

1 MARCH 2011

Risky business

Many schools incorporate camps or excursions into their learning program; it's vital they manage the risks.

A holistic education for students at primary and secondary schools involves the teaching of a range of subjects in varying educational styles. These styles include outdoor education and off-campus activities. Schools commonly incorporate camps or excursions into their curriculum and some schools have rural campuses where students board for a number of terms for outdoor-based education, generally aimed at developing in students self-confidence, leadership, teamwork, responsibility and self-reliance. But with outdoor education comes a myriad of risks that are not otherwise present in classroom teaching.

As Justice David Ipp said, in the Supreme Court of New South Wales Court of Appeal case of *Ohlstein bht Ohlstein & 3 Ors v E & T Lloyd trading as Otford Farm Trail Rides*, 'Society accepts that certain recreational activities may be provided for young children, and even encouraged, albeit that they involve risks of serious injury.'

Despite this, taking students off-campus is a manageable business. It's important that teachers and schools are aware of the risks associated with off-campus activities and are equipped to deal with those risks, so as to guard against injury to students and subsequent actions in negligence against schools and teachers.

Jemima's story

The Supreme Court of New South Wales heard the case of *Hanna v Uniting Church in Australia Property Trust (NSW)* in 2010 involving an injury on a school camp. It could happen at any school. Here is what happened.

Four people, two students, a teacher and a camp instructor, who went on the same school excursion, each had a different story to tell.

Jemima Hanna, a student on school camp, was scrambling over some rocks on a hike in February 2001 when at 12:30pm she jumped down and heard a crack in her right ankle and felt immediate pain. She was alone. There were students walking in front of her and students behind her, and a teacher in front and behind as well. Teachers caught up with her and she told them she had hurt her ankle. She complained of pain and had difficulty walking. She was told that lunch would be in half an hour and to keep walking. At lunch time, Mr Byrne, an instructor employed by the camp, took off her boot. Jemima said her foot was blue from 'the whole foot up to roughly (her) calf and halfway up (her) leg, and her foot was like ice and very cold to touch.' Mr Byrne strapped the ankle, at which stage Jemima yelled in pain, experiencing 'the most excruciating pain ever.' Her sock and boot were put back on and despite telling teachers that her



ankle really hurt, Jemima had to continue to walk for five hours after lunch. During that time, she saw Mr Byrne a few times and told him her ankle was really hurting. He said things like, '(Their destination is) just around the corner.' She was made to carry her backpack throughout the ordeal. During the remaining five hours she fell more than a dozen times.

Claire, a very close friend of Jemima's, was also on the bushwalk. She caught up with Jemima after Jemima had twisted her ankle. Jemima appeared to be in pain. Lunch was half an hour later. At lunch, Jemima's boot was removed and Claire saw the beginning of bruising, a light blue confined to the ankles. Claire said Jemima wanted to stop the hike and get off the mountain. She wanted a helicopter to come and take her away. Claire said Jemima had to continue to walk for a further four to six hours. Her backpack was carried by a teacher. Claire did not walk with

Jemima after lunch because Jemima was in distress and Claire could do nothing about it.

Two teachers told of their events of the day. Jemima injured her ankle after lunch. Within five to 10 minutes of learning of the injury, Jemima's ankle was examined by Mr Byrne, the instructor employed by the camp. Jemima said the ankle was sore but did not complain a lot and demonstrated that she was capable of bearing weight on the ankle. Jemima was diagnosed as having a sprained ankle and it was taped to add to its stability. Although the area was remote, the bushwalk was nearing its conclusion and it was only a 30 to 40 minute walk to the nearest roadway. Jemima said she could continue. One of the teachers took Jemima's backpack and assisted Jemima on difficult parts of the track. Three or four rest breaks were taken, each of about five minutes. The remainder of the walk including rest took between half an hour and one hour. Jemima complained her ankle was sore and she was limping. At no time did Jemima complain of excruciating pain, fall down or have to be dragged up by her pack. She did stumble on several occasions, as did others.

Unfortunately for Jemima, she developed a condition of complex regional pain syndrome type 1 (**CRPS**) in the right leg, which caused her ongoing pain and disability. CRPS is an extremely rare condition.

Jemima sued the school and the camp organisers, alleging that they were at fault essentially in directing her to hike in dangerous conditions and in failing to take reasonable care following her injury. The school and camp denied liability and alleged contributory negligence on Jemima's part. The school and camp successfully defended the claim. I'll address further reasons for that decision later, but the two interesting aspects in this case are that all witnesses had very different

versions of events and that the basic facts of the situation are ones that could happen in any school, regardless of how well planned a school excursion might be. Before we look at the reasons for that decision, though, it's worth reminding ourselves about negligence.

Negligence

An action in negligence may be brought against a school when there has been a breach of a duty of care. The action is a civil claim for compensation or damages for the injury suffered as a result of the breach of duty of care.

Three fundamental points must be established to succeed in an action in negligence against a school or teacher:

- the school or teacher must owe a duty of care to the student
- that duty of care must be breached, and
- that breach must cause the student to suffer loss or damage.

What does it mean to owe a duty of care?

A duty of care arises where two parties are in a relationship of 'proximity' and where the negligent acts or omissions of one party detrimentally affect the other. The duty exists in a school environment when students are engaged in any type of school-related activity, be it during class, extra-curricular activities, sports, camps or excursions, or in the playground before or after school.

There are situations where certain relationships give rise to higher levels of responsibility. The relationship between teacher and student falls into this category because, in the eyes of the law, school authorities and teachers are considered to be in a position of control and students in a position of vulnerability.



The courts have held that the responsibility includes a positive duty to act to ensure against risk of injury. This was characterised by Chief Justice Henry Winneke in *Richards v State of Victoria (1969)* as follows:

‘(It is) the need of a child of immature age for protection against the conduct of others, or indeed himself – or indeed herself – which may cause injury, coupled with the fact that, during school hours, the child is beyond the control and protection of his parent and is placed under the control of the schoolmaster who is in a position to exercise authority over him and afford him, in the exercise of reasonable care, protection from injury.’

A school cannot delegate its duty of care to any single employee. If a school is found to be responsible for a student suffering an anaphylactic shock, say, the school cannot exonerate itself by passing blame onto an individual teacher.



Similarly, where an off-campus activity is run by an external organisation, the school cannot delegate its responsibility to ensure the safety of its students to that organisation. A school will remain liable for a student who is injured even if no school employee was involved with running the activity and even if the activity did not occur on school premises.

Has the duty of care been breached?

To determine whether a school or a teacher has breached their duty of care, a court will consider whether the school or teacher failed to take steps to guard against foreseeable risks that a reasonable person would have taken in the same circumstances, namely in the planning and implementation of the off-campus activity. A school or teacher will be measured against a ‘reasonable person’ who, as described by law, is a fictitious teacher who takes appropriate safety measures against risks that may arise in any given situation.

Has loss or damage been suffered?

A school or teacher will be liable in negligence where the breach of their duty of care caused the injury suffered by the student. The courts recognise that accidents happen that are not necessarily anyone’s fault. Therefore, schools and teachers will not be liable for every injury that is sustained by a student during an off-campus activity. It must be proven that the breach of the duty caused the injury to the student.

For example, if a teacher fails to ensure that student X is wearing a life vest for a river boating trip and student X trips over a tree root on the river bank and breaks her ankle, the school or teacher will not be found negligent for that breach. This is simply because the failure to ensure that student X was wearing a life vest did not cause student X to break her ankle.

Jemima’s story continued

Jemima sued both her school and the camp organiser for damages and negligence. She also sued her school for breach of contract, being breach of the implied term to exercise reasonable skill and care to ensure safety. She attended a private school hence a contract of employment was in existence.

There were significant differences in the various witnesses’ versions of events. This was partly due to evidence being given many years after the incident and partly due to the fact that there were no contemporaneous accident reports.

The court found that no breach of duty of care had occurred nor a breach of any implied contractual term. The court found that even if there had been a breach there was no causation. The injury itself to the ankle was what caused the CRPS. What occurred post-injury was not the cause of CRPS.

Nathan’s story

In a widely publicised incident of a school’s breach of its duty of care, a 13-year-old boy, Nathan Francis, died of anaphylaxis while on a cadet camp with a private school cadet unit in March 2007.

Parents of the students attending the camp had been notified in writing that their sons were not to bring food to the camp because of the large amounts 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.

On the camp, students were provided with an army ration pack. Different packs contained different meals. The pack provided to Nathan contained

a beef satay meal containing peanut. On the first day of camp Nathan ingested a mouthful of the beef satay. Despite being administered with an epi pen, Nathan was unconscious within half an hour. By the time he reached the Royal Children's Hospital by ambulance helicopter he was dead.

In *Comcare v Commonwealth of Australia*, the Commonwealth of Australia, as the employer for the cadet camp, was found liable for Nathan's death as it failed in its duty of care because appropriate measures were not taken to prevent Nathan from being exposed to risks to his health and safety. The cadet camp failed to use the information provided to it regarding the cadets' allergies. As a consequence it failed to isolate cadets with preexisting medical conditions or notify staff regarding food allergies at the time of the distribution of the ration packs.



In December 2010, a Coroner's inquest commenced in Melbourne in relation to Nathan's death. At the commencement of the inquest the school at which Nathan was a student, through its legal representation, read out an apology to Nathan's parents, and advised that its involvement in the inquest was appropriate to ensure that such a tragedy did not happen again.

Peter's story

Markos v Catholic Diocese of Port Pirie addressed an off-campus incident in 2004 in which Peter Caulfield, a Year 10 student, attended a three-day trekking and camping exercise in the Flinders Ranges in South Australia. On the first night of the camp, Peter screwed a gas canister into a gas stove apparatus. The canister began to release gas and covered him in a fine mist. He 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 for the school, which supplied the camping equipment, including portable gas stoves and canisters, was prosecuted for breach of the SA *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 but no instructions had been given about keeping the canister away from ignition sources.

The school was convicted and fined \$19,125. The court allowed a 15 per cent discount because of the school's action in pleading guilty and taking appropriate preventive measures subsequent to the incident.

Reducing risk during off-campus activities

The obvious lesson to be learned from the death of Nathan Francis is that schools need to make appropriate use of the information provided by students and parents regarding preexisting or known medical conditions. Schools should use that information to assist with the risk of the child being exposed to allergies through the supply of food. With severe food allergies, it's prudent that schools be vigilant and remove products with allergens known to trigger allergic reactions.

In the case of the injury to Peter Caulfield, after the incident the school developed a procedure for the use of camp stoves and canisters, as well as a training program for students. Trained adults were required to supervise the assembly of camp stoves and the installation of the gas canisters. Clearly, it's prudent to 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.

The case involving Jemima Hanna is a timely reminder that contemporaneous notes when an incident occurs provide the best protection to a school if a claim is brought years later and memories have faded. Such notes should be kept by the school for as long as possible and for at least six years after the student reaches 18 years.

Consider this by no means exhaustive list:

- Obtain written consent from parents or guardians for students to attend the camp. It would be useful if parents or guardians were made aware, before giving consent, of the activities in which their child will be engaged. It's also worth checking that you haven't included exemption clauses into permission slips – a school or teacher is not able to contract out of their liability to students.

- Be aware of the food allergies of students.
- Be aware of the medical needs of students.
- Incorporate knowledge of medical needs and food allergies into the planning of the activity.
- Plan and organise the camp with great detail – over-planning is better than under-planning.
- Have risk management processes in place to assess and identify risks and plan responses to these.
- Monitor, follow and have recourse to the finalised plans while engaged in the activity and be aware of the movements of all students during each day of the camp or excursion.
- Have adequate knowledge of and be familiar with the camp or excursion site – the duty of care owed by teachers and schools to their students remains in place even if the camp or excursion site is controlled by a third party. This is particularly important for bushfire-prone areas.
- Ensure students are constantly supervised and instructed on what is expected of them, taking into account the age of the students.
- Ensure students are instructed in the use of equipment.
- Tailor the activities on the camp to suit the age and physical abilities of the students without being exclusionary to any student.
- Ensure students are educated on any risks and dangers.
- Ensure students and staff have access to first aid kits.
- Ensure access to telephones or radios to make emergency calls for help.

- Know the address of the camp or excursion site and its exact location on the land in order to advise the relevant authority in an emergency of its location.

It's important not only to have plans in place in relation to excursions, but to ensure that the plans are reviewed and followed.

For the most part, schools and teachers do an excellent job of maintaining a safe learning environment for their students in the classroom and beyond. It would be a significant loss if the fear of litigation prevented outside activities from occurring. Off-campus education does, however, require constant risk management. This is why it's important that schools and their teachers ask two simple questions when off-campus: am I taking reasonable care to ensure the safety of my students; and am I guarding against foreseeable risks to my students?

CASES

Comcare v Commonwealth of Australia [2009] FCA 70 (Cadet Francis)

Hannav Uniting Church in Australia Property Trust (NSW) [2010] NSWSC 293 (22 April 2010)

Markos v Catholic Diocese of Port Pirie [2009] SAIRC 23

Ohlstein bht Ohlstein & 3 Ors v E & T Lloyd trading as Otford Farm Trail Rides [2006] NSWCA 226 (15 December 2006)

Richards v State of Victoria (1969) VR 136

Authored by: **Leneen Forde, Cornwall Stodart**

Want to republish any of this article?

If you would like to republish any part of this article in your staff newsletter or elsewhere please contact our Marketing Team on **+61 3 9608 2168**

Disclaimer

This Article is intended to provide general information on legal issues and should not be relied upon as a substitute for specific legal or other professional advice.



**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**