The Schoolyard Fight: Duty of Care Owed By Teachers: El Sheik v Australian Capital Territory Schools Authority (2000) FCA 931 (11 July 2000)

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Introduction

People generally accept that children, particularly boys, play fight in the schoolyard and that sustaining injuries from time to time is inevitable. But what happens when lawyers raise an argument that an injury sustained was caused by the negligent supervision of the school? At what stage are injuries caused by negligence and not just the normal bumps and bruises associated with schoolboy life? This question continues to be a cause for concern for schools. Fortunately however, the decision in *El Sheik v Australian Capital Territory Schools Authority*[1] demonstrates a trend away from the nonsensical end of the negligence spectrum. This case note examines *El Sheik's case* and comments on the implications for schools in relation to supervision of students.

Facts

The plaintiff, El Sheik, was a 15 year old school student involved in two scuffles with the defendant, Esposito. The defendant surprised the plaintiff by saying out of the blue "Come on, let's fight" and then started to kick him. The defendant replied "What are you talking about? No". The plaintiff fell to the ground as the defendant continued to kick the plaintiff while other boys gathered around to shout encouragement. The plaintiff managed to overpower the defendant and told him to stop. The defendant replied "Okay".

The teacher on duty became aware of the situation. By the time the teacher was close enough to see through the crowd the fight had ceased. There was evidence that the teacher said not to fight and then proceeded to walk off.

It transpired that the fight had only ceased temporarily. As the plaintiff turned to walk away, the defendant resumed kicking him hard on the leg. The plaintiff brought the defendant to the ground again and made him agree to stop. The plaintiff said "make sure you do this time". As the plaintiff returned to class he limped and his leg hurt.

The incident was described as being a "play fight that got serious". The plaintiff sustained injuries that were exacerbated by the fact that he suffered from thrombocytopenia. This meant he was more prone to bleeding and bruising even after minor injuries. The plaintiff was hospitalised and underwent three operations. When discharged from hospital he was unable to put any weight on the affected leg. Further treatment became necessary.

Legal Proceedings

Legal proceedings were commenced against the ACT Schools Authority (first defendant), the Principal of the school (second defendant) and Esposito the offending student (third defendant). The case against the student was stood over.

The crux of allegations levelled at the first and second defendants were:

1. There was no proper and adequate supervision by suitably trained staff on the school premises and oval, a place where fights were known to take place;
2. They failed to implement policies to minimise the likelihood of injuries to school students like the plaintiff;
3. They failed to develop management systems and procedure manuals describing the specifications for proper and adequate supervision; and
4. They failed to ensure teachers were adequately equipped to cope speedily and efficiently with assaults by one student upon another student.

The Principal's and the ACT Schools Authority's defence included general denials and allegations of contributory negligence.

At First Instance

Justice Miles found in favour of the plaintiff against the first defendant only. The reasons for this decision were:

- There was no failure to supervise on the part of the teacher. The Principal was not negligent in failing to roster staff in such a way that there was one teacher supervising for every 50 students during the lunch break because it would reduce the number of teachers available for classroom and other duties before and after the lunch break.
- There was a duty owed by the ACT Schools Authority to ensure that reasonable care was taken with respect to the plaintiff's safety during the time that he was at school. To determine the defendant's duty it is necessary to evaluate the "cost that would be incurred in the measures necessary to prevent all equivalent accidents of a like kind and risk".[2]
- The ACT School Authority has a special responsibility to take care for the safety of its students because of "the notorious immaturity and inexperience of school pupils and their propensity for mischief".[3]
- The plaintiff had not been guilty of contributory negligence. In hindsight the school should have been told about the plaintiff's vulnerability. It was not a lack of reasonable care on the part of a 15 year old student to fail to notify the school about his susceptibility to injury. Although he was aware that he had thrombocytopenia, he did not understand the implications of the condition.

The ACT School Authority was ordered to pay the plaintiff damages of $770,000.00.

On Appeal

On appeal, the Full Federal Court revealed a fatal defect in the injured school boy's case: they had failed to establish a causal connection between the alleged breach of duty and the injury sustained. The result may have been different if El Sheik had sustained the injuries over a period during which the incident should have been stopped, if proper supervision had been provided. If this were the case, increasing the ratio of supervisors to students may have prevented the injury.

The Court accepted that the supervising teacher arrived shortly after the incident commenced and therefore, could not have been very far away at the time. Common sense and common practice would suggest that a second teacher would have been in a different part of the oval area; so it is most unlikely that the presence of a second teacher would have reduced the response time to the incident. It was suggested that an army of supervisors would be required to prevent any incident that might give rise to a physical injury in the circumstances.

In the leading judgment, Wilcox J said

> An educational authority can, and should, prevent rough "horse play" incidents going on for a significant time or escalating into a level of violence that is likely, under normal circumstances, to constitute a danger to life or limb; but it seems to me that is all it can do.
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> Although I accept that an educational authority has a duty to take reasonable steps to protect students from significantly violent behaviour, or from prolonged unwelcome physical attention, I do not think it can realistically be said that the duty extends to protecting an apparently normal 15 year old boy from receiving, over a short period of time, playfight kicks from his friend, even painful playfight kicks.
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> The appeal was allowed.

Discussion

While educators might take some comfort from the *common sense* approach adopted by the Court in this case, they should be sure to maintain their vigilance when it comes to supervision. Particularly in light of the inherent risks and special vulnerability that schools are placed in when asked to care for children on school property.

It will never be enough for school authorities to simply employ competent teaching staff. In short, school authorities must ensure that reasonable steps are taken for the safety of children. This must include:

1. The appointment of suitably trained supervisors;
2. The diligent supervision by suitably trained supervisors;
3. Making sure that supervisors are aware of the special needs of particular students which may warrant special attention;

4. The development and implementation of written policies and manuals designed to minimise the risk of students being injured – this should include the development of an action plan for certain eventualities;
5. Regular reviews of policies, manuals and action plans;
6. Recording of any incidents where students may be injured; and
7. The deployment of adequate numbers of supervisors.

Relevant considerations when contemplating these objectives are the geographic area to be visually supervised, the number of students to be supervised as well as seeking to accommodate the specific needs of certain students. The cost of employing these types of preventative measures may be far less than those associated with any lengthy court battle.

Endnotes

1. Supreme Court of the ACT delivered 27 August 1999 and then appealed and reported at [2000] FCA 931 (11 July 2000) – *El Sheik's case*.
2. *Romeo v Northern Territory Conservation Commission* (1998) 192 CLR 431 at 129.
3. *Carmarthenshire County Council v Lewis* [1955] AC 549 at 271-272.