

AL HIKMA COLLEGE



DUTY OF CARE POLICY

Revised and updated March 2023

This policy is pursuant to the requirements set out in section 3.6.2 of the NESA Registered and Accredited Individual Non-Government Schools (NSW) Manual

Rationale

This document is intended for the school's Principal, the executive and teaching staff who are involved in managing the duty of care and risk assessment for particular activities that students will potentially participate in with the school. The document summarises the issues in managing the duty of care in supervision, sports, and excursions. The information also reviews the duty of a school where bullying may be a concern as well as preventative steps that schools can take to mitigate risks.

Duty of care

Information Sheet: What Duty of Care Does a School Owe its Students?

- In Australia, a person owes a duty of care to others to not cause injury as a result of their negligent act or omission.
- The nature of the duty as it applies in New South Wales has now been set out in legislation. The *Civil Liability Act 2002* ('**Civil Liability Act**') applies in relation to any claim for damages for personal injury, death, damage to property or economic loss resulting from negligence. The Civil Liability Act provides that a person 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
 - in the circumstances, a reasonable person in the same position would have taken those precautions
- However, the law also imposes a special duty on certain categories of relationships, giving rise to more onerous duties. The relationship between a school and its pupils is one such relationship. A school has a duty to **ensure** that reasonable steps are taken to prevent harm to students. This is a positive duty - that is, it requires that positive steps be taken
- The Courts have said '*the reason underlying the imposition of the duty would appear to be the need of a child of immature age for protection against the conduct of others, or indeed of himself, which may cause him injury coupled with the fact that during school hours the child is beyond the control and protection of his parents and is placed under the control of the school master who is in the position to exercise authority over him and afford him, in the exercise of reasonable care, protection from injury*'

- This does not mean that the school is under an obligation to **ensure** that its pupils never suffer injury, but that the school **must take reasonable steps** to prevent the children being harmed
- The duty of care owed by a school to its students has been held by the courts to be a non-delegable duty. This means that the school cannot discharge the duty simply by putting a responsible third party, such as a teacher or a third-party provider, in charge. A school always has a responsibility to ensure that reasonable steps are taken for the safety of its students. This does not, however, mean that the school need always take these steps itself. It may be sufficient for the school to satisfy itself that the appropriate steps are being taken by others
- A school will be held to be in breach of its duty of care if a student is injured and the student can show that:
 - the risk of harm was foreseeable
 - precautions could reasonably have been taken against the risk because it was '*not insignificant*' (for example, it was not farfetched or fanciful)
 - causation - these precautions more likely than not would have prevented the harm (that is, the failure to take precautions caused the harm)
 - it is **reasonable** to require the school to take the precautions taking into account:
 - i. the probability that the harm would occur
 - ii. the burden of taking the precautions
 - iii. the seriousness of the harm
 - iv. the burden of taking precautions to prevent other, similar, harm
- Australian law is a mix of common law (the judge-made law which is found in court decisions and is a product which has evolved historically) and legislation (the Acts of Parliaments). In general, legislation takes precedence, so if there is a clash or inconsistency between the two, legislation will prevail. However, common law exists as a kind of back-up, and fills in the inevitable gaps left by legislation. Common law also records the interpretation of legislation
- This policy sets out some of the elements of a school's duty of care to its students taken from the case law. At the end of the information sheet are some case examples of the principles

What is a Foreseeable Risk?

- A foreseeable risk is one which a reasonable person in the position of the defendant would have foreseen constituted a real risk to the plaintiff or to a limited class of persons of which the plaintiff was a member (for example, a particular student, or a group of students)
- A school will not be liable unless a plaintiff can establish that the school ought to have foreseen that the negligent action of the school might endanger the plaintiff
- In the context of schools, since the *Civil Liability Act* was enacted, the Courts have held that the following risks were reasonably foreseeable:
 - the risk of injury to a student climbing a 3.8-metre-high obstacle course with wet clothing and wet shoes
 - the risk of injury to a student playing touch football on a school oval
 - the risk of injury to students left unsupervised
 - the risk of injury as a result of bullying
 - the risk of injury to a student playing on a flying fox
- However, it does not mean that the risks will always be 'reasonably foreseeable'. Whether they are depends on a careful analysis of the facts of each case. That said, these examples are a useful guide
- If a school is aware that a student has a condition that may make that student particularly vulnerable, it should alert staff to that condition and establish procedures to deal with it. Refer to the Medical Treatment for Students Policy which contains information about students with anaphylaxis

What is Causation?

- In order to succeed against a school, a plaintiff must show it was more likely than not that the negligent acts of the school caused the injury. The plaintiff must be able to point to steps that the school could reasonably have taken that would have prevented the injury
- The Supreme Court of NSW stated in ***Cox v State of New South Wales*** (2007) that the test of causation is directed at whether the negligence was a necessary condition for the occurrence of the 'particular harm' suffered by the plaintiff. In this case the Court held that the bullying suffered by the plaintiff whilst at school caused the plaintiff's psychiatric injuries. Accordingly, the school's negligence in failing to take steps to eradicate the bullying was held to be a necessary condition of the occurrence of that harm. The Court noted that it was not essential that the negligence be the sole cause of the harm
- In ***Australian Capital Territory Schools Authority v El-Sheik*** (2000) the school was not liable for a student's injury sustained at school because the student failed to establish that the injury was caused by the school's failure to provide adequate supervision. The student was kicked in a short 'play fight' at lunch time and suffered severe injuries because of a congenital syndrome which made him more prone to bleeding. The school did not know about the congenital syndrome. The court held that the congenital syndrome did not raise the standard of care expected of the school because a school authority must take reasonable care having regard to the information that it actually or constructively knows. There had been nothing unusual about this particular playground incident, and the plaintiff had failed to prove that the incident would have been avoided if there had been greater supervision
- In ***Roman Catholic Church v Hadba*** (2005) the plaintiff was injured when two students grabbed her legs whilst she was playing on a flying fox. The majority of the High Court held that the plaintiff failed to establish that a different system of supervision would have prevented the plaintiff's injuries and accordingly the plaintiff had not satisfied the test of causation

What Other Factors Should be Taken into Account in Determining Whether it is Reasonable to Take Steps to Avoid a Risk?

- In addition to the matters listed in **paragraph 7(d)** above, in the case of schools, the Court, in determining whether the steps taken by a school to avoid a risk were reasonable:
 - must take into account the burden not only of avoiding a particular risk of harm, but the burden, of taking precautions to avoid a similar risk of harm for which the person may be responsible
 - must take into account the fact that the steps a school is able to take are limited by the financial and other resources that are reasonably available to the school for the purposes of exercising its functions. The steps required to be taken by a school are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate)
 - must have regard to evidence from the school that it complied with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions

What is the Scope of the Duty of Care?

- Whether or not a school has discharged its duty of care will depend on the particular circumstances in each case. This means that it is difficult to set out precisely the scope of a duty of care or how a school may discharge its duty of care. However, some guidance can be provided as to the scope of a school's duty of care. The information provided is by no means exhaustive
- A school will generally have a duty of care in relation to its students in respect of activities engaged by students at school or activities engaged in by students outside school, but which are facilitated by the school

Supervision

- While students are on school premises, school authorities and teachers owe students a duty of care of general supervision concerning their physical safety
- General principles in relation to supervision are as follows:
 - constant supervision is required
 - a greater degree of supervision is required where there is actual or constructive knowledge of a dangerous situation
 - the appropriate level of supervision depends on the activities in which students are involved. For example, greater supervision is required in areas of a playground with dangerous playing equipment such as a flying fox, than in other areas of a playground
 - inexperienced relief teachers should not be permitted to supervise the use of dangerous equipment at the school (e.g. science and wood working equipment)
 - the mere fact of an accident occurring at school does not mean the school authority is liable. A school is not liable for a reasonably foreseeable injury sustained by a pupil under its supervision where that injury is caused by unfortunate circumstances that reasonable precautions would not have prevented. Thus, for example, schools have not been held liable where:
 - i. during a sport class a student unexpectedly, and contrary to safety instructions given by the teacher, swung his hockey stick and struck another boy in the throat, as the school had provided adequate instructions and supervision in the circumstances
 - ii. a student was injured while running in the playground, even though the supervising teacher had not observed him running
 - a school is not required to force a pupil to accept assistance in circumstances where a pupil is mature enough to make decisions about his capabilities
 - schools must, in setting out supervision arrangements, factor in the likelihood that large numbers of children, if left to their own devices, will be engaged in risky activities

Sports

- Sports are an important part of school life but can lead to an increased risk of injury. Schools should be vigilant to ensure that sporting activities are properly supervised and, as far as possible, supervised by appropriately qualified teachers
- Just as in the playground, dangerous activities should be prevented and school authorities should ensure students are aware of and follow the rules
- Schools must also take account of, and distribute, information that could prevent injuries
- It would be prudent for a school to take account of what it knows about students before allowing them to play sport. If the school is concerned that a student is not fit to participate in a particular activity, the school could require the student to obtain a medical clearance from a doctor or physiotherapist before participating in the sport
- A school and its teachers have a duty to reasonably ensure that its fields and sporting equipment pose no danger to its students. A school also has a duty to reasonably ensure that any fields upon which its students play (whether owned by the school or by some other authority) are fit and safe for that purpose
- If pupils play inter-school competitions, then the issue of shared responsibility may arise. Just as a school cannot delegate its duty to its teachers, it cannot abdicate that duty to another school.
- A school also owes a duty of care to the students of another school playing upon its premises. A school must reasonably ensure its fields are safe for all who play on them
- A school should give a risk warning under the *Civil Liability Act* in relation to sporting activities in which students participate. This should reduce the school's liability for physical harm and/or loss to a student arising from the materialisation of an obvious risk associated with the sporting activity

Before and After the School Bell and Travelling to and from School

- The duty of care owed by school authorities and staff extends to the hours that the school is open for attendance
- A duty of care may arise before the morning bell has rung or before the first teacher is on morning playground duty, if children have been-allowed to congregate on the school playground with the knowledge of the principal. A school must therefore carefully consider the extent to which supervision is required before and after school in order to discharge its duty of care
- The general rule is that once children have left the school premises; no duty of care exists on the part of the school authority or its teachers **unless it has been voluntarily assumed**
- A school must reasonably provide adequate supervision on transport to and from school when that transport is provided by the school
- Where students travel on public transport, whether the school owes a duty of care depends on the circumstance and the knowledge of the school. If the school has knowledge of a particular risk to students, it may be obligated to take reasonable steps to prevent harm to those students
- For example, if the school were aware that:
 - a particular bus driver, who transported its children, was a dangerous driver
 - that on a particular journey, older children habitually and violently bullied younger children
 - of a busy and dangerous road outside the school
 - that pupils have been habitually accosted at a certain place along the route to school, the duty may well extend so far as to require the school to take reasonable preventative steps or to warn parents
- Any child who travels to and from school by public transport, must have a waiver signed by the parents

Excursions

- Schools owe students on excursion a duty of care. As a school's duty of care is non-delegable, a school does not discharge its duty of care by placing students in the control of an excursion provider
- However, this does not mean that a school can never permit its students to participate in excursions operated by others. Rather, a school must be vigilant to ensure that excursion providers with whom it deals are competent and safe
- If the school or teacher becomes aware of a risk to its students in the course of the excursion, the school or teacher should take reasonable steps to eliminate or minimise that risk
- In ***Brown v Nelson*** (1971) the Court held that a school does not have a duty to inspect all of the equipment used in the course of an excursion itself to ensure that it is safe. It is sufficient that it appears to be safe. However, more recently in ***De Beer v The State of New South Wales and Anor*** (2009) when considering liability for an injury to a student caused by a faulty power board while on a camp the Court:
 - held that the school owed the student a non-delegable duty of care for his safety while at the camp
 - that Outdoor Education Australia Pty Ltd, who conducted the camp, had liability for the defective power board which it supplied but noted that it was properly accepted by the State that, it too, had liability in respect of that faulty equipment
 - apportioned liability equally between the school and Outdoor Education Australia Pty Ltd
- The decision in De Beer does not make clear whether the school took any steps at all to satisfy itself that Outdoor Education Australia Pty Ltd properly maintained its equipment
- In most cases it will not be reasonably practicable for a school to inspect all of the equipment provided by an excursion provider, nor will school personnel have the necessary experience to do this. However, a school should make appropriate enquiries of an excursion provider to satisfy itself that equipment and machinery (including personal protective equipment) is maintained, repaired and in good working order

- In determining the extent of a school's duty of care, regard must be had to the purpose of the excursion. For example, on a leadership camp, students must be given '*room for initiative and opportunity to display commonsense and co-operation, as well as room to allow observation of their absence*' provided that there was no obvious risk of significant harm
- Risky activities need not be avoided, provided that proper precautions and safety measures are implemented

Bullying

- School bullying has been recognised as a serious problem in schools in Australia. In addition, bullying is becoming an increasingly important public policy issue, following concern about the negative effects of bullying on pupils' academic attainment and emotional well-being. The duty of a school extends to reasonably protecting a student from the reasonably foreseeable conduct of other students or strangers and from the student's own conduct
- Schools have been held liable for injuries sustained to students as a result of bullying, where the school was aware of the bullying and failed to take reasonable or adequate steps to prevent or eliminate the bullying. For example, in ***Cox v State of NSW*** (2007) the plaintiff commenced proceedings against his primary school for injuries allegedly suffered as a result of bullying when he was 6 and 7 years of age (1994 and 1995). The plaintiff alleged that he was subject to harassment and bullying by an older student (TH) and the school authorities took no **or inadequate steps to prevent** the harassment/bullying. The Court stated that the bullying was not an isolated incident, which occurred unexpectedly, and which the school could not reasonably be expected to have foreseen. The Court held that the conduct of TH was not only foreseeable, but the school had actual and repeated notice of the bullying. As a consequence, the Court held that it was necessary that the school take greater than normal steps to eliminate the bullying in this case and held that the school breached its duty of care to the plaintiff. As the problem of bullying is now well recognised, it is reasonable to expect all schools to:
 - have policies and procedures in place to deal with bullying
 - take all reasonable steps to ensure that these policies are put into practice

- Without such policies and procedures, it is more likely that the school will be found to have failed in its duty of care to a student who suffers compensable harm as a result of bullying
- Even if such policies and procedures are in place, a school may be found to have breached its duty of care if these policies and practices are not implemented, understood and carried out by students and staff. A school should, therefore, also maintain evidence of the steps taken in implementing and enforcing such policies and procedures
- Liability will only attach to a school where the student can show that, on the balance of probabilities, the steps proposed by the student would have been effective in preventing or reducing the bullying

Injuries to Teachers

- A school owes a duty of care to an employed member of professional staff including to protect them from the dangerous behaviour of students. An employer's duty to its employees, like a school authority's duty to its students, is non-delegable

Injuries to Third Parties

- A school owes a duty of care to third parties in and around the school grounds or other areas where school activities take place to take reasonable care to ensure that third parties do not sustain harm

Obvious or Inherent Risks

- The provisions of the Civil Liability Act mean that:
 - a school does not owe a duty of care to warn another person of an obvious risk (being a risk that in the circumstances would have been obvious to a reasonable person in the position of the injured person even if it has a low probability of occurring) unless a person asks for information about the risk or a law otherwise requires it
 - a school is not liable for harm suffered as a result of the materialisation of an 'inherent risk' (being a risk that cannot be avoided by the exercise of reasonable care and skill)
- It does not appear that the NSW Courts have considered what constitutes an obvious or inherent risk within the context of schools

- In *Martin v The Trustees of the Roman Catholic Church of the Archdiocese of Sydney* (2006) the plaintiff was injured when she fell from a 3.8-metre-high structure on a school excursion. The NSW Court of Appeal held that the school was negligent as it failed to respond to the increased risk of the activity. The Court noted, however, that the defendant did not argue that there was the materialisation of an obvious risk. That the Court noted the failure to argue this point suggests that it may have been open to the argument that an injury sustained in the course of participating in an activity such as this, could be considered to be the materialisation of an obvious risk

Resource Allocation

- A school can breach its duty of care by failing to allocate resources to, for example, the engagement of sufficient staff, training and maintenance of equipment
- The following can be a breach of the duty of care:
 - failure to engage sufficient staff to safely conduct a school
 - failure to send sufficient teachers on a school excursion
 - failure to devise a safe system of playground supervision
 - failure to properly train staff
 - failure to purchase and maintain safe playground equipment

Recreational Activities and Risk Warnings

- A school will not be liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the person. This principle applies whether or not the person was aware of the risk. A '*dangerous recreational activity*' means a recreational activity that involves a significant risk of physical harm
- A school does not owe a duty of care to a student or other person who engages in a recreational activity to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the student or other person
- Risk warnings:
 - need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk). The Courts have held that the warning must include the risk of physical harm and/or loss and damage but it is still not clear whether the specific known risks of the activity must be included in the risk warning. It is important to strike a balance between this and being too specific (as this may lead to 'gaps' in the warning given limiting its effectiveness)
 - must be given by or on behalf of the school to be effective
 - must be given to both students and parents (although the school need not prove that the students or parents actually received the warning, simply that it was delivered in a manner reasonably likely to result in people being warned of the risk before engaging in the recreational activity)
- It is important to note that the provisions of the *Civil Liability Act* make it clear that a school is not entitled to rely on a risk warning if a student was required to engage in the recreational activity by the school. Accordingly, a risk warning cannot be effective in relation to compulsory school activities

Preventative Steps

- Considering the nature of children to injure themselves and the limited benefit of parental indemnity, what can schools do to protect themselves?
- **Creating a safe environment:** Schools and teachers should be meticulous about ensuring that the school environment is a safe and danger-free one. School grounds and buildings should be properly maintained, safety-checked regularly, and be free of spillages and dangerous toys. Dangerous toys and implements should be discouraged and confiscated if found to be present. Dangerous chemicals should be clearly labelled and locked away
- **Supervision:** Children should be supervised as continually as possible. Teachers must be competent (particularly in relation to science and physical educational activities) and must provide appropriate supervision of pupils. Any safety manuals or guidelines should be carefully followed
- **Insurance:** Unfortunately, even with the best preventative measures, injuries will happen. It is not possible to prevent claims, but adequate insurance will ensure that the interests of the school, the teachers and its pupils are protected
- **Communication:** In order to take advantage of the provisions of the Civil Liability Act, schools should share information with one another as to the approaches adopted to manage the risks facing pupils. This information could assist a school in establishing that there was no breach of its professional duty
- **Risk warnings:** Where appropriate, a school should issue risk warnings in relation to recreational activities engaged in by students
- **Instruction:** Students should be clearly and regularly warned not to engage in specified behaviour which is considered to be dangerous or risky



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Monday 28th April 2023

WAIVER – PERMISSION TO WALK HOME

This form is to be completely filled out and signed by a parent of _____

PLEASE PRINT CLEARLY:

PARENT FIRST NAME: _____ LAST NAME: _____

ADDRESS: _____

POSTCODE: _____

HOME PHONE: _____ MOBILE PHONE: _____

By signing this waiver, you confirm that your children will be walking from Al Hikma College to your home address at _____. Your children will be dismissed from the College at 3:30pm. Please list below the names of your children who have your permission to walk home from school on a daily basis.

CHILD'S FIRST & LAST NAME	AGE	DATE OF BIRTH
_____	_____	_____
_____	_____	_____
_____	_____	_____

WAIVER AND RELEASE

I, the undersigned, give my consent for _____ to walk to home **without adult supervision** and will assume all liability and any injury that may result during the journey from school.

Further, by signing below:

1. I will not hold Al Hikma College or its employees liable for injury occurring to the named children in the course of the journey from school.
2. I accept full responsibility and hereby grant permission for my children to walk to home.

Signature of Parent: _____

Print Name: _____ Relationship: _____

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Monday 28th April 2023

WAIVER – PERMISSION TO CATCH PUBLIC TRANSPORT

This form is to be completely filled out and signed by a parent of _____

PLEASE PRINT CLEARLY:

PARENT FIRST NAME: _____ LAST NAME: _____

ADDRESS: _____

POSTCODE: _____

HOME PHONE: _____ MOBILE PHONE: _____

By signing this waiver, you confirm that your children will be catching public transport from Al Hikma College to your home address _____. Your children will be dismissed from the College at 3:30pm. Please list below the names of your children who have your permission to catch public transport from school on a daily basis.

CHILD'S FIRST & LAST NAME	AGE	DATE OF BIRTH
_____	_____	_____
_____	_____	_____
_____	_____	_____

WAIVER AND RELEASE

I, the undersigned, give my consent for _____ to catch public transport **without adult supervision** and will assume all liability and any injury that may result during the journey from school.

Further, by signing below:

1. I will not hold Al Hikma College or its employees liable for injury occurring to the named children in the course of the journey from school.
2. I accept full responsibility and hereby grant permission for my children to catch public transport.

Signature of Parent: _____

Print Name: _____ Relationship: _____

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