

**THE IMPACT OF THE
CIVIL LIABILITY ACT
ON SCHOOLS, TAFES AND AMES**



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THE IMPACT OF THE *CIVIL LIABILITY ACT* ON SCHOOLS, TAFE_s AND AMES

This paper is about the impact of the *Civil Liability Act* on the teaching institutions of the Department; its schools, TAFE colleges and Adult Migrant Education Centres.

What will concern, of course, the principals, administrators or teachers in such organisations is whether this piece of legislation changes the way they are, or should be performing their jobs on a day to day basis.

What is the *Civil Liability Act* about, and what is it supposed to do? These issues will be examined in more detail shortly, but as a preliminary matter, the *Civil Liability Act* has a lot to do with the Duty of Care that must be exercised by all Departmental employees as they go about their employment duties. In the main, teaching staff will be pre-occupied with the Duty of Care owed to students but in certain circumstances teaching staff will owe such a Duty to other classes of people, such as parents who come on to school premises to deposit or collect children, and other visitors such as cleaners, guest lecturers, volunteer helpers or tradesmen. Nonetheless, most teachers will have as their focus the duty of care to students and for that reason, the emphasis in this paper will be on students and in particular, school children.

The *Civil Liability Act* does not create the concept of the Duty of Care, this being something that has been talked and worried about for a good deal of time whereas the *Act* has only been around since 2002.

The *Act* has a great deal to say about how the Duty can be breached or why it is no longer breached in particular circumstances, but the creation of the Duty falls within the ambit of the common law and so, to make sense of the *Act* or to put it into its correct context, the common law will also need to be examined. This is law which has evolved from the analysis and extension of legal principles by judges and so, this discussion will refer to some recent and some not-so-recent decisions, to show what the judges and in particular, the judges of the High Court and New South Wales Court of Appeal have had to say about the Duty of Care owed by teachers and teaching institutions to their students.

In the main, these cases are decisions on the law as it was before the commencement of the *Civil Liability Act*. We can then examine what impact, if any, the *Act* would have had on the results in those cases.

THE *CIVIL LIABILITY ACT*

Why do we have it?

Back in 2001, apart from September 11, the newspapers were full of stories and warnings about an impending “*public liability insurance crisis*”.

Insurance premiums were on the rise, often dramatically, and many community organisations were finding it difficult to obtain affordable public liability insurance or to find it at all.



From Hansard, the State Government was concerned that the inability of clubs and organisations to obtain affordable insurance would lead to a severe curtailment of sporting and cultural activities, as well as damage to small business, tourist operators, and local communities. [1]

There was, it was suggested, an epidemic of excessive and unjustifiable claims for personal injuries, unmeritorious recovery by plaintiffs and prohibitive cost burdens imposed on the public and on private insurance.

The problem was a national one and New South Wales took the lead with the introduction of the *Civil Liability Act* in June 2002 which was made retrospective to 20 March of that year.

The thrust of the *Act* as it then was, was to reduce the cost of claims by introducing caps on the levels of damages that were recoverable. A threshold was also introduced for what under the Common Law was termed “*general damages*” to try and eliminate small claims from the legal system. Other changes were introduced to the *Legal Profession Act 1997* which governs the conduct of lawyers restricting fees to make it uneconomic for lawyers to act for people in small value claims that would still require significant legal work to be done. Provisions were also introduced limiting the ability of lawyers to act in circumstances where their client’s claims lacked merit.

In the meantime, a Commonwealth review of the law of negligence was undertaken by a panel chaired by Mr Justice Ipp of the New South Wales Supreme Court. That panel’s report, referred to as the Ipp Report, was released at the end of September 2002 and contained many further recommendations, particularly in relation to redefining concepts fundamental to the law of negligence.

Many of those recommendations for change were adopted by the New South Wales Government when it introduced the *Civil Liability Amendment (Personal Responsibility) Act* at the end of 2002. As may be gathered from the title of that Statute, these amendments had a lot to do with forcing people to take responsibility for their own actions, or more particularly, for their choices to undertake certain kinds of activities in which they assumed certain risks. In the Premier’s words of the Second Reading Speech, the government’s intention was, “*to wind back this culture of blame*”.

In that same Speech, Mr Carr described this *Act* as “*a triumph for common sense*” and “*some of the most fundamental changes to the law of negligence ever made*”.

What has been its Impact?

There has certainly been an impact on the number of cases brought in New South Wales and no doubt, the *Civil Liability Act* and its ancillary reforms have been responsible for a big part of that.

According to a recent article in the Law Society Journal [2] there would appear to be significantly less civil litigation in New South Wales than there used to be. As the District Court is where the bulk of personal injury litigation in this State takes place, it is therefore instructive to look at the trends in that jurisdiction. Fifteen years ago, filings of new matters



of all types were running at approximately 20,000 per annum compared with approximately 7,000 per annum since 2002.

It would be overly simplistic to attribute this decline in case numbers solely to the impact of the *Civil Liability Act* because there has also been something of a change in the way the courts have been applying the common law which has discouraged plaintiffs. Nonetheless, there is no doubt that the government's reforms have had a powerful effect.

This, of course, is to the good from the perspective of a school, college or adult migrant education centre because there have been fewer claims brought against the Department for negligence. This, in fact, is probably the major impact of the *Act* even though this may not have been evident at the school level. This is because fewer cases has meant less time spent by Principals and administrators in gathering and preparing evidence and tracking down old records. It also means less disruption for teachers who would otherwise have been asked to participate in lengthy interviews or attend court as witnesses. Readers who have been unlucky enough to be involved in litigation will know just how time consuming and inconvenient it can be and that the benefit of fewer cases cannot be over-stated.

There is also an indirect benefit from a reduction in litigation in that fewer claims and claims with capped damages pay-outs means less money expended by the Department on legal matters which ultimately allows more money in the Education budget to be spent on actual education.

Still, it may be that once again, the winds of change are blowing. In a recent newspaper article, the Chief Justice of New South Wales, Mr Justice Spigelman, was reported as telling the 14th Commonwealth Law Conference in London that the *Civil Liability Act* changes were made “*without full appreciation of the extent to which judicial attitudes had already changed*”, and that the changes in New South Wales have fundamentally altered the ability of citizens to sue the government and its instrumentalities.

One of Mr Iemma's first announcements as our new Premier was that costs restrictions on lawyers for *Civil Liability Act* matters would be eased. This itself could see an increase in the number of claims being brought as the smaller matters will once again be economically viable for lawyers to process and prosecute. The full impact of this, however, will take some time to become fully apparent.

What claims does it apply to?

The Act covers claims not just for personal injuries (which includes pure mental harm) but also for property damage and economic loss. [3]

Nonetheless, it needs to be borne in mind that not all types of injuries will be affected by the *Civil Liability Act*, and that whole classes of injuries are excluded. So, for instance, if a claimant is knocked down by a departmental motor vehicle, the provisions of the *Motor Accidents Compensation Act* will apply. If a teacher falls down a stairwell at school – that will be covered by Worker's Compensation legislation. Illness caused by inhaling asbestos would be a Dust Diseases claim.



One very important exclusion from the provisions of the *Act* is civil liability in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct. For those cases, the common law will apply, which will probably simplify some issues of liability for a plaintiff as well as removing any restrictions on damages. [4]

What does it do?

Principally, the Act does these things:

- Introduces new rules for judging how and when the duty of care is breached and creates some new situations where no Duty of Care is owed.
- Limits in various ways, the amounts that can be recovered in damages.
- Shifts the onus onto the individual to take greater responsibility for his or her actions or for his or her decision to undertake certain types of activity.

I will not discuss further in this paper limitations on damages, because although the ultimate cost of a claim will have an impact at the Departmental level, as far as the principal of a school or administrator of a college is concerned, it is the fact that there is a claim which is of greater significance than whether the potential for damages has been shaved back under the Act from say \$300,000.00 to \$200,000.00. Of course, such a reduction in the dollar value of a claim is of paramount importance to an injured claimant and one would not seek to trivialise that – its just that in this paper we are viewing matters from the perspective of educational institutions and their staff.

The primary issue to be addressed here is whether the law of negligence has been changed by the *Act* and as previously mentioned, to do that, we need to refer back to the common law.

The second area which will be looked at briefly, is the shifting of responsibility back to the individual and some implications flowing from that.

Finally, this paper will briefly review another three aspects of the Act of some general interest.

Let us now look at the situation under the common law ...

THE COMMON LAW

The elements of an actionable claim in negligence are as follows:

- The defendant must owe a duty of care to the plaintiff,
- The defendant must breach the duty of care by failing to conform to a certain standard of care,
- The plaintiff must suffer injury or loss,
- The injury or loss must be caused by the defendant's breach of duty, and
- The injury or loss must not be too remote.



These principles date from a 1932 House of Lords case which really initiated the modern law of negligence. The case was *Donoghue –v- Stevenson* and arose from a set of facts whereby Mrs Donoghue claims to have drunk ginger beer in a restaurant from a bottle which, alas, was subsequently found by her to also contain a decomposing slug or snail. She became ill and subsequently sued the manufacturer of the ginger beer. This is where the case was novel; because up until that time, in such circumstances the plaintiff would have relied on contractual rights against a defendant. However, she did not have any such contractual rights against the manufacturer and so in effect, she was asking the Court to find that the defendant owed her a duty of care.

The House of Lords accepted her argument and came up with the neighbour principle which was expressed as follows:

“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected when I am directing my mind to the acts or omissions which are called in question.”

So, since 1932, schools, colleges and teaching staff have owed a duty of care to their legal neighbours and in a 1982 Australian case, [5] the High Court confirmed that students are the legal neighbours of their teachers by holding there was such a duty of care owed by teaching staff to students at school.

The obvious question arising from this is, “in what circumstances is the duty of care owed?” Is there a duty of care before school commences, or, after it concludes of an afternoon? What about when school children are walking home, or are on an excursion? Some cases will be reviewed below to see how that question has been answered by the Courts.

Our next question is, once it has been established that there is a duty of care, in what circumstances is it breached? In the High Court case of *Shirt –v- Wyong Council*, [6] it was said that the test was whether a reasonable person in the defendant’s position would have foreseen that the conduct complained of involved a risk of injury to the plaintiff or to a person in a similar position. Such a risk of injury would be foreseeable unless it was far fetched or fanciful. If the risk was foreseeable, you next consider whether the defendant’s failure to eliminate the relevant risk showed a want of reasonable care. This calls for a consideration of the magnitude of the risk, the degree of probability of its occurrence and the expense, difficulty and inconvenience of taking alleviating action as well as any other conflicting responsibilities which the defendant may have.

Implicit in the judgment from *Shirt* is the concept of reasonableness; the defendant is not to be considered automatically liable for anything that occurred just because it was foreseeable.

Unfortunately, this is where a perception developed that the common law appeared to be losing its way. In too many cases, it appeared the Courts were applying something of a “slot-machine” test. That is, where a certain result would automatically follow when determining if there had been negligence without having to think about it. In this analogy, automatic delivery of a product by the slot machine, was replaced by an automatic finding of



negligence if the defendant could have acted in a manner different to that which failed to prevent injury.

The perception of the way in which courts were applying the law of negligence reached a nadir where it was expressed in the Ipp Report that “there is a widely held view in the Australian community that there are problems with the law stemming from perceptions that:

- (a) the law of negligence as it is applied in the Courts is unclear and unpredictable
- (b) in recent times it has become too easy for plaintiffs in personal injury cases to establish liability for negligence on the part of defendants....”

So, Part 1A of the *Civil Liability Act* was introduced to tighten up the rules relating to negligence and to restore the situation where a plaintiff must properly establish existence of a duty, breach and causation. Coincidentally, this occurred at a time when the Courts themselves were toughening up in this area.

Before dealing with the cases, two additional principles require canvassing;

The first is vicarious liability. This means that where a person is liable in negligence and the act of negligence was committed by the wrongdoer whilst in the course of employment, then that person’s employer will also become liable for the wrongdoing, regardless of whether or not the employer would have been liable in its own right. Hence, a school is liable for the negligent acts or omissions of its teachers. For a public school this means the State of New South Wales is the entity that is directly liable whereas for TAFE employees, it is the TAFE Commission.

The second matter is that the duty of care owed by the school authority is non-delegable. In other words, the School Authority can’t escape responsibility by sub-contracting or otherwise delegating someone else to carry out that duty on its behalf. The delagatee can certainly be liable in his or her own right but that will not reduce in any way the liability of the school.

CASES

Cases against educational authorities usually assert that the Duty of Care was breached by inadequate teacher supervision. In some instances, the primary issue is whether there was a duty of care at all because in the circumstances of injury this may not be at all clear. To begin with, we’ll now look at what is a fairly common scenario: the playground injury.

- Playground cases

- *State of New South Wales –v- Finnan* [2004] NSWCA 314 (10 September 2004)

A Year 9 student was involved in a water fight behind the school canteen. One teacher was on playground duty supervising the canteen and another was in the quadrangle area in accordance with the school’s supervision policy and set roster. Following the water fight, a friend of the student approached him and



threatened to give him a “dead-arm”. The plaintiff ran away to avoid his friend, ultimately injuring himself when he jumped over a fence separating the quadrangle from a walkway, which was set lower than the quadrangle. There was a drop of about 8 feet. Not surprisingly, he suffered injury. It’s probably more surprising that damage was limited to his right knee, which was claimed as a continuing disability. The trial judge ruled that the school was liable as the teacher on duty should have been in a position to stop the accident but had failed to do so. He awarded the student approximately \$340,000 in damages reduced by 15% for contributory negligence.

The Court of Appeal took a different view and actually took notice of matters such as the distance covered by the plaintiff in his run, which was only about ten metres, the fact that he was going flat out to avoid the “dead arm” and hence, the likely duration of the run – about 20 seconds. The Court also inferred from the teacher’s evidence that she was on playground duty at the time but that it was also open to conclude that neither she nor any other teacher was near the route taken by the plaintiff. Hence, there was no evidence that there could have been effective intervention. It was accepted that the practice of walking around the quadrangle to supervise students was appropriate and that not all students could be visible at all times. The large number of students in the area and the brief duration of the incident meant it was reasonable for the playground teacher not to see the plaintiff run and fall. It was also noted that students had been warned about having water fights and that they were regularly warned not to run in the quadrangle. The school was found not liable, the Court noting that if liability had been found, it would have reduced damages by at least 85% for the plaintiff’s own contributing negligence.

- *Catholic Diocese of Canberra and Goulburn –v- Habda* [2005] HCA 31 (15 June 2005)

The plaintiff was an eight year old girl who was going to ride a flying fox in the school playground. As she was preparing to launch herself off the platform, holding on to a sliding metal triangle, two other students grabbed her by the legs. This was contrary to the school rules. These children were in the same year as the plaintiff, as the school’s rostering policy prevented older children being in competition with the younger ones. The plaintiff struggled to free herself, but fell from the platform and struck her face on the base of the platform, sustaining some significant dental injuries. By her father, she brought a claim in negligence against the school authority for inadequately supervising the play equipment. There was incidentally, a claim against the Australian Capital Territory, for alleged negligence arising from the initial treatment provided at Canberra Hospital.

The High Court stressed that the duty owed by the school was to provide a reasonable level of care to the students. It said this level of care should be appropriate having regard to competing matters such as allowing students to develop their gross motor skills by using play equipment and permitting teachers to have a break during recess and lunch hours (that is, apart from the



teachers rostered on duty). The school's policy for rostering use of the equipment was appropriate, as was its degree of enforcement. There were 4 teachers on duty out of a staff of 20. The teachers were able to supervise all students 95% of the time. The rules were breached when the teacher on duty was attending to another potential hazard and thus properly exercising her duty of care. The school had acted appropriately and reasonably and the plaintiff failed.

- Classroom Cases

Next, let's look at what can happen in the classroom ...

- *State of New South Wales –v- Stevens* [2003] NSWCA 298 (15 October 2003)

This was a case where the Court of Appeal had to balance the resources of the State with its obligations. In this instance, it wasn't a child that was injured, rather a government employee. The plaintiff was a qualified speech pathologist experienced in working with autistic children. She was employed by DOCS to work with a Primary School Support Unit for children with moderate to severe intellectual disability. One of these students was severely disabled and had a habit of hair pulling. This was to get attention or when he didn't know what to do or even as a greeting. On two occasions this child attacked the plaintiff by violently pulling her hair. These hair pulling incidents resulted in loss of hair, broken skin, blood and bruises.

After further incidents, the plaintiff ceased her involvement at the unit and claimed damages for various injuries allegedly sustained in the attacks from this particular child.

The school clearly had a responsibility to take reasonable steps to protect the plaintiff from harm. The question in issue was what steps should have been reasonably taken? Although other bases of liability were pressed, one failing in particular relied upon by the plaintiff, was the failure to have constant 1:1 supervision for this child. There was an aide provided for a number of hours per week, but the plaintiff alleged such support should have been constant. This led the court to consider if this indeed would have been reasonable and to do so, the issue was addressed of the availability of resources to the defendant for this sort of situation. In assessing the reasonably required level of support, the court balanced the needs and risk of harm posed by this child with the other calls on available funds and resources.

In the event, evidence was accepted that such a use of resources ie. funding a constant 1:1 supervision would not have been an efficient use of resources that were otherwise able to be better utilised in relation to this child. Overall, the defendant had acted with appropriate care.

This decision is important as the Court gave due weight to the defendant's problem of having to resource all its obligations of supervising children and in



particular, children with special needs such as the child who caused injury to the plaintiff.

- *Parkin –v- Australian Capital Territory Schools Authority* [2005] ACTSC 3 (28 January 2005)

A 13 year old boy was making a pine pencil case during an industrial design class. The class was being supervised by a substitute teacher. The boy started to hand plane his piece of wood to reduce it to the required thickness but then used a belt sanding machine. This was an inappropriate use of the sander in respect of which the usual wood working teacher had issued warnings. The plaintiff pressed the wood against the belt but on his second attempt at using the machine, his right hand was thrust across the belt which was new and very abrasive. He received a degloving injury and required the insertion of wires into his fingers. He was unable to play sport for the next year and still had difficulty holding a bat two years later. He suffered permanent scarring and appeared to be developing arthritis in his fingers.

The Court stressed the balancing of needs required to deal with risks in the school environment. It also noted that there would be a much higher degree of care required in cases involving industrial design equipment as opposed to playground cases. The school was found liable because the risk was foreseen by the previous woodwork teacher and it was felt that the school did not discharge its duty when it provided a substitute teacher with little relevant experience to supervise the class.

- Before School Cases

One of the questions posed earlier was whether there was a Duty of Care to school children before or after school hours.

- *Geyer –v- Downs* (1977) 138 CLR 91

A High School principal permitted student use of the grounds before school and before teachers were on duty. The plaintiff was severely injured when struck by a baseball bat during unsupervised play before school hours. It was held that there was a duty to take reasonable steps to secure the safety of pupils during that part of their school day as well as during classes.

This is to be compared with:

- *Strath –v- State of New South Wales* [1999] NSWCS 391

In 1999 it was held that the school was not liable when a child was injured in a fall from playground equipment in school grounds during non school hours. In that case there was evidence that the school grounds were used regularly for play by school children out of school hours but access to the grounds required the climbing of a brick fence and steps were taken to prevent the children playing in



this fashion such as the giving of an oral instruction to particular students (including the plaintiff) not to play within the school grounds at such time. There was a verdict for the defendant.

The issue in these two cases was whether reasonable steps had been taken to prevent the occurrence of a foreseeable injury. In the first case they had not and in the second, they had, even though those steps were not successful.

- Sport Cases

School sports is another fertile area of litigation.

- *Catholic Diocese of Sydney –v- Kondrajian* [2001] NSWCA 308 (24 September 2001)

This was a particularly tragic matter in which the supervising teacher had allowed 8 year olds to play mini-hockey or “minkey” with older boys who were aged 11. Young Kondrajian, one of the 11 year olds was running past an 8 year old who was looking the other way and not concentrating but who just happened to lift his stick to shoulder height as Kondrajian ran past. The hockey stick crushed the 11 year old’s throat leading to his death.

It was held in an action brought by the parents for nervous shock, that this event was the materialisation of an extremely remote risk which did not involve any breach of duty on the teacher’s part. The mere fact that serious injury or death may occur while children are playing a game will not automatically result in a finding that a breach of duty has occurred. The judgement emphasises that just because something happens, this doesn’t mean it was reasonably foreseeable and secondly, that there is a social utility in having school children play sport and it would be wrong for the Courts to interfere with the ability of schools to conduct such activities.

- *St Mary Star of the Sea College –v- Watt* [2001] NSWCA 280 (29 August 2001)

The plaintiff was a pupil at the College and sustained injury during a gymnastic class when she was aged 14. A number of students were performing different exercises and the plaintiff was part of a group on the vault. The students were under the supervision of a trainee teacher. The exercise required a springboard, a vaulting horse and a landing mat. The teacher had to supervise the students using the vault and act as a ‘spotter’ whereby he was to stand by the landing mat when the student performed a jump and render assistance if need be. The plaintiff’s jump went amiss and she landed on her back. It was alleged the trainee teacher had moved away and was not in position to properly act as ‘spotter’. Nonetheless, the plaintiff had waited until she thought she had his attention before commencing her vault. The teacher’s evidence was that he was standing in the correct position and that the plaintiff, having straddled the horse, landed on the mat on her feet but with her weight forward and subsequently went into a forward roll. He did not restrain the student because he thought it was a safe way to land.



The trial judge found that vaulting carried with it a foreseeable risk of hazards which could only be minimised by having an alert spotter. His Honour preferred the plaintiff's evidence and found that the teacher did not provide the necessary support to reduce the risk of injury. The judge concluded that had the teacher been in the correct position, on the balance of probabilities, the injury would not have occurred.

On appeal, the verdict in favour of the plaintiff was upheld.

- School Excursions

- *Gugiatti –v- Servite College Inc* [2004] WASCA 5 (17 November 2004)

The plaintiff, a sixteen year old student, was injured while on a school excursion. At the time of his accident the plaintiff attempted to jump a creek approximately 2.5 metres wide but he took a running start and landed awkwardly, resulting in significant injury. The issue of duty was widely discussed by the three appellate judges. It was noted that the injury to the student occurred outside ordinary school hours and also outside the school grounds, but it was found that the student was still in the care of the school and the duty of care which was owed to him continued unabated. Nonetheless, the Court determined that the defendant was not negligent. While supervision was required, the plaintiff was a 16 year old boy and such boys were not to be treated as infants. It was not reasonable to expect a teacher to stop a 16 year old boy jumping across a narrow section of creek.

- Travel

- *Catholic Diocese of Bathurst –v- Koffman* (1996) ATR 81

A very contentious issue is the extent to which a duty can be owed after your charges have packed up for the day and started making their way home. In this case, the plaintiff was a 12 year old student at a Catholic primary school who caught the bus home at a bus stop in front of the local public high school. There was evidently propensity for mischief in this arrangement. After climbing up and down trees and exchanging words with some high school students, he was pelted with sticks and rocks until struck in the left eye. The bus stop was 300m to 400m from the primary school. The Court of Appeal held the Catholic school was in breach of its duty to the boy when he was injured. When school authorities are aware of particular dangers, including the propensity for mischief between children of different schools, the duty of care extends to require the school to take precautions or to warn parents. Appropriate supervision would have prevented the injury. It probably didn't help that one of the primary school teachers was on hand but took no action on the basis he thought he had no supervisory role once school ended. The court said that although it wouldn't normally be the case that the duty of care would extend to the bus ride home or to children walking all the way home, this would depend on circumstances. It is to be noted that the State of New



South Wales was the other defendant due to the failure of the High School to supervise its children at the bus stop. The High School was found liable at first instance but did not appeal.

- *Graham –v- State of New South Wales* (2001) 34 MUR 198

In contrast, we have this case where the plaintiff suffered severe injuries when she was crossing a road and was hit by a motor vehicle. She was then aged twelve and was returning home from a school she had only attended for about three weeks. She was then in Year Seven. She was a disadvantaged child, suffering from impaired eyesight and bad balance, the latter condition being possibly related to the former.

Her mother lived about one kilometre from the school. To walk to and from school involved crossing a heavily trafficked street between her home and the school. Normally on the way to school, her mother would walk her across this street and allow her to walk the rest of the way unaccompanied. On the way home, her mother would meet her at the busy street, cross it with her and so on, home.

On the day of the accident her mother was apparently running late, or perhaps the plaintiff arrived early, and she tried to cross the road without assistance. It was at this point that the accident occurred. She sued over the school's failure to transport her either by bus or by taxi to her home. The school knew of her afflictions and knew that it was dangerous for her to walk across the busy street. It knew that at her previous schools she had travelled home on a school bus. It knew that her mother had requested transport to be made available for her on the way home, but transport was not available from this school and the mother had been notified accordingly.

The plaintiff failed, the court said, because the common law imposes no prima facie duty to prevent another person from loss or injury. There are exceptions to that principle but none of them were relevant here. The school had a duty to take reasonable steps to protect the child whilst she was at school, and this it apparently did. There may also have been a duty to inform her parents that neither taxi nor bus was running, and this it certainly did. There was no duty to go further to take precautions to escort a pupil like the plaintiff to her home. Except in exceptional circumstances the master/pupil relationship ceases to exist at the school boundary.

What lessons can be drawn from these cases?

First, that the plaintiff does not always win, in fact, far from it.

More importantly, that the Duty of Care to children in the classroom, in the playground, on the sports field or on an excursion will be satisfied by a level of supervision that does not require unbroken surveillance and the capacity for immediate intervention, as long as it is carried out systematically, competently and in a manner which is appropriate to the circumstances. Hence, a Court will take into account factors such as the age of the children,



the activity they are engaged upon, and whether the activity is the subject of school rules that have been adequately communicated to the children beforehand. If children are engaged in a special task that calls for a specialised degree of skill on the part of those supervising the activity, such as woodworking or gymnastics the court will require the supervision to be at an appropriate level of competence. There will also be some balancing of the risk of harm to the child with the value of the activity and the resources available to a defendant in managing the risk of injury.

A school may owe a duty of care to children out of hours or on the way home but generally this will not be the case. Creation of the duty will depend on special circumstances such as knowledge of a particular risk that was not passed on to parents and students or failure to take easily arranged action which would have ameliorated the risk.

So, this being the state of the common law, what changes have been wrought by the *Civil Liability Act*?

THE CIVIL LIABILITY ACT – IMPACT ON THE LAW OF NEGLIGENCE.

Part 1A of the Act contains those provisions which modify or redefine concepts of “negligence”. To finally put the “slot-machine” test on foreseeability to rest a checklist was introduced that must be satisfied before a Defendant can be negligent for failing to take precautions against a risk of harm.

Pursuant to Section 5B(1) such a failure won’t be negligence unless:

- (a) the risk was foreseeable;
- (b) the risk was not insignificant, and
- (c) in the circumstances, a reasonable person would have taken precautions.

Sub-section (2) sets out a list of factors a court is to consider in determining whether a reasonable person in the same circumstances would have taken precautions against a risk of harm as follows:

- (a) the probability that the harm would occur if care were not taken;
- (b) the likely seriousness of the harm;
- (c) the burden of taking precautions to avoid the risk of harm; and
- (d) the social utility of the activity that creates the risk of harm.

Some additional principles were introduced by Section 5C for the Courts to take into account when deciding negligence, and some are quite helpful to Defendants. For instance, if a Defendant takes action after an accident to remedy the risk, that is not to be taken as an admission or as giving rise to any liability. So, the barn door can be closed after the horse has bolted without admitting that it should have been shut in the first place.

Other provisions deal with matters of causation and the onus of proof. [7]

Section 5O introduces a standard of care for professionals such that a professional does not incur a liability in negligence from acting in a manner that was widely accepted in Australia



by peer professional opinion as competent professional practice. This re-introduces a common law test from an English medical negligence case [8] which was previously held as not being part of the Australian common law [9]. It is unlikely that this provision will impact greatly on actions brought against educational institutions as these are not generally framed as “professional negligence” actions. In any event, although teachers will no doubt be accepted as being professionals in the legal sense, at a practical level, peer evidence of acceptable practice is not likely to be accepted by the Courts if that practice fails to meet the standard of care demanded by the courts, notwithstanding the wording of the relevant section.

Although the above provisions will no doubt keep academics and judges occupied for years to come, there doesn't seem to be much in them that is so novel that it hasn't already been covered to some extent by the existing case law.

Therefore, the practical impact on educational institutions in terms of when they will be found to have breached a Duty of Care, is likely to be minimal. If anything, it will become a little harder for Plaintiffs in an ordinary personal injuries case to establish liability. Accordingly, there should be no need to change procedures for the supervision of children, as long as such supervision is in accordance with the principles established by the cases.

PERSONAL RESPONSIBILITY

The other aspect of the Act this paper will address in some detail is that of personal responsibility.

The Courts have also addressed this issue in recent times, holding in various cases that Plaintiffs cannot expect to recover damages when they suffer injury by virtue of their own failure to make due allowance for obvious risks.

For instance, in the High Court case of *Ghantous-v-Hawkesbury City Council*, [2001] HCA 29, the Plaintiff was a pedestrian who tripped and fell whilst walking along a concrete footpath. The verge was some 50mm lower than the path, and the Plaintiff had stepped to one side to allow another person to pass.

The High Court said there was no negligence as the footpath was not unsafe for a person exercising ordinary care.

Similarly, in *University of Wollongong v Mitchell* [2003] NSWCA 94, Mr Justice Meagher of the NSW Court of Appeal in 2003 said, “It must be the law that there is no need to warn against any danger whose existence is glaringly obvious.” That was a case where the Plaintiff attempted to resume her seat in a theatre without noticing that it had retracted upon her standing up. This was held to be such a glaringly obvious danger and she lost.

The direction taken by Courts at this time can be summed up by Chief Justice Spigelman's comment in *Waverley Municipal Council-v-Swain* [2003] NSWCA 61, that it, “... now appears possible to identify a change in the law in the other direction, i.e. greater weight has been given to the proposition that people will take reasonable care for their own safety.”



Nonetheless, the *Civil Liability Act* seeks to codify this area, making it clear that no-one is under any duty to warn anyone else of an obvious risk.

To the extent that there is any divergence here from the Common Law, this may be of some value to TAFEs, in relation to adult students who must use potentially dangerous chemicals, tools, plant or equipment with which they are already familiar.

However, there is an element of subjectivity present in the test in that a risk will be deemed as obvious if it would have been obvious to a reasonable person in the position of the person suffering the harm. In the case of a child, you would have to assess whether the risk of injury would have been obvious to the theoretical reasonable child who is of the same age and mental development.

So, in the recent Court of Appeal case of *Doubleday -v- Kelly* [2005] NSWCA 151, we find that a 7 year old who attempted to use a trampoline whilst wearing roller skates could recover damages for her injuries because the supervising adult should have warned her of the risk of injury – this apparently not being obvious to the reasonable 7 year old.

Similarly, a 14 year old diving off the Forster/Tuncurry Bridge who became a paraplegic was held not to have incurred a risk that would have been obvious to the reasonable 14 year old boy. Consequently, the RTA was liable for failing to erect an adequate warning sign concerning the dangers of diving off the bridge. [10]

A defendant is only excused from the duty to warn of an obvious risk but could still be liable if the harm to the plaintiff was suffered as a result of a negligent act or omission other than the failure to warn. This is to be contrasted with an injury occurring from the materialisation of an inherent risk. In that case the defendant won't have liability for the actual materialisation of the risk, but can still be liable for failing to warn of it. [11]

We then move on to a particularly interesting part of the Act - Division 5 of Part 1A which deals with Recreational Activities.

This part of the Act is quite drastic in the fashion in which it restricts recoveries by Plaintiffs who receive injuries in Recreational Activities.

The case of *Swain -v- Waverley Municipal Council* has already been mentioned. This was a case from May 2002 that became quite "iconic" in the words of one legal commentator. The Plaintiff, a body surfer, successfully sued the Council at first instance before a jury after becoming a quadriplegic when diving into the surf. The alleged negligence was a failure to warn by the Council of shifting sandbars under the water between the flags.

The case generated a great deal of publicity at the time and was highlighted in the media as an example of everything that was wrong with the common law. It has been suggested that this case and others like it provided the impetus for Division 5. [12]

The rule now is that a Defendant will not be liable in negligence for harm suffered by a Plaintiff as a result of the materialisation of an obvious risk of a dangerous recreational activity. [13]



A Defendant will also not be liable in negligence for harm suffered by a Plaintiff as a result of engaging in any Recreational Activity, if the risk which materialised causing the injury was the subject of a Risk Warning given by or on behalf of the Defendant to the Plaintiff. [14]

There are various exceptions but nonetheless the provision is very broad and far reaching.

What is the impact of this on schools?

It really is too early to tell, but some issues to be aware of are as follows;

- The risk warning is of no effect if the Plaintiff was required to engage in the recreational activity by the Defendant. This is likely to cover most school sports, PE, gym activities and excursions.
- The Act defines “Incapable Persons” as being those who, because of their young age or a disability, lack the capacity to understand the Risk of Warning.

We are not told what constitutes a “young age”. No doubt most of any school population would be deemed as Incapable but this may not be the case for say, 17 and 18 year olds. Whether a student is regarded by the court as “Incapable” is likely to depend on both the nature of the risk and how the Risk Warning was given.

A Risk Warning cannot be given to an Incapable person directly, but it can be given to someone who is accompanying the Incapable person or, to a parent (whether accompanying or not) and then the Incapable Person is taken as having been warned.

The Risk Warning can be given orally or in writing and only has to be a general warning of risk as long as it encompasses the particular risk concerned.

This is an outline only on this topic which is likely to be a problematic area in the future.

However, readers should be aware that where a school organises a recreational activity with a third party supplier such as an ice-skating rink, indoor rock climbing venue or the local municipal pool, that supplier is highly likely to issue Risk warnings to either the students (although some or all of them may be Incapable) or to the accompanying teaching staff. Such risks may take the form of signage, written material or oral warnings.

What this may mean in the event of harm being suffered by a student, is that the recreational service provider will not have owed a duty of care to the student, but that the school still will.

The Act also allows the recreational service provider to opt out of its usual contractual obligation to provide services with reasonable care and skill. [15]

If a contract is forwarded to a school in advance by a recreational service provider whose use is being considered, the school should review the contract to see if it does, indeed, contain such a clause. If so, the school may prefer to give its business to an alternative service provider that doesn't reserve to itself, those rights.



TAFEs are not likely to afford the same opportunities to their students as schools for recreational activities but where they do, the adult students should at least be capable of weighing up the risk of participating themselves and will in any event, be able to receive a risk warning directly.

Other Issues:

Another three aspects of the Act are dealt with in outline below:

- Apologies

Often people are afraid to apologise after an injury has occurred in case this will be taken as an admission by them of guilt or liability. Even simple expressions of regret that the accident victim has suffered harm can be stifled in this way. From the victim's perspective this failure to apologise can add insult to injury.

Under the Act, an apology can now be made and the fact that the apology was made will be inadmissible in civil proceedings as evidence of fault. This, of course, won't apply if the act leading to injury was intended to cause injury. [16]

- Volunteers

Many schools to some extent rely on volunteer helpers. They might work in the canteen, help children read in class, or assist in the supervision of sports activities or excursions.

A little nervousness about volunteers is understandable as they are not part of the system as such, and may not fully understand all the constraints imposed by the system. The personal exposure of volunteers can also be something of a concern when things go wrong.

Once again, the *Civil Liability Act* has changed the situation. As long as the volunteer is not under the influence of alcohol or drugs, or breaking the law and is working within the scope of his or her authorised activities, he or she will no longer be held personally liable for the harm suffered by a plaintiff.

Because vicarious liability doesn't extend to people organising volunteers, the school authority can't be liable for the volunteer's negligence either. In some circumstances, the School Authority will still retain a direct responsibility such as with respect to school children as the duty of care is non-delegable. However, there may be circumstances where the plaintiff is not a student and the injury occurs solely because of the negligent act or omission of the volunteer. In such circumstances the plaintiff may be left without a remedy – even where the volunteer would have had personal liability insurance that would have responded to the claim! [17]

- Public Authorities



The Act provides some additional protection to public authorities which would include the operations of the Department of Education and TAFE Commission.

Under s42 of the Act the Court, in addition to the balancing process it must undergo under Part 1A of the Act, has to observe certain principles in determining not only whether a public authority has breached the duty of care, but whether there exists a duty of care at all. The court must take into account the financial resources of the authority compared with its obligations. Significantly, the allocation of those resources by the Authority are not to be challenged.

It is difficult to know at this stage to what extent actions against the State of New South Wales for negligence by its school authorities might be defeated by a pro-active defence relying on these principles.

It may result in some plaintiff's claims being unsuccessful but in other cases it may not be considered relevant. For instance, a plaintiff school student who is assaulted in a playground at lunchtime and claims damages for failure by the school to adequately fence its grounds to keep out hostile gangs of youths could be faced with an argument that the school had no duty to fence the grounds as the Department's resources were insufficient to fence all schools.

If the school in question was the only one in the state which had a history of playground invasion then that argument would not carry much weight as clearly the Department would have had the resources to fence that school.

As one commentator and barrister in the field has said, "what is clear is that the length of any trial involving a public authority will be and has been in my experience, lengthened considerably by the necessity to call so-called resource allocation evidence". [18]

- Conclusion

This paper being the basis of a one hour presentation, does not canvass all the salient features of the *Civil Liability Act*. The focus has been on those aspects which have the most potential for impacting on schools, TAFEs and AMES.

The teaching profession is constantly under pressure to adjust and adapt to new demands whether they arise from new curriculum's, educational theories or Departmental policies. It is only natural that with any new piece of legislation there will be a concern as to how this will impact on the way teachers and Principals must go about their jobs.

I hope I have shown that whilst the *Civil Liability Act* may provide challenges to lawyers, academics, plaintiffs and probably judges it should not actually have a significant impact on the way schools and TAFEs go about their business.



End Notes:

1. Hansard, NSWCA, 4 June 2002, p2398.
2. Spencer D *The Vanishing Trial Phenomenon* Law Society Journal, September 2005 p58.
3. Civic Liability Act, Section 5.
4. Civil Liability Act, Section 38.
5. *Commonwealth –v- Introvigne* (1981-1982) 150 CLR 258.
6. (1979) 146 CLR 40 of 97. See also discussion by Mahoney JA in *Phillis –v- Daly* (1988) 15 NSWLR 5 at 72C.
7. Civil Liability Act, section 58, 5E.
8. *Bolam –v- Friern Hospital Management Committee* [1951] 1WLR 582.
9. *Rogers –v- Whitaker* [1992] 80 CLR 292.
10. *Dederer –v- Roads & Traffic Authority* [2005] NSWSC 185.
11. Civil Liability Act, see sections 5F, 5G, 5H, 5I.
12. Dietrich J. *Liability for Personal Injuries Arising From Recreational Services*: Torts Law Journal 2003.
13. Civil Liability Act, section 5L.
14. Civil Liability Act, section 5M.
15. Civil Liability Act, section 5N.
16. Civil Liability Act, sections 67, 68 and 69.
17. Civil Liability Act, sections 59 to 66.
18. Fordham, M. *The Civil Liability Act 2000 – A Practical Update*, 22 June 2005 @ 51.

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In preparing this presentation I have been greatly assisted by the papers below, especially those of Campbell Bridge SC and Michael Fordham from which I have borrowed freely with their kind permission.



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2. Fordham M. – *The Civil Liability Act 2002 – A Practical Update*, 22 June 2005.
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4. Harrison H. – *The Civil Liability Act* State Legal Conference Papers, 25 March 2003.
5. Harrison H. – *Civil Liability Act Update*, State Legal Conference Papers, 27 August 2004.
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9. Dietrich J. – *Duty of Care Under the ‘Civil Liability Acts’* (2005) 13 Torts Law Journal.
10. Dietrich J. – *Liability for Personal Injuries Arising from Recreational Services* (2003) 11 Torts Law Journal.
11. Channon T. – *Developments in Personal Injury Law in the NSW Court of Appeal and High Court* 2005.