

Tort Reform: Does it affect teachers and schools?

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ABOUT THE AUTHOR

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David has presented at conferences in the United Kingdom, South Africa, Belgium and throughout Australia, and published numerous papers on topics as varied as student rights, teachers' liability, teachers and confidentiality, bullying, outdoor 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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Tort Law Reform – Does it affect teachers and schools?

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What I am going to do in my seminar presentation

In my presentation, I will be considering the practical implications for those in school administration of the changes that the spate of tort law reform has introduced. I will do so by reference to some decided cases and some hypothetical situations. I will not be reading this paper.

What this paper is about

The past few years have seen much discussion and debate about the need to limit the ability of Australians to claim damages when they suffer personal injury. Governments throughout the country have responded with legislation. Courts, particularly courts of appeal, have also responded to a changing community attitude in the area by finding against plaintiffs.¹

In this paper, I will consider the practical implications for schools of the legislation that has flowed from governments responding to concerns about increasing litigation and the availability of public liability insurance. I will briefly consider the Ipp Report commissioned by the Federal Government. I will refer often to the New South Wales *Civil Liability Act 2002*.

My concern is to discover what effect this legislation has or ought to have on the day-to-day activities of teachers and practices within schools. For that reason, I do not propose to consider in any detail many of the significant changes that have been introduced (such as limiting the amount of damages one can recover, preventing any recovery unless certain thresholds are exceeded, limiting recovery of legal fees, abolishing jury trials, changing contributory negligence rules, limiting exemplary, punitive and aggravated damages, limiting recovery by intoxicated persons and

¹ For example, *University of Wollongong v Mitchell* [2003] NSWCA 93 and *Waverley Municipal Council v Swain* [2003] NSWCA 61

criminals, protecting good samaritans, changing limitation periods, and so on).

The Ipp Report

In March 2002, the Australian Competition & Consumer Commission released a Pricing Review which found that the insurance industry had had low returns for almost 10 years and that much of the problem had been caused by past mismanagement and underpricing of premiums. Senior Commonwealth, State and Territory Ministers met the same month and again at the end of May 2002. The Ministers agreed on a large number of measures aimed at solving the public liability insurance crisis. The Ministers also announced that a special panel would undertake a review of negligence laws, seeking to achieve uniformity across jurisdictions. As a result, the Hon David Ipp was appointed chairman of a panel comprising himself, Professor Peter Cane, Associate Professor Don Sheldon and Mr Ian Macintosh. The Federal Government announced terms of reference on 2 July 2002. The panel presented their Final Report of the Review of the Law of Negligence on 30 September 2002. I refer to it as the Ipp Report.

The terms of reference began this way:

The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.

The report in its introduction noted that there appeared to be perceptions within the community that:

- (a) *The law of negligence as it applied in the courts is unclear and unpredictable.*
- (b) *In recent times it has become too easy for plaintiffs in personal injury cases to establish liability for negligence on the part of defendants.*
- (c) *Damages awards in personal injuries cases are frequently too high.²*

The Ipp Report urged governments to implement the panel's recommendations in a way that would bring the law in all the Australian

² Ipp Report paragraph 1.4

jurisdictions as far as possible into conformity. Sadly, as the table at the end shows, this has not eventuated.

The Ipp Report recommendations both restate the law in an attempt to provide a greater degree of clarity and certainty and, in areas where there were various interpretations of the law being applied by the courts, give specific guidance about how to apply relevant rules and principles in individual cases.

The panel acknowledged that its recommendations would, to a degree, shift the cost of injuries from injurers to injured persons. In other words, some injured persons who were previously entitled to compensation would no longer be entitled and others would be entitled to less compensation. There is, of course, a dilemma of how to balance the interests of various groups within our community. At the end of the day, this is not a matter for the law to decide but rather for our elected representatives in government to determine.

Personal injury law - the law of negligence - essentially comprises a set of rules and principles of personal responsibility. In the school context, the law has imposed a responsibility on schools and teachers to take care of students. The current move to reform the law of negligence is tending to shift the burden of responsibility to ensure that people take more care of themselves. The issue for those involved in education is the extent to which it is right to expect that children bear some of the burden of responsibility to take care of themselves.

The panel that produced the Ipp Report drew upon the personal knowledge and experience of all of its members and on their perceptions of the attitudes and wishes of the Australian community as a whole. The panel observed³ that this approach was consistent with Lord Atkin's observation in *Donoghue v Stevenson*⁴ that the law of negligence should be based on a general public sentiment of wrong doing.

On 5 April 2002, a meeting of the Council of Australian Governments agreed to make tort reform a top priority. It also decided that State Attorneys-General would not be directly involved in developing the tort law reform agenda. Rather, a working group of treasury department heads would consult state and federal Attorney-General Departments. This move came

³ Ipp Report paragraph 1.42

⁴ [1932] AC 562 at 580

after the New South Wales Premier warned that plaintiff lawyers lobbying the Attorneys-General could compromise the process. Despite the plaintiff lawyers, New South Wales led the way by passing the *Civil Liability Act* in June 2002 and by adding many of the Ipp Report recommendations to it in December 2002.

The Common Law position

In 1932, Lord Atkin of the British House of Lords was hearing an appeal in the Scottish case of *Donoghue v Stevenson*.⁵ May Donoghue had drunk ginger beer out of a bottle in which there was said to be the decomposed body of a snail. She became ill and sued the seller of the ginger beer even though she had not bought it herself and therefore had no contract with that seller. Lord Atkin was being asked to move outside accepted principles at that time and formulate a general statement by which the courts could determine when one person would owe another a duty of care, apart from any contractual relationship. He said:

*You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected when I am directing my mind to the acts or omissions which are called in question.*⁶

Lord Atkin was saying a duty of care would be imposed on you where there was a foreseeable risk of injury to someone who is close enough to you that he should be called your neighbour. This was the beginning of the modern law of negligence.

For a student to succeed in obtaining damages from a school authority for negligence, the common law has long required these elements to be established:

1. A duty of care

Such a duty does exist where there is a school with students. The duty exists at two levels. First, the teachers have a duty of care to their students. However, the school authority is vicariously liable for injury to a student caused by the failure of a teacher to take reasonable care for the student's safety. Second, the school authority is directly liable where the injury is caused by a failure in the authority's administration of its education system.

⁵ [1932] AC 562

⁶ *Ibid.* at 580

The High Court of Australia has said: “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”.⁷ The school cannot delegate this duty. In other words, simply appointing competent teaching staff and leaving it to them to take appropriate steps for the care of the students does not discharge the duty. It is a duty to ensure that reasonable steps are taken for the safety of the students.

2. A breach of the duty of care

The duty of care is breached if a teacher or school authority fails to act as the reasonable person would have acted in their position to eliminate the risk of injury or to prevent the injury from occurring. Breach of duty in negligence depends on whether the way in which the injury occurred was reasonably foreseeable. A risk of injury is foreseeable, so long as it is not far-fetched or fanciful, notwithstanding that it is more probable than not that it will not occur.⁸

3. Damage caused by the breach

Civil Liability Act 2002

Duty of Care

Part 1A Division 2 of the *Civil Liability Act 2002* deals with the duty of care. The general principles are set out in section 5B, which reads:

- (1) *A person is not negligent in failing to take precautions against a risk of harm unless:*
 - (a) *the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and*
 - (b) *the risk was not insignificant, and*
 - (c) *in the circumstances, a reasonable person in the person’s position would have taken those precautions.*
- (2) *In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):*
 - (a) *the probability that the harm would occur if care were not taken,*

⁷ *The Commonwealth v Introvigne* (1982) 150 CLR 258

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

- (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.*

Sub-section (1)(a) refers to foreseeability whereas sub-section (2)(a) refers to probability. It is important to recognise that foreseeability has nothing to do with probability. Foreseeability is relevant to the existence of a duty of care, to the standard of care and to the remoteness of damage. I am concerned at this point with the duty of care. Foreseeability of the risk of harm is relevant to answering the questions:

- would the reasonable person have taken any precautions at all against the risk? and, hence
- can the defendant reasonably be expected to have taken any precautions?

It would be unfair to impose liability on a person for failure to take precautions against a risk of which they neither knew nor ought to have known. Similarly, a person cannot be liable for failing to take precautions against an unforeseeable risk. However, the fact that a person ought to have foreseen a risk does not, by itself, justify a conclusion that the person was negligent in failing to take precautions against it.⁹

The fact that events of very low probability may be reasonably foreseeable creates a problem. While it seems acceptable to say that a person should not be liable for failure to take precautions against unforeseeable risks, it also may not be reasonable to expect a person to take precautions against a risk of very low probability simply because it was foreseeable. To overcome this problem, the High Court of Australia in *Wyong Shire Council v Shirt*¹⁰ said that you do not have to guard against risks that are far-fetched or fanciful, even if they were foreseeable. Essentially, the Court was saying that some risks are so improbable that it is reasonable to ignore them. Section 5B(1)(b) lowers the bar so that risks which are insignificant may be ignored. As a practical matter, this change in the law is not likely to affect school practices.

⁹ This was the error into which the trial judge fell in *Cafest v Tombleson* [2003] NSWCA 210 (1 August 2003)

¹⁰ (1980) 146 CLR 40

However, remember that just because a risk is not insignificant does not of itself mean that the person harmed can recover damages. Reaching this point is only the first step. The second step involves asking whether it is reasonable to require precautions to be taken against a particular risk. This is reflected in paragraph 5B(1)(c).

The Negligence Calculus

This brings us to the so-called negligence calculus, which is found in section 5B(2). This negligence calculus provides a framework for deciding what precautions the reasonable person would have taken to avoid the harm that has occurred and, hence, what precautions the school and its teachers can reasonably be expected to have taken.

The calculus involves taking into account the four factors in paragraphs (a), (b), (c) and (d) of section 5B(2). Courts tend not to analyse these factors individually. Rather the court simply asks (in the light of these factors) what the reasonable school or teacher would have done or not done to avoid harm to the student. For example, if the probability of harm occurring is high and the harm is likely to be serious while the cost of precautions is low and there is little social utility in the activity, something should be done to prevent the harm.

The inclusion of section 5B(2) is an important development for schools, particularly as they will be able to argue that much of what they do has social utility. After all, it is compulsory for many children to attend school because as a community we believe that there is great social utility in education. While there are some cases¹¹ that demonstrate that the courts are less likely to find negligence where the activity is intended to develop independence, this has by no means been universal. Now, courts will be obliged to consider such matters. Of course, the four matters listed in section 5B(2) are not the only matters the court may consider. Nor does the sub-section prescribe the weight to be given to each matter in any particular case. Nevertheless, prudent teachers will consider the four things listed in section 5B(2) when considering what they should do to minimise the risk of injury to their students.

¹¹ *Butterworth v Collegiate Institute Board of Ottawa* [1940] 3 DLR 466; *Jeffery v London County Council* (1954) 52 LGR 521; *Kretschmar v State of Queensland* (1989) ATR 80-272; *The Trustees for the Roman Catholic Church for the Archdiocese of Sydney v Kondrajian* [2001] NSWCA 308 (24 September 2001)

The meaning of “the burden of taking precautions to avoid the risk of harm”¹² is enlarged in section 5C(a), which reads:

In proceedings relating to liability for negligence:

- (a) *the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible*

Presumably, the burden will mostly be measured in financial terms, although this will not always be the case. The burden may be quite significant for a school with a large campus and/or many students. A court must now consider this burden in its totality when determining whether a reasonable person would have taken precautions against a risk of harm.

Section 42 is worth mentioning at this point. It provides that the following principles apply in determining whether a state school¹³ or an independent school¹⁴ has a duty of care or has breached a duty of care in proceedings for tort liability:

- (a) *the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions,*
- (b) *the general allocation of those resources by the authority is not open to challenge,*
- (c) *the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate),*
- (d) *the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.*

The Department and the governing bodies of independent schools will be pleased that these principles apply.

Section 5C(b) also gives some comfort to schools. It reads:

In proceedings relating to liability for negligence:

¹² Section 5B(2)(c)

¹³ Section 41 defines public or other authority as a Government department.

¹⁴ Section 41 defines public or other authority as a body prescribed by the regulations. The Civil Liability Regulation 2003 prescribes registered non-government schools.

- (b) *the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done*

In *Nicholas v Osborn*¹⁵, Nicholas, a 14-year-old girl, was hiking in single file with other students when she fell onto rocks. A boy fell and suffered brain damage at the same time. Nicholas was hurt and the boy later died. Nicholas sued the teachers, the school and the Education Department Officer who had agreed to the camp. The judge was clearly influenced in finding negligence by the fact that there was a lower, safer track, which could have been taken. Section 5C(b) means that this of itself is not relevant to liability. Today, the judge would have to base his decision on something more, such as the inherent dangers of the high track.

Section 5C(c) reads:

In proceedings relating to liability for negligence:

- (c) *the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.*

In *State of New South Wales v Steed*¹⁶, a teacher's aide, who lived near her school, was walking to work when she fell as she stepped over a mound on the school's grounds. Within 48 hours of her fall, the Department began to build a bridge over the area where she had fallen. Ipp AJA said what was done amounted to "an acknowledgment by the appellant [the Department] of the danger that had been constituted by the earthen swale and the mound."¹⁷ Section 5C(c) ought to prevent this conclusion in future. On the other hand, it will still be the case that actions taken after the event can assist a court in finding that it was possible to adopt preventative measures earlier.¹⁸

Apologies

Just as schools have been reluctant to shut the gate after the horse has bolted for fear that this admits they were negligent in leaving it open, so too there has been a reluctance to apologise. Teachers often want to apologise for something that has happened within their community but fear that this would be seen as an admission of liability. Regrettably, such fear has often

¹⁵ *Nicholas v Osborne* (15.11.85, Victorian County Court, Lazarus J, unreported)

¹⁶ [2001] NSWCA 178

¹⁷ *Ibid.* at para 38

¹⁸ *ACT Schools Authority v Raczkowski* [2001] ACTSC 61 (22 June 2001)

been unfounded, even though based on legal advice. Division 10 now makes it clear that an apology is not relevant to the determination of liability.¹⁹ An apology is “an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter”.²⁰ It is important to note that the effect of sections 68 and 69 is that an expression of regret, which also admits fault, does not constitute an admission of fault and evidence of the apology is inadmissible.

However, an apology is not protected where there has been an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct.²¹

Are teachers professionals?

This question has relevance to two provisions of the *Civil Liability Act*:

1. Section 5H(2)(c): while section 5H(1) provides that a person does not owe a duty of care to another person to warn of an obvious risk to that person, this provision does not apply if the first person is a professional and the risk is a risk of the death of or personal injury to the other person from the provision of a professional service.
2. Section 5O(1): professionals are not liable in negligence arising from the provision of a professional service if they can show that they acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice.

Accordingly, we must ask whether teachers are professionals and to what extent they provide professional services. Back in 1944, du Parc LJ wisely said: “It seems to me to be dangerous to try to define the word ‘profession’.”²² However, he pointed to criteria such as the possession of some special skill, ability or qualifications. Ultimately, he held that the test was to ask whether the reasonable man would say of a particular occupation that it was a profession. Certainly, it seems that the categories of “professions” should not be regarded as being closed and confined to the

¹⁹ Section 69

²⁰ Section 68

²¹ Sections 67 and 3B (1)

²² *Carr v IRC* [1944] 2 All ER 163 at 166

traditional learned professions.²³ On this basis, I believe that teaching is a profession and teachers are professionals. Over 40 years ago, the High Court judges referred to teaching as a profession in *Ex parte Professional Engineers' Association*.²⁴ Parents also consider that teachers are professionals.²⁵ I observe that teachers themselves believe they are professionals.²⁶

It is more difficult to determine what things done by teachers are professional services. One view is that everything done by a professional is a professional service. However, the courts seem to focus more on the particular service than on the role of the service provider. In *Toomey v Scolaro's Concrete Constructions Pty Ltd and Ors (No 5)*²⁷, the Court had to consider whether a claim on an insurance company fell within one of the exclusions in the policy which provided that the insurer was not liable for “claims arising out of any breach of duty owed in a professional capacity by any of the Persons Insured”. When the Court considered the question of whether the duty was owed in a “professional capacity”, it held that one should focus primarily on the specific actions that gave rise to the liability rather than on the role of the person involved. The Court referred to *GIO General Ltd v Newcastle City Council*²⁸ in which Kirby P (with whom Sheller and Powell JJA agreed in this regard) held that services provided by Council employees in examining building proposals and granting approval did constitute “professional advice or service” by the insured Council so as to be indemnified under a professional liability policy clause. Kirby P focussed on “the relevant activities” of the Council employees that were said to be negligent and to have caused the liability to arise. He held that the relevant question was whether those activities were properly characterised as professional, adopting the test of “the provision of a service of a skilful character according to a discipline”. In reaching that decision, it was relevant, but not determinative, that the officers had professional qualifications, such as engineering degrees.

²³ *Toomey v Scolaro's Concrete Constructions Pty Ltd and Ors (No 5)* [2002] VSC 48 (7 March 2002) per Eames J citing with approval *Carr v IRC*

²⁴ (1959) 107 CLR 208

²⁵ “As a profession we need to value teachers.” Sharryn Brownlee, President of the NSW Federation of Parents and Citizens Associations, quoted in Sydney Morning Herald, 30 July 2003

²⁶ For example, “We teachers regard ourselves as professional people....” *Reflections on a Shifting Scene* by J Wilson Hogg page 36

²⁷ [2002] VSC 48 (7 March 2002)

²⁸ (1996) 38 NSWLR 558 at 568-69

The Court in *Toomey's Case* also referred to the Queensland Court of Appeal decision in *FAI General Insurance Co Ltd v Gold Coast City Council*.²⁹ In that case, the conduct was the conveying of negligent advice as to the location of a water main by an employee who held no professional qualifications. The Court again said that the focus was to be on the individual's activities. The Court held that the actual activity in that case was the mere conveying of factual information, on which it was the plaintiff who made a professional judgment, not the Council employee, whose activity was deemed not to have been a professional one.

For sections 5H and 5O to apply to teachers, one must find not only that they are professionals but also that they provided a professional service. In addition, for section 5H(1) not to apply, the risk to the student must be a risk of death or personal injury from the provision of a professional service by the teacher. A teacher, therefore, does not have a duty to warn a student of an obvious risk unless that risk is a risk of the student dying or being injured from the provision of a professional service by the teacher. Even then, there is no presumption of a duty to warn of a risk in those circumstances. Nevertheless, it would obviously be prudent to do so.

So what do teachers do which amounts to the provision of a professional service? In my opinion, their classroom teaching is a professional service. Accordingly, teachers of subjects such as science, agriculture, design and technology, food technology, textiles and design must consider the risks of personal injury that these subjects entail, take steps to minimise the materialisation of the risks and warn students about them.

Division 6 (sections 5O and 5P) to an extent reinstate the so-called "Bolam rule", which ceased to apply in Australia following the High Court's decision in *Rogers v Whitaker*.³⁰ This rule gets its name from the statement in *Bolam v Friern Hospital Management Committee*³¹ where McNair J said:

a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art ... merely because there is a body of opinion that would take a contrary view.

Section 5O(1) reads:

²⁹ (1995) 2 Qd R 341 at 344

³⁰ (1992) 175 CLR 479

³¹ [1957] 1 WLR 582 at 587

A person practising a profession (a professional) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

The Bolam rule did not require the notion of wide acceptance. The fact that there are differing peer professional opinions widely accepted in Australian concerning the matter does not prevent any one or more or all of those opinions being relied on.³² Further, peer professional opinion does not have to be universally accepted to be considered widely accepted.³³ Finally, peer professional opinion cannot be relied on if the Court considers that the opinion is irrational.³⁴

This has practical application for teachers when they are sued for negligence arising from the provision of a professional service. They will not be liable if they can establish that they acted in a way that was widely accepted by their peers as competent professional practice. Once again, we must find that what was done or not done arose from the provision of a professional service. I have already said that I think that their classroom activities amount to professional service delivery. It is less clear that coaching sport by non-specialist sports teachers and playground supervision amount to the provision of professional services. As I mentioned earlier, one must focus on the nature of the activity rather than the role of the person involved. Doing this, it is probable that coaching and supervision are not professional services. Negligence arising from such activities will therefore continue to be judged in accordance with the principles set out in *Rogers v Whitaker*. In other words, the courts are not constrained by expert opinion. While they may accept a responsible body of expert opinion unless there is a strong reason to reject it, it is ultimately up to the courts to decide what reasonable care requires in each case.

Interestingly, section 5P states that section 5O does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in respect of the risk of death of or injury to a person associated with the provision by a professional of a professional service. Therefore, the principles set out in *Rogers v Whitaker* will also

³² Section 5O(3)

³³ Section 5O(4)

³⁴ Section 5O(2)

continue to apply to situations where, for example, teachers fail to give warnings to students in science laboratories about the risk of injury from dangerous chemicals.

Obvious Risks

Division 4 deals with the assumption of risk. Section 5G(1) states that a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk unless the person proves on the balance of probabilities that he or she was not aware of the risk. The person is aware of a risk if the person is aware of the type or kind of risk even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.³⁵

An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.³⁶ For example, in *Cafest v Tombleson*, Meagher JA said: “the plaintiff must have known ... that falls occur to skaters, that if one falls one often injures one's wrist (sometimes seriously, sometimes not) in making an attempt to break the fall.”³⁷ Clearly, what is obvious to an adult may not be obvious to a child. Indeed, what is obvious to a high school student may not be obvious to a primary or infants student.

Obvious risks include risks that are patent or a matter of common knowledge.³⁸ What is common knowledge will differ from person to person. Young students may not know things that are common knowledge to teachers.

Before the *Civil Liability Act* was enacted, the common law was also that a defendant was not liable where the plaintiff had engaged in an activity with obvious risks. For example, in *Prast v Town of Cottersloe*³⁹, a man was injured while body surfing. Ipp J noted that:

Body-surfing is a traditional Australian pastime that has been indulged in by citizens of this country for a very long time. There must be few who have never thrown themselves upon a wave in the hope of being carried by the rush of water to the shore, and there must be few who do not know (from hearsay at least, if not personal

³⁵ Section 5G(2)

³⁶ Section 5F(1) See *State Rail Authority of New South Wales v Wynn* [2003] NSWCA 209 (5 August 2003) for a recent example of a risk which was found not to be obvious and *Rallis v Pang* [2003] NSWCA 202 (31 July 2003) for a recent example of a risk which was found to be obvious.

³⁷ [2003] NSWCA 210 (1 August 2003) at para 16

³⁸ Section 5F(2)

³⁹ (2000) WASCA 274

experience) what a "dumper" is, and how it can throw a helpless surfer about.⁴⁰

He added:

*The risk of serious spinal injury being caused in these circumstances is patently obvious. If the appellant did not know that body-surfing could cause serious spinal injuries (as he asserted), objectively speaking, he should have known.*⁴¹

Section 5G may have changed the law in favour of plaintiffs. They may now be able to avoid the presumption of awareness of the risk of harm by proving that they were not aware of the risk. It may no longer be open to judges to say, as Ipp J did, the plaintiff should have known of the risk. On the other hand, however, judges may turn to section 5I, which says, in the school context, that a teacher is not liable in negligence for harm suffered by a student as the result of the materialisation of an inherent risk.⁴² An inherent risk is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.⁴³ In *Prast's Case*, the trial judge found that the danger of being dumped was both obvious and inherent and that the injury was brought about by an obvious risk inherent in body surfing. Ipp J said:

*The risk of so being dumped is inherent in body-surfing itself, cannot be avoided and is well-known.*⁴⁴

His influence on the drafting of section 5I is apparent. Plaintiffs cannot prevent defendants escaping liability for harm suffered as a result of the materialisation of an inherent risk by proving that they were not aware of the risk.

A risk of something occurring can be an obvious risk even though it has a low probability of occurring.⁴⁵ A risk can be an obvious risk even if the risk is not prominent, conspicuous or physically observable.⁴⁶

⁴⁰ *Ibid.* at para 33

⁴¹ *Ibid.* at para 35

⁴² Section 5I(1)

⁴³ Section 5I(2)

⁴⁴ *Prast's Case* (2000) WASCA 274 at para 32. See also *Waverley Municipal Council v Swain* [2003] NSWCA 61 at para 178 where Handley and Ipp JJA said: "When one dives into a wave over a channel close to the shore there is an inherent and well-known risk of encountering a sandbar."

⁴⁵ Section 5F(3)

⁴⁶ Section 5F(4)

Recreational Activities

Division 5 deals with recreational activities, which are defined widely to include:

- (a) any sport (whether or not the sport is an organised activity), and
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and
- (c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.⁴⁷

It is arguable that this definition means that any activity engaged in at a school is a recreational activity (despite the protest students would mount against such a proposition) because schools are places where people ordinarily engage in sport or other activities for enjoyment. The question, of course, is whether the meaning of the general word “place” is to be limited by the particular examples given in the brackets.⁴⁸ If the argument is successful, there will be beneficial consequences for schools giving warnings pursuant to section 5M, of which I speak below. On the other hand, in response, one could say that one cannot call a school a place as a school is made up of many places, only some of which are where people ordinarily engage in sport or other activities for enjoyment (for example, the oval or pool).

The Division also refers to dangerous recreational activities as recreational activities that involve a significant risk of physical harm.⁴⁹ Many school sporting activities would fall into this category. Speaking of rugby in *Agar v Hyde*, Gleeson CJ 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. A great deal of public and private effort, and funding, is devoted to providing facilities for people to engage in individual or team sport. This reflects a view, not merely of the importance of individual autonomy, but also of the public benefit of sport. 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

⁴⁷ Section 5K

⁴⁸ See the useful discussion of the relevant rules of construction by Mahoney JA in *Mattinson v Multiplo Incubators Pty Ltd* [1977] 1 NSWLR 368 at 373

⁴⁹ Section 5K

*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.*⁵⁰

However, one ought not jump too quickly to the conclusion that school activities are dangerous. For example, in *Nobrega v Trustees of the Roman Catholic Church for the Archdiocese of Sydney (No. 1)*, the trial judge and Powell JA in the Court of Appeal found that a water slide activity was not a dangerous one.⁵¹

A teacher 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.⁵² This reflects the common law position.⁵³ When considering the impact of this, one needs to remember the meaning of obvious risk and, in particular, the fact that the risk must have been obvious to a person of the age of the student. However, section 5L(2) says that the exclusion from liability in section 5L(1) applies whether or not the student was aware of the risk. In other words, one need not consider the injured student's actual awareness. Rather, one must consider whether the risk would have been obvious to a reasonable student of the age of that student.

Warnings

Of particular importance to schools is section 5M which states that neither a teacher nor a school owes a duty of care to a student who engages in a recreational activity to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the student.⁵⁴ Bear in mind that this provision does not apply if the student was required by the school or teacher to engage in the recreational activity.⁵⁵ In other words, the school may still be liable if its negligence has been the cause of an injury to a student engaged in a compulsory sporting activity even if a risk warning has been given.

⁵⁰ (2002) 201 CLR 552 at para 15

⁵¹ [1999] NSWCA 75 (23 March 1999) at paras 30-32

⁵² Section 5L

⁵³ "There are serious and sometimes catastrophic injuries suffered by the players of those sports. However it is not at law required that warnings of the kind suggested for the appellant in this case be given to the players of those sports." Per Wallwork J in *Prast's Case* (2000) WASCA 274 at para 58.

⁵⁴ Section 5M(1)

⁵⁵ Section 5M(9)

Assuming the activity is not compulsory, the school may rely on the risk warning as long as it is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity.⁵⁶ This is an objective test. The school does not have to establish that the student (or, in some circumstances, the student's parent) received or understood the warning or was capable of receiving or understanding the warning. Risk warnings may be given orally or in writing. They can be on a sign or in a letter or in any other form.⁵⁷ The risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk).⁵⁸

Where a school wishes to warn a student who, because of that student's young age or physical or mental disability, lacks the capacity to understand the risk warning, the warning must be given either to another person who accompanies the student and who does have the capacity to understand the risk warning or to the student's parent (whether or not the student was under the control of or accompanied by the parent).⁵⁹

Not surprisingly, a school or teacher cannot rely on a risk warning in a situation where they have contradicted the warning itself by some other representation made by them or on their behalf to the person to whom the warning has been given.⁶⁰ For example, if a warning has been given about the risks of abseiling but the teacher in charge advises the students that it really is quite safe, the school could not rely on the risk warning.

I mentioned earlier that a school or teacher might not be liable for harm where the risk was obvious or inherent. If a school gives a warning, this does not of itself mean that the risk is not obvious or inherent. It also does not mean that the school owes a duty of care to a person who engages in an activity to take precautions to avoid the risk of harm from the activity.⁶¹

Volunteers

Schools often use the services of volunteers. These are parents, grandparents, former students and friends who assist with reading, in

⁵⁶ Section 5M(3)

⁵⁷ Section 5M(4)

⁵⁸ Section 5M(5)

⁵⁹ Section 5M(2)

⁶⁰ Section 5M(8)

⁶¹ Section 5M(10)

libraries, on excursions, at fundraising events and by serving on school councils or parents and friends' associations. Division 9 of the *Civil Liability Act* has removed any doubt about the potential liability of such people for their negligence while engaged in their voluntary activities. Section 61 states:

A volunteer does not incur any personal civil liability in respect of any act or omission done or made by the volunteer in good faith when doing community work:

(a) organised by a community organisation, or

(b) as an office holder of a community organisation.

The protection conferred by this section does not extend to situations where the volunteer engages in criminal conduct⁶², is intoxicated⁶³ or acts outside the scope of the school's activities or contrary to the school's instructions.⁶⁴

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.

So what does it all mean?

The driving force behind tort reform in Australia has been the perceived need to limit liability for personal injury and death. This is being achieved by legislation that shifts the cost burden of injuries more to those who suffer them. One way this is done is to make people more responsible for their own choices and actions and therefore for their own safety.

However, there has been a recognition that one cannot go down this path with children to the same extent as with adults. Hence, one finds phrases like "in the circumstances" in section 5B(1)(c) and "a reasonable person in the position of that person" in section 5F(1). One also finds the concept of "the incapable person" in section 5M. I believe that these provisions will allow the courts enough flexibility to protect younger children. At the same time, older children ought to bear some responsibility for their actions. I am comfortable with the balance that we have in the *Civil Liability Act*.

Another balancing act is called for in this area where schools are involved. It is not new. Almost 50 years ago, McNair J observed:

⁶² Section 62

⁶³ Section 63

⁶⁴ Section 64

*School authorities ... must strike some balance between the 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....*⁶⁵

Who wants an education system that seeks to exclude every risk of injury? Section 5B(2)(d) will hopefully ensure that, when injury occurs, we remember that education has a social purpose and utility. We do not want our educators or judges to echo Benchley who said:

My only solution for the problem of habitual accidents is for everyone to stay in bed all day. Even then, there is always the chance that you will fall out.

Rather, we want teachers to be sensible in developing a risk minimisation mindset while at the same time being able to say to students, like the mother who said to her child:

Don't be afraid to go out on a limb. That's where the fruit is.

So what effect will tort reform have on the day-to-day activities of teachers and practices within schools? I suggest, fortunately, not much. There will probably be a few more warnings given. Hopefully, there will be a few more apologies offered, at least in New South Wales. School administrators and school lawyers will notice many changes (and maybe even lower insurance premiums) but those serving our children in the classroom, the playground, the sports field and gymnasium, and on excursions continue to have a duty to care for them. They do a marvellous job with an already very full load. I am glad to tell them that, for a change, government and community have not burdened them with additional responsibilities.

⁶⁵ *Jeffrey v London County Council* (1954) 52 LGR 521 at 523