

Beyond the Campus: Is it too risky?

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David has presented at conferences in the United Kingdom, South Africa, Belgium, New Zealand and throughout Australia, and published numerous papers on topics as varied as student rights, teachers' liability, teachers and confidentiality, bullying, outdoor education, discrimination, child protection and investigations. He regularly presents in-school seminars for both teachers and administrators on education law matters. He also consults to schools and their boards on governance issues.

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Why leave the school campus?

It is only in adventure that some people succeed in knowing themselves.

André Gide

It has been common for many years for schools to organise activities for their students away from their main campus. Students often travel to other schools or venues for sport, debating, drama and music. Work experience also takes students out of school into work places. The last decade has also seen an increased emphasis on outdoor education and on overseas excursions for sporting, music, history and language groups. While the former tends to be a compulsory part of the school curriculum, the latter are more often optional and can involve parents accompanying the group.

The major purpose of outdoor education is to enrich and complement areas of the normal curriculum by being able to learn and experience in the outdoors. Traditional forms of education, which have been largely limited to the classroom, are, for the most part, highly instructional and verbal. Outdoor education provides more opportunities for the students to experience and learn things for themselves. This is consistent with the move in education to a greater emphasis on independent learning.

Extending the classroom into the outdoors provides the setting for bringing deeper insight, greater understanding and clearer meaning to those areas of knowledge which ordinarily are merely read and discussed but seldom experienced. Further, for those schools with spiritual aims, outdoor education programmes assist the achievement of such aims.

One of the most common and successful forms of carrying out an outdoor education program is the school camp. School camps offer an alternative to education in the classroom where students can gain first hand experience of nature.

Some of the advantages of outdoor education are:

1. It takes place outside where the students can gain direct experiences from the sights, sounds, smells, textures and tastes of the environment.
2. It may remove the unnecessary complexities of modern living by placing students in a basic living situation closer to the natural environment. This presents them with a greater opportunity of developing an awareness and appreciation of the natural environment.
3. It requires students and teachers to participate in the activities and not be spectators. As opposed to the classroom, outdoor education provides settings and environments that encourage the individual to become more involved in the subject matter.
4. It provides a higher ratio of leaders to students than in the normal classroom, which lessens the problems of the students feeling lost or left out of activities.
5. It provides a group living experience. The students have an opportunity to live together twenty-four hours a day. They can learn, some for the first time, what cooperative living can mean. It may even be, for some, the first time in their lives that they have had a chance to participate in a decision making process. They will make decisions which will affect not only themselves but also the other students in their group.

Outdoor education aims:

1. To provide specific situations that will assist the individual through experiential learning to understand himself or herself.
2. To encourage self-reliance, resourcefulness, self-esteem and the ability to make decisions.

3. To help an individual to relate to his or her peers, teachers and other people.
4. To provide opportunities for extension of academic pursuits.
5. To develop each student's leadership potential.
6. To enable staff and students to communicate and share with each other outside the classroom.
7. To facilitate an awareness, understanding and appreciation of the Australian bush.
8. To develop an appreciation of the delicate balance in which all ecosystems exist.
9. To introduce physical challenges based on adventure activities and to develop skills that individuals may wish to pursue as healthy recreational activities.
10. To develop independence from the comforts of home and the luxuries of modern urban living.¹

Overseas excursions provide similar advantages. Students with particular interests or skills are given opportunity to develop these interests and skills in the context of other cultures. School excursions can be a fun filled, learning experience for students, giving them an opportunity to learn and experience outside of the classroom and away from their textbooks.

The Duty of Care

While the law recognises the advantages of outdoor education and appreciates its aims, some have held that “education must give way to safety”². Such pronouncements have had an impact on the policies of the Department of

¹ I am grateful to St Andrew’s Cathedral School for material on the advantages and aims of outdoor education.

Education and Training: see, for example, the Department's *Excursions Policy* of October 2004. This in turn has led to some differences of opinion with the Teachers Federation:

But apparent concern for children's safety is also threatening to render extinct the traditional school excursion, the president of the NSW Teachers Federation, Maree O'Halloran, said.

Department of Education and Training guidelines introduced last year require teachers to fill in lengthy risk assessment forms before children take so much as a step outside the school gates.

Ms O'Halloran said feedback from teachers indicated that excursions were declining because the department's safety requirements had become too onerous and time-consuming. Rather than making out-of-school adventures safer for students, the department was merely transferring its legal responsibility to schools, she said.³

A balancing act is involved: "schools must strike some balance between meticulous supervision of children every moment of the time when they are under their care, and the very desirable object of encouraging the sturdy independence of children as they grow up".⁴ Nevertheless, there are cases which suggest that the courts are less likely to find negligence where the activity is intended to develop independence.⁵

The potential liability of schools and teachers arising out of injury to students is well known. Schools and teachers have a duty of care to their students. If

² Inquest touching the death of Joshua Keith Fitzpatrick, Coroners Court, Moss Vale, 20 November, 1996, Coroner Elms at p 12

³ *At risk - children's wellbeing and school excursions* by Kelly Burke, Sydney Morning Herald, 22 February 2005

⁴ *Jeffery v London County Council* (1954) 52 LGR 521 at 523.

⁵ *Butterworth v Collegiate Institute Board of Ottawa* [1940] 3 DLR 466; *Jeffery v London County Council* (1954) 52 LGR 521; *Kretschmar v State of Queensland* (1989) ATR 80-272.

there is a breach of that duty and damage is suffered as a result, the school and/or the teacher are liable to the injured student.⁶

The action based on negligence is part of the law of tort. While this is the most probable basis for a claim by a student, it may be possible to allege breach of contract. This is most likely to happen in independent schools where there is a contract between parents and the school. It may well be argued that there is an express or implied term of that contract to the effect that the school and its teachers will take reasonable care for the safety and welfare of the students. This is why it is unwise, in my opinion, for independent schools to insert into their enrolment documents any obligation on their part to exercise proper care, or indeed to educate the students!

However, I shall confine my remarks to situations where a claim is brought for negligence. To succeed, the student must prove that:

- the school (and I include in this expression from now on, its teachers) has a duty of care to the student at the particular time the injury occurred;
- the risk of injury was foreseeable;
- the likelihood of what happened was more than insignificant;
- there was a failure to observe a reasonable standard of care;
- this failure was the cause of the injury.

Much more detail about the principles involved here may be found in other places.⁷ I am not concerned today with issues such as whether the duty of care exists. When students are involved in off campus activities, the duty of care clearly exists. The students are under the care and control of their

⁶ *Richards v State of Victoria* [1969] VR 136 at 138-9 per Winneke CJ; *Ramsay v Larsen* (1964) 111 CLR 16 at 28 per Kitto J

⁷ For example, David Ford *Tort Law Reform: Does it affect teachers and schools?* ANZELA Annual Conference, Sydney 2003

teachers when they are taken from the school campus to an outdoor education venue or an excursion locally or overseas.

A Non-delegable Duty

The school's duty is to ensure that reasonable care is taken of students while they are in the school's care. The school cannot delegate this duty. In other words, the duty is not discharged simply by appointing competent teaching staff and leaving it to them to take appropriate steps for the care of the students. It is a duty to ensure that reasonable steps are taken for the safety of the students. Accordingly, if reasonable care was held in a particular case to require the presence of two supervising teachers on an excursion, and only one was present, it would not matter whether the teacher who was present took reasonable care or not. It would not even matter if the school had required a second teacher to be present but that teacher, for some reason such as illness, was not present. What matters is that reasonable care is held in the circumstances to require the presence of two teachers. The school's duty requires it to ensure that reasonable care is taken, not to take reasonable care to ensure that reasonable care is taken.

The Standard of Care

The standard of care in outdoor education and on many excursions is greater than in the classroom or the playground. This is because the degree of risk has an impact on the standard of care required. In *Wyong Shire Council v Shirt*, Mason J spoke of determining "what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty

and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.”⁸

Real questions arise when we move beyond the campus as to the nature and extent of the duty of care. What is a reasonable standard to expect of teachers when they are in a location which is probably not familiar to the students and which may also be unfamiliar to staff? “It is an onerous responsibility which the school undertakes when parents hand over their children for expeditions..., and they are entitled to expect that no risks at all which can be avoided will be taken with their safety.”⁹

Foreseeability

When students are involved in outdoor education, foreseeability is unlikely to be an issue. The High Court in *Commonwealth v Introvigne*¹⁰ held that a risk of injury may be foreseeable even if one could say that it probably would not happen. When one moves into the outdoors, particularly the Australian bush or waterways, it is more likely that one would say that certain things probably will happen. “Of course, serious accidents can and do occur in the playground at school, with all due precautions being taken, but the risks are magnified when children of this age are self navigating in areas of bushland where neither they nor their instructors have ventured before.”¹¹ However, not everything that happens is reasonably foreseeable. In *Gugiatti v Servite College Council Inc*¹², the Court found that it was not reasonably foreseeable that a 16-year-old boy would wrench his knee, suffering significant injury, as a result of jumping across a creek.

⁸ *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47

⁹ Inquest touching the death of Joshua Keith Fitzpatrick, Coroners Court, Moss Vale, 20 November, 1996, Coroner Elms at p 12

¹⁰ (1982) 150 CLR 258 at 267

¹¹ Inquest touching the death of Joshua Keith Fitzpatrick, Coroners Court, Moss Vale, 20 November, 1996, Coroner Elms at p 12

¹² [2004] WASCA 5 (17 November 2003)

Probability

Is the risk more than insignificant? The High Court in *Wyong Shire Council v Shirt*¹³ said that it was not fair to find someone liable in a situation where, although the risk was foreseeable, the probability of it happening was far-fetched and fanciful. Now, because of the *Civil Liability Act 2002*, the bar is even lower: risks that are insignificant may be ignored. Essentially, some risks are so improbable that it is reasonable to ignore them.¹⁴

Would a reasonable teacher have taken precautions?

Would a reasonable teacher have taken precautions? In answering this question, the law takes us to the reasonable person. It is an objective test. One asks whether an imaginary teacher who behaves decently and carefully would have taken precautions. This brings us to the so-called negligence calculus, which is found in section 5B (2) of the *Civil Liability Act 2002*. This negligence calculus provides a framework for deciding what precautions the reasonable teacher would have taken to avoid the harm that has occurred and, hence, what precautions the school and its teachers can reasonably be expected to have taken.

The calculus involves taking into account the four factors in section 5B (2):

- (a) the probability that the harm would occur if care were not taken,
- (b) the likely seriousness of the harm,
- (c) the burden of taking precautions to avoid the risk of harm,
- (d) the social utility of the activity that creates the risk of harm.

The inclusion of section 5B (2) (d) is important for schools as they can argue that much of what they do, particularly off campus activity, has social

¹³ (1980) 146 CLR 40 at 47

¹⁴ An example of this is found in *Nobrega v Trustees of the Roman Catholic Church for the Archdiocese of Sydney (No. 2)* [1999] NSWCA 133

utility. While there are some cases that demonstrate that the courts are less likely to find negligence where the activity is intended to develop independence, this has by no means been universal. Now, courts will be obliged to consider such matters. Of course, the four matters listed in section 5B (2) are not the only matters the court may consider. Nor does the sub-section prescribe the weight to be given to each matter in any particular case. Nevertheless, prudent teachers will consider the four things listed in section 5B (2) when considering what they should do to minimise the risk of injury to their students.

The Courts are not prepared to set down guidelines as to what constitutes reasonable care. The Courts decide each case on its particular facts. Nevertheless, certain guidelines can be extracted from an analysis of all the decided cases. Further, every set of circumstances is different and the following are some of the variables which should be taken into account:

- (a) the age of the student;
- (b) the existence of any physical handicaps of the student;
- (c) the nature of the activity in which the student has taken part;
- (d) the hazards or dangers that are known or should be known to the school;
- (e) the previous practices of the school.

I set out here some of the principles which one can draw from the cases dealing with outdoor education:

- Plan, plan, plan!¹⁵
- Check, check, check!
- Supervise, supervise, supervise!¹⁶

¹⁵ *Regan v ACT Schools Authority* [2003] ACTSC 47 (13 June 2003)

- Consult experts¹⁷;
- Train the students and teachers beforehand¹⁸;
- Ensure that the qualifications of all staff have been checked and are current¹⁹;
- Reconnoitre the site or route beforehand²⁰;
- Choose an area safe for the age of the students;
- Compile equipment lists;
- Have proper equipment in good condition;
- Check the condition of equipment regularly;
- Ensure the equipment includes complete First Aid kits;
- Arrange proper transport;
- Develop emergency procedures;
- Be prepared to cancel the activity if conditions change (e.g. weather, staff availability)²¹;
- Take into account the age, physical development and experience of the students²²;
- Warn of dangers²³;
- Have adequate briefings²⁴;

¹⁶ *Haines v Watt* (29.8.91, NSW Supreme Court, Court of Appeal, unreported)

¹⁷ *Munro v Anglican Church of Australia* (15.5.87, NSW Supreme Court, Court of Appeal, unreported)

¹⁸ *Regan v ACT Schools Authority* [2003] ACTSC 47 (13 June 2003).

¹⁹ A major factor in the deaths of four teenagers in the Lyme Bay canoe disaster in the UK in 1994 was the failure of an unqualified instructor to tell the youths to inflate their life jackets.

²⁰ *Ayoub v Downs* (7.10.82, NSW Supreme Court, Common Law Division, Yeldham J, unreported); Inquest touching the death of Joshua Keith Fitzpatrick, Coroners Court, Moss Vale, 20 November,

²¹ *Munro v Anglican Church of Australia* (15.5.87, NSW Supreme Court, Court of Appeal, unreported)

²² *Nicholas v Osborne* (15.11.85, Victorian County Court, Lazarus J, unreported)

²³ Inquest touching the death of Joshua Keith Fitzpatrick, Coroners Court, Moss Vale, 20 November, 1996

- Ensure that an adequate supervision ratio is maintained at all times²⁵;
- Actively supervise throughout the activity²⁶;
- Obtain parental consent to student being involved and to emergency medical treatment;
- Obtain students' medical history and ensure teachers have this information with them;
- Know the health and fitness of the students.

When there are special risks, one must take special care. Therefore, if there are cliffs in the area, one must take special precautions such as:

- telling the students what to do if they come to the top of a cliff;
- checking the route to ensure it does not go near cliffs;
- ensuring the students stay on or near the planned route;
- ensuring there is a way to get help quickly.

Warnings

I mention above the need to warn of dangers. While there may be occasions when teachers get the benefit of Section 5H of the *Civil Liability Act 2002*,

it is clearly prudent to warn students in advance when they are about to engage in dangerous activities - those involving a significant risk of physical harm (for example, abseiling, white water rafting, rock climbing, caving).

These activities also commonly involve obvious risks; that is, risks that are obvious to a reasonable person in the position of that person.²⁷ Clearly, what is obvious to an adult may not be obvious to a child. Indeed, what is

²⁴ Inquest touching the death of Joshua Keith Fitzpatrick, Coroners Court, Moss Vale, 20 November, 1996

²⁵ Inquest touching the death of Joshua Keith Fitzpatrick, Coroners Court, Moss Vale, 20 November, 1996

²⁶ *Haines v Watt* (29.8.91, NSW Supreme Court, Court of Appeal, unreported)

²⁷ Section 5F(1) *Civil Liability Act 2002*

obvious to a high school student may not be obvious to a primary or infants student. Obvious risks include risks that are patent or a matter of common knowledge.²⁸ What is common knowledge will differ from person to person. Young students may not know things that are common knowledge to teachers. A risk of something occurring can be an obvious risk even though it has a low probability of occurring.²⁹ A risk can be an obvious risk even if the risk is not prominent, conspicuous or physically observable.³⁰

Section 5G(1) states that a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk unless the person proves on the balance of probabilities that he or she was not aware of the risk. The person is aware of a risk if the person is aware of the type or kind of risk even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.³¹

Recreational Activities

Section 5M of the *Civil Liability Act 2002* states that a school does not owe a duty of care to a student who engages in a recreational activity to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the student.³² Bear in mind that this provision does not apply if the student was required by the school to engage in the recreational activity.³³ In other words, the school may still be liable if its negligence has been the cause of an injury to a student engaged in a compulsory outdoor education activity or excursion even if a risk warning has been given. It seems to me that such activities are compulsory even if the students may choose from a number of activities but must choose one. For example, if boys are told that every Wednesday afternoon they must participate in one of cadets, Duke of Edinburgh or scouts, they are really left with no choice but to participate.

²⁸ Section 5F(2) *Civil Liability Act 2002*

²⁹ Section 5F(3) *Civil Liability Act 2002*

³⁰ Section 5F(4) *Civil Liability Act 2002*

³¹ Section 5G(2)

³² Section 5M(1)

³³ Section 5M(9)

Accordingly, a risk warning in that situation will not, of itself, avoid liability.

Most optional outdoor educational activities and excursions would be recreational activities. Schools may therefore limit their liability by giving risk warnings. A school may rely on a risk warning as long as it is given in a manner that is reasonably likely to result in the students being warned of the risk before engaging in the recreational activity.³⁴ This is an objective test. The school does not have to establish that the student (or, in some circumstances, the student's parent) received or understood the warning or was capable of receiving or understanding the warning. Risk warnings may be given orally or in writing. They can be on a sign or in a letter or in any other form.³⁵ The risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk).³⁶ Ideally, the warning should be written and be given to both students and their parents.

Where a school wishes to warn a student who, because of that student's young age or physical or mental disability, lacks the capacity to understand the risk warning, the warning must be given either to another person who accompanies the student and who does have the capacity to understand the risk warning or to the student's parent (whether or not the student was under the control of or accompanied by the parent).³⁷

Not surprisingly, a school cannot rely on a risk warning in a situation where it has contradicted the warning itself by some other representation made by the school or on its behalf to the person to whom the warning has been given.³⁸ For example, if a warning has been given about the risks of

³⁴ Section 5M(3)

³⁵ Section 5M(4)

³⁶ Section 5M(5)

³⁷ Section 5M(2)

³⁸ Section 5M(8)

abseiling but the teacher in charge advises the students that it really is quite safe, the school could not rely on the risk warning.

Sharing The Risk

With Parents

It is common for schools to have parents sign forms consenting to their child attending a particular activity. Sometimes, the form incorporates a paragraph aimed at excluding liability for injury to their children. For example, one that I am aware of reads:

I/We understand that while everything is done to ensure both the comfort and safety of those attending the [description of activity] and whilst every care will be exercised by those who are in charge, the [name of organisation] and its staff are not responsible in any way for any accident or sickness which may occur or happen through any circumstances.

Schools often wrongly believe that such consent forms provide complete protection. The form does not stop the student suing. The parents sign it. The child has the right to sue. Even if the child signed, it would not be effective as the child is a minor. Nevertheless such forms, to the extent that they are not misleading, are worthwhile in that they probably discourage a number of small claims. They can also be useful in putting teachers on notice of any peculiar needs of particular students.

It is the practice of some schools to have parents sign a general Consent Form at the beginning of each calendar year to cover all excursions during that year. This is an example:

CONSENT FORM

SCHOOL EXCURSIONS IN 2005

I consent to my son/daughter participating in all school excursions this year and agree to delegate my authority to the teachers and assistants involved. I also authorise the teachers and their assistants to obtain such medical assistance and ambulance transportation as they think necessary should illness or accident occur. I undertake to be responsible for payment to the school of the cost (if any) of my son/daughter's participation in excursions, including all medical and ambulance expenses incurred on his/her behalf. I am aware that I may obtain private insurance cover for my son/daughter in respect of any particular excursion/s.

I understand that:

. I will be sent advance notice of each excursion, describing its nature and activities. If I have any questions about a particular excursion, I will clarify these with school staff prior to the excursion.

. The term "excursion" includes all departures from school premises for educational, sporting, musical, dramatic, cultural and outdoor educational purposes.

. Excursions may involve travel away from school premises for varying periods of time and by various modes of transport.

. By participating in excursions my son/daughter will be departing from school routine and may have an altered or increased risk of injury or illness.

. Excursions may involve my son/daughter's participation in activities of a hazardous nature, though school staff will take reasonable care to minimise risks to participants.

This consent is effective until the end of 2005 unless I revoke it, either completely or in respect of any one or more excursions, by delivering a letter to that effect to the Principal.

.....
(Signature of Parent/Guardian)

.....
(Full name of Parent/Guardian)

Date.....

While that practice has obvious administrative benefits to the school, there are some potential problems. Before obtaining parents' consent, the school must provide parents with all necessary, significant information about the excursion. This ensures that parents are able to make a properly informed decision as to whether or not they will allow their child to go on the excursion. For example, if the excursion involves swimming, parents need to be told as their child may not be able to swim either at all or at the time of the excursion because of some illness. Likewise, if the excursion is to a factory where there may be dust or fumes, parents must be informed so they can decide whether or not to allow their asthmatic child to attend.

Where it is the school's practice to send home a description of each particular excursion before it takes place, the description must have sufficient information to allow parents to make an informed decision as to whether or not to allow their child to go. I also suggest that a statement along the following lines be included in each note sent home before an excursion:

You are reminded that you consented to your son/daughter participating in this excursion at the beginning of this year. If you wish to withdraw that consent in respect of this excursion, please send a letter to that effect to the Principal immediately.

The Medical History Form is clearly an important ingredient in all of this. A reference to it could be inserted in the Consent Form. For example, a new penultimate paragraph could be added as follows:

I attach a Medical History Form containing information about my son/daughter.

With Other Providers

While a number of independent schools own their own outdoor education sites and run their own programmes with their own staff, both State and independent schools are making use of others to provide sites and/or run programmes. This can be both cost effective and sensible risk management.

While the use of external providers does not remove the duty of care and hence the potential liability, it does limit the matters which a school must consider and therefore also reduces the risk of being sued. Further, if a school is sued and an external provider has been used, any liability for damages may end up being shared with others.

What then does a school have to do to fulfil its duty to its students when it uses the services of an external provider?

- The school must check that the site is apparently safe.
- The school must check that the staff are competent and careful people that they have undergone the Working with Children check and have signed Prohibited Person declarations.
- The school must see that the equipment to be used is apparently safe and is under the control of competent and careful people who supervise its use. The school does not have an obligation to inspect the equipment.

The experience and reputation of the service provider, the experience that the school has had with the provider over a period and the school's observations of the checks and inspections carried out by the provider are all relevant considerations when considering the school's liability. In *Brown v Nelson*,³⁹ a school had used an external provider. Nield J concluded:

In the present instance, the school authorities knew the camp from previous visits, and at all times believed it to be run by the Outward Bound Organisation, which would clearly indicate that it was under responsible management. They knew that Mr Nelson was a careful and competent person. They knew that he had a trained staff. They have been referred to during the proceedings as the "senior boys". Some of them must be old boys of the school, because they were

³⁹ (1971) 69 LGR 20

about 18 to 24 years of age. These boys were very familiar, as the school knew, with the equipment. They knew also that inspections were frequently made. They always asked for permission to use the equipment before doing so. They were not allowed to do so until tests had been carried out, and that part of the cable where the defect lay was really out of sight and not reasonably approachable and generally the equipment appeared in good and safe condition. I am satisfied that the school authorities in no way failed in their duty towards the deceased.

The injured student may also have an action against the owner of the land where the injury occurred. This was tried unsuccessfully in *Brown v Nelson* where the land owner had allowed Outward Bound to use part of his property free of charge. The Court found that the owner had never exercised any control over the outdoor education activities and that he could not have been expected to know of the danger which caused the injury. An injured school cadet unsuccessfully sued the Commonwealth as occupier in *Fazio v The Commonwealth*.⁴⁰ At that time, the general negligence principles did not apply to occupiers liability. This case may have been decided differently today.

With Insurers

Lest it be overlooked, clearly schools ought to share the risks of involvement in off campus activities with insurance companies.

⁴⁰ (1970) 91 WN (NSW) 806