nevertheless, for their son or daughter to take part? Are schools able to indemnify themselves from actions being brought by parents/students when students suffer personal injuries at school or while on a school trip? Can schools disclaim liability on the basis of notices of consent signed by parents?

It is a common practice for schools taking students on school trips to require parents to sign a permission slip before the student is entitled to go. Such 'consent forms' do not amount to a waiver by parents of the school's potential liability for negligent acts.[66] Consent forms do not indemnify schools or those responsible for organising or supervising the activities against responsibility for negligence giving rise to accidents, injuries or illness. A parent who signs a consent form is not prevented from bringing legal action against a school if he or she believed that the school and/or activity operator was negligent.[67] Rather, by signing a consent form the parent is acknowledging that he/she is allowing his/her child to participate in the proposed activity, notwithstanding the risks associated with the activity. The consent form has an educative purpose and will assist the school in circumstances where an accident occurs through no fault of the school. The parent cannot deny that he/she was aware of his/her son's or daughter's participation in the activity.

It is best practice for schools to provide parents with detailed information about the nature of the trip/activity, the purpose, possible risks involved, the number of teachers accompanying the students, an itinerary and contact numbers. Arguably, providing parents/students with a warning of the risks inherent in an activity may have evidential value for the school in showing that it acted reasonably in all the circumstances. Further, parents have the option of not consenting to their son or daughter participating in certain activities if they are fully aware of all the potential risks.

An example of the importance of parental awareness/consent was illustrated in the New Zealand media in 2000.[68] It was reported that an 11 year old boy competing in a school cross-country running race was struck by a 4-wheel-drive vehicle and thrown 60 metres along the road. He ended up in hospital in a coma and with suspected brain damage. The injured boy was one of 20 students competing in the race. At the halfway point the track crossed a main road in a 100km/h zone. The students were told that when they got to the track before they crossed the road, a teacher would be waiting to run across the road with them. When the boy reached the crossing point of the road, there was no teacher waiting to run with him. His parents said that there was no mention in the school's consent letter to parents that the students would be running along a busy road. They said that they would never have agreed to let their son run in the race if they had known that the course included the busy section of road.

Defences to a Personal Injury Action

There are two main defences to personal injury action – contributory negligence and *volenti non fit injuria* (to a willing person no harm is done), also known as a voluntary assumption of risk.

Contributory Negligence

The most common defence in personal injury matters is contributory negligence. However, in New Zealand this is no longer a complete defence. Under section 3(1) of the *Contributory Negligence Act 1947,* the damages are reduced to:

> … such an extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

In the context of claims in other jurisdictions brought by students/parents against schools for negligence resulting in personal injury, the courts appear to be reluctant to find that a student has contributed to his or her injury through their own negligent behaviour. While students themselves have a duty to act with reasonable care for their own safety it is often the case that students (even those who are old enough to know better) lack the experience and or maturity to fully appreciate the magnitude of danger involved in certain situations.

> The problem is that the court may often conclude that although pupils recognise that a warning of danger has been given, they do not fully comprehend the extent of the danger. The Court is likely to see in the failure to properly supervise the creating of an improper atmosphere of temptation to experiment.[69]

Voluntary Assumption of Risk

A person who has voluntarily assumed the risk occasioned by a breach of duty by the defendant is barred from bringing an action in respect of harm resulting from breach. In such case the maxim '*volenti non fit injuria'* (to a willing person no harm is done) applies. It is for the defendant to prove that the plaintiff consented to, or assumed the risk, of the harm.[70] Before the defendant is required to establish this, however, the plaintiff must prove that the defendant owed a duty to take care and was in breach of this duty.

A plea of *volenti* can only succeed if the defendant can establish that the plaintiff freely and voluntarily agreed to take upon himself or herself the risk of harm which in fact eventuated. In order for a person to be held to have assumed the risk of harm it must be shown:

1. that he or she was aware of the factual circumstances and of the danger to which they gave rise; and
2. that he or she freely and voluntarily decided to incur that danger.[71]

The Court must determine whether a defendant has taken an appropriate degree of care in all the circumstances, irrespective of whether the plaintiff knew that he or she was taking a risk. Cases where the plaintiff has been injured while a spectator at, or participant in, a game or sport might best be understood in this light. The playing of the game may pose a risk of harm which the plaintiff knows about or recognises, but provided that the game is played properly, organised, and played within the rules the harm, if it eventuates, is not actionable because there has been no negligence.

Claims by a six year old boy struck by a puck at an ice hockey match,[72] and by a spectator to a game of catch in a school playground[73] have failed on this ground. On the other hand, the driver of a boat towing a water ski was liable for his avoidable negligence, when he steered too close to a stationary boat and the skier hit it. The defendant argued, unsuccessfully, that he was not liable on the basis that what happened was part of the risks of water skiing. Chief Justice Barwick concluded that the plaintiff may have accepted those risks which were inherent in the sport of water skiing but not those involving avoidable negligence by the driver.[74] Similarly, a footballer was held liable for serious foul play which broke the plaintiff's leg.[75] In none of these cases was the

plaintiff's knowledge of a risk of any relevance. In each case the standard was no less than that of reasonable care in relation to the activity in question, taking due account of the exigencies of the moment.

Cases involving objectively negligent conduct, where the plaintiff knew he or she was running a risk, fall within a discussion of *volenti non fit injuria*. It is very difficult to show an assumption of risk in cases where the negligence complained of lies in the future. This is because the Courts require there to be both full knowledge of the whole extent of the risk, and free and voluntary acceptance of the legal burden of the risk.[76] Knowingly to encounter no more than a potential risk of uncertain gravity normally goes only to the question of contributory negligence, in which case damages can be apportioned in accordance with the relative blame worthiness of the parties.

What Can Schools Do to Fulfil Their Obligations and Minimise the Risk of Liability?

Safety on School Trips

Taking students out of the classroom environment creates potential dangers to their safety. While school authorities cannot reasonably be expected to know, control or be able to alter many places outside the school grounds, there is an expectation that the school will take all practicable steps to ensure that the teacher accompanying the students is responsible, and is not likely to take any action or inaction, which could directly lead to harm. Teachers undertaking responsibility for school excursions and educational visits are legally responsible for the students in their care throughout the entire duration of the trip. Moreover, the responsibility of a teacher for the safety and welfare of the students is not lessened by the fact that participation might be voluntary and take place during or after school hours. A teacher's duty of care extends beyond normal school hours when he or she is acting in an official capacity.

Recent high profile accidents in New Zealand involving children on school trips raise the issue of whether the Government should set legislative safety standards, including teacher-student ratios, when students are involved in extracurricular activities. This would ensure that consideration is given to the potential risks and that preventative measures are put in place. The nature of the trip or camp will have an impact on the duty of care owed by the school for the safety of the students. (For example, a class trip to the library is clearly less inherently dangerous than a trip to a beach or forest.) When organising camps or trips away, schools should ensure that parents/caregivers are fully informed, and consent, in writing, to the purpose and location of the camp or trip, the activities available and the materials/equipment to be used. A clear description of the nature of the activities to be undertaken and the risks involved, if they are not apparent, should also be provided so that parents are fully aware of what they are agreeing their child may do.

In exercising its duty of care, the school must also ensure that students are adequately prepared for the trip. A school can assist in proper preparation by identifying expected standards of behaviour, providing a timetable of events and adult supervision roster, and carefully explaining what students should do if they get lost or have an accident, so that parents, staff and students are all aware of and understand emergency procedures.

The New Zealand Ministry of Education *Guidelines for Good Practice relating to 'Education Outside the Classroom'* provide ways of formalising a school's risk management process by establishing minimum safety requirements. It supplements the Ministry's *Health and Safety Code of Practice for State Primary, Composite, and Secondary Schools* (1993) which establishes physical standards for school buildings and facilities.

As noted above, schools may be legally responsible where accidents occur as a result of defective equipment or premises which are beyond the control of the school and teachers in charge. However, in the English case of *Brown v Nelson and other*,[77] a student took part in a course at an Outward Bound Centre. While using an aerial ropeway, the wire cable snapped and the boy fell to the ground. The cable was found to be rusty internally, but the defect could not have been discovered without dismantling it. The warden was ordered to pay damages while the owner and the school were dismissed from the suit. Mr Justice Nield stated that:

> where a school must take their pupils to other premises, they discharge their duty of care if they know the premises and if the premises are apparently safe, and if they know that the premises are staffed by competent and careful persons. They further discharge their duty if they permit their pupils there to use equipment which is apparently safe, and is under the control of competent and careful persons who supervise the use of such equipment.

Bullying

As we have seen, where a student suffers mental injury as a result of taunting, teasing or psychological abuse at school, which is not the result of physical injuries, the student will not be covered by the *Accident Insurance Act 1998*, and may be able to sue the school for compensatory damages. To properly discharge its duty to provide a safe learning environment, every school should have a policy with clear guidelines on how to deal with cases of bullying. Policies should be reinforced in school assemblies and newsletters and be seen to have the active and visible support of all staff.

There are a number of things that boards can do to raise awareness of staff, parents and students and reduce the risks of bullying at school, including:

- implementing a school-wide Code of Conduct, specifying what is and is not appropriate behaviour in the classroom and around the school;
- providing clear guidelines for teachers to help them maintain a safe classroom environment. The responsibilities of teaching staff when dealing with a case of bullying should be clear;
- ensuring that target areas and activities where bullies dominate, are adequately supervised;
- having staff monitor students' arrival and departure from school, and movement around the school between classes and lunchtime activities;
- developing prevention programmes and support-systems so that students can report bulling without fear of further repercussions;
- achieving consistency when dealing with student misbehaviour;

- organising meetings with parents and students to discuss the nature and consequences of the behaviour, its impact on all participants, and the school's bullying policy.

Schools should ensure that programmes designed to prevent bullying are school-wide, pro-active, and aim to show attitudes and behaviours, rather than focus on punishments and rewards. Studies have found dramatic reductions in bullying of between 20-80% when school wide strategies are used. Peer mediation programmes, where senior students are trained as mediators to help assist in resolving conflict between students, have been successful in encouraging students to seek help when they are in a conflict situation. Mediation can help the bully understand the hurt he/she is causing.

Internet

Although there are many benefits in providing internet access to staff and students at school, a board could face civil or criminal liability if basic precautions are not taken by the school. To minimise such risks, schools can:

- install a filtering programme. Filtering programmes or 'Net Nannies' are designed to remove unsuitable sites that result from key word searches. Some schools may choose not to instal a Net Nanny on the basis that many objectionable sites can still be accessed unintentionally by entering common phrases into search engines. While it may not be a failsafe measure, it shows that the school is taking all reasonable precautions available to it to provide a safe internet environment.
- implement a policy which establishes clear guidelines and rules for using the internet at school.
- ask students and staff to sign an internet use agreement which includes the rules for using the internet and acknowledges that they are aware of the school's policy and the terms of use of the net at school. While these agreements may not necessarily protect the school from liability, they promote discussion about safe practices on the internet and show staff and students that misuse will not be tolerated.
- ask parents to countersign the student's internet use agreement and/or sign a consent form acknowledging that they are aware that their son or daughter has access to the internet at school.
- appoint a staff member (Internet Safety Officer) with computer skills and an interest in the internet to monitor, be responsible for, and regularly review, the school's internet use and adequacy of its internet safety policy.
- hold a parent/student information evening outlining the positive and negative aspects of the internet and the school's internet policy.
- hold practical workshops and training sessions so that staff/parents know how to provide students with safe internet use.
- ensure that a staff member closely supervises students using the internet.

- only give staff members access to 'log on' so that students need a teacher to give them access to the internet.
- provide teachers with procedures to follow if they suspect that a student may have been misusing the internet (eg check the 10-15 websites most recently visited and stored in the computer's address history).
- treat access to the internet as a privilege which may be withdrawn for misuse.

Conclusion

While the New Zealand Accident Compensation Scheme generally prevents claims for compensation damages for personal injury, exemplary damages are sometimes sought to circumvent accident compensation legislation. However, this is not their proper function. They are intended to punish the perpetrator, not compensate the victim. To succeed on a claim for exemplary damages, the offensive conduct must be highhanded, reprehensible or illegal. In the case of a school it would be necessary to show that the school's failure to take care amounted to outrageous and flagrant disregard for the student's safety, meriting condemnation and punishment. Even if claims are successful, awards of exemplary damages for personal injury are seldom substantial, and tend to be around $10,000 to $15,000.

Schools may face claims for mental injury suffered as a result of negligence, but not arising out of physical injury to the student. Potential circumstances where this might occur include, for example, where a student suffers mental injury as a result of witnessing the death or injury of another student (nervous shock), where he or she suffers post traumatic stress disorder as a result of serious, prolonged psychological abuse/bulling at school, or exposure to graphic or objectionable material on the Internet. There was an example recently where a District Court judge criticised a local Auckland high school for taking no steps to prevent a third form female student from being 'stalked' by another boy at the school with the result that she suffered extreme stress and trauma. That student may well have had a potential claim against the school.

A school may be prosecuted under the HSEA for failing to act to eliminate, isolate or minimise a 'hazard' that could foreseeably cause 'serious harm'. The whole or any part of a fine imposed under the HSEA may be awarded to a victim of the personal injury resulting from the breach of the Act.

There is also the potential for liability under the *Crimes Act 1961* for breach of the statutory duty prescribed by section 156. This is certainly likely if a student died while taking part in an activity involving some sort of dangerous equipment under the control of the school. As far as we are aware, this section has not yet been used to prosecute a school.

Irrespective of the Accident Compensation regime, which significantly reduces the likelihood of New Zealand schools/their insurers having to pay out substantial monetary payments to victims of personal injury, most New Zealand schools today are alive to the importance of putting in place policies and procedures, along the lines outlined in section IX above, and in so

doing appear to be motivated more by a genuine desire to ensure that their students are kept safe at school, than primarily to fulfil their statutory obligations and minimise the risk of liability.

Keywords

Duty of care, liability for personal injury, schools, New Zealand.

Endnotes

1. *Williams v Eady* (1893) 10 TLR 41, CA.
2. [1982] 41 ALR 577, Murphy J at 591.
3. (1964) 111 CLR 16, Kitto J at 28.
4. National Administration Guideline Number 5. The National Administration Guidelines are given effect by sections 60A and 61 of the Education Act 1989.
5. [1982] 41 ALR 577.
6. [1982] 41 ALR 577 Mason J at 586.
7. [1955] AC 549. A school authority was held liable for an injury caused to a motorcyclist when a child wandered onto the road through an unlocked gate at the school. Their Lordships found that the injury was caused by the failure of the authority to take reasonable steps to prevent the escape of the child.
8. [1982] 41 ALR 577 Mason J at 586.
9. [1982] 41 ALR 577 Mason J at 588.
10. [1982] 41 ALR 577, Murphy J at 591.
11. *Richards v Victoria* (1969) VR 136, Winneke CJ at 138.
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13. (1969) VR 136, Winneke CJ at 141.
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17. (1969) VR 136.
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19. (1893) 10 TLR 41.
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23. [1951] AC850 (HL).
24. [1982] 1 NZLR 97 (CA).
25. [1982] 1 NZLR 97 (CA) Cooke J at 107.
26. Section 3(2)(a).

27. [1989]1 NZLR 325 (CA).
28. Section 396 Accident Insurance Act 1998
29. [1995] NZAR 33 Master Thompson, at 43.
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39. [2000] 3 NZLR 499.
40. 8 November 2000 TLR (QB).
41. [1999] 1 NZLR 549.
42. *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 [1991] 4 All ER 907 (HL).
43. *Mt Isa Mines v Pusey* (1970) 125 CLR 388.
44. *Chadwick v British Railways Board* [1967] 1 WLR 912.
45. [1996] 3 NZLR 733.
46. [1983] 1 AC 410.
47. [1992] 1 AC 310.
48. [1983] 1 AC 410.
49. *McLaughlin v O'Brian* [1983] 1 AC 410 Lord Wilberforce at 422.
50. [1992] 1 AC 310.
51. 19/12/97, Master Venning, HC Christchurch M290/96.
52. [2000] 1 NZLR 179.
53. *Van Soest & Ors v Residual Health Management Unit & Anor* [2000] 1 NZLR 179, Blanchard J at para 65.
54. [2000] 1 NZLR 179.
55. *Van Soest & Ors v Residual Health Management Unit & Anor* [2000] 1 NZLR 179, Blanchard J at para 72.
56. [1997] ERNZ 136 (HC).
57. [1994] 1 ERNZ 339, HC, Christchurch.
58. Section 16 of the HSEA imposes a duty on *'a person who controls a place of work'* to take *'all practicable steps to ensure that no hazard that is or arises in the place harms people in the vicinity of the place (including people in the vicinity of the place solely for the purpose of recreation or leisure)'* and *'people who are lawfully at work in the place'*.

59. '*Schools warned of legal risk*', Sunday Star Times, 5 November 2000.
60. *Christian Youth Camps v Department of Labour*, (Unreported) 11/12/2000, High Court, Auckland, Justice Morris, A 210-00.
61. *Department of Labour v De Spa & Co Ltd & Ors* [1994] 1 ERNZ 339, HC, Christchurch.
62. Unreported, 15/11/99, CA 332-99.
63. Unreported, 1/12/98, CA 310-98.
64. (1991) 7 CRNZ 510.
65. For example, *The Humorist* [1944] P28. Todd, 'Defences' in Todd (ed), *The Law of Torts in New Zealand* (2 ed, 1997) 1110.
66. (Barnes, 1990) From www.mum.ca/educ/ed4361/virtual *academy/campus_a*/alegal.html
67. '*Safety in schools: the duty of care*' EduLaw Newsbrief (Vol 1 No 3 1995).
68. '*New Zealand: Police Investigate school after boy seriously injured*', Sunday Star Times, 22 October 2000, at p1.
69. Reynolds C Seitz, 'Legal Responsibility Under Tort Law of School Personnel and School Districts as Regards Negligent Conduct Towards Pupils', Hastings Law Journal 495, 504 (1964).
70. *James v Wellington City* [1972] NZLR 978 (CA).
71. *Osbourne v London & North Eastern Railway* (1888) 21QBD 220 Wills J at 223-224.
72. *Murray v Harringay Arena* [1951] 2 KB 529 (CA).
73. *Plumb v Cowichan School District No.65* (1993) 83 BCLR (2d) 161 (CA).
74. *Rooter v Shelton* (1967) 116 CLR 383.
75. *Condon v Basi* [1985] 1 WLR 866 (CA).
76. *Osborne v London and North Western Railway* (1888) 21 QBD 220 at 223-224.
77. *Brown v Nelson and others* (1970) 69 LGR 20, Queen's Bench Division.