

Managing the Risks in Off-Campus Activities

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David has presented at conferences in the United Kingdom, Belgium, the Czech Republic, South Africa, New Zealand and throughout Australia, and published numerous papers on topics as varied as student rights, teachers' liability, teachers and confidentiality, bullying and cyber bullying, outdoor education, discrimination, parents in education, 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?

The theory of Timbertop was this: that adolescent boys could better develop by themselves, out of the usual school machine. Placed in a different and less clement environment, they should undertake responsibility for themselves and be given the challenges of something like a man's life under conditions that they had to conquer. But the first principle was essentially one of self-reliance and the challenge to live up to this responsibility.

Sir James Darling

Expeditions can greatly contribute towards building strength of character. Joseph Conrad in Lord Jim tells us that it is necessary for a youth to experience events which 'reveal the inner worth of the man; the edge of his temper; the fibre of his stuff; the quality of his resistance; the secret truth of his pretences, not only to himself but others.'

Kurt Hahn

Like Darling and Kahn, the law recognises that good education involves risk. Children grow, develop and mature as they face risks and learn to deal with them. The courts do not want our children wrapped in cotton wool. Over 50 years ago, McNair J spoke of "the very desirable object of encouraging the sturdy independence of children as they grow up".¹ Judges have continued to take such an approach. For example, when faced with a 12 year old boy injured in a game of *Rob the Nest*, de Jersey J, noting that there was a risk of injury, asked whether that risk was enough to bar the game. He decided that it would not be reasonable to do so, saying:

Allowing the pupils to play it conceivably fulfilled a relevant purpose, in developing their manipulative skills and fostering team spirit. ... to brand this game ... as unreasonable because of the admitted risk would be overprotective, and would involve overemphasising the risk of injury, and ignoring the countervailing considerations, the slightness of the risk, and the potential benefit of the activity."²

¹ Jeffery v London County Council (1954) 52 LGR 521 at 523.

² Quoted by Thomas J in the Full Court of the Supreme Court of Queensland, *Kretschmar v State of Queensland* (1989) ATR 80-272 at page 68,891

On appeal, Thomas J (Ambrose J concurring) said:

*... it is not in the interest of society to impose artificial standards that would encourage the rearing of a greenhouse generation.*³

In a more recent case⁴, a Western Australian school took year 11 students away to a retreat to assist staff to select potential year 12 leaders. One of the challenges was to cross a shallow creek about 2.5 metres wide. The trial judge found that there was no need for the teachers to have prescribed a safe method for crossing the stream. One of the very purposes of the excursion was the reasonable purpose of encouraging and assessing leadership skills. Steytler J (with whom Miller J and Wallwork AJ agreed) said: "It would have been inimical to that purpose for the teachers to have told the children how to undertake so simple a task as crossing a stream."⁵ He also said:

Also, while it must be recognised that a 16-year-old schoolboy cannot be taken to have attained such a degree of maturity or judgment or experience as no longer to stand in the need of the protection of a schoolmaster against risk of injury arising from his own conduct, it must also be accepted that 16-year-old boys "are not to be treated as if they were infants at creches ..." [case citations omitted]⁶

The recurring theme is that while the risks of off-campus activities must be managed, such management does not mean stopping them altogether or making them so bland that their educational benefits cease to exist.

In an earlier paper⁷, I outlined in some detail the purposes of outdoor education and other off-campus activities, the opportunities these activities provide for students, and the many advantages from an educational perspective. In this paper, I take these as given.

The Duty of Care

Despite the law's recognition of the advantages of outdoor education and other off-campus activities, the courts have nevertheless continued to insist that schools and the teachers exercise reasonable care. If there is a breach of the duty of care and damage is suffered as a result, the school and/or the teacher are liable to the injured student.⁸

³ *Kretschmar v State of Queensland* (1989) ATR 80-272 at page 68,892

⁴ *Gugiatti v Servite College Council Inc* [2004] WASCA 5 (17 November 2003)

⁵ *Gugiatti v Servite College Council Inc* [2004] WASCA 5 (17 November 2003) at para 30

⁶ *Gugiatti v Servite College Council Inc* [2004] WASCA 5 (17 November 2003) at para 23

⁷ David Ford *Beyond the Campus: Is it too risky?* UNSW School Law Alert Seminar 2005 available at www.emilford.com.au

⁸ *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

To succeed, the student must prove that:

- the school and its teachers have 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; and
- the injury was of a type for which damages are awarded.⁹

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 most off-campus activities 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."¹⁰

⁹ Much more detail about the principles involved here may be found in *Tort Law Reform: Does it affect teachers and schools?* David Ford, ANZELA Annual Conference, Sydney 2003 available at www.emilford.com.au

¹⁰ *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47

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 them? “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.”¹¹

Foreseeability

When students are involved in outdoor education, foreseeability is unlikely to be an issue. The High Court in *Commonwealth v Introvigne*¹² 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.”¹³ However, not everything that happens is reasonably foreseeable. In *Gugiatti v Servite College Council Inc*¹⁴, 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.

Probability

Is the risk more than insignificant? The High Court in *Wyong Shire Council v Shirt*¹⁵ 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. Since the 2002 changes to civil liability legislation, 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.¹⁶

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

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

¹² (1982) 150 CLR 258 at 267

¹³ Inquest touching the death of Joshua Keith Fitzpatrick, Coroners Court, Moss Vale, 20 November, 1996, Coroner Elms at p 12

¹⁴ [2004] WASC 5 (17 November 2003)

¹⁵ (1980) 146 CLR 40 at 47

¹⁶ 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

teacher who behaves decently and carefully would have taken precautions. This brings us to the so-called negligence calculus¹⁷, which 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 these four factors:

- (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 last of these factors is important for schools as they can argue that much of what they do, particularly off-campus activity, has social utility. For example, this point was clearly made in a case where a young boy was killed after being hit in the throat by a hockey stick during a game of minkey (a form of mini hockey).¹⁸ Although a sporting activity was involved rather than an off-campus activity, the principle is the same. Ipp JA said that a factor such as the benefits of the game was important in determining whether reasonable steps were taken to prevent injury occurring.¹⁹ He went on to say:

Every sport or physical activity carries with it a foreseeable risk of injury. Yet our society accepts that it is desirable for children to acquire skills in sport and physical activities. Games and activities such as gymnastics, rugby, soccer, cricket and hockey are ordinarily part of school curricula. This is so despite the fact that it is foreseeable that participation in these games, even when carefully organised and supervised, can lead to serious injury and, in extraordinary cases, even death.

It is hardly necessary to spell out the benefits of participating in sporting activities. Children thereby acquire physical fitness, develop physical co-ordination, and participate in team games. These are all deep-rooted aspects of community life in this country and it is important for children to be taught the skills to be able to participate in them.

¹⁷ Found in s 5B(2) *Civil Liability Act 2002 (NSW)*, s 9(2) *Civil Liability Act 2003 (Qld)*, s 32(2) *Civil Liability Act 1936 (SA)*, s 5B(2) *Civil Liability Act 2002 (WA)*, s 48(2) *Wrong Acts Act 1958 (Vic)*, s 11(2) *Civil Liability Act 2002 (Tas)* and s 43(2) *Civil Law (Wrongs) Act (ACT)*

¹⁸ *The Trustees for the Roman Catholic Church for the Archdiocese of Sydney v Kondrajian* [2001] NSWCA 308 (24 September 2001)

¹⁹ *The Trustees for the Roman Catholic Church for the Archdiocese of Sydney v Kondrajian* [2001] NSWCA 308 (24 September 2001) at para 65

*There are undoubted dangers inherent in minkey. These dangers stem largely from the fact that each player plays the game with a hockey stick, a piece of equipment that is capable of causing serious injury. But ... minkey is part of the curriculum in many primary schools and this is testimony to its acceptance by the community as being beneficial for young children.*²⁰

Of course, the four factors of the negligence calculus are not the only matters the court may consider. Nor does the relevant legislation prescribe the weight to be given to each matter in any particular case. Nevertheless, prudent teachers will consider the four factors when considering what they should do to minimise the risk of injury to their students.

Practical Guidelines and Principles

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 and principles 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 off-campus activities²¹:

- Plan, plan, plan!²²
- Check, check, check!
- Supervise, supervise, supervise!²³
- Consult experts²⁴;
- Train the students and teachers beforehand²⁵;

²⁰ *The Trustees for the Roman Catholic Church for the Archdiocese of Sydney v Kondrajian* [2001] NSWCA 308 (24 September 2001) at paras 69 to 71

²¹ This list is based on a similar one found in my paper *Beyond the Campus: Is it too risky?* (Footnote 7)

²² *Regan v ACT Schools Authority* [2003] ACTSC 47 (13 June 2003)

²³ *Haines v Watt* (29.8.91, NSW Supreme Court, Court of Appeal, unreported); Inquest into the death of Amarni Dirani, Westmead Coroners Court, 24 October 2008; *Markos v Catholic Diocese of Port Pirie* [2009] SAIRC 23 (22 April 2009); *Comcare v Commonwealth of Australia* [2009] FCA 700 (30 June 2009)

²⁴ *Munro v Anglican Church of Australia* (15.5.87, NSW Supreme Court, Court of Appeal, unreported)

- Ensure that the qualifications of all staff have been checked and are current²⁶;
- Reconnoitre the site or route beforehand²⁷;
- Choose an area safe for the age of the students;
- Compile equipment lists;
- Have proper equipment in good condition²⁸;
- Check the condition of equipment regularly²⁹;
- Ensure the equipment includes complete First Aid kits;
- Arrange proper transport;
- Develop emergency procedures;
- Be prepared to cancel or stop the activity if circumstances change (e.g. weather, staff availability, ability to provide proper training)³⁰;
- Take into account the age, health (especially allergic conditions), physical development and experience of the students³¹;
- Warn of dangers³²;
- Have adequate briefings³³;
- Ensure that an adequate supervision ratio is maintained at all times³⁴;
- Actively supervise throughout the activity³⁵;
- Obtain parental consent to student being involved³⁶ and to emergency medical treatment;
- Obtain students' medical history and ensure teachers have this information with them³⁷;
- Know the health and fitness of the students;
- Keep full and proper records³⁸.

²⁵ *Regan v ACT Schools Authority* [2003] ACTSC 47 (13 June 2003); *Markos v Catholic Diocese of Port Pirie* [2009] SAIRC 23 (22 April 2009)

²⁶ 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.

²⁷ *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,

²⁸ *De Beer v The State of New South Wales and Anor* [2009] NSWSC 364 (11 May 2009)

²⁹ *Brown v Nelson* (1971) 69 LGR 20; *Toutounji v The Girl Guides Association (Sa) Inc* [1998] SASC 6954 (27 November 1998)

³⁰ *Munro v Anglican Church of Australia* (15.5.87, NSW Supreme Court, Court of Appeal, unreported); *Bidner v State of Queensland* [2001] QDC 41 (16 March 2001)

³¹ *Nicholas v Osborne* (15.11.85, Victorian County Court, Lazarus J, unreported); *Comcare v Commonwealth of Australia* [2009] FCA 700 (30 June 2009)

³² Inquest touching the death of Joshua Keith Fitzpatrick, Coroners Court, Moss Vale, 20 November, 1996; *Comcare v Commonwealth of Australia* [2009] FCA 700 (30 June 2009)

³³ Inquest touching the death of Joshua Keith Fitzpatrick, Coroners Court, Moss Vale, 20 November, 1996; *Munro v Anglican Church of Australia* (15.5.87, NSW Supreme Court, Court of Appeal, unreported)

³⁴ Inquest touching the death of Joshua Keith Fitzpatrick, Coroners Court, Moss Vale, 20 November, 1996

³⁵ *Haines v Watt* (29.8.91, NSW Supreme Court, Court of Appeal, unreported)

³⁶ Inquest into the death of Amarni Dirani, Westmead Coroners Court, 24 October 2008; Inquest into the death of David Iredale, Penrith Coroners Court, 7 May 2009

³⁷ *Comcare v Commonwealth of Australia* [2009] FCA 700 (30 June 2009)

³⁸ Inquest into the death of David Iredale, Penrith Coroners Court, 7 May 2009

The Risk Management Process

With the benefit of this analysis of the law and cases, the school should now be ready to manage the risks which may arise from off-campus activities. It is important that proper consideration be given to appropriate measures to take by way of risk management before such activities commence.

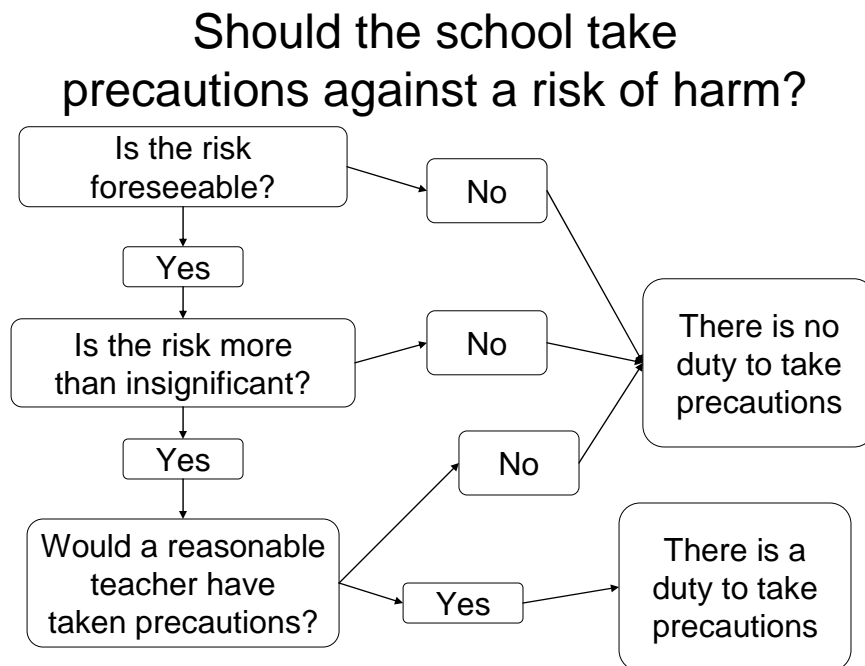
It may be helpful to see this as a three step process.

Step 1 Risk Identification

First, the risks must be identified. This task ought not to be left to one person. Rather, a group of people involved with the particular off-campus activity and others with experience of such activities should together identify the risks.

Step 2 Risk Assessment

Second, the precautions to be taken need to be determined. This is the point at which one asks questions about foreseeability, probability and what is reasonable. The following diagram sets out the process used by the courts after the event. However, it can be used in advance to assist with the risk assessment process.



Step 3 Ongoing Review

Finally, a school and its teachers must monitor the situation and the precautions that have been put in place. In other words, they must keep checking that the risks are being managed. While it is important to manage the risks before heading off-campus, it is also important to remember that this is not a once only exercise. The risks must continue to be managed during the course of the activity. New information may be uncovered or new circumstances arise which will require new strategies.

When an off-campus activity has been completed, there is opportunity for the school to examine its overall practices in relation to it. One should ask what lessons can be learned from what has happened. Should the school's policies be revised? Should there be more staff training? Are there situations which could be avoided by some simple changes? All these questions and more should be considered once the activity is over because, at this point, the school will have the benefit of lessons learned during the activity.

Sharing the Risk with External 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.

This situation was well illustrated in a recent New South Wales case.³⁹ Michael De Beer was a year 11 high school student at a government school when he attended the Aussie Bush Camp at a site owned and operated by Outdoor Education Australia Pty Ltd. The camp was for year 7 students. Michael was there as a year 11 peer support leader. He received an electrical shock when he picked up an electrical power board while he was editing a video he had taken of camp activities, using equipment provided by Outdoor Education Australia. The power board did not have a back cover and it appears that he touched exposed wires when picking it up.

The New South Wales Supreme Court had to consider whether the Department of Education and Training had satisfied its duty of care by appointing Outdoor Education Australia to run

the school camp. It was not disputed that the Department owed a duty of care to Michael which involved taking reasonable steps to ensure his safety while at the camp. It was also accepted that, together with Outdoor Education Australia, the Department was an occupier of the camp. The Court found that the camp was conducted by Outdoor Education Australia which was liable for the injury caused by the defective power board which it supplied. Strangely to me, the Department accepted that it, too, was liable in respect of the faulty equipment. There is very little analysis in the judgment about why the Department was liable, apparently because the Department has conceded liability.

This result is at odds with the outcome in *Brown v Nelson*⁴⁰, an English case in which a school used an external provider. Mr Nelson ran Outward Bound type confidence courses for small groups of students from a school in Surrey. Robert Brown was a 16 year old student from the school who attended a course, part of which involved a flying fox apparatus. A cable was slung between two trees. A pulley was attached to the cable and a knotted rope hung from the pulley. Students stepped from a platform in one of the trees, about 35 feet above the ground, stood or sat on a knot in the rope, and then took off, their own weight carrying them to the other tree. Robert and another boy had each done this twice before the day of the incident. On that day, both boys stood together on the departure platform. The other boy held the pulley while Robert got onto the rope. As soon as he did, the cable broke causing him to fall to the ground. The court found that there was a clean cut fracture in the cable which showed internal rust but no external sign of rust or defect.

Robert sued Mr Nelson, his school and the owner of the property. The Court found that the owner of the property was not in a position to exercise any control over the activities or equipment. He was therefore found to have had no responsibility for what happened. On the other hand, Mr Nelson was clearly found to be in occupation of the site and of the confidence courses and exercised overall control over both. He had a duty to use all reasonable care for the safety of persons visiting the site and using the course. He was found liable because he ought to have, but did not, take the cable down for checking.

³⁹ *De Beer v The State of New South Wales and Anor* [2009] NSWSC 364 (11 May 2009)

⁴⁰ (1971) 69 LGR 20

The school clearly had a duty to take reasonable steps for the safety of its students. Nield J said:

In my judgment, 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 the 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. They do not in such circumstances have an obligation themselves to make an inspection.⁴¹

Nield J concluded:

In the present instance, the school authorities knew the camp from previous visits.... They knew that Mr Nelson was a careful and competent person. They knew that he had a trained staff.... Some of them must be old boys of the school, because they were 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 [Robert].⁴²

Why then did the Department concede liability in *De Beer*? The Court said: “That concession was given consistently with the approach of the Court of Appeal in *Fuller v NSW Department of School Education and Training* [2004] NSWCA 242”.⁴³ *Fuller* was a case where a school employee used a ladder not fit for the purpose to hang banners in the assembly hall. The ladder slipped and he was injured. To my mind, this situation is not comparable with the *De Beer* situation. I am not convinced that schools should accept *De Beer* as authority for the proposition that they must inspect all equipment at hired campsites in the same way that they do on their own premises.

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

⁴¹ (1971) 69 LGR 20 at 25

⁴² (1971) 69 LGR 20 at 26

⁴³ *De Beer v The State of New South Wales and Anor* [2009] NSWSC 364 (11 May 2009) at para 66

- The school must check that the site is apparently safe.
- The school must check that the staff are competent and careful people, and that they have undergone the relevant child protection screening.
- 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.

Can the risks be managed?

They certainly can! The risks are quite manageable. Those who would say schools must stop their off-campus activities are alarmist. Their voices must not prevail over those who understand that educating children involves risk taking.

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