

Duty of Care and Managing Risk in School Activities – Striking the Right Balance

Daniela Cecere-Palazzo
Director, Dux Lawyers

Expectations about school planned activities



- Students
- Parents/Guardians

Duty of Care

- Schools owe students a legal duty to take *reasonable* care for their safety. This continues to apply in the context of school activities and excursions when students venture outside the school.
- The law recognises a special relationship exists between schools and students based on the fact that students are in position of vulnerability. For this reason, the duty owed by schools is non-delegable.

What does a Non-Delegable Duty require?

- Non-delegable duty requires a school to ensure that reasonable care is taken for the safety of students. It is a personal duty.
- This duty cannot be delegated by a school (or the organisation/school authority that sits behind a school) to others for example employees, contractors or excursion organisers.
- Eg. *Perisher Blue v Harris* [2013] NSWCA 38
 - School can be liable where others fail to exercise reasonable care for the safety of students

When will a school be negligent?

- A school will be found negligent where:
 - a duty of care is owed to the student
 - that duty of care is breached
 - the breach causes the student to suffer loss and damage

How is breach of duty determined?

- Courts assess each case on its particular factual circumstances.
 - In particular, courts will examine:
 - what the school did or did not do
- Vs
- What a reasonable person would have done in the school's position who was in possession of all the information that the school had or ought reasonably to have had at the time of the incident (standard of care)

s. 31(1) *Civil Liability Act 1936 (SA)*

How is breach of duty determined? (cont)

- The standard of care owed by schools will be depend on things like:
 - The nature of the activity being undertaken and the magnitude of the risks to student safety
 - The age and experience of students
 - Students' physical capabilities, limitations and behavioural traits
 - Financial means that the school has available to it
 - Cost and inconvenience of taking alleviating action
 - Usual practices of the school and any applicable policies or guidelines

How is a breach of duty determined? (cont)

Uniting Church in Australia Property Trust (NSW) v Miller (2015)
NSWCA 320

When do precautions need to be taken?

- Schools are not required to take precautions against all risks
- Precautions must only be taken where:
 - (a) The risk is foreseeable;
 - (b) The risk is not insignificant; and
 - (c) In the circumstances, a reasonable person in the school's position would have taken the precaution.

When do precautions need to be taken? (cont)

- Relevant factors used to determine whether a reasonable person in the school's position would have taken the precautions are:
 - The probability that the harm would occur if precautions were not taken
 - The likely seriousness of the harm
 - The burden of taking precautions to avoid the risk of harm
 - The social utility of the activity that creates the risk of harm

Eg. *Action Paintball Games Pty Ltd (in liq) v Barker* [2013] NSWCA 128

Risk Management Tips

Inadequate planning for school excursions

- risk management plans should be prepared carefully and thoroughly
- plans should be prepared or at least overseen by staff who have tried and tested the excursion/planned activities beforehand
- Consider whether the proposed activities are appropriate in the context of the age, needs and experience of students in attendance. Do the activities need modification? Are there more suitable alternatives?

QLD College of Teachers v Jason Caldwell [2015] QCAT 229

Risk Management Tips (cont)

- Ensure your forward planning also covers off on:
 - Need for safety equipment
 - Emergency protocols, particularly in remote locations where access is difficult. Brief potential rescuers beforehand about your plans and ensure they can remain in contact throughout the excursion
 - Police check requirements. Have checks been completed and cited before the excursion commencement?
 - Plan for any allergies or medical conditions and how they will be managed
 - Ensure that first aiders have skills proportionate to the activity and that essential medical supplies (such as asthma puffers, epi-pens etc) are readily accessible on the excursion

Risk Management Tips (cont)

- Consider whether the facilities of an acceptable standard, in good repair and appropriate for student use. Are there any dangers or hazards which could pose a foreseeable and not insignificant risk to students? If so, would a reasonable person take precautions to guard against that risk?

Risk Management Tips (cont)

- Monitoring of external risks such as weather conditions and travel warnings leading up to and during the excursion from authoritative sources
- Sufficient level of provisions such as food, clothing and equipment appropriate for the conditions and duration of the excursion
- Make sure that all school staff attending on the excursion are provided with a copy of the risk management plan and relevant medical information about students.

Risk Mangement Tips (cont)

Poor planning can have potentially catastrophic consequences

Eg. Inquest into death of Nathan Francis, Coroners Court Victoria,
1 June 2012

Risk Management Tips (cont)

- **Continuing vigilance about managing risk on excursion**
 - Notwithstanding comprehensive preparations, it's a trap to think managing risk ends at the planning phase
 - Schools should be on the look out for foreseeable and not insignificant risks to the safety of students throughout the excursion.
 - It is prudent for staff to take action where a reasonable person in their position would do so, particularly, where precautions can be easily implemented or where serious injury may result if no action is taken
 - Staff should be encouraged to should step in, ask questions and even put a stop to activities. Schools should consider providing periodic training to staff to ensure they are clear about what is expected and are provided with opportunities to develop their confidence to take action when it counts.

Risk Management Tips (cont)

Failure to take action can have adverse liability consequences

Martin v Trustees of Roman Catholic Church of Sydney [2006] NSWCA
132

Risk Management Tips (cont)

- **Seeking and receiving consents**

- Sounds obvious but inquest into death of Rene Levi in May 2012 suggests otherwise.
- Make sure schools have consent evidenced in writing from parents or guardians prior to school facilitating the student's attendance on excursion
- Consent form should include sufficient detail about all arrangements for the excursion, the activities involved and any other pertinent information about risks which may affect the preparedness of parents to provide consent

Risk Management Tips (cont)

- Schools should also obtain consent to the provision of medical treatment to students from their parents or guardians prior to an excursion.
- Failure to do so could compromise school's ability to discharge its duty of care to the student and result in adverse health outcomes.

Risk Management Tips (cont)

- **Don't be afraid to consult with experts and engage specialist instructors**
 - This could greatly enhance the safety of your activity as well as the experience for students
 - Make sure you do your due diligence on the instructors first!

Hanna v Uniting Church in Australia Property Trust (NSW)

[2010] NSWSC 293

Risk Management Tips (cont)

- **Provide training**

- Students should receive adequate training and instruction before using any potentially harmful equipment or undertaking physical activities posing a real risk to safety. Keep training records including names of attendees.
- The degree of training that is appropriate is likely to be influenced by the nature of the activity and the seriousness of the potential consequences.
- Where practicable schools could consider delivery of training in the lead up to the excursion, rather than just on the spot .

Risk Management Tips (cont)

In Markos v Catholic Diocese of Port Pirie [2009] SAIRC 23 (22 April 2009) a 15 year old student was not provided with any instruction by the school about how to connect a gas cartridge to a portable stove. He sustained severe burns when the cartridge exploded after being ignited by a nearby campfire.

Make sure training extends to supervising staff so that they will be well placed to not only offer instruction to students, but also intervene where necessary.

Risk Management Tips (cont)

- **Lastly and importantly, supervise!**
 - Many incidents can be avoided where supervising staff provide adequate levels of supervision.
 - Again what is appropriate depends on the particular circumstances. Activities that result in higher degrees of risk to safety should be more closely supervised than others where the risk is insignificant.
 - Schools should ensure that appropriate staff to student ratios are maintained at a minimum and should not hesitate to increase the number of supervising staff beyond the recommended ratio where required.

Risk Management Tips (cont)

- Students should be aware of what is expected of them and where they fall short of that expectation, teachers should intervene at an early opportunity to correct that behaviour
- Ensure that staff are dispersed so that they are able to effectively supervise and monitor students

Concluding Remarks

- Schools must remain vigilant about protecting students from foreseeable and not insignificant risks to safety that a reasonable person would guard against.
- Schools should not be deterred from planning activities and excursions where their risk management processes and preparations are carefully undertaken.
- In most cases risks can be appropriately managed

Questions?

