

From Liability to Student Safety

...in Education Outside the Classroom (EOTC)

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Abstract

Since the conviction of the organiser of 'Le Race 2001' in 2003, school principals and boards have been nervous about liability if things should go seriously wrong during a school event. This paper examines the place of education outside the classroom (EOTC) in formal schooling in New Zealand, explores myths and facts about liability, and then explains how liability for an EOTC incident can arise under New Zealand law. Finally the Ministry of Education's support for schools to meet their safety and educational responsibilities are outlined. Overall, the paper tracks a change in focus from liability to student safety in EOTC.

EOTC is a valuable part of New Zealand education

Most New Zealanders will remember trips that took them outside the classroom and away from school to learn. Whether it was a week long geography field trip where the mysteries of U shaped valleys and truncated spurs were revealed; a wild ride on a flying fox that boosted your confidence no end; or a walk down the river looking for taniwha¹ to appreciate local legend and inspire creative writing or art work; these kinds of learning experiences remain in your memory for a long time and provide a foundation for further learning.

The outdoors has always been a part of formal schooling in New Zealand. References to its use in an education context have been noted in documents over a century old.² Education Outside the Classroom (EOTC) is a term used in New Zealand schools to describe curriculum-based learning that extends beyond the four walls of the classroom. This ranges from a marae³ visit to a sports trip, outdoor education camp or a rocky shore field trip.⁴

¹ Guardians of the area.

² Abbott, 1990.

³ The marae is the centre of Maori tribal activity, and refers generally to the area of land surrounding the main meeting house (Wharehau).

⁴ Ministry of Education, 2002.

EOTC is interwoven into the New Zealand curriculum. New Zealand Principals' Federation president Kelvin Squire says '*EOTC provides teachers with meaningful contexts for learning*'.⁵ Primary school children can learn about transportation in the social studies curriculum by visiting the airport or railway station and riding on a horse and cart at Ferrymead. Intermediate students can learn about emergency services in the health and physical education curriculum by visiting the fire station, sitting in the driver's seat and climbing inside and over the fire engine. In science, secondary students can learn about altitudinal zonation by climbing a ridge through beech forest, taking transects and comparing their own height with the changing heights of the trees as they ascend.

Understanding is far more than the disembodied rote learning of facts. Full understanding involves the development of rich personal memories and mental representation of actual sensations in a variety of settings. Richard White⁶ calls these elements memory episodes and images. He suggests they form an essential part of deep understanding. This level of understanding provides the possibility of transfer of learning from one context to another.⁷ It is not easily acquired but White believes full immersion in a learning experience is one way of providing for such learning to occur. The natural tendency of young learners to explore a novel and stimulating environment increases the possibility that the environment outside the classroom will engage minds more fully. A skilful teacher can focus this heightened engagement around the key learning ideas, skills and attitudes to be developed.

Teachers use direct experiences to enhance and enrich curriculum delivery. Pedagogically, direct experiences that use all the senses are more than learning by doing.

'They involve a process of experience, active reflection, conceptual understanding and a re-orientation towards new ideas. Such experiences allow learners the opportunity to try out their new understandings, ideas and behaviours to create deeper understanding'.⁸

Deeper understanding helps learners develop their capabilities. Expert and informed teachers are essential mediators and guides in this process.

EOTC is often a challenging way to teach as a number of logistical considerations require attention. However, the risk of not using EOTC as part of the teaching repertoire is that students may miss critical opportunities to learn in authentic environments and communities.

⁵ West, 2004.

⁶ 1988 and 1991, *cited in* Arcus 1995.

⁷ Henton, 1996.

⁸ Law, 2003.

Shifting the focus from liability to student safety

Chronicle of events

School camps, museum trips and sports tournaments have long been a feature of school life in New Zealand. However, when the organiser of Le Race 2001 was prosecuted and fined \$10,000.00 after a cyclist was killed, event organisers across the country shuddered. Would they also be held liable if a similar incident occurred in their event?

The conviction of the organiser of Le Race 2001 coincided with the commencement, in May 2003, of the Health and Safety in Employment Amendment Act 2002 (the HSE Amendment Act). Misconceptions and confusion about accountability under the law fuelled concerns in the recreation, sport, and education sectors.

Among those concerned were the Auckland Primary Principals' Association (APPA), New Zealand Principals' Federation (NZPF) and New Zealand School Trustees' Association (NZSTA). APPA threatened to cease all EOTC in members' schools unless the Ministry of Education indemnified principals from liability. President of the APPA, Ian Fox⁹, summed up principals' fears with a statement that was widely reported in the media at the time.

'When we come to work each day we do expect to put our job on the line should we make a bad decision. We do not however expect to put our house on the line as well.'

Ministry of Education staff met with representatives from NZSTA, NZPF and APPA in November and December 2003 to discuss their concerns. Following the discussions, the Ministry has provided Frequently Asked Questions (FAQs) about liability, available at www.tki.org.nz/e/community/eotc and has held seminars for principals in eight regions to date. Principals' professional groups have said that they felt better informed about liability and more confident about running EOTC programmes as a result. President of NZSTA Chris France¹⁰ urged schools to go ahead and organise camps but manage the risks associated with them. He stressed:

'the importance of students learning through activities such as camping. It's about,
A. learning how to do these things; and
B. knowing how to manage risk yourself when you're in those places.'

NZPF president Kelvin Squire (2004) continues to stress that *'EOTC is integral to New Zealand education.'* He affirms that:

'NZPF encourages schools to continue to provide authentic experiences outside the classroom for children as long as principals

⁹ Fox, 2004.

¹⁰ France, 2004.

have ensured that they have taken all reasonable steps to identify and reduce hazards associated with such experiences. Failure to do so not only increases the risk for children but exposes the principal to possible prosecution.

In this context it is important that the principal play a lead role in ensuring that his/her school has rigorous risk analysis processes in place that will ensure the safety of all involved in Education Outside the Classroom, in particular our tamariki.¹¹

Furthermore, NZPF encourages schools to moderate their EOTC practices by sharing their procedures with each other.

We strongly encourage all schools to review their internal EOTC processes using the Ministry of Education's "Safety & EOTC - A good practice guide for New Zealand schools" as a guide.'

Many schools are reviewing safety management systems for EOTC as they follow the *Safety and EOTC* guidelines and attend professional development to support them in the process. Many principals and boards report¹² they are confident that they are taking all reasonable practicable steps to provide safe EOTC experiences for students.

In terms of the attitudes toward EOTC within the education sector, the focus is now returning to student safety and the valued benefits that EOTC brings to student learning. Unfortunately, there are some who still hold the view that the risk of liability is prohibitive, and who have taken measures to avoid the perceived liability by, for example, protecting their personal property. These shifts in the way we think about liability and safety are analogous to the shifts in the way accident compensation legislation was and is now viewed. Since the 1970s, the legislation has been driven by a 'compensation' mentality, hence its name at the time; the Accident Compensation Act 1972¹³. Today we focus on injury prevention, and the Act has been renamed to the Injury Prevention, Rehabilitation, and Compensation Act 2001.

Urban Myths

In 2003, the negative attitudes that had developed within the education sector toward EOTC, resulted in several urban myths gaining currency, some of which are still remain. In other sectors, the unbalanced fear of liability resulted in many reports of Christmas parades and other sporting events being cancelled¹⁴.

These urban myths appear to have been the result of a lack of understanding about liability in general and also partly due to incorrect reporting in the media of the Le Race Case¹⁵. The main misconceptions that surfaced are

¹¹ Children.

¹² Cooper, 2004; Corbett, 2004; Parker, 2004; Studholme, 2004.

¹³ Later repealed and replaced by the Accident Insurance Act 1988.

¹⁴ For example, refer to the OSH press release, 2003.

¹⁵ See sentencing remarks, *Abbot J, R v Anderson* (DC T021347, 29 August 2003).

summarised below. Liability is covered in the next section headed ‘How does liability arise?’

MYTH 1: The organiser of Le Race 2001 was prosecuted by OSH under the Health and Safety legislation.

A perception resulting from the Le Race case prosecution was that Occupational Safety and Health (OSH) was now targeting event organisers.

FACT 1:

The Le Race case was not one brought under the Health and Safety in Employment Act 1992 (the HSE Act), but under the Crimes Act 1961 (the Crimes Act). The Le Race 2001 organiser was prosecuted by the Police for criminal nuisance under section 145 of the Crimes Act. The jury returned a guilty verdict that the event organiser failed her duty to take reasonable care, that breach leading to the death of a participant. The breach of duty was attributable to a failure to ensure information relating to road closures was clear to participants, and a failure to consult her safety manager.

MYTH 2: The law has changed and now boards and principals can be liable under health and safety legislation.

After the Le Race case, another misconception arose that the law had changed making it more likely that boards and principals would be prosecuted for incidents during EOTC events. The negative reaction was largely caused by a general lack of understanding about the Le Race case, aggravated by an overreaction and a degree of misinformation in the media about the case. Judge Abbot in his sentencing remarks in that case noted:

‘As I have indicated, since the verdict there have been a number of wild pronouncements in the media and by sporting organisations and event organisers that the verdict on the criminal nuisance charge against [the defendant] is the death knell of the sporting culture of this country as we know it ... That is utter nonsense. Nothing could be further from the truth.’¹⁶

A second contributing factor was the coincidental timing of the HSE Amendment Act, which took effect just prior to the Le Race case decision¹⁷. This led to an assumption that the Le Race case was an interpretation of the new HSE Act changes and that the conviction of an event organiser was made under these changes.

¹⁶ See footnote 15, at para 39.

¹⁷ The HSE Amendment Act came into force on 5 May 2003.

FACT 2:

Changes were in fact made to the HSE Act¹⁸, but the general law and its application to event organisers (including those responsible for EOTC outings) had not changed.

Three amendments to the HSE Act relevant to EOTC are:

- (i) Removal of the Crown's exemption from liability under the HSE Act;¹⁹
- (ii) Introduction of liability of individual officers of Crown organisations (includes employees concerned in the management of the organisation);²⁰
- (iii) Prohibition on providing an indemnity to others for their liability to pay a fine or infringement fee under the HSE Act.²¹

These changes did not materially impact on the prospect of liability for boards and principals. This is because the law relevant to EOTC is broader than the HSE Act. Furthermore, the HSE Act has limited application outside of the employment relationship²². Since liability must be considered within the much broader context of the general law (which has not changed in recent times), amendments to the HSE Act may not have a significant effect on the liability of boards or principals.

Under general law (i.e. not HSE Act specific), the basic responsibility is to use reasonable care, particularly when undertaking a dangerous activity²³. In terms of the school/student relationship, the tort of negligence also has more application than the HSE Act, as the tort of negligence does not predetermine the type of relationship that may give rise to a duty of care, but is only limited by a connection between the particular relationship and the activity²⁴. Obviously, the teacher/student relationship gives rise to a duty of care as it is reasonably foreseeable that the actions of the teacher will have an affect on the student²⁵. These legal principles have always applied to those responsible for organising the type of activities typically undertaken in EOTC. Boards (as legal entities), principals and teachers are no different in this respect to any other member of the public, and have always been open to scrutiny under the law, which in general, requires the use of reasonable care.

¹⁸ See, Crown Organisation (Criminal Liability) Act 2002 (the 'Criminal Liability Act') and the HSE Amendment Act.

¹⁹ See section 3 of the HSE Act and section 6 of Criminal Liability Act, which came into force December 2002.

²⁰ Section 56(2) of the HSE Act. This section is discussed more fully at page 11. These amendments were the result of the Cave Creek tragedy and a groundswell of public concern over the lack of accountability in the public sector.

²¹ Section 56I of the HSE Act. Under this section, the Ministry was required to remove the indemnity it provided to boards for fines under that Act.

²² Although the HSE Act places some duties on employers in respect of others (non-employees), there are varying degrees of responsibility placed on the employer compared to the duties owed to employees. In some instances, the employer is only required to take practicable steps 'warn' others of any significant hazards under section 16(3) of the HSE Act.

²³ See sections 145, 155 and 156 of the Crimes Act 1961 ('the Crimes Act').

²⁴ The tort of negligence is discussed further in the section below "How can liability arise?"

²⁵ For further information on the 'reasonable foreseeability test', see the section below "How can liability arise?"

MYTH 3: The Le Race Case conviction increased the likelihood of principals and boards being prosecuted and convicted.

As the Le Race case was a conviction of an individual event organiser, the perception was that anyone involved in organising outdoor events would be targeted by the authorities.

FACT 3:

The Le Race case was not a ‘watershed’ case, because it is specific to its particular facts. The particular facts of that case should be kept in mind when comparing it to any other given situation. Judge Abbot stated:

*‘...There is no reason whatever to suggest that people who are involved in organising sporting or other events have any justified cause for alarm as a result of the verdict in this case ... The facts of this case speak for themselves, and the verdict which the jury reached was specific to those facts’.*²⁶

*... it is clear that the tragedy which befell [the victim] during Le Race 2001 resulted from a **series of flawed decisions** by [the defendant], in particular [the defendant’s] failure to consult her safety manager.*²⁷
(Emphasis added).

It should be noted that at the time this paper was written, an appeal had been filed by the defendant.

MYTH 4: If injury or death occurs during an event, then someone will be automatically liable.

The Ministry of Education has received feedback from principals’ and professional groups indicating a perception that injury automatically invokes liability.

FACT 4:

Liability will depend on the circumstances of each individual case. In terms of non-strict liability offences,²⁸ the law will generally not punish a person for incidents where there was no fault on their part. There may be a range of tests to be satisfied before culpability can be established. In other words, injury does not automatically lead to liability or even prosecution.

Also, the principal or board is not required to guard against all possible harm or risk. Rather, the law requires the use of reasonable care and to take all practicable steps to avoid harm occurring or to minimise the risk of harm.

²⁶ See footnote 15, at para 40.

²⁷ See footnote 15, at para 44.

²⁸ In strict liability offences, it does not matter that the person took care, or that there was no fault, but simply that harm/injury was suffered due to a dangerous activity being carried out, for example, demolition, fireworks or transporting explosive materials may warrant public interest policy reasons for categorising the activity as strict liability offences.

How can liability arise?

The previous section identified that a misunderstanding of liability in general caused some anxiety in 2003. This section provides a brief explanation of relevant law. The content of this section is necessarily brief and general in nature, as this area of law is dense and complex, and could not be covered in-depth within the scope of this paper.

This section may also serve as a basic framework to supplement other tools available for EOTC planning, such as the Ministry Guidelines for EOTC. It is also hoped that the information on liability would encourage a focus on student safety rather than liability.

In the context of EOTC, there are three main areas of law affecting liability and the likelihood of prosecution. These areas are:

- Health and Safety Legislation;
- Criminal Nuisance;²⁹ and
- The Tort of Negligence.³⁰

Other topics of relevance are:

- Other requirements - Education Act³¹;
- Other Protections for individual trustees and board staff.

It is important to emphasise that regardless of the technical legal assessment, best practise principles will always be the same, as the legal requirements set out the “minimum” standards required to be maintained under the law.

Health and Safety Legislation

The purpose of the HSE Act is to promote the prevention of harm to all persons at work and other persons in, or in the vicinity of, a place of work.³² A place of work is any place in the control of the employer where there is an employee working for reward.³³ Schools are a place of work because teachers and other staff work at the school and are employed by the board. Boards have direct duties in respect of their employees and may also owe duties of varying degrees to others who come into contact with the place of work (students, parents and possibly other visitors to the school).

The HSE Act does not set out the specific steps to be taken by employers in any given situation, but provides a framework for ongoing hazard identification and management. The duties are expressed as the “duty to take all

²⁹ Section 145 of the Crimes Act.

³⁰ The tort of negligence is a legal doctrine developed by the judiciary, and in New Zealand, the New Zealand judiciary has further developed the tort, which was first based on the English common law (case made law).

³¹ In addition to the enforceable duties in a court of law, boards have other responsibilities under the Education Act 1989, which are enforced through other statutory mechanisms.

³² Section 5 of the HSE Act.

³³ Section 2 of the HSE Act.

practicable steps”, and are placed on employers, mainly in respect of their employees. The practicable steps to be taken will depend on the specific facts of each case, such as the nature of the hazard or severity of potential harm concerned.³⁴

Whether or not an employer is ‘in control of a place of work’, may be a question of fact. There are many types of EOTC activities ranging from a walk to neighbouring sports fields, to camping trips. Usually, facilities visited by a school will be managed and operated by the owner. Where this is so, the owner of the facility may owe duties to the students, teachers and volunteers taking part in the visit, but this will not diminish the duties owed by the board and school staff. If the board has paid for the exclusive use and hire of a facility (camp/adventure area), it is more likely to be regarded as “the person in control of a place of work”, in respect of that facility. In either case, the board may still owe duties to those students in addition to the practicable steps they are required to take when planning and preparing for the activity.

The board may be required to take all practicable steps to:

- (a) ensure that no action or inaction of any employee harms the students,³⁵

For example, a practicable step may be to develop sound EOTC procedures based a national set of guidelines (such as the EOTC guidelines developed by the Ministry of Education), and to monitor whether staff have reviewed the procedures and are applying them effectively. Another practicable step may include ensuring that staff are provided with adequate training.

- (b) ensure that no hazard that exists or arises at the site harms any student who has (i) an express or implied consent, and (ii) have paid to be there.³⁶

A practicable step may be to ensure that a full and thorough outdoor safety management system is in place, which may include a Risk Analysis Management System (RAMS) or a Safety Action Plan (SAP). The parents of all students attending should be given full safety management details prior to the event. It may also be practicable to visit the site prior to conducting the SAP or RAMS to see first hand any inherent hazards that may exist, or are likely to arise at the facility. A process of good safety management may also identify that certain activities require particular competency levels to be held by those supervising the activity, or that volunteers are properly briefed on their responsibilities.

³⁴ See section 2A of the HSE Act, for a further explanation of other relevant considerations when determining what is a practicable step.

³⁵ Section 15 of the HSE Act.

³⁶ Section 16(2) of the HSE Act.

- (c) ensure that students are warned of any significant hazards.

The board may be able to warn students and parents of any significant hazards identified in the RAMS or SAP, as well as advise the students before arrival at the site about the areas that are considered out of bounds without supervision, due to hazards.

There is also an enforceable duty on employees to take practicable steps to ensure that no action or inaction of the employee harms any other person³⁷.

Whether or not a student has paid to attend the EOTC activity may be an issue. In order to be covered under section 16 (duties to others – non-employees), a person must have paid to be there.³⁸ If the EOTC activity is a compulsory part of the school's curriculum, the student cannot be said to have "paid to be there", because the board cannot require payment as a condition of participating in the outing³⁹. If the student is deemed not to have paid, the effect is that the only duty on the board (other than duty (a) above⁴⁰) is to take practicable steps to 'warn' the student of any significant hazards (duty (c) above),⁴¹. However, best practice principles should be applied in any case.

Duties owed to Volunteers

Some volunteers are also covered under the HSE Act, and for the purposes of the Act, they are treated as employees. Volunteers covered by the HSE Act are those who have the employer's consent do any activity on an ongoing and regular basis, and the activity is an integral part of the employer's business.

Volunteers assisting on EOTC are excluded from coverage, as EOTC is not 'regular or ongoing', and because volunteers are expressly excluded if they are assisting with activities for an education institution outside of the premises of the educational institution⁴².

The HSE Act also sets out non-enforceable duties for employers in respect of volunteers, who do not qualify under the criteria above. Employers are recommended to take into consideration the volunteer's safety when planning any activity.

³⁷ Section 19 of the HSE Act.

³⁸ In summary, section 16 (which is the main section in the Act dealing with an employer's responsibilities in relation to 'others') categorises the types of "other" people covered. People who have express or implied consent to be at the "place of work" must have either paid to be there or are there to inspect goods. People in the vicinity of the "place of work" are also covered, but students while at school (or at the EOTC site), are "at or on" the site, not "in the vicinity" of the site. Section 16 has been referred to by legal commentators as "artificial in its application". For a fuller discussion of section 16, see (Shona Carr and Alastair Sherrif, 2003).

³⁹ Note that the board may request a reasonable contribution towards some expenses for trips away (refer to Ministry of Education Circular 1998/25), but cannot exclude a student from attending if the activity is a compulsory part of the school curriculum on grounds that they have not paid. For example, for a trip to the beach or a class skiing trip during the holidays involving no curriculum based activity, the board has complete discretion. If the trip involved research or a follow-up report for a school assignment, the board could not exclude a student who did not pay, without risking a breach of the student's rights to free education under section 3 of the Education Act. Arguably, a reasonable contribution does not qualify as having 'paid to be there', because the making of a contribution is not determinative of the student's attendance. In actual practice, the student's parents normally pay for the cost of attendance; therefore it may be a question of fact in each case.

⁴⁰ See footnote 35 above..

⁴¹ Section 16(3) of the HSE Act.

⁴² See section 3C of the HSE Act.

Penalties

Boards can be issued with compliance notices, infringement notices and infringement fees under the HSE Act, but cannot be issued a court ordered fine for any offence committed under that Act⁴³. This was to avoid funds being transferred from one part of the Crown to another. Boards can however be ordered to pay reparations⁴⁴ and legal costs. The board is not prohibited, under the HSE Act, from arranging suitable insurance for these types of Court orders.

Personal liability – OSH enforcement policy

One of the changes made to the HSE Act was the addition of section 56(2), which provides for the individual or personal liability of Crown officers. This section of the Act applies to any officer, employee or agent, concerned in the management of the organisation (example, principal of a school or teacher involved in a management team), who have directed, authorised, assented to, acquiesced in, or participated in, the failure.

OSH provided a summary of their enforcement policy to the Ministry which indicates when a prosecution of an individual for an offence would be a possibility under section 56⁴⁵. The summary states that prosecution would only take place against an individual if:

*‘prosecution is in the public interest to proceed against the individual(s) as well as (or instead of) the organisation, that there is sufficient evidence to support such a charge AND that the individual(s) **had clear knowledge** that the situation was unsafe or was otherwise contrary to the Act. (A possible scenario is where there were practicable steps which should have been taken and the individual(s) **decided** not to take those steps). Consideration would also be given to whether the level of knowledge was such as to warrant a charge.’* (Emphasis added)

The test for individual prosecutions currently applied by OSH is a much higher test than, for example, the threshold applied under negligence. In negligence based claims, an objective test is applied, which means the claimant does not have to prove the person’s knowledge of the steps that ought to have been taken. The OSH test is a subjective test, requiring that the person actually knew what they were doing was wrong, and this is much harder test to meet.⁴⁶ In lay terms, it may be said that OSH would be reluctant to prosecute an individual unless there was an element of gross negligence or recklessness, in that the person actively disregarded the steps to be taken.⁴⁷

⁴³ Section 8(4) of the Criminal Liability Act.

⁴⁴ See sections 12 and 32 of the Sentencing Act 2002

⁴⁵ Moir, R. (2003).

⁴⁶ OSH appears to apply a strong public interest consideration before prosecuting individuals. For further information on this policy, see <http://www.osh.dol.govt.nz/order/catalogue/808.shtml>.

⁴⁷ In legal terms, a consideration of ‘recklessness’ includes that the person must have turned their mind to the matter and disregarded it (subjective test). In contrast, negligence requires that the person took steps that the reasonable person would have taken (objective test).

It should also be noted that it is possible for private prosecutions to be brought under the HSE Act, if an enforcement authority has not taken action, or with the leave of the Court. OSH also state that:

'There is a theoretical (and, in our view, remote) possibility that a private prosecution might take place under s.56 in circumstances outside OSH's policy'.

OSH internal enforcement policies are subject to modification or change at any time.

Criminal Nuisance

Criminal nuisance applies where a person has either committed an unlawful act, or failed to discharge a legal duty, and that person knew that that act or omission would endanger the life or safety of another person.⁴⁸

In the context of EOTC, a legal duty may arise in several ways. Under the Crimes Act, there are two specific duties, which may apply. Section 155 (duty of persons doing dangerous acts) and section 156, (duty of persons in charge of dangerous activities).

Under these sections, persons undertaking any lawful act (such as surgery⁴⁹) that may be dangerous, or is in charge of any activity requiring precaution or care, are under a legal duty to use reasonable knowledge, skill and care in doing such acts. Criminal responsibility will be established if the person omits without lawful excuse to discharge that duty.

Section 150A sets out the test for criminal responsibility. Under that test, the person must not depart significantly from the standard of care expected of a reasonable person.⁵⁰

This means in EOTC activities that are potentially dangerous (such as abseiling, kayaking or swimming), the board, the principal and any other person responsible for running the activity, has a duty to use reasonable knowledge, skill and care in planning and running the event. For example, it may be reasonable to expect a principal to ensure adequate supervision is arranged and is present during a boating exercise. The principal may also know that failure to discharge this duty will endanger the safety of the students. The court will need to decide whether such an omission is a "major departure" from the standard required of the "reasonable" principal or teacher.

The Tort of Negligence

Negligence is well-understood in lay terms as the broad notion of carelessness.⁵¹ In order for liability in negligence to be established in New

⁴⁸ Section 146 of the Crimes Act 1961.

⁴⁹ Examples in the EOTC context may include kayaking, abseiling or rock climbing.

⁵⁰ Similar to the reasonable person test applied in the tort of negligence discussed below.

Zealand, there are three basic elements that must be made out on the facts of the case. These are:

- Duty of Care (foreseeability, proximity of relationship);
- Breach of Duty (the reasonable person test); and
- Harm (causation and remoteness);

Other relevant considerations include:

- Vicarious Liability;
- Damages; and
- Defences

Over the years, the Courts have developed the common law (law developed by the judiciary on the facts of cases brought before the courts) into a set of tests in an attempt to delineate the boundaries of liability.⁵²

Duty of Care

For negligence to apply, it must first be established that a duty of care existed between the person accused, and the person harmed. In New Zealand, the test has been developed over time by the courts to determine whether a duty arises, but at its heart, the test is founded on an early legal principal first used by Lord Atkin in the classic case, *Donahue v Stephenson*⁵³. In simple terms, where it is reasonably foreseeable that the actions or omissions of one person (person A) could have an affect on another person (person B), a sufficiently proximate relationship is said to have been established to give rise to a duty, on the part of person A, to take care, in respect of person B. This test arose from a question of whether or not a vendor could be responsible for harm suffered by a person with who there was no contractual relationship. (A bottle of ginger beer, purchased by the plaintiff's friend, was discovered to have contained the remains of a snail after most of its contents had been consumed by the plaintiff). In that case, despite there being no contractual relationship, it was held that it was reasonably foreseeable that the vendor's actions or omission could have an affect on people for who the goods were purchased or shared with.⁵⁴

In the school context, it is obvious that the board and the board's staff owe a duty of care to students as they also have a direct relationship with students. Students are required by law to attend school⁵⁵ and are placed in the care of the teacher for that purpose.

⁵¹ See Todd (ed), *The Law of Torts* (3rd ed, 2001), at page 142.

⁵² As above, footnote 51.

⁵³ [1932]AC 562, 580.

⁵⁴ The duty is not owed to the world at large, and unlike the teacher/student relationship, it may not be clear in other circumstances whether a duty exists between the plaintiff and defendant. The Courts use the test of reasonable foreseeability to determine whether the relationship is of such proximity, or closeness, to give rise to a duty of care.

⁵⁵ Section 20 of the Education Act, requires all students aged between 6 and 16 to be enrolled. Those required to be enrolled must attend school whenever it is open under section 25 of the Education Act. Any person aged between 5 and 19 years, who are not foreign students, also have the right to free enrolment and free education at any state school under section 3 of the Education Act.

The duty owed by principals and teachers, is not a duty to guard against all possible harm, but is a duty to take “reasonable care” to protect students from injury. It is common knowledge that incidents occur everyday in schools without prosecutions taking place. Generally, before an incident can give rise to liability, it must be shown that the board or school staff failed to meet their legal duty to use reasonable care.

Breach of Duty

For a civil claim in negligence to be successful, it must be shown, on a balance of probabilities, that the person accused of negligence has breached their duty of care (provided a duty has been established). The court in considering whether a breach of care had occurred, will apply what is commonly referred to by legal commentators and the courts as the “reasonable person test”⁵⁶. This test is an objective test that is applied without reference to the particular knowledge or actual intent of the accused. The test requires the person who owes the duty of care, to take the steps that the ‘reasonable person’, acting in the same circumstances, would have taken.

A person could be said to have breached a duty of care, where their actions fall short of those steps. For example, where a teacher takes the class boating, the court may determine that a reasonable teacher would have ensured that the students were each supplied with a life-jacket, and took reasonable steps to ensure the life-jackets were worn correctly. If a teacher failed to ensure adequate safety equipment was worn by a student, they may be found to have fallen short of the reasonable person test, and breached their duty of care.

The standard is not whether the person tried to exercise due care (subjective test), but whether they did exercise due care based on the reasonable person test (objective test)⁵⁷. The test is based on a standard of reasonableness, and not such a high level of care that guards against all harm. The actual level of care required to be attained will also depend on the activity involved. If the activity requires some specialist skill or knowledge, the person will be measured by the reasonable person possessing those skills or knowledge.⁵⁸ Therefore it is important that teachers ensure that skilled persons are involved in the supervision of any activity involving specialist skill or knowledge, and do not attempt to carry out supervision of the activity alone or with others who do not possess the requisite specialist knowledge or skills. For example, boating may require supervision by competent and experienced boating instructors, who have knowledge of the river or coastal environment used for the activity. The duty on the teacher may be to use reasonable care in planning, and to ensure that adequate supervision is organised. The supervisors may also owe a duty of care as described above.

⁵⁶ The reasonable person test was first used in *Blyth v Birmingham Waterworks*(1856) 11 Ex 781, 784.

⁵⁷ See footnote 51, at page 385.

⁵⁸ See footnote 57.

Harm

Breach of duty is not enough in negligence claims to incur liability. There must be some form of harm suffered by the person to whom the duty was owed for liability to be established, and the harm must also satisfy two other elements before liability is incurred; causation and remoteness.

Causation

Assuming there is breach of a duty, and harm was suffered, the person in breach will still not be liable unless the harm suffered was actually caused by the breach or by that person's actions or omissions. This will only become complicated where other factors may have contributed towards the injury. For negligence, the breach must be an effective cause of the harm, not simply a historically contributing factor.

Take for example the following situation: A class trip to the beach for swimming is scheduled. No planning was completed. On the way, the driver of the school van had to swerve to avoid an oncoming vehicle. If the cause of injury was due to an oncoming vehicle crossing the centre line, it is unlikely that any planning would have prevented the incident. The fact that there had been a breach of duty, by not using reasonable care in planning was not a contributing cause of the harm suffered. On the other hand, if a student drowned because the part of the beach used by the teacher was prone to dangerous rips, there may be sufficient link between the breach (in this case, the lack of planning) and the harm to give rise to liability.

The test applied by the courts is commonly referred to as the "but-for" test. In order for liability to apply, it will need to be established that harm would not have been suffered "but for" the actions/inaction (or breach of duty) of the defendant⁵⁹.

Remoteness/Likelihood of harm

The risk of harm must be a foreseeable risk, and not too remote. For example, it is a foreseeable risk that during a boating activity, the boat could capsize in the water, and the possibility of this occurring is 'not unlikely'. The type of harm that could occur from a capsized boat is sufficiently foreseeable. In some cases, the harm may be of a type not normally associated with the particular activity, and may be found to be an "unforeseeable" risk. The question of remoteness is also linked to the proximity of relationship test outlined above. Is the harm a type of harm which could occur as a result of the particular relationship? Using the above example, it is foreseeable that the risk of drowning is a risk that could arise from the teacher or principal/student relationship, as the teacher or principal is likely to be the person responsible for the planning and supervision of the canoeing activity. If an injury or death occurred, it is likely the Court would find in this scenario that the harm was neither too remote, nor unlikely to occur and is therefore a 'foreseeable risk'.

⁵⁹ See footnote 51, at page 989.

Damages

In New Zealand, a number of actions brought in the tort of negligence are personal injury related claims. New Zealand has a no fault compensation regime for these types of injuries under the Injury Prevention, Rehabilitation and Compensation Act 2001, and the right to sue is removed. However, the Court may award compensation for mental distress or exemplary damages as a form of punishment or deterrence imposed over and above any order to pay compensation. Note an award for exemplary damages is not likely unless there are exceptional circumstances.⁶⁰

Defences

If a prima facie case is successfully proven, the accused may be able to raise a defence. In terms of EOTC, the principal or responsible teacher would have to show that the student contributed to any injury they suffered by not taking reasonable care themselves. For example, this defence may be relevant where a student, 18 years of age decides to disobey instructions. Notwithstanding any breach of duty that may have been established, a defence may be raised, depending on other circumstances of the case, that there was little the teacher could do. There are a range of other defences available to negate a claim in negligence.⁶¹

Vicarious Liability

Vicarious liability places responsibility for the actions of a person onto another person (or other body corporate – for the purposes of tortious liability, boards are independent entities). This legal doctrine does not require fault on the part of the person alleged to be vicariously liable; it requires that a relationship exists between the vicariously liable person and the person who committed the tort, and that the relationship has some correlation with the tort committed.

A common type of relationship relied upon is the employment relationship, whereby the employer can be held responsible for the actions or omissions of its employees. The connection requirement would be that the act or omission causing commission of a tort was done in the '*course of the employee's employment*'.⁶² If the act or omission was not related to the employment duties, then the court may find that the employee was not acting within the course of their employment, and the employer would then not be vicariously liable.

Other requirements - Education Act 1989

The provisions of the Education Act do not give rise to legally enforceable duties, but may be referred to by the courts when considering whether other a duty of care exists under negligence for example. The provisions of the Education Act are enforced through other statutory levers, such as powers of

⁶⁰ See *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424.

⁶¹ For further information on available defences against actions in tort, see (Todd (ed), 2001).

⁶² An early explanation of vicarious liability was made in *Canadian Pacific Railway Co v Lockhart* [1942] AC 591.

intervention held by the Minister of Education and the Secretary of Education⁶³.

The relevant requirement concerning student safety is expressed in NAG 5, which states that the board of trustees is required to:

- (i) provide a safe physical and emotional environment for students; and
- (ii) comply in full with any legislation currently in force or that may be developed to ensure the safety of students and employees

The NAGS are a set of statements setting out the “desirable codes or principles of conduct or administration for specified kinds or descriptions of person or body, including guidelines for the purpose of section 61 (school charter).”⁶⁴

Boards are required to prepare and maintain a school charter, and the charter must include the board’s aims and objectives, including activities aimed at achieving the general government policy objectives as set out in the national educational guidelines.⁶⁵ The effect of the charter is a legal undertaking with the Minister that the board will take all practicable steps to ensure the broad aims defined within the school charter are achieved.

Other Protections For Individual Trustees and Board Staff

Individual trustees are protected from liability under the Education Act,⁶⁶ provided that they have acted in good faith. There is no conflict between this protection and section 56 liability of individual trustees⁶⁷. Section 56 is concerned with personal liability for personal acts. The Education Act protection concerns the liability of the board. If the board is charged with an offence, the individual trustees are protected, provided that they acted in good faith. However, if the individual is prosecuted for their own actions or omissions, such as for negligence, the protection does not apply because it only protects the individual from the board’s liability, not personal liability.

Principals and teachers have a similar protection from the board’s liability under section 77 of the State Sector Act 1988, provided they have acted in good faith. Section 77 is poorly drafted and it is not clear whether the protection extends to include protection for personal liability. For example, the section states: “...no chief executive (the principal) shall be personally liable for any...act done or omitted by the chief executive in good faith...”

⁶³ There are a range of interventions such as dissolving the Board and appointing a Commissioner. See part 7A of the Education Act.

⁶⁴ Section 60A Education Act.

⁶⁵ Section 61(4)(b) Education Act.

⁶⁶ Clause 4, 6th Schedule, Education Act 1989 (the Education Act).

⁶⁷ Liability under section 56 is discussed above at page 11.

Focus on education and safety outcomes

Given that EOTC is a valuable and integral part of a New Zealand student's education, safe management of the learning experience is essential. This is reinforced by the record of deaths during EOTC activities between 1998 and 2001 in New Zealand. However, there has been an increased awareness in the education sector, and the trend has improved since the Ministry's EOTC safety guidelines were updated in December 2002, and professional development on the guidelines to support schools began in July 2003.

While planning EOTC events can seem daunting in a climate of fear about liability if something goes wrong, schools should balance such fear with knowledge. Planning for safety and educational outcomes are intertwined. If boards, principals and teachers plan on safety and apply good practice in EOTC, they can maximise educational and safety outcomes for students while minimising liability risk for themselves. Schools that ban EOTC activities due to the risk of liability may risk losses to the educational process instead.

Risk management in EOTC is about reducing potential losses to an acceptable level. Losses may be physical, mental, social or financial. The risk management process includes:

- a. Identifying the educational goals of the activity.
- b. Identifying the risks/losses that could happen.
- c. Identifying factors that could cause the losses.
- d. Deciding on management strategies to prevent the losses.
- e. Having emergency procedures in place in case a loss does occur.⁶⁸

In addition to these steps, educators need to ensure EOTC activities are run in accordance with accepted best practice for the activity; written plans match their practice so they are walking their talk; and activities are reviewed to assess whether educational and safety outcomes have been met. Recommendations from the review should be incorporated into future planning.

Safety and EOTC – A good practice guide for New Zealand schools

The Ministry of Education published *Safety and EOTC – A good practice guide for New Zealand schools* in November 2002. *Safety and EOTC* aims to:

- reduce the proliferation of documents schools have to refer to and provide a 'one stop shop';
- clearly outline legal requirements and best practice guidelines for schools; and
- provide practical safety management tools.

⁶⁸ Haddock, 2004.

Copies of *Safety and EOTC* are in every school in New Zealand. It is also available online at www.tki.org.nz/e/community/eotc along with other resources, links and information.

Professional Development

The Ministry of Education is providing professional development to support schools to implement the *Safety and EOTC* guidelines. Two workshops, a school term apart, are being offered to all schools in New Zealand from July 2003 to June 2005.

The professional development targets the principal, a board of trustees member and the EOTC co-ordinator in each school. As at July 2004:

- seventy five percent of schools invited had attended the professional development; and
- ninety seven percent of participants were satisfied with the training, especially with the attention to health and safety standards.

The following feedback has been received from participants:

‘Still confident in my ability and desire to run school camps.’

‘Clearer understanding of legal obligations.’

‘I need to tighten up procedure and policy.’

‘Our school does a lot right but documentation needs to be improved on.’

‘It is still okay to have great EOTC experiences.’

Codes of Practice and Accepted Best Practice

Schools should ensure that any EOTC events they organise are consistent with relevant best practice for the event or activity. *Safety and EOTC* summarises relevant codes of practice and accepted best practice guidelines for EOTC. Best practice guidelines are established by national organisations for the activity and are often documented in publications such as *Outdoor Pursuits – Guidelines for Educators*.⁶⁹ There are plans to revise this resource at the time of writing. Peer consultation is recommended for activities such as museum visits or skateboarding, where best practice is not documented.

Conclusion

Striving to provide a safe physical and emotional environment for students is a challenge for all schools. Whether students are engaged in learning

⁶⁹ Watts, 1996.

experiences in or out of the school grounds, risk exists. Schools and individuals have the same liability to students in their care when they are in the school grounds. While school trips may present different risks, risk cannot be avoided simply by staying at school.⁷⁰

Boards and principals can be confident that if they take all reasonable practicable steps to manage risk during EOTC events, they will significantly reduce the chances of an incident occurring, and therefore being prosecuted. Reasonable practicable steps should include following relevant guidelines, such as *Safety and EOTC – A good practice guide for New Zealand schools*. In addition, activities should be managed in a way that is consistent with best practice for that activity. Best practice can be established by the national body for the activity or, in the absence of written guidelines, peer consultation is recommended.

EOTC is a valuable tool in the teacher's pedagogical repertoire. When good planning for learning and safety outcomes are intertwined, these strands give richness and strength to the textured rope of a Kiwi student's education⁷¹.

⁷⁰ Anderson, Lloyd, Caldwell, 2003.

⁷¹ This paper is not intended to be, and should not be relied upon as, legal advice. Boards and individuals who are involved in the areas covered by this paper should seek independent legal advice if they are unsure of their legal rights and/or obligations.

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