

Some practical advice for running schools injuries claims

Inadequate supervision, defective equipment, building structure defects
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Readers of Melbourne metropolitan daily newspapers could be forgiven for thinking that school injuries involving Victorian children are on the rise. Numerous reports have appeared in the media over the past 12 months detailing successful compensation claims for victims of school accidents.

For those practitioners working in Public Liability these reports tell only part of the story. During the same period a significant number of cases have run to jury verdicts and lost!

We suspect however, that this apparent rise in school injuries has less to do with an increase in the actual number of incidents leading to injury and more to do with the present claims handling policy adopted by the Victorian Education Department. Although unstated, that policy appears to require Plaintiffs to run their case through to verdict if they are simply alleging a "failure to supervise". This policy has exposed some cases as being under-prepared at trial and ill-considered in the initial strategy planning phase when the evidence gathering focus needs to be at its sharpest.

As a consequence of this "no offers" policy adopted by the Victorian Education Department the recent experience suggests that Plaintiff practitioners will need to take a great deal more care in the selection of cases in which to commence legal proceedings and in the preparation of those cases for trial if they are to obtain a favourable jury verdict for their client.

The purpose of this paper is to provide some practical advice and handy tips to practitioners in this area of the law based on our recent experiences and from the lessons learnt through other cases that have been successful or otherwise. The discussion below is intended to be of some assistance to all practitioners in this area.

Types of Claims

The circumstances in which children can be injured are infinite and in a school setting the opportunities for injuries to occur are multiplied further. Not surprisingly the categories of school injuries are numerous however, the vast majority fit neatly within one or more of three broad categories.

These broad categories that we will consider are as follows:

1. Inadequate supervision.
2. Defective equipment.
3. Building structure defects.

These categories invariably require the practitioner to pay close attention to the essential elements of all negligence claims, namely: establishing the duty of care and proving that a breach of that duty resulted in injury to the Plaintiff.¹

As in most common law actions the real challenge is not in identifying these essential elements but in gathering evidence which is relevant to the claim of negligence, compelling and capable of convincing a judge and/or jury that the Plaintiff should be compensated for the loss or damage they have sustained.

1. Supervision

Given the nature of claims involving school children it is inevitable that claims will include an allegation that the school authority did not do enough in the way of supervision to protect the Plaintiff from injury. In almost every case the facts will give rise to an issue of supervision.

In order to prove this allegation the focus is usually on the conduct of the school authority and the teacher and in the assessment of whether such conduct was that of a "reasonable teacher" in the same circumstances.² It is a mistake to take a broad brush approach when dealing

with the issue of supervision. Too often practitioners just focus on the incident which caused the injury and not on the events leading to the injury and the environment in which it occurred.

The following is a checklist of some of the matters to which practitioners should turn their mind when dealing with the allegation of negligent supervision:

1.1 Age of child

The age of the children involved in the incident will obviously impact upon what level of supervision is deemed reasonable in the circumstances. For example, a child in Year 12 may require less supervision than say a child in Year 7.

1.2 Number of children

Whilst the incident in question may only involve two children, it is essential to see what number of children were within the area at the time and what type of activities they were performing. It seems to be common sense and common experience that the more children in the area and the potential for varied activity (e.g. in playground setting) the more teachers are required to supervise this area.

1.3 Number of teachers

This category is self explanatory. There is no set formula as to the number of teachers required to supervise any number of children. The test is what is "reasonable" in the circumstances. In looking at this, one might wish to consider the following:

- the age and experience of the teacher(s);
- What the teachers were doing at the time (eg: were they eating? who were they talking to? were they observant?);
- The positioning of the teachers (e.g. were they walking together or rotating one at a time clockwise and anti-clockwise?);

- What had they been directed to do? what were their designated duties? (e.g. supervision of rubbish collection, supervision of specific activities - how did this affect their supervision of children?);
- How many children were they supposed to be supervising (e.g. was there a disabled child that took most of their time).

1.4 Staff rosters

These are usually relevant in cases where children have been injured in the school yard. Rosters will usually be produced by the Defendant as evidence that a certain number of teachers were on duty at a given time. This will not necessarily reflect the true situation at the time the child was injured. Looking at these rosters, practitioners should focus upon what were the prescribed duties of each teacher on roster on that day.

1.5 Witnesses

In addition to the usual information that may be obtained from witnesses, some thought needs to be given to the age of the witness, whether the witnesses are friends of the Plaintiff and what impact this may have on the evidence of the Plaintiff. Interestingly, in the case of *Dunn v. State of Victoria* [3] (see case note summary on page 39), Judge Dove of the Victorian County Court found that when the recollections of the boys did not coincide these “contradictions gave strength to the view that they had **not** put their heads together” (emphasis added).

1.6 Focus on the specific act which caused the injury

Perhaps this point is best demonstrated by looking at the “stone throwing” cases. On one view, if a child picks up a rock and throws it in an instantaneous fashion, then even if the teacher was present within the vicinity of the stone thrower there was little that teacher could do in order to prevent that child from throwing the rock. To overcome this argument by the Defendant, the practitioner might wish to look to:

- the previous behaviour of the child i.e. whether the child was a known stone thrower and therefore putting the school on notice of his aggressive behaviour;
- whether the circumstances presented a risk of this occurring i.e. loose

stones in a rock garden and therefore making it preventable; and

- whether after further investigations the act was **not** instantaneous at all. In *Dunn's case*, the Plaintiff was able to show that the final act of throwing the stone was not an isolated act but rather the final action in a long chain of events which would not have occurred had there been proper supervision in the circumstances.

1.7 Geographic setting

In school yard cases, for example, it is important to look to the size of the yard and in particular whether there were “blind spots” preventing a teacher viewing the whole area at one time. Similarly, in the classroom setting it is important to look to whether the teacher has positioned himself or herself in a spot where he or she can offer proper and adequate supervision e.g. this could be particularly relevant at a school assembly.

This issue also arises in circumstances when children are on excursions. In those instances practitioners should look to the nature of the excursion (eg: day-trip or school camp), the level of supervision afforded and whether it was adequate (eg: is it a public area or dangerous bush terrain etc.) and the activity undertaken by the children at the time (eg: a water-based activity). The question of the reasonableness of the supervision will differ in an excursion setting from that which is required on-campus.

1.8 Prior behaviour of children/prior complaints

School records/reports should be obtained of the offending child so as to determine whether any prior complaints have been made in relation to aggressive behaviour of the offender. This could assist in proving that the teachers and the school authorities were on notice about the offender's behaviour prior to the incident occurring. In these circumstances, it would be argued that in light of the offender's prior acts of violence greater supervision should have been afforded in the circumstances [4]. The practitioner should also look at the prior record of the teacher(s) supervising at the time.

Litigation tools for supervision cases

(i) Expert evidence

Given that the focus is on whether

the conduct of the teacher was “reasonable” in the circumstances, it is extremely helpful to obtain evidence from another teacher (preferably school principal) who can assist the Court in formulating an opinion on what the relevant standard of supervision could be in those circumstances. Whilst it is preferable to have a teacher from a similar school to that in which the Plaintiff was injured, it is not necessary and any teacher from any system (Catholic, public or private sector) would be useful in this context.

(ii) Discovery

It is essential in school injury cases that discovery be obtained from the Defendant. Turning to the checklist above, discovery could assist in obtaining the following:

- Staff rosters;
- School policy and/or guidelines in relation to supervision of children;
- Documentary proof that the offender child was an aggressive child (e.g. school reports, prior complaints etc.);
- The incident report and statements in relation to the Plaintiff's injury;
- Maps and/or sketch plans of the school yard and school rooms;
- Government and/or departmental guidelines in relation to supervision of children (particularly relevant in the public sector).

(iii) Interrogatories

Using those documents obtained through discovery, interrogatories should be drawn to question the appropriate person about the conduct of the staff in the circumstances. For example, one should interrogate the Principal or head of the department about whether the staff roster was adhered to on the day or generally adhered to at all; whether he or she knew about the prior aggressive behaviour of the child and so on.

(iv) Subpoenas

It will sometimes be necessary to subpoena documentation from various sources including other schools. For example, in *Dunn's case* the Plaintiff subpoenaed school policies from other primary schools in the western region of Melbourne.

By producing these school policies in Court, Counsel for the Plaintiff was able to “paint a picture” for the Court as to the rel- ▶

evant standard in relation to supervision to children in like schools in the area.

2. Defective Equipment

The next main category arises out of defective equipment. It must be remembered that a case which, on first blush, appears to be about defective equipment may also involve an issue of supervision and vice versa. A careful consideration of the factual background will identify the area of overlap and should alert practitioners to other lines of inquiry.

This category covers a broad range of factual possibilities. When reviewing what evidence needs to be adduced on the liability issue a careful consideration of basic safety issues (as might apply in the work place occupational health and safety area) will be a worthwhile starting point.

Some of the more common place equipment defects and a checklist of some of the matters that need to be considered are as follows:

2.1 Playground Equipment

Practitioners should obtain copies of the relevant Australian Standards to see what the minimum standards are for playgrounds generally. These standards cover matters ranging from the suitability of equipment, proper installation, inspection and maintenance protocols right through to playground surfacing requirements.

Information obtained from the Plaintiff (and other witnesses if possible) should cover the age and condition of the particular item of equipment, a description of the general state of the playground equipment and surrounding play surface, details of playground rules (whether given verbally or in printed form at some point and when given and by whom), an explanation as to the type of use or misuse to which equipment was put by children generally as well as an understanding of the regularity of such use by the students. Whenever possible a photograph of the equipment should be taken at the earliest practical time. Close questioning of other students can reveal evidence of the school ignoring a longstanding practice of unusual or dangerous misuse by students or, of the equipment being in a state of disrepair or the cause of prior accidents or mishaps.

Expert evidence may be of benefit in those cases where equipment has failed "unexpectedly" or because of improper installation or a failure to conduct regular maintenance checks.

2.2 Sporting and Activity Equipment

These types of equipment defects frequently involve a failure to properly instruct or supervise students in the use of the equipment with the result that equipment fails or is simply used in an unsafe manner. In these cases evidence needs to be gathered from appropriate experts in the field as to operating standards, safety protocols and other relevant matters (e.g. from physical education teachers or educational consultants).

Many other cases involve a failure to observe basic safety standards, e.g. no padding on goal posts, inadequate matting around gymnasium equipment or the use of out-of-date equipment which has long been superseded with newer and safer designs.

In such cases the practitioner needs to make contact with appropriate experts to ascertain what the generally desired practice is or whether particular equipment is suitable for the activity engaged in. This information can come from other schools, and sometimes from equipment suppliers who are only too willing to explain safety advancements in the new equipment vis-a-vis the inadequacies of older equipment.

Again, in these cases there is a need to take careful and detailed instructions from the Plaintiff and from other students on all issues relating to the equipment in question and the extent of instruction and degree of supervision provided by the staff member on this and other occasions. As in all school injury cases the Defendant's representatives will appoint loss assessors to investigate the claim and interview witnesses as soon as the claim is brought to their attention. It is therefore imperative, therefore, that the Plaintiff's practitioner complete witness interviews and staff interviews before proceedings are instituted.

2.3 Class-room Equipment

Defects under this head encompass injuries directly arising out of faulty equipment e.g. glassware in a science laboratory which is cracked or split or, electrical woodworking machinery which is

inadequately guarded or not properly maintained in accordance with standard industry practice or simply damaged furniture. But again, it also covers those cases in which injuries occur because of a failure of the teaching staff to provide proper or adequate instruction to the students in the use of that equipment.

As in the previous categories, appropriate recourse to experts in the field will yield good evidence as to the relevant safety standards that should apply. The experts may include educational and technical specialists. Detailed instructions from the plaintiff and fellow students will reveal important information about the injury and also about the past practice of the teacher in question or of the standard practice of other teachers in similar teaching environments.

It is preferable to obtain expert evidence from teachers or education specialists as to the relevant standard required or expected in a particular situation before interviewing other students about the circumstances of the Plaintiff's case. This will ensure that pertinent questions are asked and all relevant evidence obtained when interviewing the students.

3. Building Structure Defects

The remaining category covers a broad array of what are loosely classed as structural defects. Some common examples of the defects covered are such things as:-

- failure to use safety glass where appropriate;
- failure to put safety marks on specific windows or door glazing;
- dangerous surfaces or surface finishes in pedestrian areas, amenities buildings or on sporting arenas.

The approach to these types of claims should be similar to that in occupier's liability claims. The essential principles apply so appropriate technical experts may be called upon. By way of example, in a case involving the surface of a basketball court, it was discovered that recent floor repairs had resulted in the application of a different floor surface treatment on the repaired boards than had been applied to the older surrounding boards. There was a consequential change in grip characteristics for that floor area which caused injury to a

player. Investigations involved advice from paint technicians and tradespeople as to the "proper" materials and method for re-surfacing an indoor court.

In a lot of cases the Plaintiff or fellow students can provide anecdotal or direct evidence of prior incidents involving the particular structure in question or details of warnings given by staff members which make it clear that the school authorities were on notice of the particular defect.

Australian Standards quite often impose minimum safety standards, as do uniform building regulations. In cases involving laceration injuries from glass there are very specific regulations governing the need for safety glass in specific areas. Arguments by defendants that school buildings pre-date the relevant building standards will usually count for little in the face of evidence of a prior injury involving a similar structural defect within the school.

Litigation tools for defect cases

(i) Expert Evidence

As noted the use of appropriate experts is essential in proving that there has been a deviation from the appropriate standard of care.

It is not always easy to obtain the services of a practising teacher to explain what is "reasonable" in a given circumstance and in our experience it can be useful to seek expertise from educational consultants or teacher trainers. Recently retired teachers can also be very helpful especially as they usually have high expectations of professional teachers. Technical expertise should be gathered on a needs basis. It is only worth calling if it adds real weight to the allegation - although it must be said that a good technical expert can carry the day in the right case.

(ii) Discovery

This is an essential tool in this area. School authorities, particularly State Education Departments, tend to generate a large amount of documentation, very little of which ever appears in a defendant's Affidavit of Documents. Practitioners need to turn their mind to the types of documents that might exist which assists the plaintiff's case. In this respect, a "friendly" teacher can be a very

helpful source of information as to the variety of relevant documents likely to be available and the descriptive title of those documents. Teacher's manuals, school policy manuals or department guidelines, maintenance work orders (including "working bee" work schedules) and prior incident reports etc. should be chased down with the zeal necessary to uncover the required evidence. Do not accept inadequate discovery if you have good reason to believe that other relevant documents exist. Even if documents do not get discovered it can often be a strong argument to say that the absence of these types of documents reflects a poor approach by the school to safety issues. For example, a lack of evidence about general equipment maintenance suggests that no maintenance was carried out by the school at all.

(iii) Interrogatories

Carefully drawn Interrogatories based on thorough discovery will elicit helpful admissions about prior knowledge of defects, equipment maintenance programs, prior accidents, safety warnings and the like. Again, admissions that a school has not carried out routine maintenance programs can be more damning than an admission that they did have such a program even though it was not performed with sufficient regularity.

Summary

This area of practice can be a most rewarding one. To achieve a favourable settlement or verdict for a young plaintiff is one of the most gratifying for plaintiff practitioners, particularly when the outcome has been achieved after considerable investigative work and strategic preparation. We can only encourage practitioners in this area to carefully consider the facts as presented by the client before undertaking the investigative steps prior to commencing proceedings. Proper preparation is essential to give practitioners the upper hand in litigation and the practical hints above will hopefully be a useful starting point. ■

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Notes:

- ¹ Practitioners are referred to the paper delivered by Dr Keith Tronc to the 1997 APLA National Conference titled: "School Injuries"
- ² *Stephens v. State of Victoria* (unreported) Victorian County Court, 11 May 1998.
- ³ *Dunn v. State of Victoria* (unreported) Victorian County Court, 27 May 1997.
- ⁴ *Stephens v. State of Victoria* This point was considered at length in the judgment.

\$60,000 for losing mum

A TEENAGE boy whose mother died in jail from a chronic heart condition was yesterday awarded almost \$60,000 damages after authorities were found negligent in caring for her.

Shawn Delaney, 17, and his grandparents, Dawn and William Delaney, had accused the State of NSW of causing Janet Beetson's death in 1994.

Ms Beetson, 30, died in Mulawa prison in the early hours of June 4, 1994, from complications as a result of her heart condition, known as endocarditis. Downing Centre District Court acting Judge Jennifer Blackman found yesterday Ms Beetson's medical condition was noted on court and prison documents.

"The prison medical authorities should have done something for Ms Beetson's heart condition," the judge said.

Instead, prison medical staff apparently assumed Ms Beetson was displaying symptoms of drug withdrawal, she said.

Mr and Mrs Delaney, of Eastern Creek in Sydney's western suburbs, claimed they had the right to sue over Ms Beetson's death because they acted as her parents.

Judge Blackman refused to award damages to them, but awarded Shawn \$58,730.

□ AAP

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