Managing the Risks in Off-Campus Activities

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David is:

- Former President of the NSW Chapter of the Australia and New Zealand Education Law Association.
- A member of the English, American and South African Education Law Associations.
- A member of the Editorial Board of the CCH *School Principals Legal Guide*.
- The editor of *Education Law Notes*, which keep schools throughout Australia up-to-date with education law developments.
- A reviewer for the *International Journal of Law and Education*.
- A former Chairman of the Council of MLC School, Sydney.
- A Fellow of The Taxation Institute.

David has presented at conferences in the United Kingdom, South Africa, Belgium, the Czech Republic, New Zealand and throughout Australia, and published numerous papers on topics as varied as enrolment procedures and conditions; student rights; teachers' liability; investigations; risk management; teachers, school counsellors and confidentiality; bullying (including cyber bullying); outdoor education; sport; multiculturalism in education; discrimination; discipline; and child protection.

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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 60 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*

[1] *Jeffery v London County Council* (1954) 52 LGR 521 at 523

> *of injury, and ignoring the countervailing considerations, the slightness of the risk, and the potential benefit of the activity.*"[2]

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]

These sentiments were echoed by Ipp JA in a NSW Supreme Court case involving injury to a young child while horse riding:

> *Society accepts that certain recreational activities may be provided for young children, and even encouraged, albeit that they involve risks of serious injury.*[4]

In another case, 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*

[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

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

[4] *Ohlstein bht Ohlstein & Ors v E & T Lloyd trading as Otford Farm Trail Rides* [2006] NSWCA 226 (15 December 2006)

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

> *must also be accepted that 16-year-old boys "are not to be treated as if they were infants at crèches …"* [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 a paper I wrote in 2005,[7] 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 their 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]

To succeed, the student must prove that:

(a) the school and its teachers have a duty of care to the student at the particular time the injury occurred;

(b) the risk of injury was foreseeable;

(c) the likelihood of what happened was more than insignificant;

(d) there was a failure to observe a reasonable standard of care;

(e) this failure was the cause of the injury; and

[6] Ibid 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

(f) 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-

[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] WASCA 5 (17 November 2003)
[15] (1980) 146 CLR 40 at 47

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 teacher who behaves decently and carefully would have taken precautions. This brings us to the so-called negligence calculus,[17] 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

[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

[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)

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.*
>
> *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]

The social utility of the activity was also considered in *Sanchez-Sidiropoulos v Canavan*.[21] Jade, a 10-year-old student, was playing a game of 'table soccer tag' on an asphalt basketball court. The taggers were required to keep to white lines across the court, whilst the runners tried to go from one end of the court to the other without being tagged. It was a warm-

[19] Ibid at para 65
[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] [2015] NSWSC 1139; [2016] NSWCA 221

up session for a PE class, which was being supervised by the PE teacher. Jade was one of seven or eight runners left in the game when she collided with another runner and fell on her right wrist and hip.

The PE teacher did not see the accident occur. However, she sent Jade to the office with another student for assistance. Jade was later taken to hospital and her wrist x-rayed. No break in the bones was revealed. The bruising to her hip healed reasonably quickly, but the sprain of her wrist took longer, causing her chronic pain, and this was the reason that she brought a claim for damages in negligence.

The matter was heard at first in the Supreme Court by Schmidt J who said:

> *It has long been recognised that it is neither practicable nor desirable to attempt to establish a system of education that seeks to exclude every risk of injury and that schools must encourage and teach high spirited children to engage in games and sporting activities, for their own health and wellbeing.*[22]

Therefore, as the Court stated, "the injury which [the student] suffered, regrettable as it was, was not the result of the breach of the duty which the School owed her."[23]

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.

The issue of reasonableness was considered in *Hanna v Uniting Church in Australia Property Trust (NSW)*.[24] Whilst participating in a year 10 school camp organised by an external provider, an independent school student fell when hiking in bushland, injuring her right ankle. Consequently, she

[22] [2015] NSWSC 1139 at para 4
[23] Ibid at para 56

developed complex regional pain syndrome in her right leg, which caused her ongoing pain and disability. The girl sued the school in negligence in relation to her injury and its consequences, alleging that it had failed to take reasonable care of her following her injury.[25] She also sued the external provider. I deal with sharing the risk with external providers below.

The Court accepted that the injury occurred near the end of the hike. It found that the school "did not show a lack of reasonable care" in permitting the student to walk for a further half to one hour on a sprained ankle because:

(a) The instructor and the teachers had experience in first aid and the treatment of ankle injuries.

(b) The diagnosis of a sprained ankle was the correct diagnosis.

(c) The ankle was strapped.

(d) The injury occurred in a remote area and the group walked to the nearest road from which transport could be accessed.

(e) The student was able to weight bear on her foot and to walk. She said she was able to continue and she did. She was accompanied by the teachers for the rest of the walk. They observed nothing to indicate the student should stop walking.

(f) The student's pack was taken by a teacher and she was assisted when required. Rests were taken.[26]

The Court accepted evidence that:

> *Minor injuries are best treated functionally. That is, as practically as possible with normal activities. A good outcome can reasonably be expected in a large majority of cases. The outcome in [this student's] case, however, followed an unusual pathway which <u>was</u>*

[24] *Hanna v Uniting Church in Australia Property Trust (NSW)* [2010] NSWSC 293 (Hislop J)
[25] Ibid [1]-[3]
[26] Ibid [38]-[42]

> *not to be predicted and which unfolded slowly over a period of about eight weeks.*[27]

Consequently, the Court held that the school had not breached its duty of care because it had not acted unreasonably.

Practical Guidelines and Principles

The Courts are generally 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 activities[28]:

(a) Plan, plan, plan![29]

(b) Check, check, check!

(c) Supervise, supervise, supervise![30]

(d) Consult experts;[31]

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[27] Ibid [44]

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

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

[30] *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)

(e) Train the students and teachers beforehand;[32]

(f) Ensure that the qualifications of all staff have been checked and are current;[33]

(g) Reconnoitre the site or route beforehand;[34]

(h) Choose an area safe for the age of the students;

(i) Compile equipment lists;

(j) Have proper equipment in good condition;[35]

(k) Check the condition of equipment regularly;[36]

(l) Ensure the equipment includes complete First Aid kits;

(m) Arrange proper transport;

(n) Develop emergency procedures;

(o) Be prepared to cancel or stop the activity if circumstances change (e.g. weather, staff availability, ability to provide proper training);[37]

(p) Take into account the age, health (especially allergic conditions), physical development and experience of the students;[38]

(q) Warn of dangers;[39]

(r) Have adequate briefings;[40]

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[31] *Munro v Anglican Church of Australia* (15.5.87, NSW Supreme Court, Court of Appeal, unreported)
[32] *Regan v ACT Schools Authority* [2003] ACTSC 47 (13 June 2003); *Markos v Catholic Diocese of Port Pirie* [2009] SAIRC 23 (22 April 2009)
[33] 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.
[34] *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,
[35] *De Beer v The State of New South Wales and Anor* [2009] NSWSC 364 (11 May 2009)
[36] *Brown v Nelson* (1971) 69 LGR 20; *Toutounji v The Girl Guides Association (Sa) Inc* [1998] SASC 6954 (27 November 1998)
[37] *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)
[38] *Nicholas v Osborne* (15.11.85, Victorian County Court, Lazarus J, unreported); *Comcare v Commonwealth of Australia* [2009] FCA 700 (30 June 2009)
[39] 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)
[40] 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)

(s) Ensure that an adequate supervision ratio is maintained at all times;[41]

(t) Actively supervise throughout the activity;[42]

(u) Obtain parental consent to student being involved[43] and to emergency medical treatment;

(v) Obtain students' medical history and ensure teachers have this information with them;[44]

(w) Know the health and fitness of the students;

(x) Keep full and proper records.[45] If something does go wrong, it is imperative that schools have a protocol for recording injuries and that incident reports are in fact completed. Although the Court found for the school in *Hanna v Uniting Church in Australia Property Trust (NSW)*, things would have been much simpler if the protocol for recording injuries had been followed and incident reports had in fact been completed.[46]

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

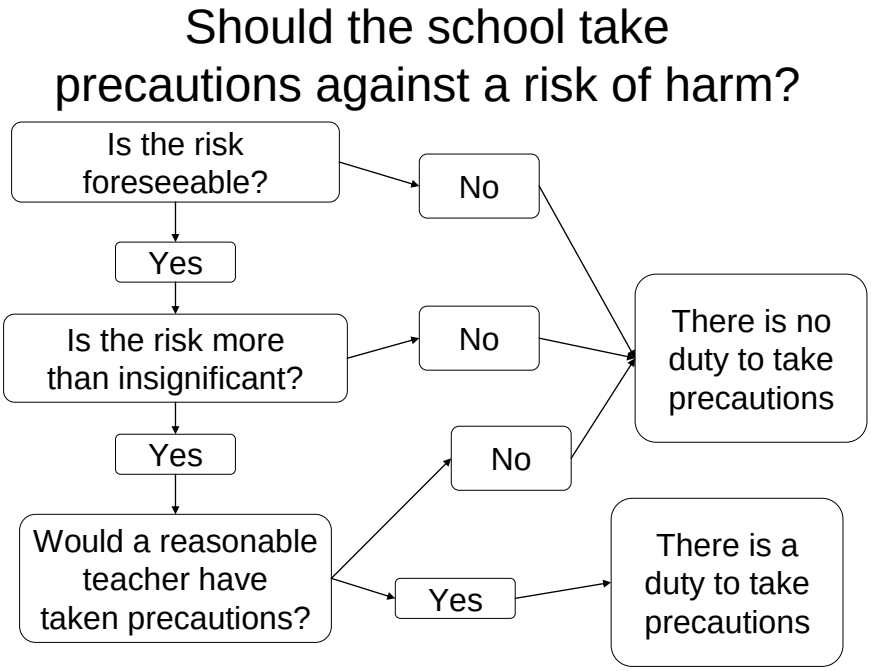
First, the risks must be identified. This task ought not to be left to one person. Rather, a group of people involved with the particular off-campus

[41] Inquest touching the death of Joshua Keith Fitzpatrick, Coroners Court, Moss Vale, 20 November, 1996
[42] *Haines v Watt* (29.8.91, NSW Supreme Court, Court of Appeal, unreported)
[43] 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
[44] *Comcare v Commonwealth of Australia* [2009] FCA 700 (30 June 2009)
[45] Inquest into the death of David Iredale, Penrith Coroners Court, 7 May 2009
[46] *Hanna v Uniting Church in Australia Property Trust (NSW)* [2010] NSWSC 293 at [14]

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 New South Wales case.[47] 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 conceded liability.

This result is at odds with the outcome in *Brown v Nelson*[48], 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 10.5 metres 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

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

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.

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.*[49]

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*

[48] (1971) 69 LGR 20
[49] (1971) 69 LGR 20 at 25

> *that the school authorities in no way failed in their duty towards [Robert].*[50]

Brown v Nelson was decided in 1971. In 2012, the English Court of Appeal was asked to consider a similar factual situation in *Woodland v Essex County Council*.[51] On 5 July 2000, Annie, a 10 year old student at an English primary school, went with her class to the local swimming pool. The class was divided into groups, according to their ability to swim. She was in the group of better swimmers, who used the deep pool. In groups of three or four abreast, at 5 to 10 second intervals, they were to dive into the pool at the deep end, swim the length to the shallow end, exit the pool, and return by the pool side to the deep end ready to swim the next length when it was their turn to do so. The swimming lesson was supervised by a swimming teacher, who was in the pool, and by a life guard, who was at the side of the pool. When Annie was swimming her first length of the pool, she got into difficulty and was seen hanging vertically in the water. Tragically, Annie suffered severe hypoxic brain injuries.

The issue before the English Court of Appeal was whether the Education Authority, which was responsible for the school, had "a duty not merely to take care, but a duty to provide that care [was] taken" by the swimming teacher and the life guard, both of whom were employees of Direct Swimming Services, which provided swimming lessons for school children.

The majority held that the Department's duty of care did not extend so far. They gave similar reasons to those in *Brown v Nelson*:

> *[Annie suffered her injuries] in an environment which was not under the control of the school staff and whilst engaged in an activity which was not being conducted or overseen by the school staff. The school had no swimming pool and it is not suggested that its staff*

[50] (1971) 69 LGR 20 at 26
[51] *Annie Rachel Woodland v Essex County Council* [2012] EWCA Civ 239

> *were trained as life guards or had the necessary expertise properly to supervise children taking swimming lessons.*
>
> *... [The school] never undertook that it would itself teach its pupils to swim; nor did it undertake the care, supervision or control of the pupils while they were taking swimming lessons. To the contrary, I think the [school] might reasonably have been criticised had it not engaged a suitable and competent independent organisation with appropriate skills and access to appropriate facilities to conduct the swimming lessons for which [it] was evidently not itself equipped.*[52]

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".[53] *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?

(a) The school must check that the site is apparently safe.

(b) The school must check that the staff are competent and careful people, and that they have undergone the relevant child protection screening.

(c) The school must see that the equipment to be used is apparently safe and is under the control of competent and careful people who

[52] *Annie Rachel Woodland v Essex County Council* [2012] EWCA Civ 239, [81]-[82] (Lord Justice Kitchin; Lord Justice Tomlinson concurring)
[53] *De Beer v The State of New South Wales and Anor* [2009] NSWSC 364 (11 May 2009) at para 66

> 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.

All these factors were of importance in *Hanna v Uniting Church in Australia Property Trust (NSW)*.[54]

Can the risks be managed?

There are risks in outdoor education and they certainly can be managed! Not only are the risks quite manageable but the benefits are immeasurable. 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.

A balancing act is involved. As McNair J said in the case cited at the start of this paper: "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".[55]

In a Canadian case in 1940, Mackay J said:

> *With great respect, I am further of opinion that paternalism in respect to boys of teen age in collegiate institutes should not be extended to a degree which would virtually deprive them of that exercise of intelligence demanded of young people of that age in other walks of life.*[56]

[54] *Hanna v Uniting Church in Australia Property Trust (NSW)* [2010] NSWSC 293 [42]
[55] *Jeffery v London County Council* (1954) 52 LGR 521 at 523
[56] *Butterworth et al v Collegiate Institute Board of Ottawa* 1940 CanLII 347

Young people must be allowed to learn and grow by taking risks. While taking sensible precautions, teachers must not deprive our young people of the opportunity that outdoor education provides to use initiative and intelligence in community to grow in independence and in an understanding of themselves.

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

André Gide