A plaintiff lawyer's guide to litigating children's injuries

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When children injure children

If you are representing an injured child, the age of the other child who has caused the injury is of crucial importance, when you are planning your plaint. If the errant child is too young to have foreseen the consequences of what he or she has done, then that child cannot be liable in negligence.

If the child is also too young to form an intention to cause injury, then personal trespass as a cause of action will also be futile. However, it is fair to say that children may be held liable in trespass at a younger age than when negligence is able to be established, so factor that point into your planning. (See *Ellis v D'Angelo* (1953) 253 P 2d 675, where it was held that a U.S. infant aged 4 was capable of intending an assault and was therefore liable in trespass, even though he could not appreciate the wrongfulness of the behaviour and could not be liable in negligence.) See also *Hogan v Gill* (1992) Aust Torts Reports 81-182, involving a six year old shooting a four year old in the head.

The leading case is *McHale v Watson* (1964) 111 CLR 384, where Master Barry Watson aged 12 years threw a home-made metal dart which struck Miss Susan McHale, aged 9 years, in the eye, after bouncing off a post.

The claim against the boy Watson was made on the basis that the dart was thrown with the intention to hit the girl McHale and alternatively that the boy was negligent in throwing the dart as he did. Mr Justice Windeyer held that the plaintiff could not succeed in trespass if what the defendant Barry Watson did was without any intent that the dart should hit the girl, and without negligence on his part.

Can you sue the parents of the offending child?

No, not unless the parents have incited their child to carry out the offence, or played some active role in the misconduct of their child, participating in it, directing it, or ratifying the wrongful behaviour. In *McHale v Watson*, there was an unsuccessful claim against the father of the boy Watson, on the basis that the father had neglected to exercise due care and control of the actions of his son, having himself made the dart and having also made himself responsible for the payment of most of the plaintiff's hospital and medical expenses.

There is no principle of vicarious liability applying to the parents of the child who has injured another person. The parent's direct liability for the injury must be established either in negligence, or in breach of some statutory duty.

In *Smith v Leurs* (1945) CLR 256, a boy's eye was injured by a stone fired from a shanghai by another boy. The parents had taken "all the precautions that could reasonably be expected" with their previous warnings to their son about the dangers of shanghais and the need for careful use of the implement. Latham CJ said that it would have been an "impracticable and unreasonably high standard of parental duty" to have confiscated or completely prohibited the weapon's use (at 260).

His Honour said at 259, while pointing out that parents are generally not liable for their children's torts, unless those children are acting within authority as servants or agents:

"A parent as such is not responsible for the torts of his child, though, if the child is his servant or acts with his authority, the parent will be liable as his employer or principal. But a person who, as a parent, has the control of a child is responsible for negligence in the exercise of that control if injury results."

Parents, children, and firearms

A case where parents were held liable in negligence and also in breach of statutory duty, having supplied their 15 year old son with a firearm against the law, and where his younger friend was injured, was *Pask v Owen* [1987] 2 QdR 421.

Some English firearm injury cases, where the courts have closely examined the level of control exerted by parents over their children's use of an inherently dangerous object, in determining whether the parents were negligent or not, have been:

a) *Newton v Edgerley* (1959) 3 All ER 337
b) *Donaldson v McNiven* (1952) 2 All ER 691
c) *Gorley v Codd* (1966) 3 All ER 891.

The situation is markedly different in the U.S.A., where 42 states have enacted laws making parents responsible in some way for their children's criminal offences. Seventeen states make parents criminally liable, with fines and custodial sentences. California's "anti-gang" law provides penalties of up to twelve months' jail and $2,500 fines for parents' inadequate supervision of their children's behaviour while Arkansas has a parental-responsibility law which can order parents to attend for "responsibility training". Criminal prosecution can be brought against Arkansas parents whose "gross neglect of parental duty" can be shown to have led to their child's criminal acts. About twenty states have "child access prevention laws" which hold parents accountable if they allow guns to fall into children's hands. Doubtless the number of U.S. states with parent responsibility legislation will soon dramatically increase, in the wake of the Jonesboro Arkansas schoolboy-sniper massacre of 1998.

What is the standard of care in the negligence of child defendants?

If a defendant child can be shown to have had sufficient age to have foreseen the consequences of his or her particular conduct in the given circumstances, and if negligence is the plaintiff's cause of action,

then the standard of care to which the defendant child must conform is the standard appropriate for children of the same age, intelligence and experience. (see *McHale v Watson*, per Owen J, at 231, and *Griffiths v Wood* (1994) Aust Torts Reports 81-274.)

Who brings the action on behalf of your injured plaintiff child?

If your client is a legal infant, under the age of 18 years, action is brought on the injured child's behalf by his or her next friend, often a parent. You will usually need to draw up and file a "next friend certificate" together with your plaint.

Children's injuries - setting back the hands of the statute-bar clock

If one child injures another child, civil action may be possible against the wrongdoer, but it will probably be a Pyrrhic victory. The defendant will usually have no assets to pay the damages awarded. So the usual plaintiff strategy will be to identify, if possible, some adult whose inadequate and negligent supervision led to or permitted the conduct of the misbehaving minor. Sue the adult instead, because the adult is likely to have personal assets, insurance, or sometimes even the benefit of an employer's vicarious liability. [See *Clarke v Bethnal* Green Borough Council (1939) 55 TLR 519. Here, a 13 year old girl was injured at a public swimming pool. She was standing on the springboard preparing to dive. Another child, holding onto the under part of the springboard, suddenly let go and the intending diver was thrown on to the edge of the pool and injured. No use suing the offending child here, so the Council, the owners of the pool, were sued instead (unsuccessfully).]

An alternative strategy for the plaintiff lawyer representing a child injured by another child is to wait until the defendant does have the necessary assets to make suing worthwhile. This originally happened in *Lubner v Stokes* (1952) SASR 1, where a boy aged nine de-eyed the plaintiff child aged eleven, by throwing a steel-nibbed pen at him in a school classroom. Proceedings to recover damages were not commenced for thirteen years, when the defendant did now have worthwhile assets for pursuit. That case was in the days when the age of majority was 21. Now, of course, adulthood is a status acquired at 18 years. The litigation rule for injured children is that the three year statute of limitations only operates to bar actions, three years after the plaintiff has reached 18 years.

Will damages for your injured child plaintiff be reduced on the basis of contributory negligence?

Probably not. Children are younger, less experienced, more wilful, more curious, and less able to understand the ramifications of their actions or the potential risks involved, than are adults. Sometimes, for example in schools, they engage in conduct under the direct orders or directions of persons in authority, such as teachers. In *Ramsay v Larsen* (1964) 111 CLR 16, damages for a schoolboy's injuries, sustained when falling out of a schoolground tree which he had climbed in direct contravention of school rules, were held not to require reduction on the grounds of contributory negligence, because a teacher had ordered him to retrieve school keys lodged in the tree through horseplay, instead of ordering him down immediately.

Children injured at school

Children are statutorily required to spend many of their childhood years at schools. It is during those years and at those places that a great many of the litigated injuries occur.

A primary or personal duty of care can rest upon several parties within the school system: individual teachers, the school principal, and the school authority itself. In government schools, it will usually be the Minister for Education.

Individual teachers may be liable to an injured pupil, but which particular teacher will depend on all the circumstances, including the organisation of responsibilities within the school. An individual teacher may have been given responsibility for supervising a particular class, excursion, or playground activity, but in some cases it may be difficult for the plaintiff to establish causation, because the accident or injury was "a thing of the moment" (*Gow v Glasgow Education Authorities* [1922] S.C. 260, 266) or "happened in a flash" (*Clark v Monmouthshire County Council* (1954) 52 L.G.R. 246, 248 per Denning L.J., or "happened suddenly and unexpectedly" per Morris L.J. at p. 250). As Hodson L.J., quoting the trial judge in *Rich v London County Council* (1953) 2 All E.R. 376, 380 stated, "One can supervise as much as one likes, but one will not stop a boy being mischievous when one's back is turned. That, of course is the moment he chooses for being mischievous." By contrast, however, in *Beaumont v Surrey County Council* (1968) 66 L.G.R. 580, an accident resulted from horse play which had lasted some seven to eight minutes before the plaintiff was hit. The court held that under an adequate system of supervision, the horse play would have been stopped immediately, or at least within two or three minutes and the accident would never have occurred (at 587). Such "but for" tests of causation are often difficult to apply, as it involves considering whether the hypothetical presence of some precaution would more probably than not have affected the final outcome. It can often be difficult to prove that reasonable action by a particular teacher would have avoided injury to the plaintiff. In most cases, it would usually not be good plaintiff strategy to proceed only against particular teachers.

Because a teacher (or even the school principal) is likely to be a "man of straw", an injured pupil is usually best served not by seeking relief primarily from them. A better and more usual strategy is choosing to sue the school employing authority, also thereby consequently bringing the insurer on to the scene, in the case of non-government schools.

The school principal is likely to be responsible for a broader range of educational and managerial matters, such as the allocation of responsibilities in respect of teaching, supervision, safe premises, etc. In *Geyer v Downs* (1978) 52 A.L.J.R. 142, the principal was held negligent for failing to make sufficient provision for the supervision of a pupil who had been permitted to enter school premises before the commencement of the daily routine. In *Jackson v The London County Council* (1911) 28 T.L.R. 66, the principal was found negligent for leaving unguarded a quantity of lime which had been left by a contractor in the playground. Because an employer is liable in a master-servant rela- ▶

tionship for the torts of its employee, a pupil who establishes negligence on the part of either a teacher or a school principal may therefore claim against the school authority, provided the negligence occurred in the course of the teacher's or the principal's employment as a servant of the school authority.

"Negligence is, in every case, a question of fact. In no case can the answer to that question be found in words, however eloquent, uttered by Judges, however eminent, about the facts of some other case." (Per Windeyer J. in *Sungravure Pty Ltd v Meani* (1964) 110 C.L.R. 24 at p37.) A famous quotation, which is of particular relevance to plaintiff planning in actions for injured children.

In *Ramsay v Larsen* (1964) 111 C.L.R. 16, 28 Kitto J. said, "In the absence of a special arrangement to the contrary, it is, I think, the necessary inference of fact from the acceptance of a child as a pupil by a school authority, whether the authority be a government or a corporation or an individual, that the school authority undertakes...to give the child a reasonable care." The duty of care owed to pupils has two main aspects. The first is the duty to provide adequate supervision. A consequence of failing to fulfil this duty is that a pupil may be injured by a fellow pupil. The second is the duty to provide safe and suitable premises and equipment. A consequence of failing to fulfil this duty is that pupils may injure themselves, e.g. by running into a dangerous glass door, walking on a slippery floor, using a defective swing, drinking from unsafe drinking facilities, etc. This second aspect of the duty of care may combine with the first, for example, where an unsupervised pupil swings on a dangerous door. As the reported cases show, other heads of duty may also be relevant, such as occupier's duties and statutory duties.

In addition to the potential defendants already mentioned, a "stranger" to the teacher/pupil relationship may also owe a duty to the pupil, for example, drivers of vehicles, manufacturers of educational products, and occupiers of premises outside the school.

The basis of the duty of care: the teacher/pupil relationship

One usual test for liability is foreseeability of risk and injury. All persons owe a duty to all foreseeable victims of their careless acts or omissions. They owe a duty to their "neighbours" as that word was used in Lord Atkin's sense, in the famous *Donoghue v Stevens* "snail in the bottle" action. In the case of pupils, the duty of the teacher depends not merely on the foreseeability of injury, but primarily on the relationship between the parties. In the teacher - pupil relationship, "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 the breach of that duty...The duty springs from the relationship itself". (*Richards v State of Victoria*) [1969] V.R. 136 at 140).

Standard of care

In determining whether there has been a breach of duty, consider first the standard of care demanded of the teacher or school authority. That standard of care is regarded today as much higher than that of a "reasonable parent". In *Geyer v Downs* the reasonable parent analogy was described as "somewhat unreal in the case of a school master, who has charge of a school with some 400 children, or a master who takes a class of 30 or more children. What may be a useful guide applicable to a village or small country school cannot be of direct assistance in the case of a large city or suburban school." (1978 52 A.L.J.R. 142 at 147 per *Murphy & Aickin* J.J.)

Although high, the standard of care is not absolute. As Lord Reid said in 1995: "There is no absolute duty; there is only a duty not to be negligent". (*Carmarthenshire County Council v Lewis* [1955] A.C. 549 at 566). This view has been confirmed in Australia. "It is not ... a duty of insurance against harm but a duty to take reasonable care to avoid harm." (*Richards v The State of Victoria* [1969] V.R. 136 at 138; *Victoria v Bryar* (1970) 44 A.L.R. 174 at 175).

Factors relevant to breach - foreseeability

The High Court has held that 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 therefore foreseeable". (*Wyong Shire Council v Shirt* (1980) 54 A.L.J.R. 283 at 286 per Mason J.)

Given the mischievous tendencies of young children, the reasonable teacher is able to foresee fairly bizarre possibilities. Lord Esher stated that the teacher, "was bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts and their propensity to meddle with anything that came their way". (*Williams v Eady* (1893) 10 T.L.R. 41 at 42). Children are mischievous not only in their tendency to do deliberately mischievous acts, but also in their inability to fully comprehend the consequences of what they do (*Edgecock v The Minister for Child Welfare* [1971] 1 N.S.W.L.R. 751 at page 758). As the foreseeability test has been so relaxed in its recent applications, chances of a court's ruling a risk of injury unforeseeable in the school setting are fairly slim.

In school injuries, liability and negligence do not depend upon "The capacity of a reasonable man to foresee damage of a precise and particular character, or upon his capacity to foresee the precise events leading up to the damage complained of" (*Chapman v Hearse* (1961) 106 C.L.R. 112 at 121). In a school accident, the test will often be of the type: "a risk of injury of some kind to someone, as a result of disobedient horseplay or foolhardiness in the absence of supervision" (*Bills v S.A.* (1982) 32 S.A.S.R. 312 at 319).

The fact that a school injury has been foreseeable does not mean that liability is a foregone conclusion. A reasonable teacher, principal, or teaching authority, like any other reasonable person under a duty of care, has to sensibly respond to a situation involving risk of injury, by considering the degree of risk. The reasonable teacher also considers the practicability of eliminating risks. The standard of care demanded of a reasonable teacher or teaching authority will inevitably vary, according to the pupils' ages, experience, and capabilities. With very young children, the standard of care imposed on teachers is naturally more onerous. "Adequate supervision is needed not only to avoid external dangers which might threaten immature children, but also to prevent them inflicting injury on each other." (*Geyer v Downs* at 845).

Obviously what constitutes adequate

or inadequate supervision will depend on all the circumstances. "What precautions would have been practicable and what precautions would have been reasonable in any particular case must depend on a great variety of circumstances." (*Carmarthenshire County Council v Lewis* [1955] A.C. 594 at 566 Reid L.J.).

Causation

Not only must a plaintiff show a breach of duty, but it also has to be established that it is more probable than not, that if due care had been taken, the accident would not have happened. "An examination of the many cases on this topic which have been reported both in Australia and in England, shows that the plaintiffs have often failed because they have been unable to prove that the exercise of an appropriate degree of supervision would have prevented the particular injury in question, notwithstanding that no supervision at all was attempted in the particular case." (Per *Murphy & Aickin* J.J. in *Geyer v Downs* at 147).

Barwick C.J. has said, "Where the breach of duty of care is founded on evidence of a failure to maintain discipline, it is particularly important ... to examine closely the material placed before the jury to ensure that there is a basis in fact for the conclusion that the action on the part of the teacher, which it is thought that he ought to have taken to maintain discipline, would more probably than not have prevented or minimised the injury to the injured pupil ... Because notwithstanding the proper maintenance of discipline, a recalcitrant pupil may act to the injury of another, great care ... needs to be taken to see that the necessary causal relationship is made out". (*Victoria v Bryar* (1967) 44 A.L.J.R. 174 at 175.) His Honour added that in order to satisfy the requirement of causation, "generally speaking, it is necessary to identify the nature of the step which the jury on the available evidence could conclude that a teacher ought to have taken".

There may sometimes be problems for a plaintiff in establishing causation, in the case of an attack by a "bully", because it will often be a "thing of the moment" or will have "happened in a flash" and no amount of supervision could have prevented it.

However, if bully-type attackers had previously displayed a propensity for aggressive conduct with such frequency that the school knew, or should have known, of such misconduct, then it would have been reasonably foreseeable that unless they were disciplined and supervised, they would cause significant physical injury to a fellow pupil.

The biggest plaintiff hurdle - proving inadequate supervision

The argument of a fixed and predictable teacher-student supervisory ratio was dismissed in *Commonwealth of Australia v Introvigne* (1981) 150 CLR 258.

In a number of cases, including *Warren v Haines* (1987) Aust. Torts Reports 80-115 and *Gaetani v The Trustees of the Christian Brothers* (1988) Australian Torts Reports 80-156; *Ward v Hertfordshire County Council* (1970) All E.R. 535 and *Bills v State of South Australia* (1985) 38 SASR 80, it was held that the Plaintiff could not succeed because of an inability to prove that increased supervision would have prevented the injury.

If the Plaintiff cannot show that the level of supervision which allegedly should have been provided would more probably than not have prevented the injury, then he will lose his action, either on the ground that he has failed to show a causal link between the alleged breach of duty and the injury, or on the ground that there was no breach of duty in the circumstances. Thus, in *Barker v State of South Australia* (1978) SASR 83, Jacobs J held that not only was there no breach of duty, but that there was no causal link between the alleged breach and the injury sustained. The evidence satisfied him that "the teacher can do little or nothing to stop a student pushing another off a chair, or pulling a chair out from underneath, unless he or she by chance saw it about to happen", although he considered that it was less likely to happen if the teacher had been present rather than absent. This kind of judicial reasoning is especially likely where the injury is the result of a spontaneous act, or an isolated mishap, or a sudden incident occurring unexpectedly.

There are cases where the courts have found no breach of duty in supervision of school sports or recreational activities, despite the presence of absolutely no teachers at all at the time of the accident. The reasoning there has been to the effect that there was no requirement for constant supervision of the pupils in question, or that supervision (or greater supervision) would not have prevented the particular accident anyway. See, for example, *Clark v Monmouthshire County Council*, (1954) 52 LGR 246, where a schoolboy aged 13 was accidentally stabbed in the leg by another boy in the course of a scuffle during the morning break in the playground. There was no supervising teacher present at the time. The Court of Appeal held there was no negligence on the part of any member of the staff in not knowing that one of the boys was in possession of a knife; nor was there negligence in lack of supervision. Denning J said: "It was said that in the playground on this occasion there was no prefect, whereas usually there were two prefects. Apparently the two prefects had been sent out to mark points on a cross-country run. I do not think that was negligence. The master on duty passed through the yard twice during the break. The duty of a school does not extend to constant supervision of all the boys all the time; that is not practicable. Only reasonable supervision is required... Furthermore, the incident happened in a flash. There was just a scuffle between two boys trying to get a knife from a third boy. It was the sort of scuffle which would pass unnoticed in a playground in the ordinary way. The incident would take place in the fraction of a second which the presence of prefects, or indeed of a master, would not have done anything to prevent at all."

Another example is *Ricketts v Erith Borough Council*, (1943) All E.R. 629. During the lunch break a boy of 10 left the school playground and bought a bamboo bow and arrow at a nearby shop. (Children, with permission, could leave the playground through an unlocked gate to buy sweets or to go home for lunch). On his return, the boy fired the arrow in the playground, where some 50 children were playing, and it struck the plaintiff aged six. There was no teacher continuously in the playground but from time to time a teacher did go into the playground to see that all was well. Tucker J held that the system of supervision was reasonably adequate in all the circumstances. "I find it impossible to hold that it was incumbent ▶

to have a teacher, even tender as were the years of these children and bearing in mind the locality of this school, continuously present in that yard throughout the whole of this break; and that nothing short of that would suffice. Unless that is their duty, nothing less is any good, because small children, or any child, can get up to mischief if the parent's or teacher's back is turned for a short period of time."

There is therefore no absolute duty to provide constant supervision. In *Carmarthenshire County Council v Lewis* (1955) AC 549, Lord Oaksey stated that "to hold that education authorities must keep children under constant supervision throughout every moment of their attendance at school...is to demand a higher standard of care than the ordinary prudent schoolmaster or mistress observes." This is also the position in Australia. Intermittent supervision may be sufficient in the circumstances. In *Barker v State of South Australia* (supra) the plaintiff, a girl aged 12 years, was injured when another girl pushed her as she tilted on her seat. The teacher was temporarily absent from the room. It was held that there was no breach of duty. Jacobs J said, "I am unable to find upon the whole of the evidence that a short absence of a teacher from a class room is a breach of duty of care which the school owes to children in this age group."

The plaintiff will have a better chance of success if it can be shown that there was a known hazard with foreseeable risks, particularly if there had been previous incidents, or unenforced rules, or lack of action by the authorities in the face of obvious danger.

A final summary : the law of negligence as it relates to school supervision and school injuries

The tort of negligence is not actionable without proof of injury, and a threshold question is whether the injury complained of by the plaintiff is of a type recognized by the law as justifying damages.

In proving negligence, there must be a duty of care owed to a class of persons, of which the plaintiff is one; the duty of care must be shown to be related to the proximity and foreseeability of the risk of injury; there must have been a breach of the duty of care and the resultant injury must be shown to be causally related to the breach.

The common law, in relation to the duty of care owed by school authorities and teachers to their students, has now been firmly established in Australia. Teachers are now required to act beyond the level of caution expected even of good parents, in taking reasonable precautions to avoid foreseeable injury to the students placed in their care.

In terms of the general law of negligence, teachers have a duty of care placed upon them by the instructor-learner relationship. The duty is a direct one between the school and the pupil, and arises solely from that relationship. See *Richards v State of Victoria* (1969) VR 136, at p 140. Winneke CJ at pp 138-139 expressed the reason for the imposition of a duty of care upon teachers as arising from:

"...the need of a child of immature age for protection against the conduct of others, or indeed of himself, which may cause him injury coupled with the fact that, during school hours the child is beyond the control and protection of his parent and is placed under the control of the schoolmaster who is in a position to exercise authority over him and afford him, in the exercise of reasonable care, protection from injury."

Teachers must take positive action to forestall danger and ensure safety. The duty of the school authority to its pupils has been expressed as a duty "to ensure that reasonable care is taken of them when they are on the school premises during hours when the school is open for attendance." (See *Commonwealth of Australia v Introvigne* (1981) 150 CLR 258, per Mason J. at p 269). The standard of reasonable care expected of teachers in their relationships with students had traditionally been that of a reasonably careful parent. See *Ramsay v Larsen* (1964) 111 CLR 16, where Kitto J. said at p 27:

"The breach of the duty which the plaintiff alleges is a failure to take such precautions for his safety on the occasion in question as a reasonable parent would have taken in the circumstances. It is indisputable that, in general, a schoolmaster owes his pupil a duty of that order."

Note, however, that some practical limitations have now been placed on the 'reasonable parent' equivalent as it applies to large city schools. See *Geyer v Downs* (1977) 138 CLR 91.

A breach of the duty of care constituting negligence depends on whether the way in which the injury occurred was reasonably foreseeable - (see *Watson v Haines* (1987), Australian Torts Reports 80-094) and must be causally related to the injury received - (see *State of Victoria v Bryar* (1970) ALR 809.) It has been held that the teacher's duty of care includes an obligation to maintain effective control and discipline, in order to achieve continuous safety of the students (See *Richards v State of Victoria,* supra). Because of the problems of applying the careful parent formulation to teachers with big classes in large city schools, a new test of 'taking reasonable precautions against foreseeable dangers' has been formulated. The duty is not to insure against injury absolutely, but only to take reasonable steps to protect the plaintiff against risks of injury which reasonably should have been foreseen.

At the heart of most litigation arising out of injury to school pupils is the allegation of negligence associated with inadequate levels of supervision. The amount of supervision required depends on the age of the students, their capacity and handicap, the extent of hazard associated with the activity being pursued, and the past experience of their reliability and trustworthiness. The courts are reluctant to impose liability for breach of the duty to supervise, in the case of older students, unless there is some special risk. It is generally accepted by the courts that teachers do not have eyes in the backs of their heads and it is not necessary or possible to watch every child for every second of its time in the classroom. The philosophy of education is to make pupils independent and mature, able to act autonomously without constant teacher supervision, and it is in this context that the need for supervision is usually assessed.

The length of time during which a teacher is absent from direct supervision is relevant to the issue of liability, as are the issues of age, capacity, and activity of the students, and the teacher's general experience of the students' trustworthiness. (See *Barker v State of South Australia* (1978) 19 SASR 83.)

If there has been a history of known misbehaviour by students, a higher standard of teacher supervision becomes nec-

essary to prevent liability. As authority for this, see *Introvigne v Commonwealth* (1981) 32 ALR 251.

In that case, while making reference to the English case *Carmarthenshire County Council v Lewis* (1985) A.C. 549, Mason J said at page 270, 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".

Children injured in sport and recreation

Set out below, is a small selection of cases involving sporting or recreational injuries to children. As a plaintiff lawyer, you may find the summaries useful in getting the general "flavour" of the various incidents and causes of action. Most of the cases are unreported, and, interestingly, many of them just happen to be from Western Australia, where it used to be thought that there was a greater willingness by the State to proceed to court in school injury cases than was apparent in other States of Australia.

i) *Booth v Minister for Education W.A.* (1978) (unreported). Operating a flying fox over very rough ground spread with rocks and branches at a school camp was held to be negligent. Because the children had received proper instruction to take part in this kind of activity during an obstacle course, the activity was not in itself negligent. It was held that the likelihood of falling was one of the elements of danger making for part of the excitement in an obstacle course, and if a fall were in fact to take place over soft ground or even into water, then it was unlikely that any real injury would result. The negligence in this case arose from the fact that the flying fox was strung above very rough ground.

ii) *Walsh v Minister for Education W.A.* (1969) (unreported). In this case, when the liability of a teacher in charge of physical education at a school camp was being considered, the Judge stated as follows:

"Discipline, supervision and freedom must be nicely balanced, so that these two objectives (to teach personal health and safety and to provide the opportunity for students to assume responsibility and develop self-reliance) do not conflict."

iii) *Minister for Education v Walsh* (1969) (On Appeal - unreported). A 13 year old girl sustained serious injuries when she fell to the ground while using a trampoline. It was held that the teacher in charge had not provided adequate instruction in the proper use of the trampoline and also had failed to provide sufficient backup persons who could catch any child who inadvertently jumped away from the centre of the mat.

(iv) *Thomas v Minister for Education W.A.* (1973)) (unreported). Here, the court considered the liability of a teacher when a 12 year old boy was hit in the face by a softball bat. This took place during a game at a primary school. The Judge considered what constituted proper instructions and supervision on the part of teachers. The facts were as follows: the boy's teacher had been supervising some children at a high jump pit and had arranged that those who were not actually taking part in athletics training could play a game of softball. He set up the bases and warned children of the dangers of coming too close to the batsman. Another teacher later noticed that some of the children waiting their turn to bat were moving too close to the batter and told them to move back and sit down about 3 metres away from the batter. The boy who was injured was next in line to bat and was standing about 2 metres behind the child with the softball bat. When the child with the bat missed in a swing at the ball, the bat struck the plaintiff, whose front teeth were knocked out and whose face was severely cut. It was held that it was not enough merely to have given instructions to keep well clear. Children are excitable and are likely to forget instructions. The instruction was a sound one but it was ineffective because it had not been properly followed up. It would have been far better if one of the two teachers had actually marked a line and told the children not to go over it until the batting place was clear. In that case the activity would have been more easily enforced, even from a distance. The important thing is that teachers not only have to warn children of dangers, but must also actively intervene to protect them from their own inexperience, curiosity, wilfulness and carelessness. Teachers have to keep a weather eye open at all times and ensure that instructions are being carried out.

v) *Hicks v Minister for Education W.A.* (1978) (unreported). A child injured her foot when she was practising the high-jump. Her foot buckled under her when she landed on the edge of a gym mat. It was claimed that the teacher had been negligent in placing the mat a few inches back from the bar, rather than immediately beneath it. It was also alleged that the teacher had failed to provide the necessary foam-filled bags which were usually used. The court ruled that teachers could not reasonably be expected to foresee that if mats were only 3 inches from the position in which they were usually placed, a girl who was a competent jumper with some experience and who, moreover, had used the equipment before and was not jumping over the bar at a great height anyway, would land on the very edge of the mats and fall as a result. It was held that there was no lack of necessary supervision in this case and the teacher could not be held to be negligent.

vi) *Giliauskas v Minister for Education W.A.* (1969) (unreported). This case involved a child while on a school outing, being severely mauled by a bear during a visit to the zoo. The teacher was found to have been negligent in breaching her duty of care by allowing 8 year old children to wander off in pairs, unescorted by an adult. It was held that it was not enough that the teacher had spoken to the class regarding their conduct at the zoo and had personally conducted them around the various paths past the animal cages before giving them permission to move off in pairs by themselves. In fact, this went to the teacher's disadvantage, because it

showed that she was well aware that the animals on display were dangerous. Some of the children were throwing nuts to bears in a cage on the other side of a safety fence. When some of the nuts fell in the safety zone between the cage and the fence, a number of boys leaned over to pick them up. When one boy jumped into this buffer area, an animal seized him and pinned him against the outside of the cage with one paw while severely mauling him, badly scarring his face and injuring his right hand and arm with the other paw.

vii) *Pook v Ernesttown Public School* (1944) DLR 268. In this case the school was held to be negligent because clearly dangerous objects had not been removed from the playground. During a prescribed sporting period a child was badly injured during a scuffle with another pupil by falling onto stones and other debris which had for some time littered the grounds. It was held that the school should have taken steps to protect children from this danger.

viii) *Geyer v Downs* (1977) 138 CLR 91. An eight year old girl was injured in the playground by a softball bat just 10 minutes prior to the time when teachers were officially required to be on playground duty. Because of worry about "latchkey children" congregating outside the gate, the principal had allowed the gates to be opened and children to come in early. The principal had warned the children that they must sit down and talk, or could read, but they must not run around during this privileged period of early entry. Teachers were required to keep a weather eye open and the principal made frequent checks on the safety of the children. It was held by the Court of Appeal that the school and the principal and the Education Department were not negligent because no duty of care had been established due to the accident happening ten minutes before official playground duty time. However, on appeal to the High Court of Australia, this verdict was overturned and it was held that if children are invited into the playground, then a teacher/pupil relationship is established and the school does then owe a duty of care to the students.

ix) *Ralph v London County Council* (1947) 63 TLR 546. In this case, it was held that a reasonable and prudent teacher would or should have foreseen that it was likely that children might injure themselves by putting their hand through, or falling through glass partitions, when they were involved in a game of being chased over every part of the floor space of a hall, of which one side was composed almost entirely of a glass partition.

x) *Portelance v Grantham School* (1962) 32 DLR (2nd) 337. In this case, two students were blinded by hawthorn trees with sharp thorny branches, during a chase which took place through the dense bush area which was part of the school ground immediately adjacent to the playground. This occurred during the lunch hour period, when teachers were providing playground supervision. There was a rule that children were not to play in the area and it was held that the school was not liable for failing to provide adequate supervision. In this instance, the accident occurred in a game improvised by the pupils themselves.

xi) *Gibbs v Barking Corporation* (1936) All ER 115. A boy vaulting over a gymnastic "horse" stumbled on landing and was injured. The teacher in charge was held to be negligent in not having provided assistance for those using the vaulting horse at the landing point. (There are other cases where teachers have been held to be not liable, because although the same equipment was involved, the standard of performance of the students and the experience they had previously had was much higher.) It is quite clear that if students are beginners at a physical education-type task, then they require much greater supervision and assistance, than would normally be given to older, more experienced and more expert students.

xii) *Povey v Rydal School* (1970) 1 All ER 841. A 16 year old boy was made a paraplegic by a fall from gymnastics rings seven feet above the floor. There was a mat below the rings, but when the student fell, he broke his spine. The school was held to be liable because the mat had not contained sufficient cushioning, and also because it had not been insisted that the boy should have a proper warm-up, before commencing and also because no-one had been appointed to stand by to minimize the risk of a fall.

xiii) *Edgecock v Minister for Child Welfare* (1971) 1 NSWLR 751. A physical education teacher divided up the boys and girls of his class into two groups during a physical education lesson. The girls were playing non-stop cricket in the playground and the boys were playing on a football field 30 metres away. The teacher was not able to see both groups at the one time, so he walked backwards and forwards between them dividing his time equally between the two groups. While the teacher was with the boys' group, a girl suffered an injury to her back and claimed negligence. It was held that the decision to divide the class was a reasonable one. Teachers must make whatever reasonable use of whatever resources they have. The children were 11 years of age and leaving them unsupervised for brief periods did not constitute a major foreseeable risk. ■

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