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# Sport in Schools: Some Legal Liability Issues

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## Abstract

The playing of sport in Australian schools is a tradition. It is therefore not unusual that a student might suffer a serious injury at school while participating in a sporting activity. This paper examines the origins and nature of a teacher's personal duty of care, and the education authority's non-delegable duty of care, for the physical safety of students in the context of sport in schools. Within this framework, it discusses recent cases involving injury to students while playing sport, such as *Geyer v Downs*, *Watson v Haines*, *Thomas v State of South Australia*, and *Vandercheur v State of New South Wales*.

## Introduction

The playing of sport is a tradition in Australian schools, just as it is in the wider community. Both before classes officially commence and after the school day has ended, as well as during recess periods throughout the school day, students engage in a variety of activities on school grounds, often including informal versions of well-known games like football, cricket, basketball, and hockey. At some stage during a student's compulsory attendance at a government or non-government school, the school's curriculum may include the formal teaching of skills relating to the playing of individual and team sports. In addition, schools often participate in intra-school and inter-school competitions where individual and team sports are played with serious commitment to winning. Given this tradition, it is not unusual that a student might suffer an injury while participating in such activities and then seek to sue the education authority for compensation.

## Legal principles

Where a student is injured while participating in sport and pursues a claim for compensation, the student usually sues the education authority in negligence.

Under the laws of negligence, an education authority can be found indirectly, or vicariously, liable for breach of the personal duty of care owed by its teacher-employees to students at school.<sup>1</sup> Alternatively, even where there has been no negligence on the part of its teacher-employees, an education authority can be found directly liable for breach of its own non-delegable duty to ensure that reasonable care has been taken for the physical well-being of students in its schools.<sup>2</sup>

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<sup>1</sup> See, for example, *Geyer v Downs* (1977) 138 CLR 91 (the *Geyer Case*); *Shaw v Commonwealth of Australia* (1992) 110 FLR 379. See John Fleming, *The Law of Torts*, 9<sup>th</sup> edn, LBC Information Services, North Ryde, 1998, pp. 409-438, and David Gardiner and Frances McGlone, *Outline of Torts*, 2<sup>nd</sup> edn, Butterworths, Sydney, 1998, pp. 394-406.

<sup>2</sup> See, for example, *Commonwealth of Australia v Introvigne* (1982) 56 ALJR 749 (the *Introvigne Case*). It has been suggested that it is an important pleading strategy for a lawyer representing an injured student in a claim for compensation to specifically include, whenever appropriate, a claim for breach of this non-delegable duty, as well as the normal pleadings relating to the vicarious liability in the employer-employee relationship: Keith Tronc, *Australian Professional Liability – Education*, CCH, Sydney, 2000, p. 35,052.

## Vicarious liability

According to the principle of vicarious liability, an employer is liable for the torts committed by his/her employee in the course of the employee's employment.<sup>3</sup> In establishing a claim in vicarious liability, a student as plaintiff must establish that a particular teacher-employee employed by the education authority has been negligent. This requires that the student prove the traditional elements of a negligence claim, viz:

- the teacher owed the student a duty of care;
- the teacher breached the appropriate standard of care in the circumstances; and
- the student suffered an injury caused by the teacher's actions and of a type that was reasonably foreseeable.<sup>4</sup>

The basis of the duty of care owed by a teacher to a student, as well as the standard of care required when carrying out that duty of care, have received special attention in court decisions involving students injured in the course of a school-sanctioned activity.

## Duty of care

Modern-day negligence can be traced back to the famous English decision of *Donoghue v Stevenson* where it was established that, as a general rule, a defendant will owe a duty of care to a plaintiff if the plaintiff is the defendant's 'neighbour'.<sup>5</sup> Whether the

plaintiff is the defendant's neighbour depends in part upon whether there is a reasonably foreseeable risk of harm to the plaintiff in the defendant's conduct. While the High Court of Australia continues to explore with an Australian eye the meaning and application of the 'neighbour' principle in various situations,<sup>6</sup> it has nonetheless made it clear that the relationship of student and teacher is of such a special nature that any duty of care owed by the teacher to the student arises, of necessity, from the relationship itself. In *Geyer v Downs*,<sup>7</sup> for example, the High Court endorsed the views expressed in an earlier decision where the Supreme Court of Victoria said:

[T]he relationship of schoolmaster and pupil is another example of the class of case in which the duty springs from the relationship itself...As the duty is one to take reasonable care, foreseeability of harm arising from the particular conduct is of course relevant to the question whether there has been breach of the duty, but it is not, in our opinion, relevant to the existence of the duty which arises from the relationship of schoolmaster and pupil.<sup>8</sup>

Given the special nature of this relationship and the resultant duty of care arising from it, any duty of care owed by a teacher to a student therefore arises independently of foreseeability of harm, in other situations an essential prerequisite for the existence of a duty of care.<sup>9</sup> And while the *Geyer Case* dealt specifically with the position in government schools, cases involving injury to a student attending a non-government school have proceeded on the basis that

<sup>3</sup> See Fleming, pp. 409-438; Gardiner and McGlone, pp. 394-406.

<sup>4</sup> See Fleming, pp. 113-254; Gardiner & McGlone, pp. 131-307. It should be noted that in any negligence claim, it is always open to the defendant to argue the defences of voluntary assumption of risk and contributory negligence. However, the defence of voluntary assumption of risk almost never succeeds, and only rarely does the defence of contributory negligence succeed, when a defendant teacher has been sued by a student plaintiff. See Tronc, pp. 15,502-15,504; Fleming, pp. 302-344.

<sup>5</sup> [1932] All ER 1 at 11, per Lord Atkin. In this case a manufacturer was found to owe the ultimate consumer of a contaminated bottle of ginger beer produced by the manufacturer a duty of care.

<sup>6</sup> See, for example, Gardiner & McGlone, pp. 131-162.

<sup>7</sup> *Geyer v Downs* (1977) 138 CLR 91 (the *Geyer Case*).

<sup>8</sup> *Richards v State of Victoria* [1969] VR 136, pp. 140-141.

the relationship of student and teacher in a non-government school is no different from that which exists between student and teacher in a government school.<sup>10</sup>

Thus, whether it be a government or non-government school, a teacher at that school will owe a student a duty of care simply whenever and wherever the student-teacher relationship is in existence. In some situations it may be difficult to determine whether, in the circumstances, the student-teacher relationship was in existence at the time a student was injured. In the *Geyer Case*, for example, the 8 year old student plaintiff was hit on the head by a softball bat when walking past a group of other students playing a game in the school grounds before the official commencement of the school day. The principal of the school had not rostered teachers for supervision duty in the playground for the period before school officially commenced but he had nonetheless allowed students on school grounds before school commenced and had assumed responsibility for them. The High Court found that, in all the circumstances of the case, the student-teacher relationship did exist between the principal and the student and that as a result the principal owed the student a duty of care. In the vast majority of situations, however, the matter seems clear - during the course of a normal school day, whether teaching a skills lesson relevant to a particular game or while on supervision duty during recess when students are playing an informal game of cricket or basketball, the teacher teaching the lesson or on supervision duty at the time the game is being played will owe those participating students a duty of care because the

student-teacher relationship will exist in those circumstances.

### **Breach of the standard of care**

The second element of a negligence claim requires the plaintiff student to establish that in carrying out the duty of care the teacher fell below the required standard of care in the circumstances. In early cases, courts took the view that because a teacher stood *in loco parentis* (literally 'in the place of a parent') in relation to students at school, the teacher should take as much care in relation to students as a 'reasonable parent' (usually a father) would take in the circumstances.<sup>11</sup> While some Australian courts still insist that the 'reasonable parent' standard is to be applied when a teacher is looking after a small group of students or very young students,<sup>12</sup> in more recent times Australian courts, including the High Court, have moved away from such a stance, believing that:

The notion that a school teacher is *in loco parentis* does not fully state the legal responsibility of a school, which in many respects goes beyond that of a parent. A school should not be equated with a home. Often hazards exist in a home which it would be unreasonable to allow in a school.<sup>13</sup>

In the *Geyer Case*, the High Court endorsed a standard of care defined by reference to what the 'reasonable teacher' would do in the circumstances.<sup>14</sup>

<sup>9</sup> Peter Heffey, 'The Duty of Schools and Teachers to Protect Pupils from Injury', *Monash University Law Review*, vol. 11, 1986, p. 3.

<sup>10</sup> *Gaetani v Trustees of the Christian Brothers* [1988] Aust Torts Reports ¶80-156; *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* [1996] Aust Torts Reports ¶81-399. See Heffey, pp. 1-2.

<sup>11</sup> *Williams v Eady* (1893) 10 TLR 41, at 42; *Ramsay v Larsen* (1964) 111 CLR 16, at 25, per McTiernan J.

<sup>12</sup> *Kretschmar v State of Queensland* [1989] ¶80-272 (the *Kretschmar Case*); *Miller v State of South Australia* (1980) 24 SASR 416.

<sup>13</sup> *The Introvigne Case*, p. 757, per Murphy J.

<sup>14</sup> The High Court adopted the 'reasonable teacher' standard that had first been formulated in *Richards v State of Victoria* [1969] UR 136 and approved by the High Court in *State of Victoria v Bryar* (1970) 44 ALJR 174. To paraphrase, the duty of care owed by a teacher requires that the teacher should take such measures as in all the circumstances are reasonable to

Establishing whether a defendant teacher had done all that the reasonable teacher would have done in similar circumstances requires identification of what the reasonable teacher would have done in the circumstances, bearing in mind various factors, and whether the defendant teacher did it.<sup>15</sup> Thus, in assessing a defendant teacher's conduct against that of the 'reasonable teacher', courts will weigh up various factors, including:

- the foreseeability of risk involved in the activity and the cost (educational or otherwise) of eliminating the risk;
- student characteristics (e.g. age, intellectual and physical capabilities, skills level, the mischievous tendencies of young people); and
- the seriousness of injury likely to occur in the circumstances.<sup>16</sup>

The case of *Thomas v State of South Australia*<sup>17</sup> is a good example. While trying out for track and field events at the school, a 15 year old student experienced in shot put was injured when he was struck on the head with a shot put during a sports practice involving about fifteen students. The injury occurred when, after putting the shot and walking out to measure his effort as instructed by the teacher, the plaintiff was struck by a put delivered by another student inexperienced in the

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prevent physical injury to the student. The duty is not one to insure against injury but to take reasonable care to prevent it, and this requires no more than the taking of reasonable steps to protect the student against risks of injury that *ex hypothesi* the teacher should reasonably have foreseen.

<sup>15</sup> The established principles relevant to determining breach of the standard of care are those set out by the High Court in *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

<sup>16</sup> For a comprehensive discussion of these factors and their operation in various cases see Heffey, pp. 8-18; Simon Blake, 'Supervision Issues for Teachers and Principals', in *Education, Law & Politics – Who Wins, Who Loses – Who Cares?: Proceedings of the 7<sup>th</sup> Annual Conference of the Australia & New Zealand Education Law Association, Canberra, 1998*, Australia & New Zealand Education Law Association (Inc), Canberra.

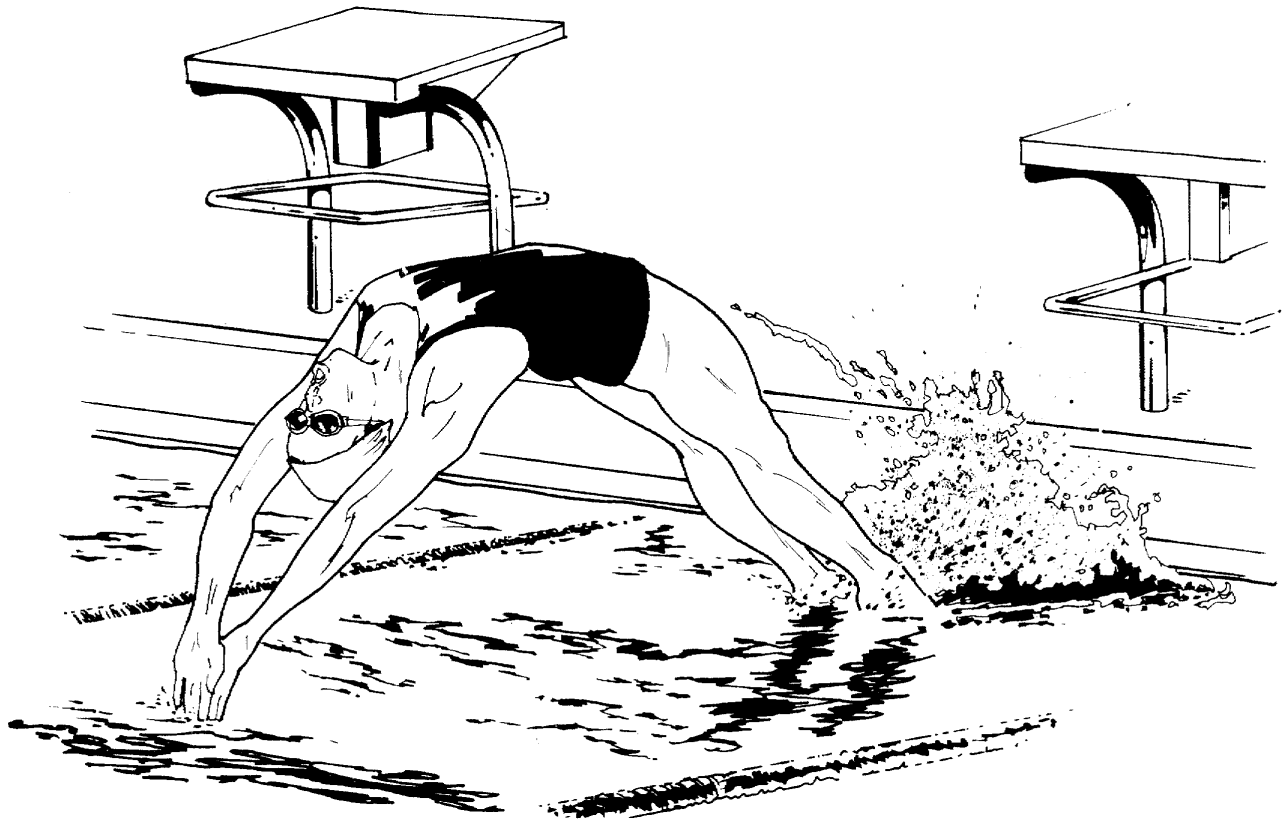
<sup>17</sup> Unreported, Supreme Court of South Australia, 1992.

activity. While there was some dispute about whether the teacher was observing the students at the time of the accident, the court found that the teacher was in breach of the required standard of care. The court felt that because the shot put session was potentially dangerous, it was necessary that an appropriate system be devised to remove, or at least substantially reduce, the risk of danger. Because the risk of injury was heightened by the nature of the competitive activity and by the enthusiasm and exuberance of students of that age and level of experience, it was essential that the teacher not merely supervise the practice session but do so at all times. The teacher had instructed students in the procedures to be followed in putting and retrieving a shot but she had not strictly supervised the system at all times and so had not done what a reasonable teacher would have done in similar circumstances, bearing in mind the heightened risk.

The case of *Vandercheur v State of New South Wales*<sup>18</sup> demonstrates not only the importance a court attaches to the risk factor but also the stark reality that there are risks that might be tolerated in a suburban back yard but which would not be acceptable in a school setting. A 13 year old student was injured when playing a makeshift game of cricket during the lunch recess at a school. The boys playing the game had on previous occasions asked teachers for a loan of cricket equipment but their request had been denied. So the boys used two garbage bins as wickets, a jagged piece of a paling fence as a bat and a tennis ball. The pitch was part of the concreted schoolyard, and a drainage gutter covered by a metal grate was the crease from which the bowler bowled and to which the student plaintiff ran for a run. On one occasion when the student ran towards the bowler's end and attempted to ground his bat, the bat became stuck between two slots in the drainage grate, the student tripped and the jagged edge of the bat pierced his calf

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<sup>18</sup> Unreported, New South Wales Court of Appeal, 1999.



causing injury. One teacher was watching the game at the time of the accident. The student sued for negligence. The trial judge had taken the view that there was no negligence on the part of any teacher but the NSW Court of Appeal found the supervising teacher negligent. While the dissenting judge in the appeal court argued passionately that to permit 13 year old boys to play cricket with a knock-up bat and ball on a knock-up pitch was simply part of the Australian way of life, the majority felt that the supervising teacher had not taken as much care as the reasonable teacher would have taken, given the foreseeability and magnitude of the risk of injury to the students playing the game in the way they were playing it.

### **Direct liability of an education authority**

Where a teacher has not been in breach of the personal duty of care owed to a student, the student will not succeed in a negligence claim against an education authority as the teacher's employer under the principle of vicarious liability. However, the High Court of Australia has made it clear that the liability of an

education authority for injury to a student is not purely a vicarious liability.<sup>19</sup> It has held that an education authority owes its own non-delegable duty of care to students attending its schools. The nature of the duty of care is not simply to take reasonable care but to ensure that reasonable care is taken for the safety of its students, a much more stringent obligation of care than the personal duty of care owed by a teacher.

In *Watson v Haines*<sup>20</sup> (the *Watson Case*) a 15 year old school boy who had a long thin neck, and who played as hooker for his school's first grade team, suffered a fracture of the cervical spine and, as a consequence, quadriplegia when the two halves of a scrum collapsed

<sup>19</sup> The *Introvigne Case*. In this case, a student was hit on the head by a truck falling from the top of a flag-pole in school grounds when the student was swinging on the halyard of the flag-pole before the official commencement of the school day. The Commonwealth of Australia as the body responsible for the provision of schooling in the Australian Capital Territory was found liable for breach of its non-delegable duty to ensure the safety of students attending its schools.

during an inter-school competition. He sued the State of New South Wales, alleging that there had been a failure within the administration system for State education as a result of which he had not, in fact, received reasonable care and had thereby suffered serious harm. A senior bureaucrat in the NSW Education Department had been warned by medical experts about allowing boys with long, thin necks to be involved in scrums, and the medical experts had provided resources such as posters and audio-visual kits to the department for distribution to schools throughout the state. The NSW Supreme Court found that the bureaucrat had made very little effort to ensure that the information provided by the medical experts was distributed to schools, despite the number of avenues available to him to do so. It concluded that the State of New South Wales, through its education bureaucracy, had failed to ensure that reasonable care was taken for the safety of its students, and the student was awarded \$2.2 million.

Both the *Introvigne Case* and the *Watson Case* make it clear that the non-delegable duty is both an onerous and significant duty imposed on education authorities for the safety of students, including those involved in sport in schools. This non-delegable duty of the education authority is in addition to, and is not extinguished by, any personal duty of care owed by a teacher to a student. Thus, it is not enough for an education department, for example, to simply place all responsibility for the safe and proper organization and implementation of sport in schools on the shoulders of teachers and principals. An education authority has its own legal responsibility to manage, in a practical and proactive way, the matter of sport in schools in such a way that the safety of students is not compromised through participation in sporting activities in its schools. Following the *Watson Case*, for example, the New South Wales Education

Department embarked on a process of taking control of the sport of rugby away from schools. Schools were required to obtain departmental approval to offer rugby as a school sport, with the Department insisting that schools provide structured training and coaching programs with qualified and experienced coaches. Each school was required to devise a formalised selection procedure for inter-school teams, and the school principal was instructed to certify that requirements for team selection had been met.<sup>21</sup>

### Conclusion

Sport in Australian schools is an everyday occurrence, and it is simply neither possible nor desirable to wrap students in cotton wool in an attempt to protect them from all conceivable harm while participating in a sporting activity. Nonetheless, the courts do indicate that both the teacher's personal duty to take reasonable care for the safety of students, as well as the education authority's non-delegable duty to ensure that reasonable care is taken for the safety of students, apply to the playing and organisation of sport in schools. It is the responsibility of both teachers and their education authority employers to respond to these duties in legally defensible ways.<sup>22</sup>

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<sup>20</sup> [1987] Aust Torts Reports ¶180-094.

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<sup>21</sup> Anwar Khan and Peter Williams, 'The Liability in Negligence of Teachers and Schools in Australia', *Education and the Law*, vol. 5, 1993, p. 162, note 10.

<sup>22</sup> For discussions of various cases where teachers and education authorities have been found liable or not liable for injuries suffered by students in sport see, for example, P Singh, 'Schoolchildren and Sports Law', in *Australian Schools and the Law*, eds Jane Edwards, Andrew Knott and Dan Riley, LBC Information Services, Sydney, 1997; Tronc, pp. 15,803-15,852.