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THE YEAR THAT WAS

Schools fear litigation. The number of legal cases decided by Australian courts and tribunals each year suggests however that this fear is ill-founded. Relatively few cases find their way to a final determination in the court system. That said, by reflecting on some of the cases that are commenced and settled or run to trial, schools can take appropriate steps to minimise the risk of finding themselves in similar situations.

This paper reviews some of the cases that have been decided during the last twelve months.

Negligence on School Camp

On 22 April 2009, the Magistrates' Court of South Australia handed down judgment for the prosecution in the case of *Markos v Catholic Diocese of Port Pieri*[1]. The case arose out of an incident in 2004 when Year 10 school students attended a three day trekking and camping exercise in the Flinders Ranges in South Australia. The event had been held for 20 years. The governing authority for the school supplied camping equipment, including portable gas stoves and canisters. On the first night of camp a 15 year old student screwed a gas canister into a gas stove apparatus. The canister began to release gas and covered the student in a fine mist. The student dropped the canister and the gas ignited, engulfing him in a ball of fire. He was hospitalised for two weeks with serious burns.

The governing authority was prosecuted for breach of the *Occupational Health, Safety and Welfare Act 1986* and pleaded guilty. The evidence showed that neither the student, nor the other student with whom the injured student was to share the camp stove, had been instructed about how to assemble the stove and attach the gas canister. There were some printed instructions on the packaging of the canister. No instructions had been given about keeping the canister away from ignition sources.

Following the incident, the school developed a procedure for the use of camp stoves and canisters and a training program for students. Trained adults were required to supervise the assembly of camp stoves and the installation of gas canisters. The school was convicted and fined $19,125.00. The court allowed a 15% discount because of the school's action in pleading guilty and taking appropriate steps.

Lessons learned: Ensure that students are instructed on the use of any potentially harmful equipment and supervised by trained adults when such equipment is being installed or used.

1 [2009] SAIRC 23

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Death on School Camp

Due to the publicity surrounding the incident, many people will be aware of the death of Nathan Francis, a 13 year old attending a cadet camp with the Scotch College Cadet Unit on 29 March 2007. Parents had been notified in writing that their sons were not to bring food to the camp because of the large amount of time and money that had already been devoted to the menu. Parents were also required to advise the Cadet Unit in writing about any medical conditions of their sons attending the camp. Mrs Francis replied in writing that her son was severely allergic to peanuts.

Once at camp, children were provided with an army ration pack. Different packs contained different meals. The pack provided to Nathan contained a beef satay meal made with peanut. On the first day of camp Nathan took a bite of his satay meal. He was unconscious within half an hour and, by the time he reached the Royal Children's Hospital by air ambulance helicopter, he was dead.

Comcare took proceedings against the Commonwealth for breach of its duty to take all reasonable practical steps to protect the health and safety of people covered by the *Occupational Health & Safety Act 1991* (Cth) (**Act**)[2]. The Commonwealth admitted liability. It did not however agree on the appropriate amount of the penalty.

Another serious incident occurred on the same cadet camp. Six boys were lost in the bush for 18 hours. While this was a contravention of the Act, this particular part of the case was adjourned.

Students of Scotch College are required to participate in a number of activities. Cadets was Nathan's third choice. Part of his acceptance as a cadet required a medical examination. The examination record had a response completed by Nathan's mother which stated *"use of epi pen for peanut allergy"*. The medical form prepared for the purpose of the cadet camp showed that Nathan had asthma and a peanut allergy and that all nuts were to be avoided. Six other cadets on the trip also had allergies to peanuts. After Nathan had ingested a mouthful of the beef satay, very shortly after he was administered with an epi pen. Shortly thereafter he became unconscious.

The case concerned the actions of the Commonwealth acting as the Chief of Army. It appears that the camp was however run by staff of Scotch College. The court was told that the Victorian WorkSafe Authority was not taking action against the school. There remains however the possibility for a coronial inquest and also a civil action by Nathan's parents against the school.

One matter of relevance to this later possibility is the failure of the then School Principal to visit Mr and Mrs Francis after their son died. This was an omission which they relayed to the court. The Vice Principal and Chaplain had visited them and the new School Principal visited them. It was noted in the judgment that when the students boarded the buses from Scotch College to the army camp under the care of their teachers and staff of Scotch College, they were under the duty of care of Scotch College. Those same teachers and staff then assumed army ranks in uniform once at the camp and from that point in time the students were, for the purposes of the Act, the responsibility at law of the Commonwealth. It is specifically noted that *"that legal transformation explains why this proceeding had been brought against the Commonwealth and not against Scotch College"*.

The judgment contained a strong recommendation that the coroner conduct an enquiry and that the role of Scotch College in the death be examined in public. The obvious lesson to be learned from this decision is that schools need to make appropriate use of information provided by students and parents regarding pre-existing or known medical conditions and use that information to assist with the risk of the child being exposed to allergies through the supply of food. With severe allergies it is prudent for schools to ensure that the products with allergens known to trigger allergic reactions be removed from food supplies. The failure in this case was the failure to isolate cadets with pre-existing medical conditions and/or notified food allergies at the time of distribution of the ration packs. A balance needs to be developed between singling children out with medical conditions and ensuring their health is at all times protected.

2 *Comcar v Commonwealth of Australia [2009]* FCA 700

Psychological Injury from Repeated Exposure to Violent Behaviour

On 19 December 2008, the Industrial Court of New South Wales handed down judgment in favour of a plaintiff in the case of *Cahill v State of New South Wales (Department of Education and Training) (No 2)*[3]. The New South Wales Department of Education and Training (**DET**) operated a school for detainees aged between 10 and 21. Teaching staff had personal duress alarms to call for assistance.

In March 2004, a teacher was the subject of abuse by a detainee. The detainee swore at and abused the teacher and repeatedly shoved a classroom table at his stomach. The teacher thought he was going to be hit and activated his personal alarm. There was no response to the alarm. The student left, but returned later in the company of another detainee and made further threats. The student took a piece of paper from the teacher's hand and again caused the teacher to think he was going to be physically abused. The teacher activated his personal duress alarm and again there was no response. There was an aid present at the time who, being female, thought she could diffuse the situation by placing herself between the teacher and the detainee. She did so and tried to calm the detainee. Finally the detainee was removed. After the event, the teacher's aid became distressed and suffered nightmares. She became preoccupied with two other critical incidents previously experienced by her. During the hearing it became apparent that the non-response to the personal alarm was due to the fact that three detainees were at the time trying to escape; two of them apparently succeeded. Therefore, there was no one to respond to the teacher's distress call.

3 [2008] NSWIRComn 246

Five days later another detainee became abusive during the same teacher's class. Once again, the aid was in attendance. The student left to go to the toilet against protocol and on return started shouting at the teacher, threatening to kill him. A chair was thrown, narrowly missing the teacher. The student then started to trash the room. The aid pressed her duress alarm, and the student was restrained and removed by a number of Juvenile Justice Officers. The aid did not return to work.

DET was charged with breaches of the *Occupational Health and Safety Act 2000* (NSW) in relation to the injury to the aid and another aid whose experience is not set out in this article. DET pleaded not guilty. Medical evidence showed that both aids suffered psychological injury from being exposed to violence at work. Despite policy, the incident on 10 March 2004 was never investigated. Staff had been refused permission by the school principal to discuss the incident. DET argued that it was not reasonably foreseeable that staff would be injured as the aids had been. It also argued that it had not been established that a person of normal fortitude would suffer a psychological injury from exposure to the events in question. The court found that the offences had been proved. In so doing, it found that the protocols in place had not been followed.

Lessons learned: The obvious one is that your workplace may not be so bad! On a serious note, it is of little benefit to have protocols in place if those protocols and policies are not followed. If anything, the existence of such protocols creates evidence which may be used against a school should there be a failure to adhere to a certain standard. Accordingly, schools should ensure not only that they have policies and protocols in place, but they have a mechanism by which they will be enforced and reviewed.

Duty of Care

In *Fitzgerald v Hill & Ors*[4], the plaintiff was an eight year old child when he took part in a Ta Kwon Do class in a local hall. The instructor took the class to a nearby beach to train and the plaintiff was struck by a car. The driver of the car was found to be negligent. The owner of the Ta Kwon Do Academy was found to have the ultimate responsibility for the conduct of the class and as such had a non-delegable duty. It was found that he failed to ensure reasonable care was taken in the performance of the activities involved in the classes.

The Court of Appeal reaffirmed the law relating to non-delegable duty of care as applying to a school authority and its enrolled students. One of those duties is to take all reasonable care to provide an adequate system to ensure that no child is exposed to any unnecessary risk of injury and to take all reasonable care to see that the system is carried out. Further, the court noted that if policy considerations are relevant, the existence of a duty in the present case is consistent with the public

4 [2008] QCA 283

interest in ensuring children involved in self improvement activities are not treated negligently.

Lessons learned: This case provides a reminder that teachers of extra curricular activities should be made aware of their responsibilities to students, especially when students of varying ages are involved and students are taken outside the classroom. It is important to establish a safe system for the supervision of young children.

Injury to Member of the Public on School Grounds

In 2008, in *Rouvinetis v Varady & Ors*[5], Mr Rouvinetis brought a claim against Sydney Girls High School and the New South Wales Department of Education and Training seeking compensation for $1,000,000. One evening when a private function was being held at the school, Mr Rouvinetis passed by, saw the school open and went in to observe the function. He said he had a duty to investigate as a good constituent. He was informed there was a private function and asked to leave. He refused to do so until he had seen the principal or school administrators so that he could be assured they knew what was occurring or unless the police were called. He claims he was assaulted by several security guards who detained him until the police attended.

The defendants argued that any claim Mr Rouvinetis might have was against the hirers of the school that evening, the Jewish Board of Deputies. Mr Rouvinetis alleged that the principal failed in her duty of care in not providing safety and security to anyone and everyone on school grounds during the function, including him. Interestingly, Mr Rouvinetis did not claim to have any right to be on the school ground. Mr Rouvinetis claimed that the departmental policy designed to give community groups access to the premises had been breached because it was the Jewish Board of Deputies who were given permission to use the school. He said the principal created a dangerous environment by allowing private security guards with no links to the school security. On 5 March 2009, the court found that the defendants owed Mr Rouvinetis no duty of care in relation to the observational implementation of the policy.

In relation to the actions of the security guards in assaulting Mr Rouvinetis, the court noted that it had *"long been the law that 'the general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third'"*. The court found that, on the pleadings in the case, no reasonable cause of action had been disclosed and the proceedings were dismissed.

5 [2009] NSWSC 109

Extending Time for Bringing a Claim – HWC v The Corporation of the Synod of the Diocese of Brisbane & Ors[6]

In this case the plaintiff who was then 40 years of age sought to extend the time in which he could bring a claim as a result of being sexually abused by his music teacher when he was a school student. The events occurred more than 25 years ago, the limitation period having expired in 1989. Leave was granted by the primary judge for the extension of the limitation period and the Court of Appeal overturned the decision on 16 June 2009[7].

What is interesting in this case, however, relates to liability issues. The teacher in question had been employed by the State of South Australia in 1997. There were allegations of improper conduct against him and he was found guilty of disgraceful and improper conduct and dismissed from the teaching service by the Minister of Education. Shortly thereafter, the Minister advised that the dismissal was rescinded as the teacher's resignation had been accepted. The Minister for Education was joined as a party to the proceedings, as was the State of South Australia, being the operator of the school.

The teacher in question obtained a reference from the high school he had taught at prior to 1977, as well as a reference from the Minister of Education in his capacity as a member for Boudin in the South Australian Parliament and his capacity as president of the Noarluanga

6 [2008] QSC 212
7 [2009] QCA 168

City Council Band. The reference was on South Australian Parliamentary letterhead.

In 1980 the teacher taught at Brisbane Boys College (**BBC**), a Brisbane private school, to obtain registration as a teacher in Queensland. He was asked to leave that school at the end of the year because of complaints, including complaints of a sexual nature. He then moved to the school at which the offending conduct took place. It was found that the headmaster of BBC had warned the headmaster of the school at which the abuse of the plaintiff took place of incidents surrounding the teacher.

The claim against the Minister of Education was that he breached his duties by providing the teacher with a reference in circumstances where it was foreseeable that he would rely upon the reference to gain employment. The allegation is that when the Minister wrote the reference he specifically referred to the teacher's suitability in dealing with teenagers. The ultimate issue of liability was not determined, as leave to extend the limitation period was not ultimately given.

The case provides a timely reminder for any institution or teacher providing a reference. This case repeated the law relating to references in that the liability with respect to references is limited to the intended recipients of such a reference, rather than an indefinite number of potential recipients. It is necessary to show both foreseeability and proximity.

The defendants appealed against the decision. The matter was heard by the Supreme Court, Court of Appeal in the decision handed down on 16 June 2009. The court found that the primary judge was wrong in extending the time. Accordingly the plaintiff's claim was dismissed.

Impairment Discrimination

In December 2008, Alex Walker (then 13) and his mother instituted proceedings against the State of Victoria. The claims included not being able to attend school fulltime, attend school excursions and having to return home for lunch because funding was not available for a teaching aid. He was prevented from travelling on the school bus. Alex had a number of disabilities including Asperger's Syndrome, Dyslexia and Attention Deficit Disorder.

A newspaper report of the action stated that Alex resorted to swearing when under stress and teachers unfamiliar with the disability could easily misconstrue this as bullying or controlling behaviour. I have made inquiries with the Victorian Civil and Administrative Tribunal and it appears the case was not pursued in that jurisdiction.

In 2007, the Victorian Government was ordered to pay more than $800,000.00 in compensation to Rebekah Turner when it was found that the Education Department failed to provide classroom help for her.

The State appealed the decision of the Victorian Civil & Administrative Tribunal. The Supreme Court handed down judgment in March 2009, finding that VCAT erred in law in relation to some of the remedies it awarded in favour of Ms Turner and making findings of discrimination.

Since 1999, Ms Turner had Attention Deficit Hyper Activity symptoms and anxiety features. At various times she had depression and a double depressive disorder. She had severe language disorder and a severe learning disability.

In 2005 Ms Turner, through her mother, lodged a complaint with the then Equal Opportunity Commission of Victoria. She claimed that the State had indirectly discriminated against Ms Turner by limiting her access to education benefits. The discrimination alleged with the imposition of a condition that Ms Turner *"be educated without an appropriate program of assistance"*, which was said to be unreasonable. The Commission was unable to resolve the complaint and it went to the Supreme Court.

Part of the particulars of the complaint included the fact that the State had not ever provided Ms Turner with a teacher's aid or an appropriately advised resource program of assistance and, in so doing, had discriminated against her. The Supreme Court judgment is 41 pages. The court noted that the test of reasonableness is less demanding than one of necessity, but more demanding than one of convenience. Relevant considerations under s9(2) of the Equal Opportunity Act include the cost of alternative conditions and the financial circumstances of the State. In considering this, it is appropriate to include the fact that the State does not provide benefits to a single student in a single school, but operates schools with many students and that the education budget each year is not unlimited. Also, where the proceedings are a test case, the flow-on effects are relevant to a consideration of the issues.

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Ms Turner was able to comply with the *"no fulltime teacher's aid"* condition in relation to certain subjects she undertook. She was unable, however, to access the State's education benefits in Maths and English in most of her schooling. The case highlights the complex nature of the discrimination provisions and students with disabilities.

Summary

Considering the number of schools throughout Australia, there is thankfully not an abundance of litigation. Every case decided by the courts does, however, provide a timely reminder to schools to consider their obligations and ensure all risk minimisation policies are not only in place, but regularly reviewed and implemented.

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For further information please contact:

Leneen Forde, Partner
Phone (direct) **+61 3 9608 2243**
Mobile **+61 417 165 315**
Email **l.forde@cornwalls.com.au**