



## Duty of Care

The law imposes a legal duty on teachers and schools to take care of the safety and wellbeing of pupils in their care. This duty of care arises whenever a teacher-pupil relationship exists.

Duty of care can be defined as "an obligation, recognised by law, to avoid conduct fraught with unreasonable risk of danger to others". Every teacher and school authority owes a duty of care to take reasonable care to ensure that their acts or omissions do not cause reasonably foreseeable injury to their pupils.

There is no clear-cut formula to establish when a duty of care is owed between individuals. Common law proceedings have identified two important factors giving rise to a duty of care:

1. reasonable foreseeability; and
2. proximity.

If the wrongdoer knows, or should have known, that his or her acts or omissions may cause injury or impairment to the legal rights of another person who is not in a position to protect his or her own interests, there is a relationship of proximity giving rise to a duty of care. Duty of care is a matter of law and can be denied on public policy grounds (i.e. if in the court's estimation, it is not fair or just that duty of care should exist).

Children stand in need of care and supervision while attending school. Parents can no longer provide their own level of care as they are not physically present. Therefore, teachers and the school must provide the children with this requirement.

A higher standard of care is expected from a teacher than from a parent. The law expects a teacher to act as an "ordinary reasonable school teacher" rather than a "good and careful parent".

However, the courts have emphasised that it is not a duty to *ensure* that students do not suffer any harm at all, but rather a duty to take *reasonable* care to protect students from harm which is reasonably *foreseeable*. Accordingly, an action brought by a student against a school or teacher for compensation for personal injuries will only succeed

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where the student can establish that there has been carelessness by the teacher or school. A negligence claim is not like a worker's compensation claim where the employee injured at work receives payment for medical expenses and lost wages regardless of whether there has been any fault on the part of the employer. An action will not succeed if the harm results from an unanticipated accident – the harm must have been reasonably foreseeable.

There have been a great many cases before the courts over the years in which the scope of the duty has been discussed. The impact of all these cases on the scope of the teacher's duty can be summarised by stating that the duty can involve taking reasonable care to:

- adequately supervise students
- protect students from dangerous situations and activities
- maintain safe premises and equipment; and
- protect students from bullying and violence

A teacher is not negligent in failing to take precautions against a risk of harm unless;

- the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known)
- the risk was not insignificant (insignificant risks include, but are not limited to risks that are far-fetched or fanciful)
- in the circumstances, a reasonable person in the teacher's position would have taken those precautions.

In determining whether a reasonable person would have taken precautions against a risk of harm, the court will consider the following;

- the probability that the harm would occur if care 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

Teachers and schools can be found in breach of their duty of care and prosecuted under criminal law *or* civil law *or* both. Even when the students are involved in an excursion or camp where a 'specialist' firm is organising and running all the activities, the school's duty of care is still in existence.

Some previous court findings outlined below highlight some situations where duty of care prosecutions have occurred or been overturned and can help to clarify what can and cannot constitute this breach.

#### Haines v Warren

A boy who was well known as a bully and was known to operate in a particular part of the playground, injured another student during recess. There were teachers on duty, but they did not supervise that part of the playground. The school was found to have been negligent, and one New South Wales Court of Appeal judge commented that the school had failed to discipline a troubled child, while another judge found a breach of the duty of care because of inadequate supervision of the playground.

#### Eskinazi v Victoria

This case provides another example of where there was insufficient action taken by a school to prevent bullying. The court found that the student suffered quite vicious verbal and physical abuse at her secondary school during years 7 and 8, before she finally left the school in August of her year 8. When the bullying began, the girl was reluctant to tell anyone about it – teachers or parents. Once she told her parents, the matter was taken up with the school welfare co-ordinator, the year 8 co-ordinator and the principal, but none of these took adequate steps to deal with the problem. All three were found by the Court to have been in breach of their duty of care.

#### Moran v Victorian Institute of Teaching

The Victorian Civil and Administrative Tribunal (**VCAT**) overturned the decision of the Victorian Institute of Teaching to deregister a teacher because he failed to intervene in a school yard fight. The VCAT held that it was reasonable for the teacher not to intervene in the fight, if his/her physical safety was under threat.

#### Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Hadba

A pupil who was injured at the hands of another pupil while playing on a flying fox during recess hours in school, was not allowed to recover **damages** for her injury because she failed to establish that constant supervision would have prevented the injury to her. In this case, the court held that the teacher acted reasonably because it is not “reasonable to have a system in which children are observed during particular activities for every single moment of time...[such a requirement] is damaging to teacher-pupil relationships [and is likely to] retard the development of responsibility in children and is damaging to teacher-pupil relationships by removing even the slightest element of trust.”

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Similarly, in the earlier decision of *H v Pennell and South Australia* the South Australian Supreme Court held that the degree of supervision required "a fine balance between discipline and supervision on the one hand and freedom of action and inculcation of independence on the part of students, on the other hand".

#### Miller v South Australia

The teacher's employer, individual school or the state may be vicariously liable for the actions or omissions of their employees. A South Australian school was held liable for the injuries sustained by a 4-year-old boy who escaped from his class and was burnt by a barbecue in the school grounds.

#### AB v State of Victoria

In this case, the Supreme Court allowed a pupil to recover damages from the Department of Education because her school failed to detect her sexual abuse although there was a reasonable suspicion that the pupil might be the victim of sexual abuse at home.

A school's duty of care to pupils is higher than a teacher's duty of care. The school's duty of care may arise under **common law** principles of negligence, assault or battery, or under occupational health and safety, family law, **mandatory** child abuse reporting, anti-discrimination legislation and other **statute** requiring schools to act in a certain manner.

The teacher's duty of care does not extend to preventing property damage at the hands of students, though the teacher's obligations to their employer compels at least some level of action – using voice control and /or reporting the incident in their incident log. Any force used to intervene must be, as always, reasonable and proportionate.

While it is clear that teachers and schools have a legal duty to protect the physical wellbeing of pupils in their supervision and control, it is not clear whether they also have a legal duty of care to protect the intellectual, and emotional, wellbeing of pupils.

There is little useful case law on this subject in Australia, but courts in the US and the UK have considered two categories of suggested liability by teachers and school systems;

1. educational malpractice - negligent performance of teaching function leading to functional illiteracy of pupils.
2. educational negligence – failure by school systems to diagnose and attend to the special needs of pupils, especially pupils with special needs or disabilities.

There have been several instances of educational negligence considered in Australia. These cases involved the failure of educational authorities to diagnose (or the misdiagnosis of) the special needs or characteristics of students, failure to provide appropriate instructions, or the provision of instructions that were outdated and wrong (for example, the wrong curriculum). The attached document *When is a Teacher or School Liable in Negligence* details the issues surrounding negligence with regards to duty of care.

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