

# School Sport and the Law

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## ABOUT THE AUTHOR

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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; tort law reform; investigations; teachers, counsellors and confidentiality; bullying; cyber bullying; outdoor education; multiculturalism in education; discrimination; and child protection. 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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## What is this paper about?

The opportunity to be involved in sport while at school is greatly valued by students and parents alike. The benefits of sporting activities are well-known. As Ipp JA said:

*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.*<sup>1</sup>

Sport also plays a significant role as a promoter of social integration and economic development in different geographical, cultural and political contexts. Sport is a powerful tool to strengthen social ties and networks, and to promote ideals of peace, fraternity, solidarity, non-violence, tolerance and justice. Tackling problems in post conflict situations can be eased as sport has the ability to bring people together.

Accordingly, school sport, by promoting sport among the youth of our country, has enormous value. Yet there are those who seek to reduce or eliminate sport from school curricula on the basis that it is too risky.

This paper will examine the law's response to a variety of practical situations involving school sport, drawing upon legal precedent not only from Australia but also from England and the United States.

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<sup>1</sup> *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Kondrajian* [2001] NSWCA 308 (24 September 2001) at [70]

## Duty of Care

### Generally

Schools and teachers owe a duty of care to their students. Put simply: 'A school authority owes to its pupils a duty to ensure that reasonable care is taken of them whilst they are on school premises during hours when the school is open for attendance.'<sup>2</sup>

This clearly does not mean that a school is liable just because, for example, a student is injured playing rugby. There is no duty to insure against injury. The High Court has on at least two occasions approved this statement by a Victorian judge:

*The duty of care owed by (the teacher) required only that he should take such measures as in all the circumstances were reasonable to prevent physical injury to (the pupil). This duty not being one to insure against injury, but to take reasonable care to prevent it, required no more than the taking of reasonable steps to protect the plaintiff against risks of injury which ex hypothesi (the teacher) should reasonably have foreseen.'*<sup>3</sup>

### Concussion

Let us assume for the moment that a schoolboy, in the course of a rugby game, has had his head knocked into the ground heavily as he was tackled. He is quite concussed and is unable to resume playing. His coach attends to the boy who, after groggily coming to, is entrusted to the care of his father. The coach tells the father to take the boy home and put him to bed.

The issue is whether the school or its staff for whom it is vicariously liable did enough after the boy was injured. In a NSW case<sup>4</sup> way back in 1993, a boy was injured when a Year 12 student on Muck Up Day threw fruit in his eye as he cycled to school. I will not deal here with the issue of whether there was negligent supervision that day. However, the injured boy arrived at school a few minutes after being hit and, after a while, finally found a teacher who told him to go to Sick Bay. Instead the boy went home. His mother then got him medical attention. Meanwhile, the teacher had gone to her staff room. She said she checked a little later whether the boy had

<sup>2</sup> *The Commonwealth of Australia v Introvigne* (1981) 150 CLR 258 at 269 per Mason J.

<sup>3</sup> *Geyer v Downs* [1977] HCA 64 at [19] (Stephen J), quoting *Richards v Victoria* (1969) VR 136 at pp138, 140-141 (Winneke CJ).

<sup>4</sup> *Reynolds v Haines* (Unreported, Supreme Court of New South Wales, McLaughlin M, 27 October 1993) 22.

reported to admin. She found he had not done so but she did nothing further. She had not felt it necessary to accompany him to Sick Bay even though he was obviously in pain and distressed. The judge compared her attitude to that of the trio of sage simians in the adage.. He felt she was more concerned to see if the boy had followed her directions than to see if he was okay. She just abandoned the problem. The Court was clearly of the view that the school was negligent in the care it took of the boy after he was injured. Arguably therefore, just sending a boy off with his father is not enough to fulfil the school's duty.

In April 2011, an American high school boy, Zachary Alt, claimed his football coach sent him back into a game after suffering a concussion despite teammates' warnings about his incoherent condition. Zac has sued his school, the coach and the principal.<sup>5</sup>

Zac alleges that the coach left Zac in the game in 'deliberate indifference' to his condition which worsened throughout the game. Zac says that, fearing for his health, at least two of his teammates approached the coach during the course of the game and advised him of Zac's incoherent condition. Allegedly the coach did nothing in response to the players' pleas.

Zac claims that the negligence did not end on the field. The coach and the team trainer said Zac had to go in the bus back to school with the team. Then they decided that the trainer would take Zac home. Zac alleges that, 'even after observing me in this vulnerable state, the trainer failed to understand the risks associated with my injuries, and suggested to my mother that she should just put me to bed.' Instead, Zac's mother immediately took him to the emergency room at their local hospital. A doctor at the hospital told Zac's mother that had she followed the advice of the trainer and put Zac to bed, he would most likely have fallen into a comatose state. The hospital found that Zac had suffered 'a substantial closed head injury.'

As an aside, Zac also alleges that, when his injuries became so debilitating that they affected his grades, the Principal said he could fix that with a 'shake of his magic wand' in an 'overt and unethical' offer to change his grades.

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<sup>5</sup> *Zachary Alt v Thomas Shirley et al* (District Court for the Western District of Pennsylvania, 2:05-mc-02025, 7 April 2011).

Although this case has yet to be decided, there is every likelihood that the coach and the trainer will be found to have acted negligently.

Interestingly, US lawmakers have recently re-introduced legislation in the U.S. Congress that would force school districts to adopt concussion management plans that educate students, parents, and school personnel about concussion recognition, response and prevention. The legislation, the *Protecting Student Athletes From Concussions Act*, would require schools to post information about concussion at schools and on school websites.<sup>6</sup> It would also emphasize a "when in doubt, sit out" policy for student athletes.

Meanwhile in Pennsylvania, state senators have introduced companion bills that would require student athletes who suffer concussion to obtain clearance from a doctor before returning to play. The bills would also require students and parents to sign a "concussion awareness sheet" to help educate both parents and students about the risks they face. Apparently, an estimated 3.8 million sports-related concussions occur each year in the US.

Pennsylvania is not the first state to introduce this type of legislation. In December 2010, New Jersey enacted a similar provision. Wyoming is also considering similar legislation. Washington state first introduced concussion legislation back in 2009. Overall, 10 US states currently have legislation that control when a student athlete who has suffered concussion may return to the playing field.

The North Carolina *Concussion Awareness Act*, which promotes the development of an athletics concussion safety training program and concussion safety requirements for interschool athletics, mandates the education of coaches, school nurses, athletics directors, volunteers and student athletes and their parents on the dangers and symptoms of a concussion. It also requires that all high school students be removed from play immediately upon showing signs of a concussion, and held out for the rest of the day and until authorised by a doctor. In addition, it requires each school to develop an emergency action plan to deal with serious injuries, and to document compliance with these rules.

I mention this American experience not because it binds schools in Australia but because it indicates that the things that are mandated there by legislation

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<sup>6</sup> Protecting Student Athletes from Concussions Act, H R 6172, 111<sup>th</sup> Congress (2009-2010)

are very likely to be considered by courts here as what is reasonable for schools when dealing with concussed children.

### **Obvious Risks**

Sport clearly requires a high standard of care because of the extra likely and foreseeable risks. Teachers must therefore take extra care. They must try to foresee the likely injuries and take precautions to minimise risks. However, the *Civil Liability Act (NSW)* gives some relief in this area. The Act speaks of an obvious risk as one that, in the circumstances, would have been obvious to a reasonable person. Obvious risks include risks that are observable or a matter of common knowledge. The Act says that people who are injured are presumed to have been aware of the risk of injury if it was an obvious risk. Also, there is no duty to warn of an obvious risk. In relation to sport, the Act is quite specific: a person is not liable in negligence for injury suffered by another person as a result of the materialisation of an obvious risk of a dangerous sport engaged in by the injured person. It seems to me that high school boys are aware of the risks of playing rugby. However, there is certainly no harm in warning of those risks even if playing the game is compulsory. I will mention later the importance of risk warnings when the activity is not compulsory.

### **Duty of Care to Visitors**

Schools not only have a duty to their students but also to others who visit their campuses. The High Court has said that a school has a duty to take reasonable care to protect its students from the criminal behaviour of third parties, random and unpredictable as such behaviour may be<sup>7</sup>. It seems to me that the same duty is likely to extend to students of another school visiting for sport or other activities. Accordingly, there is a potential liability if a parent of a student of the school assaults a student from a visiting school in the course of a sporting fixture. However, the host school is unlikely to be liable unless there is a history of the parent acting criminally without the school having done anything about it.

Another potential liability situation is where young spectators are injured on the side-line by players training or warming up in readiness for their game. It seems quite likely that a school will have failed to take the care required of it in relation to a young spectator in such circumstances unless reasonable

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<sup>7</sup> *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61.

steps to avoid the injury have been taken. Accordingly, the school would be liable for the damage the young spectator suffers.

However, if a spectator was injured by one of the players in a game being played (for example, by one of the players diving to tackle an opponent, missing and rolling into the spectators), the spectator would not normally have an action against that player<sup>8</sup>. The cases say that a player would need to break off from the game and have a fight and injure someone to be liable<sup>9</sup>.

### ***Do parents have a duty of care?***

When parents take their children to school sporting fixtures, are they under any duty to take reasonable steps to keep an eye on those children, particularly younger ones?

This question arose in *St Mark's Orthodox Coptic College v Abraham*<sup>10</sup>, a case where a 9 year old boy fell from a balustrade at school in Western Sydney and suffered significant injuries. He sued the school. The school said that the boy's father was responsible as he had left the child on the premises before school hours knowing that there would be no formal supervision. Because under Australian law parents do have a duty of care to their children, the school was allowed to bring a cross claim against the father.

However, the duty of care on the school will be different to that on the parent. In the *St Mark's Case*, Ipp JA noted that the College owed a duty not only to the individual students but to the students (all 382 of them) as a class. He added:

*St Mark's was required to take into account the risk of injury to the class comprised of 382 students (including Christopher). The risk so to be assessed involved the risk of one or more of those students suffering harm during the period from 7.45 am each day (when students had already begun to arrive and from which time, according to St Mark's, supervision should have been formally undertaken (but, in practice, was not) until 8.35 am (when classes commenced). Mr Abraham, on the other hand, was required to take into account the risk of injury to Christopher, alone, on a single*

<sup>8</sup> *Wooldridge v Hugh Sumner and the British Horse Society* [1962] 2 All ER 978.

<sup>9</sup> *Payne and Payne v Maple Leaf Gardens Ltd* [1949] 1 DLR 369.

<sup>10</sup> *St Mark's Orthodox Coptic College v Abraham* [2007] NSWCA 185.

*occasion on 23 August 2000 between 8.00 am and 8.20 am. The risk was that Christopher, a dutiful child, might be mischievous and something untoward might happen to him in that short period.*<sup>11</sup>

Accordingly, the risk of harm that the school was required to take into account differed substantially from that which the father had to consider. The former was far greater than the latter and obviously required the taking of precautionary measures that did not apply to the risk that the father had to bear in mind. The school could not expect too much of the father and had to continue to be diligent in managing the risks that it brought into the lives of not only its students but also students from other schools and visitors generally.

### **Coaches**

Back in 1982, a 15 year old boy suffered a broken neck and consequent quadriplegia in a school football scrum<sup>12</sup>. The Minister for Education had been warned of this very risk by Dr John Yeo and his team at Royal North Shore Hospital but nothing had been done by the Department. The warnings never reached teachers generally including the boy's teachers who therefore did not know and could not reasonably have been expected to have known that it was unsafe to play boys with long necks in the front or second row of the scrum. Therefore, the teachers were not negligent. However, the Department was held negligent for its failure to ensure that reasonable care was taken for the safety of school children. The damages were assessed at well over \$2 million. Today, a coach would not be able to say that he did not know that a boy with a long thin neck was at risk playing in the front row. Today, a school would be vicariously liable for the coach's negligence and may also be negligent itself if it had failed to ensure its coaches were properly trained in such matters.

### **Opposing Players**

There is an English case<sup>13</sup> dealing with a colts (that is, players under 19) rugby game in 1991. A 17 year old lad called Ben was the hooker in his team. His neck was broken when a scrum collapsed. Ben sued one of the opposing props and the referee. He did not succeed against the opposing

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<sup>11</sup> Ibid [24].

<sup>12</sup> *Watson v Haines* (1987) Aust Tort Reports 80-094.

<sup>13</sup> *Smoldon v Whitworth* [1997] ELR 115.

player. The principles there were laid down by the Australian High Court in *Rootes v. Shelton*<sup>14</sup> and adopted by the English courts.

Barwick CJ and Kitto J took different approaches which essentially produce the same result. The Chief Justice started with a more generalised duty of care and modified it on the basis that the participants in sport impliedly consent to taking risks which otherwise would be a breach of the duty of care. Kitto J said in effect that there is a general standard of care, namely the *Donoghue v Stevenson*<sup>15</sup> approach that you are under a duty to take all reasonable care taking account of the circumstances in which you are placed, which, in a game of football, are quite different from those which affect you when you are going for a walk in the countryside.

The courts in both countries have said clearly that the breach by one player of the rules of the game is not in itself an indication of negligence by that player but rather just one of the matters to consider.

### **Referees**

Benø's suit of the referee was novel. However, both the trial judge and the Court of Appeal found that the referee owed the players a duty of care which he had breached. Despite arguments that to find the referee had a duty of care would lead to defensive refereeing, the trial judge said that the collapsing of scrums carried a very high risk of injury particularly to the front row. He noted that the laws of the game, especially those that applied to colts games, were there in the interests of safety. Accordingly, he saw nothing wrong with imposing a duty of care, saying that no responsible referee has anything to fear. The English Court of Appeal agreed. The NSW Court of Appeal in *Hyde v Agar*<sup>16</sup> which also involved spinal injuries from a rugby scrum seemed to accept that *Smoldon's Case* did state the law in relation to the duties of referees.

### **Volunteers**

Schools often use the services of volunteers. These are parents, grandparents, former students and friends who assist, in the sporting context, with coaching and refereeing. The *Civil Liability Act* (NSW) has removed any doubt about the potential liability of such people for their negligence while engaged in their voluntary activities. Section 61 states that

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<sup>14</sup> *Rootes v Shelton* (1967) 116 CLR 383.

<sup>15</sup> *Donoghue v Stevenson* [1932] AC 562.

<sup>16</sup> *Hyde v Agar; Worsley v Australian Rugby Football Union Ltd* (1998) 45 NSWLR 487, 513.

a volunteer does not incur any personal civil liability in respect of any act or omission done by the volunteer in good faith when doing community work organised by a community organisation. This covers doing things at a school.

The section 61 protection does not extend to situations where the volunteer engages in criminal conduct, is intoxicated or acts outside the scope of the school's activities or contrary to the school's instructions.

While section 61 removes liability from the volunteer, the school for which the volunteer is working may be vicariously liable for the volunteer's negligence and so should continue to insure against the risk of being found liable in this way.

### ***Skiing***

Many schools give their students the opportunity to go skiing during the winter holidays. Snow sports have received considerable attention from the school administrators following the deaths of Hannah Taylor and Amelia McGuinness in 2009. Both girls were 16 when they died and both were on school excursions to the snow. Although the circumstances of death were not exactly the same, it is sufficient for our purposes to note that both girls died after colliding with trees while free skiing; that is, they were on patrolled runs but were not taking part in formal races or competitions at the time. Both girls were wearing helmets.

The Coroner's findings into the deaths of Hannah Taylor and Amelia McGuinness were handed down in April 2011. The Coroner's recommendations have caused alarm to some schools with skiing or snowboarding programs. Typically, the outcome of coronial enquiries is a knee jerk response to abandon altogether the activity that caused the death. Fortunately, most schools (either because good sense prevails or because they forget what the Coroner has said) resume the activity even if for a period they let it go. I want to stress that the Coroner himself said that he had no desire to discourage school ski excursions. He also rightly noted that his role was not to attribute fault or to make findings in relation to negligence or breach of duty of care. To the extent that he made recommendations which he thought might make the slopes a safer place for young skiers, what he said should be considered by schools when managing the risks of snow field activities. However, failure to adopt the recommendations will not lead automatically to liability on a school's part.

This is underlined by the fact that both girls would probably still have died even if all the Coroner's recommendations had been adopted.

In the English case of *Woodbridge School v Chittock*<sup>17</sup>, Simon Chittock was 17 and one of three senior boys on a school ski trip to the Austrian Alps. The three older boys had been given permission by their parents to free ski together. Simon lost control going round a bend, causing him to fall down a slope and fracture his spine. As a result he was permanently paralysed from the waist down. Like the Australian girls, he had probably been going too fast.

Simon argued that he should not have been allowed to ski unsupervised at all. It was accepted that the school owed Simon a duty of care and that this could, in appropriate circumstances, include a duty to take positive steps by way of supervision. However, it was not a duty to ensure his safety against injury from skiing mishaps such as those that might result from his own misjudgment or inadvertence when skiing unsupervised. It was a duty to take such steps as in all the circumstances were reasonable to see that he skied safely and otherwise behaved in a responsible manner. The English Court of Appeal said that the standard of care should reflect the particular circumstances in which Simon went on the trip. These included the understanding with his parents that he should be allowed to ski unsupervised, but also an implicit assumption by the School of responsibility for general oversight of his skiing and other activities at the resort, backed, where necessary, by appropriate discipline to safeguard him and others from reasonably foreseeable harm.

Simon's age and skiing experience and ability fully justified the teachers sticking to the understanding reached with his parents that, absent some supervening circumstance indicating a need for supervision, Simon should ski unsupervised. All the runs at the resort were well within his capabilities and he was observed throughout the week until the accident to be skiing on them in a competent, sensible and safe way. The teachers were therefore not in breach of their duty of care.

Even if they had been, the Court said it is highly questionable whether one could find on the balance of probabilities that supervision, whatever form it took over this fast moving and intrinsically hazardous activity in frequently changing terrain and run conditions, would have prevented the accident.

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<sup>17</sup> *Woodbridge School v Chittock* [2002] EWCA Civ 915.

Even if the boys had been supervised on that morning, it cannot sensibly be said that such supervision, or the simple presence of teachers nearby, would, on a balance of probabilities, have prevented the accident. The extent to which even the most expert supervision could have prevented an accident such as this, turning as it did on a conjunction of a narrowing and turning run and its near blocking by slow-moving skiers in front, must be questionable.<sup>18</sup>

### **Dangerous Recreational Activities**

Clearly, skiing and a number of other school sports are dangerous. The former Chief Justice of the High Court of Australia, Murray Gleeson said:

*People who pursue recreational activities regarded as sports often do so in hazardous circumstances; the element of danger may add to the enjoyment of the activity. Accepting risk, sometimes to a high degree, is part of many sports. Sporting activities of a kind that sometimes result in physical injury are not only permitted; they are encouraged. Sport commonly involves competition, either between individuals or teams. A sporting contest might involve body contact where physical injury is an obvious risk, or the undertaking by individual competitors of efforts which test the limits of their capabilities in circumstances where failure is likely to result in physical harm.<sup>19</sup>*

A school is not liable in negligence for harm suffered by a student as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the student. When considering the impact of this, you need to remember that the risk must have been obvious to a person of the age of the student. However, you do not have to worry about the injured student's actual awareness. Rather, you must consider whether the risk would have been obvious to a reasonable student of the age of that student.

### **Risk Warnings**

The next thing to note is that a school does not owe a duty to a student who engages in a non-compulsory sport to take care in respect of the risks of that sport if a risk warning is given to the student. On the other hand, a school may be liable if its negligence has caused a student's injury in a compulsory sporting activity even if a risk warning has been given.

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<sup>18</sup> *Woodbridge School v Chittock* [2002] EWCA Civ 915.

<sup>19</sup> *Agar v Hyde* (2000) 201 CLR 552 at [15].

Assuming the activity is not compulsory, such as the ski trips of many schools, the schools may rely on the risk warning as long as it is given in a way that is reasonably likely to result in people being warned of the risk before engaging in the activity. This is an objective test. The school does not have to show 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.

Where a school wants to warn young students or students with disabilities who will not be able to understand the risk warning, the warning must be given either to another person who accompanies the student and who can understand the risk warning or to the student's parent.

Not surprisingly, a school cannot rely on a risk warning where it has contradicted the warning itself. For example, if a school warns its students about the risks of skiing but the teacher in charge advises them that skiing really is quite safe, the school could not rely on the risk warning.

## **Parental Behaviour**

Unfortunately, the enthusiasm of parents on the side-line of their children's games can lead to difficulties. Parents can be very vocal spectators. They can decide that a referee knows much less about the rules of the game than they do. Other parents can seek to contradict the first group and suddenly matters can get out of control.

What can we do about parents behaving badly? As a start, consider the NSW *Inclosed Lands Act 1901*. Schools are inclosed lands, whether they are fenced or not. This fact allows a principal some control over the access unruly parents have to the school campus. The Act provides among other things that any person who, without lawful excuse (proof of which lies on the person), remains on those lands after being requested by the owner, occupier or person apparently in charge of those lands (the school principal) to leave those lands, is liable to a penalty. A complementary provision states that any person, who remains upon inclosed lands after being requested by the principal to leave those lands and while remaining upon those lands conducts himself or herself in such a manner as would be regarded by reasonable persons as being, in all the circumstances, offensive, is also liable to a penalty.

Therefore, a school principal can make it clear to parents that they must not enter the school without consent. If parents do so anyway, it will not be sufficient for them to say that they are on the school premises for a purpose which in itself is lawful, such as coming to see their child play rugby.

Second, independent schools can try to deal with this situation by contract. In other words, they can include a term in their enrolment contract that will help. I have been advising schools for some time to include a condition which allows the school to terminate the enrolment contract if the behaviour of parents goes beyond certain limits. I refer to my paper on *Enrolment Contracts*<sup>20</sup>. A condition like this would allow a school to engage with the parents and ultimately, if there was no change in their attitude or behaviour, to terminate the enrolment contract.

What can be done when parents seek to discipline or interfere with the children of others? Sadly, some parents fail to realise that, when dealing with other people's children, they do not have the benefit that the law affords both parents and teachers who administer discipline. For example, it is a crime to assault another, whether it leads to actual bodily harm or not.<sup>21</sup>

The *Crimes Act* (NSW) has other provisions which may be relevant. Section 60E makes it a crime to assault or intimidate any school student while the student is attending a school, although no actual bodily harm is occasioned. The section also makes it a crime to assault a school student while the student is attending a school and by the assault occasion actual bodily harm. Similarly, a person who recklessly by any means wounds a school student or inflicts grievous bodily harm on a school student while the student is attending a school is liable to imprisonment for 12 years. School teachers should draw to parents' attention the fact that their behaviour is or could easily become criminal and indicate that, unless they stop, the police will be called. Obviously, the police should be called immediately if there is a risk to students.

## **Child Protection**

How do child protection laws come into play in the sporting arena? Clearly, if a sports coach employed by a school allegedly engages in reportable conduct, the matter must be notified to the NSW Ombudsman and

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<sup>20</sup> Delivered at the UNSW School Law Alert 2009 and available at the Education and Schools page at [www.emilford.com.au](http://www.emilford.com.au).

<sup>21</sup> *Crimes Act* 1900 (NSW), ss 59, 61.

investigated. Similarly, if a sports coach employed by School A allegedly engages in reportable conduct at the premises of School B during an interschool sporting fixture, School A's principal must notify the Ombudsman and investigate the allegation.

I have already considered the issue of parents behaving badly. If a parent, who is also a teacher, assaults a student (even if a student is at another school), this is a matter for notification to the Ombudsman and investigation. Reportable conduct includes assault.

## Privacy

Not surprisingly, schools are keen to use the sporting prowess of their students for marketing purposes. Photographs of students engaged in sport commonly appear on school noticeboards, on school websites and in local papers. However, privacy legislation can spoil the marketing director's day. Photographs which identify students contain personal information about those students. Can that information be used or disclosed by putting the photos up around the school or on the website? This is a big topic which has been well dealt with on other occasions. For example, my colleague Nathan Croot has an excellent paper on the topic<sup>22</sup>. Suffice to say here that the issues can best be resolved in advance by a good school privacy policy, collection notice and, for independent schools, a term in the enrolment contract specifically allowing the use of photos for marketing purposes.

## Racial Discrimination

Racial discrimination is a real issue in schools today. The federal *Racial Discrimination Act* and the NSW *Anti-Discrimination Act* both apply in some ways to NSW schools. The former protects people across Australia from discrimination on the grounds of race, colour, descent, national or ethnic origin, and immigration status. The NSW Act says that a person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of race if, on the ground of the aggrieved person's race or the race of a relative or associate of the aggrieved person, the perpetrator treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of a different race or who has such a relative or associate of a different race.

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<sup>22</sup> Nathan Croot, 'Practical Privacy Issues for Schools' (2010) available at the Education and Schools page at [www.emilford.com.au](http://www.emilford.com.au).

In both Acts, causation is important. One must ask 'Was the alleged discriminatory act done on the ground of or based on the aggrieved person's race?'

Typically, a parent complains that the student has been discriminated against on the ground of race when not elected for a sporting team. The answer to this will no doubt be that the student was not selected because he was not good enough. Hopefully, the school will have staff who have made good notes of the selection process and who can honestly say that they took into account the ability of all the students who tried out for the team.

What if a Muslim girl alleges that she is not able to take part in school swimming because she insists on being fully covered in the pool?

The NSW Act defines race this way: race includes colour, nationality, descent and ethnic, ethno-religious or national origin. This is similar to the federal Act which speaks of race, colour, descent, national or ethnic origin, and immigration status. None of these expressions in the federal Act are defined. However, it is important to understand the meanings of these terms because this will affect who is covered by the law.

For example, Courts have decided that to fall within the ground of ethnic origin, the following characteristics are considered essential<sup>23</sup>:

- É a shared history, of which the group was conscious as distinguishing it from other groups, and the memory of which it keeps alive and
- É a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.

The following characteristics are considered relevant, but not essential by courts<sup>24</sup>:

- É a common geographical origin or descent from a small number of common ancestors;
- É a common language, not necessarily peculiar to the group;
- É a common literature peculiar to the group;

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<sup>23</sup> *Mandla v Dowell-Lee* (1983) 1 All ER 1062; *Macabenta v Minister of State for Immigration and Multicultural Affairs* (1998) 159 ALR 465, 471; *Jones v Scully* [2002] FCA 1080

<sup>24</sup> *Ibid.*

- É a common religion different from that of neighbouring groups or the general community surrounding it; and
- É being a minority or an oppressed or a dominant group within a larger community.

Courts in the United Kingdom have decided that Jewish people<sup>25</sup> and Sikhs<sup>26</sup> fall within the meaning of ethnic origin outlined above.

Australian courts have adopted these meanings and have also found that Jewish people comprise a group of people with a common ethnic origin under the federal Act. As yet, Australian courts have not been asked to consider whether Muslim people constitute a group with a common ethnic origin under the federal Act.

However, cases that have considered this issue under the NSW Act have found that Muslims do not share a common racial, national or ethnic origin because while Muslims profess a common belief system, the Islamic faith is widespread covering many nations and languages. A recent decision of the NSW Administrative Decisions Tribunal noted that

*There are Muslims in every continent and of many different racial and ethnic backgrounds. It is common knowledge for example that there are South Asian, South-East Asian, African, Middle-eastern and European communities of Muslims. Many African-Americans, most famously Muhammed Ali, are Muslims', and that 'while Muslims are all adherents to Islam, they do not share common racial, national or ethnic origins.'*<sup>27</sup>

If a person believes that they have been discriminated against because they are of a particular national origin (such as Malaysian or Turkish) rather than because of their religious belief, then they are likely to be covered by the grounds in the Acts and can make a complaint.

## Drug Testing

The Australian Sports Anti-Doping Authority (ASADA) is a government statutory authority empowered by the *Australian Sports Anti-Doping Authority Act 2006 (Cwlth)*. Under s 9 of the Act, a National Anti-Doping

<sup>25</sup> *Seide v Gillette Industries Ltd* [1980] IRLR 427.

<sup>26</sup> *Mandla v Dowell-Lee* (1983) 1 All ER 1062.

<sup>27</sup> *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131 at [18].

Scheme is established. This Scheme prescribes procedures and conditions on which testing may take place.

Who can be tested? The Act defines 'athlete' as a participant in a sporting activity who is subject to the National Anti-Doping Scheme. Athletes who are in the ASADA's registered or domestic pool of athletes may be tested. In addition to that, persons who fall under the definition of 'athlete' in the National Anti-Doping Scheme may also be tested. Since 2008, school sport competitors are not normally included. However, if the school athlete competes at a national or international level or is subject to an anti-doping policy, then they must still comply with testing.

Therefore, a student can be tested if he or she competes in one sport nationally even if that testing is to occur in the context of another sport.

In 2007, ASADA developed, in coordination with NSW schools, protocols and procedures for the testing of 'junior elite school athletes'. Under s1.06 of the National Anti-Doping Scheme, ASADA may test those athletes who come under a contract or an anti-doping arrangement. Such arrangements may be made by schools with ASADA to allow for the testing of their athletes.

Under s 3.01 of the National Anti-Doping Scheme, the officer appointed to be a doping control officer must obtain clearance from their relevant state or territory to work with minors. This applies to investigators and chaperones as well (s 3.02, 3.03).

Under s 3.06 of the National Anti-Doping Scheme, doping control officers must have an identity card which has a recent photograph of them included. For blood collection officers, there must be a signature and an endorsement that they are indeed a blood collection officer.

Under s 3.07, when a doping control officer makes a request, the officer is required to produce his or her identity card. The athlete or the support person is not required to comply with their requests until the officer has produced their identity card.

Under s 3.21, an athlete who is a minor may elect a representative to monitor the collection of a sample.

Sample collection can be either in-competition or out-of-competition (such as at an athlete's training venue or home). The majority of testing is carried

out with no-advance-notice. The test can involve the collection of urine, blood or both.

Athletes must comply with a valid request for testing. Athletes may face sanctions if they refuse to comply. The penalty for refusing to provide a sample upon a valid request may be the same as providing a sample that contains a prohibited substance.

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