Education Law Newsletter

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Suing Schools

Introduction

We all know that our society is becoming increasingly litigious. Whilst western society generally is litigious, some information suggests that New South Wales is one of the most litigious jurisdictions in the English speaking world.

Schools operate in what might be called a growth area for liability and so litigation. Concerns over liability and risk management are increasingly demanding the attention of school boards and executive staff. Schools are seen as institutions with broad shoulders and with solid insurance. Given that the law expects that young people will act irresponsibly and that schools ought to plan their affairs accordingly, there is obviously great potential in an imperfect world in the event of injury or otherwise for a school to be sued by or on behalf of a student.

It is not only student actions which are becoming more prevalent. A plethora of legal claims are available to staff who wish to sue a school as their employer.

A recent case in Victoria illustrates how a staff member who might become aggrieved with a school over an incident might frame a claim against a school. Whilst this case is primarily concerned with the legal principles regarding expert evidence it is a useful example of what schools will face in the future.

Complaint by employee

In the Victorian case of Rees v Lumen Christi Primary School an employee of the school sued the principal and the school for a breach of duty which the employee alleged led to her sustaining both physical and psychological injuries. The case is due to be heard by a jury in due course. In the course of the argument the issue of negligence transformed into a legal battle of principles centred on the admissibility of expert evidence.

Basic facts

The employee, Ms Rees, was an integration teacher's aide at the Lumen Christi Primary School. During the course of her employment, Ms Rees alleged that she sustained physical and psychological injuries after restraining a violent and aggressive student at the school. Subsequently, Ms Rees contends her condition was exacerbated by the duties

undertaken in the course of her employment and mistreatment by the principal and other staff members. Relying upon expert opinions, Ms Rees sought to call upon oral evidence of Professor Trouc who held specialised knowledge in the theory and practice of educational administration.

Objections of the Educational Institution

Prior to the admission of Professor Trouc's report, the school challenged the admissibility of this evidence by arguing that it did not comply with the Victorian equivalent of provisions of the *Evidence Act 1995* (NSW). The school also argued that the majority of Professor Trouc's opinions and conclusions were based on assumptions, rather than facts, which would likely lead to unfair prejudices against the school and might mislead or confuse the jury.

Decision

The Supreme Court held that the so called expert evidence did not constitute what the law requires for the admission of expert evidence. Professor Trouc was essentially asked to provide an opinion, albeit from an expert in the field.

The claim

Ms Rees framed an ambit case against the school both under her contract of employment (alleging breach of conduct at general law) and under the Victorian equivalent of the *Occupational Health and Safety Act* 2000 (NSW) alleging breach of statutory duty. The ambit claim of the staff member was that the school bore legal responsibility to her for:

- failing to instruct or properly instruct a teacher or employee
- failing to provide a teacher with any or any adequate supervision
- failing to provide a teacher with any or any adequate assistance
- failing to provide a teacher with any or any adequate equipment
- failing to carry out any or any adequate risk assessment in the tasks required of a teacher
- failing to heed complaints made by a teacher
- failing to provide the plaintiff with any or any adequate:
  - support
  - counselling
  - post restraint instruction
- ignoring a teacher's request for assistance in respect of the need to be able to adequately control aggressive, violent student behaviour
- exposing a teacher to aggressive violent student behaviour in the circumstances
- failing to take heed of past aggression and violence of the student in establishing work practices and protocols

- failing to recognize the risks created by the aggressive and violent student to the health and welfare of a teacher and other students at the school
- failing to implement any or any adequate system of advice to parents, other students and staff in relation to dealing with, the consequences of, the presence of an aggressive and violent student at the school
- failing to ensure that the Principal had adequate training and experience to properly direct a teacher
- permitting the Principal after and in relation to the restraint to engage in bullying of a teacher by way of humiliation, scape-goating, lack of support, disbelief, ostracism, public abuse, exclusion, denigration, inconsistent and overbearing work demands and intimidation
- permitting a teacher to be subjected to mobbing by others of its staff at the school after the restraint, in their lack of support, mirroring the Principal's lack of support, particularly in relation to a teacher's expressed concern about the legitimacy of their action in effecting the said restraint.

Fortunately, the Court no doubt correctly held that there was not really such a thing as an expert witness to say whether or not a school was negligent in a particular case. That was a question of law and fact which the Court determined.

Conclusion

The case illustrates how schools can be exposed to claims, how broadly a claim can be framed, and suggests that schools have to adopt systems including risk management policies to deal with potential exposure not only to staff but also to students and to any other stakeholders in the institution.

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Bullying in schools

Introduction

A Sydney school has been ordered to pay damages to a former student following a recent judgment in the Supreme Court of New South Wales. In *Oyston v St Patrick's College* [2011] NSWSC 269, the Court accepted that the school had policies in place to protect against bullying - but it failed to implement them.

The judgment of the Supreme Court on 14 April 2011 is the most recent pronouncement by a New South Wales Court that considers the duties upon a school to effectively respond to complaints about bullying.

The case raises two issues of particular interest to educational institutions. First, the limits to which policies to address bullying can be relied upon and secondly the need to balance the duties and pastoral care obligations to those who are bullied, and those who bully.

Allegations

Ms Oyston alleged that she was constantly bullied during her three years at the school, that she reported some bullying and that the reaction of the school was inadequate. Her case was that the school's policies and practices in relation to bullying, as implemented in her case, failed to protect her from a recognised and foreseeable risk of harm when she was subject to relentless bullying between 2002 and 2005, when her father withdrew her from the school.

The school's case was that Ms Oyston was not the subject of such bullying, or if she was, the circumstances were not such as to allow the school to be aware of the bullying to which she was being subjected. At the very least, the school argued, there was contributory negligence by Ms Oyston in failing to complain.

Duty of care

Negligence is defined in section 5 of the *Civil Liability Act* as "failure to exercise reasonable skill and care". The Court referred to a decision of the High Court in which this duty within an education context was stated in the following terms:

> *"The breach of duty which the Plaintiff alleges is a failure to take such precautions for its safety on the occasion in question as a reasonable parent would have taken in the circumstances"*

The limit of this duty of care is specified in section 5B of the *Civil Liability Act* 2002 which provides:

> *"5B General Principles*

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),

   (b) the risk was not insignificant, and

   (c) in the circumstances, a reasonable person in the persons position would have taken those precautions."

The Court accepted that Ms Oyston's recollections were deficient and that some of her evidence was "seemingly irreconcilable". Nevertheless the Court held that she had been bullied and that she had not been contributorily negligent because she had in fact complained and there was documentary evidence of her complaints.

School policies

The school relied on its policies "Student Conduct Policies and procedures" and "Personal Protection and Respect Policy", both of which were printed in the annual school diary given to each pupil.

Both the school and Ms Oyston introduced "expert" evidence about the effectiveness of anti bullying processes in the school. The evidence was inconsistent as one might expect.

Overall the Court seemed to take the view that because the bullying occurred then the policy had not worked. It therefore followed that the school had not adhered to and ensured that its policy was enforced. The school was found liable to Ms Oyston.

The Court particularly commented that, in dealing with such complaints as were received from Ms Oyston on bullying, the school did not adopt the correct balance between its duties towards the bullying students and its duties towards the student being bullied. The school had a policy to ensure that those who perpetrated the bullying were also subject to pastoral care with a view to improvement and extinguishment of the bullying. The Court decision suggested that, in being cautious in dealing with those who were perpetrating the bullying, the school gave insufficient protection to Ms Oyston from ongoing bullying.

Compensation

There were issues regarding Ms Oyston's pre-existing mental conditions and family background. All these issues are extensively examined in the case. Ms Oyston claimed more than $500,000 in damages. As at the date of this article, the Court has not made a formal award of damages which will be assessed under the *Civil Liability Act (NSW)* 2002. However, the Court has determined that the plaintiff is entitled to non-economic loss damages of 20% of the most extreme case. That equates to $17,500. She will also be awarded one year's loss of earnings as a result of her need to repeat Year

9 at her new school which was held to be a direct consequence of the bullying which she suffered. She was also awarded an additional buffer of $50,000 for future economic loss. In addition, she will be awarded a sum which reflects 20-25 sessions of psychotherapy with monthly follow ups for a further year and second monthly follow ups for a further year.

Obligations of schools

The challenge facing schools in dealing with bullying is a major issue for educators. Experts do not appear to be unanimously agreed about how to best prevent bullying or how to deal with it if it occurs. The experts called by the parties disagreed on many issues, however they did agree that if complaints about bullying arose:

"1. The complaint should have been investigated.

2. *If shown to be true then any or all of the following actions may have followed:*
   - (a) *Conflict resolution procedures such as restorative conferences or peer mediation arranged;*
   - (b) *Counselling for the plaintiff and for the perpetrators by the relevant pastoral care personnel (for example year coordinators);*
   - (c) *Arrangement of suitable peer support for the plaintiff;*
   - (d) *Parental notification to carers of all parties*
   - (e) *Counselling sessions by trained counsellors remembering that participation in counselling is voluntary;*
   - (f) *If appropriate, punishment sanction should have been imposed, such as the detention system and restorative questionnaires evidently in use. This could have included short suspension, but only in the case of repeated harassment of the plaintiff and only as a last resort;*
   - (g) *Follow up monitoring of both the plaintiff and alleged perpetrators;*
3. *Appropriate records should have been maintained in the student files or students concerned.*
4. *Consideration should have been given to cohort or school assemblies to address personal relationships."*

Summary

The points for educational institutions to take from this case are as follows:

- Just having policies to deal with bullying is not enough - steps must be taken to ensure that policies are understood and carried out by the staff and students of the school. It is important to be able to evidence the steps taken in this regard.

- Even then schools may face difficulty in bullying cases because of the subtle nature of bullying and the apparent pressure to ensure that the policies are enforced at all times.
- A balance needs to be drawn between the rights of and obligations to all parties - both the person bullied and the perpetrators.

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Western Australian Government introduces law to improve the emergency treatment of anaphylaxis in schools and child care services

Introduction

The Western Australian Government introduced on 1 March 2011 the *Health, Safety and Civil Liability (Children in Schools and Child Care Services) Act 2011* (**Act**) to address the provision of emergency medical assistance in schools and child care services, aimed at the management of anaphylaxis.

The Act implements a recommendation of the Western Australian Anaphylaxis Expert Working Committee that child care staff and teachers be protected from civil liability where they administer medication to a child experiencing an anaphylactic reaction when the child care staff or teacher has acted in good faith and without recklessness. The Act could potentially have wider effect and apply to other forms of emergency medical assistance.

The management of anaphylaxis is of significant concern to educational institutions, and the protections to teachers afforded by the Act will be of interest to teachers in New South Wales (where there is currently no equivalent legislation).

Background

The risk of death from anaphylaxis – a sudden and severe allergic reaction that can be triggered by exposure to certain substances such as foods, medications and insect stings and bites – is well known. In 2001 a 13 year old boy from a NSW school died from an anaphylactic reaction whilst on a school excursion and a four year old girl at a Victorian kindergarten died three years later.

Following the release of the findings of the NSW Coronial Inquest into the NSW death, the Western Australian Government established its own Expert Committee to review the issues relating to the management of anaphylaxis in schools and licensed child care services and make recommendations.

The Committee released a report in September 2007 called "Anaphylaxis: Meeting the Challenge for Western Australian Children". The report made various recommendations including legislative proposals.

One of the challenges identified by the Committee was the presence of legal constraints regarding the administration of EpiPens - a pre-filled auto-injector containing adrenaline - by child care and school staff. They also recognised the common concern among teachers and child care staff about potential legal liability.

The Committee recommended that legislation be introduced to give child care and school staff protections in this regard, and the Act is based on these recommendations.

The legislation

The Act amends the *Civil Liability Act 2002* (WA) to insert a new Part 1CA that provides that staff members of a school or child care service do not incur any personal civil liability in respect of:

- an act or omission done or made by the staff member at the scene of an emergency in assisting an enrolled child in apparent need of emergency medical assistance, or
- advice given by the staff member about assistance to be given to an enrolled child in apparent need of emergency medical assistance.

The protections are not available if the staff member was at the time of giving assistance intoxicated by alcohol, drugs or other substances and do not affect the vicarious liability of any persons for the staff member's acts or omissions.

Although the Act is aimed at dealing with anaphylaxis, it is worded widely, referring to protections for staff in the case of "emergency medical assistance", meaning medical assistance of a type as prescribed by regulations. This suggests that provision may subsequently be made for emergency treatment of other conditions (eg epilepsy).

The position in NSW

While there is no legislation in NSW which specifically protects school staff from civil liability when providing emergency medical assistance, the *Civil Liability Act 2002* (NSW) offers "good samaritans" with protection from civil liability in respect of any act or omission done or made by the good samaritan in an emergency when assisting a person who is apparently injured or at risk of being injured.

This legislation protects teachers - like all ordinary persons - from civil liability where they have acted in good faith and without recklessness. It does not,

however, affect the vicarious liability of any other person for the acts or omissions of the good samaritan.

Relevantly for school and child care volunteers, there are also protections in the *Civil Liability Act 2002* (NSW) for volunteers, subject to certain restrictions, including that they must not have failed to exercise reasonable care and skill, or have acted outside the scope of activities authorised by the organisation for which they were volunteering or contrary to its instructions.

What would no doubt be welcomed by educational institutions in NSW are the specific protections afforded by the Act, particularly given the growing number of incidents of anaphylaxis in school children.

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