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CONTEMPORARY DEVELOPMENTS IN THE LAW RELATING TO PERSONAL INJURY, NEGLIGENCE AND COMPENSATION¹ by Justice Bernard D Bongiorno

INTRODUCTION

It is somewhat unusual for judges to speak about the law publicly, except when they are delivering judgments on cases. Lord Hailsham, the famous British lawyer, politician and wit, once said that judges can maintain an unassailable reputation for wisdom as long as they keep their mouths shut. So, it is with some trepidation that I speak on what is essentially a very 'legal' topic.

The modern law of Negligence dates from 1932, when the case of *Donoghue v Stevenson*² was decided by the House of Lords. The case originated in Scotland. Ms Donoghue had drunk ginger beer out of a bottle in which there was said to have been the decomposed body of a snail. She became ill and sued the seller of the ginger beer even though she had not bought it herself and therefore had no contract with that seller. Until that time English judges had been very resistant to the idea that a duty to compensate a person injured could be imposed on someone in circumstances other than where there was a mutually binding contract between the parties, a relationship entered into between the parties in some kind of quasi-contractual way, or a relationship of a particular category well defined by the cases as they then stood.

This is not to say that the idea of a general duty of care had not been around for some time. At the end of the 19th century, the English courts had begun to try to formulate some theory whereby a duty could be imposed upon a person outside the area of contract, outside the situation where the person had accepted the duty as part of a quasi-contractual obligation, and outside those other areas accepted by the law as imposing a duty. Two cases that were determinative in this area were *Heaven v Pender*³ in 1883, and *Le Lievre v Gould*⁴ in 1893. In these cases Sir William Brett, who was Master of the Rolls (the head of the Court of Appeal) together with Lord Justice A. L. Smith, formulated ideas about duty of care which were taken up seriously only half a century later, in 1932.

DUTY OF CARE

I thought I would start by looking briefly at Lord Atkin's judgment in *Donoghue v Stevenson*, the 1932 case, and then see where Australian law has gone from that point, in the search for what various judges and writers have referred to as the "unifying principle" of the duty of care in negligence. Is there a universal quality or character to a relationship between two people such that a court is able to say that in a particular circumstance one of those people has a duty to take reasonable care for the other?

"Duty of care" is a great phrase. It has been picked up by journalists and social workers in recent times and is now indiscriminately attributed to almost anybody against whom an allegation of neglect or carelessness is being made. I find it fascinating to read in a newspaper that somebody has breached his duty of care, or that somebody else is going to be disciplined for breaching his duty of care, or that somebody else ought to have a duty of care in circumstances where even the most liberal legal theorists would deny that such a duty existed. But what does it mean?

Well, it is a legal term of art. It is the first of the three elements that a claimant must establish before he or she can successfully sue in negligence. When a lawyer talks about negligence, he or she means the breach of a recognised legal duty of care, which causes damage. The damage may be, and in many cases is, personal injury. It may also be physical injury to property, or it may be economic loss. In this address I will talk mostly about personal injury, because I suspect that, as people involved with education of the young, this is the area in which you will be most interested.

As I said before, when a lawyer talks about a duty of care, he or she is referring to the duty that the law imposes, and for the breach of which, if it causes damage, a person can sue. Since *Donoghue v Stevenson* in 1932, there has been a search by the courts — in England, New Zealand,

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Canada and the USA as well as Australia — for some unifying touchstone or principle by which the existence of a duty of care can be universally determined. As has often been said, you can be as careless as you like if the person who is affected by your carelessness is not somebody to whom you owe a duty of care. There is no such thing as negligence in the air. You can only be legally negligent in respect of someone to whom you owe a duty of care.

If one goes back to what Lord Atkin said in 1932 it can be seen that not much has changed so far as the search for such a universal principle is concerned. Perhaps he foreshadowed the difficulties the courts were going to face in their search for that principle when he said:

*“It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The Courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in each of those circumstances ...”*⁵

What he is really saying is that it is sufficient in each case to determine what the duty of care is. But what is the criterion? Is there some unifying principle? Is there some quality attaching to a relationship which, if it exists, means that there will always coexist with that relationship a concomitant duty of care?

The elusiveness of this unifying principle means that the courts have traditionally engaged in an elaborate classification of duties as they exist. These classifications might be in respect of property, whether real or personal, with further divisions based upon ownership, occupation or control. They have embraced distinctions based on a particular relationship of a particular plaintiff to the particular defendant whether manufacturer, salesman, landlord, customer, stranger, teacher and so on. In this way, it was thought it could always be ascertained whether the law recognised a duty in any particular circumstance, but only when the case could be placed into some recognised category.

Lord Atkin’s test for a duty of care

Lord Atkin was asking whether there was some way in every case that the existence of a duty of care could be determined. He said that liability ought to be based on a general public sentiment of moral blameworthiness, for which the offender must pay. In other words, liability should be rooted in fault.

He then formulated the classic test for the existence of a duty of care. Every law student knows the passage almost by heart.

*“...[A]cts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour?, receives a restricted reply. 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 by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”*⁶

Lord Atkin is saying a duty of care will be imposed where there is a foreseeable risk of injury to someone who is in such proximity to the actor that he could be called a “neighbour”, in the sense that the judge has used it here. He suggests that this should be the touchstone upon which the duty of care in negligence can always be determined.

This proposition, enunciated in 1932, was distilled from the earlier thoughts of A L Smith LJ, Brett MR and the other judges who had discussed the broad issues of policy in the late 1800s, in the cases I mentioned earlier and others at about the same time.



... there has been a search by the courts — in England, New Zealand, Canada and the USA as well as Australia — for some unifying touchstone or principle by which the existence of a duty of care can be universally determined.

Advances in the 1960s, 1970s and 1980s

Things then went along in a somewhat dilatory manner for many years. It was probably only in the '70s and '80s that this area of law began to be re-examined and the law of negligence as we now know it began to develop. In 1984 we leave England and take up a case in Australia, called *Jaensch v Coffey*⁷. The High Court, in particular, perhaps, Justice Deane (who later became Governor General and has recently retired) began a series of cases that has continued right up to the present. In these cases the basic principles of negligence have been examined again and again. To a lawyer with an interest in the topic they make fascinating reading. To one engaged in arguing cases on a day to day basis they are required reading; and by no means always easy reading at that.

Jaensch v Coffey was the case of a South Australian policeman's wife who suffered a psychiatric reaction when she was told, and later saw, that her husband had been knocked off his police motor cycle and was very severely brain damaged. Here is some of what Justice Deane said in that case:

*"It is an incident of human society that action or inaction by one person may have a direct or indirect effect on another. Unless there be more involved than mere cause and effect however, the law remains indifferent. A person's action or inaction may be a cause of another's injury or discomfort; unless there be some particular relationship, personal or proprietary right or other added element, common law imposes no liability to make payment of compensation or other damages. In a society where material success, commonly measured in comparative terms, is accepted as a legitimate objective and the preservation of individual freedom of action or speech is acknowledged as a legitimate goal, the law must remain so restrained if it is to be attuned to social standards and reality. If material success were to be accompanied by legal liability to all who have suffered emotional chagrin or physical or material damage as a consequence or along the way, it would be largely self-destructive. In that regard, the common law has neither recognised fault in the conduct of the feasting Dives nor embraced the embarrassing moral perception that he who has failed to feed the man dying from hunger has truly killed him."*⁸

This case appears to have commenced a fundamental re-evaluation of the law of negligence, and in particular the consideration of what it is that distinguishes liability in one case from no liability in another. A generation after *Donoghue v Stevenson* Sir William Deane returned to what Lord Atkin had meant when he talked about proximity — somebody who was close or a neighbour. Was this then the unifying principle which had proved elusive? Was it really there all the time?

Until *Donoghue v Stevenson* in 1932 there had been a series of situations where a defendant could be held liable if he or she was in a particular, rigidly defined, relationship with the plaintiff. For example, if a person occupied premises, and somebody came into those premises and was injured because of a defect in the premises, they could probably sue successfully.

That principle goes back at least to a case of *Indemauro v Dames*⁹ in 1866. In other situations, where, for example, water escapes from somebody's property and goes on to somebody else's property — as in the case of *Rylands v Fletcher*¹⁰ — liability would traditionally have been imposed. But there always had to be a recognised relationship between the parties, which relationship had been recognised in earlier cases as giving rise to a duty of care.

In the almost twenty years since *Jaensch v Coffey* the High Court has continued to develop the law of negligence in the Australian context. The concepts discussed in *Jaensch v Coffey* have been analysed and reanalysed again and again. I shall mention an almost random selection of the cases decided by the High Court since 1984 as illustrative of the point I am making.

In 1984 the Court looked at the question of an employer's liability towards his employees and said the duty of care that an employer owed could not be delegated — an employer could not effectively say

"I have done my best. I've contracted with someone who is competent to do a certain part of the work function and by so doing I've discharged my duty of care towards my employees."

The Court said that this was not good enough. Not only should an employer be liable for his own acts of negligence, but he ought to be liable for those whom he employs to fulfil the duty of care that is personally imposed upon him. It reiterated the idea, which came from the 19th century, of the non-delegable duty of care.



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In the context of the ANZELA conference, it is interesting that in the same case, *Kondis v State Transport Authority*¹¹, almost as an aside, Justice Mason said:

*“Likewise with a school authority. It is under a duty to ensure that reasonable care is taken of pupils attending the school. It is the immaturity and inexperience of the children and their propensity for mischief that lie at the basis of the special responsibility which the law imposes on a school authority to take care for their safety: Introvigne*¹². *The child’s need for care and supervision is so essential that it is a necessary inference of fact from the acceptance of the child by the school authority, ‘that the school authority undertakes not only to employ proper staff but to give the child reasonable care’ to use the words of Kitto J. in Ramsay v Larsen*¹³.”

So the school authority, like the employer, is saddled not only with a duty to take care; it has a duty to ensure that care is taken. It is not sufficient for the school authority to say “*Well, we employ a competent teacher.*” The school is responsible personally for the “safety” of the child in the school situation, in the same way that an employer is responsible for his employee.

In 1986 the Court looked at another area of negligence — the question of “extra hazardous activities”. It rejected the idea that extra hazardous activities *per se* gave rise to a duty of care where it would otherwise not exist but reiterated the personal nature of an employee’s duty of care. That case was called *Stevens v Brodribb Sawmilling Co Pty Ltd*¹⁴.

In 1987, the Court took a giant step forward, in lawyers’ terms at least, when it abolished the technical rules which came from the 19th century and related to the duty of care imposed upon the occupier of premises. As I said previously, there had always been a recognition by the law that if you occupied premises you owed certain responsibilities to people who came onto those premises. Lawyers had hitherto engaged in hair-splitting determinations as to whether somebody entered premises as what was called an “invitee” or a “licensee”, as a trespasser or as a person who entered under a contract.

In 1987, the High Court said that this didn’t matter any more. From now on, we should take

the principle that Lord Atkin spoke of and look at the question in terms of whether there is a sufficient proximity between the person who enters the premises and the person who occupies the premises. There is no need, the Court suggested, to engage in the sterile task of trying to determine in what capacity the claimant came onto the property if other criteria giving rise to a duty were present.

In the case concerned, a Mrs Zaluzna slipped over on the Safeway supermarket floor out at Forest Hill. Her case became the one in which the High Court abolished what the Judges referred to as “the barren exercise of categorisation” of people into one category or another, where if two people walked into a building it would be possible for them to have duties of care of different content in their favour.

For example, one person could be entering as a licensee, permitted to go into the building, while the other might be coming to conduct some kind of business, and would be entitled to a higher standard of care by ranking as an invitee. Seeing this sort of distinction as a barren exercise, the Court abolished the occupier’s duties in favour of the imposition of the general duty of care that Lord Atkin had spoken of.

The High Court took the specific case of Mrs Zaluzna, together with the earlier case of *Shaw v Hackshaw*¹⁵ and rewrote the law of negligence in this area. As Justice Deane said in *Australian Safeway Stores Pty Ltd v Zaluzna*:

*“All that is necessary is to determine whether, in all the relevant circumstances including the fact of the defendant’s occupation of the premises and the manner of the plaintiff’s entry upon them, the defendant owed a duty of care, under the ordinary principles of negligence, to the plaintiff.”*¹⁶

The Court said there was no need to engage in a categorisation process as to whether an entrant to premises had come on to the premises as a trespasser or as an invitee, as Mrs Zaluzna had at the supermarket.

Interestingly, just as the High Court abolished the old legal distinctions between the various categories for entrants into property, in Victoria the legislature altered the law itself, to effect almost exactly the same result¹⁷.



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The 1990s

In 1995 the court looked at questions of causation. There have always been arguments amongst lawyers as to how you determine questions of cause and effect. The same issue has, of course, always interested philosophers and scientists, but from different perspectives. What are the mechanics of an action which causes a particular effect? How does one determine in a legal action whether a particular effect should be compensable as having resulted from a particular cause?

In *March v Stramare*¹⁵ the High Court adopted the simply stated (but not always equally simply applied) test of causation as being “common sense”.

In 1992, the High Court decided a landmark case in the area of medical negligence. In the case of *Rogers v Whitaker*¹⁹ it turned its attention to how a court should determine whether a doctor has been negligent. (For doctor you could read “architect”, “engineer” or any other professional or skilled person.) Up until then it was commonly accepted by lawyers that a professional person would not be guilty of negligence if he acted in accordance with the practice accepted as proper by a responsible body of other professional people in the same discipline. Doctors traditionally defended their position by calling as witnesses other doctors who said something like:

“Well, I would have done that in exactly the same way”

or, alternatively, perhaps,

“I might not have acted in exactly the same way, but what he did I don’t regard as being outside the ordinary bounds of professional competence.”

In your context as educators, you could read “teacher” instead of “doctor”. The same situation applies. It might be said that if a teacher acted in a particular way professionally, and a reasonable body of opinion among other teachers said that that teacher had not acted negligently, then he or she would not be found to be negligent. However, the High Court said that is no longer the test in Australia. It is still the test in England, where it derived from the case of *Bolam v Friern Hospital Committee*²⁰ in 1957.

In 1992 the High Court turned that principle on its head. In *Rogers v Whitaker*²¹, the plaintiff had been advised to have a particular eye operation. She asked the doctor repeatedly for

information about the operation and, in particular, asked whether there was any risk of blindness from the operation. He did not answer her questions. In the event, she had the operation and went blind. In the trial of the action brought against him, the doctor called a number of other doctors who said they too, would not have given the information to the patient. It might have frightened her, such that she would have decided not have the operation which they believed she needed.

The statistical risk of going blind as a result of the operation — one in more than a thousand — was relatively low, they said. But this depends upon your point of view. If you become blind, it is not low. If, on the other hand, you win Tattsлото, you don’t regard that possibility as remote at all. It all depends on where you stand.

The High Court said that it was inappropriate for the doctor to take it upon himself to say, in effect “*I am not going to tell this patient because it might frighten her*”. The Court, in a movement away from paternalism, said she had a right to know what the risk was, and to assess it herself. It said this:

“In Australia, it has been accepted that the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill.²² But, that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade²³... it is for the courts to adjudicate on what is the appropriate standard of care after giving weight to the paramount consideration that a person is entitled to make his own decisions about his life.²⁴”²⁵

That case, as you might imagine, sent a rumble through the medical profession. In my former “existence” I acted for a number of medical indemnity organisations. It is extremely difficult to convince doctors that this is the law — that they are required to pass on to their patients information which the patient reasonably requires, or asks for, such as the risks inherent in any procedure they were contemplating or recommending. It is not a decision which has met with universal approval in the medical profession. But it is the law of this country.

In *Rogers* the High Court accepted the reasoning in South Australia called the *F v R*²⁶, an important decision of the Supreme Court of



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South Australia, in which the Chief Justice said that the ultimate question was:

“not whether the defendant’s conduct accords with the practices of his profession or some part of it, but whether it conforms to the standard of reasonable care demanded by the law. That is a question for the court and the duty of deciding it cannot be delegated to any profession or group in the community.”

So much for *Rogers and Whitaker*. Another major development occurred in 1994, in a case called *Burnie Port Authority v General Jones Pty Ltd*²⁷ an action brought after a wharf burned down in Burnie, Tasmania. In dealing with that case, The High Court abolished a principle which had existed since 1866, from the ruling in *Rylands v Fletcher* which I have already mentioned. Again, every law student knows about that case. It concerned the obligations of a person who brought water onto his property which subsequently overflowed and damaged neighbouring properties. Since *Rylands v Fletcher*, this had given rise to a specific right of action. The High Court, in 1994, effectively abolished that right of action, and determined that for relief in those circumstances one needed to look to the law of negligence.

In one sense these were step-by-step modifications. In another they represent a philosophical expansion of some of the more difficult concepts relating to negligence generally and to the concept of the duty of care in particular. However it is characterised, there has been a continuing process of development in recent times, led by judges like Justice Deane, Justice Brennan, Justice Kirby and others.

Prior to 1996, it was thought that a landlord was immune from a suit for negligence from somebody visiting his tenant’s premises. In 1996, in Queensland, a little girl was electrocuted when she turned off a cold water tap after the pipe had become “live” by reason of a negligently caused fault. The High Court said that because the landlord came within the proximity principle — within the principle of being the “neighbour”, in Lord Atkin’s sense — of the little girl, he was liable in negligence.

It is not unusual in the development of the law, for an argument or line of reasoning to be “in vogue” for a few years after which a court reconsiders it and determines that a different track should be followed. In 1985, in a case called *Hayman v Shire of Sutherland*²⁸ Justice Mason, who later became Chief Justice, said that where

citizens rely — in a general, non-specific sort of way — on organs of government or regulatory or safety authorities, to protect them from certain types of harm, a sufficient proximity for the purposes of negligence would be established so as to give rise to a duty of care.

He derived this concept from a series of American cases, in which the issue had been considered. For example, an American court had said that when you get on a plane, you don’t know who it is who keeps the plane in the air, or who it is who navigates it. You know the pilot is involved. You know the airline company which owns the plane has something to do with it. You also have a vague notion that somebody “out there” regulates things and tells the pilot of your plane not to fly at the same level as the pilot of the plane that is about to take off in five minutes time. Justice Mason said that this created what he called a “general reliance” — an idea that there was somebody out there looking after us, and that this gave rise to a duty of care.

In 1998, the High Court took another look at this area. It turned its attention to public authorities, city councils and the like and, for a while, it tested a theory. The 1998 case was *Pyrenees Shire Council v Day*²⁹. A fire had broken out in a fish and chip shop in the tiny Victorian town of Beaufort, in circumstances where it was proved the local council had known that a fireplace in which the fire started was faulty.

The Court examined the principle of “general reliance” in this context and the judges, after considerable debate and by a majority of 4 to 3, decided that the principle of general reliance was a fiction, and that they would withdraw from it. The Court determined that it was inappropriate to widen liability in that sort of way.

The development of the law is not an academic exercise. In determining cases, the Court endeavours to ensure that a liability is only imposed when justified. Society can only operate if there is a balance. The idea that there is a cheque book behind every disaster is one the law cannot countenance. In all of the cases to which I have referred the Court sought to ensure that the line was drawn in the right place.

I should add that in the *Pyrenees* case, Justice Kirby took the opportunity to consider the whole question of negligence again and promoted a three-stage test to determine the existence of a duty of care. He said that not only should there be proximity or neighbourhood, but that a duty of care should only exist when it is just and reasonable that it should do so.



The development of the law is not an academic exercise. In determining cases, the Court endeavours to ensure that a liability is only imposed when justified. Society can only operate if there is a balance. The idea that there is a cheque book behind every disaster is one the law cannot countenance. In all of the cases to which I have referred the Court sought to ensure that the line was drawn in the right place

The new millennium

And so we get to this year, and the High Court has not been inactive. For about 200 years there has been a principle that if a road authority made a road, it might be liable for accidents that were caused by the road — for example by potholes or misplaced drain covers and the like; but only if it engaged in what the law called “misfeasance”. It was not liable if its only fault was one involving “non-feasance”. Lawyers spent a lot of time arguing whether an accident was caused by misfeasance (the doing of something wrongly) or non-feasance (not doing it at all).

For example, is the pothole in the road there because the road was badly built in the first place or is it there because the rain has been particularly heavy in the last six months? This sort of consideration, arcane as it might seem, was of great importance to councils and road authorities which construct highways at enormous expense to all of us. The principle derived from a very old idea that the parish, which used to make the roads, could only be liable if it did something that was actively negligent, not simply passively negligent.

In a case called *Brodie v Singleton Shire Council*³⁰, the High Court reconsidered this principle. Despite the fact that in two cases (in 1936 and 1950) the same Court had said that the law of misfeasance and non-feasance still applied in Australia, in 2001 the Court abolished the rule. Henceforth, the ordinary rules of negligence will apply to road authorities as to anyone else who owes a duty of care in particular circumstances to another.

Between 1987 and the end of the year 2000, 105 tort cases were heard by the High Court. For those of you who are not familiar with the hierarchy of courts in Australia, the High Court sits only as an ultimate court of appeal. It does not decide primary liability. The High Court does not hear cases as of right. A filtering system is in place. In order to get a case to the High Court, you must obtain “special leave”, which is only granted if the Court determines that your case involves an issue of great public interest. The High Court will not hear a case simply because someone asserts that the local intermediate court of appeal — which exists in each state — has made a mistake.

All of the 105 tort cases determined by the High Court since 1987 involved some principle of public interest, which the High Court considered was of sufficient importance to warrant it being considered. There are only seven High Court judges and they hear something like eighty or ninety cases a year; an enormous workload, considering that at least five of the seven must sit on each case. In addition, they write judgements which are often of great length and complexity.

The cases of which I have spoken this morning are only a very small selection of those which have reached the High Court. Forty-nine of the 105 tort cases since 1987 were personal injury cases, in the area of negligence. In almost every decision there was some modification, one way or the other, in what had hitherto constituted the law of Australia. I have not even touched on developments such as those initiated in *Perre v Apand Pty Ltd*³¹, *Hill v Van Erp*³² or *Astley v Austrust Ltd*³³ and many of the other tort cases decided in the last few years. They will have to await another occasion.

Pure economic loss and other issues

In the brief review undertaken here, I have left out all the negligence cases involving what is called “pure economic loss”, an area perhaps about to burgeon in a significant way. In these cases the breach of somebody’s duty of care has led not to personal injury (as it would in a motor car accident, or in slipping over) but, rather to the closure of a business, the dismissal of workers, the loss of jobs, or economic loss of other kinds. These cases have their own particular difficulties and problems. Doubtless the High Court will continue to plough the fields of the law in this area in the coming years.

There are still many issues that the High Court has not considered or has not said the final word upon. One example concerns an aspect of the assessment of damages. How, for instance, do you assess the loss of what is called “a chance”? This can be significant in medical negligence litigation. What happens if someone had a chance (but not the certainty) of a cure from a particular operation but, due to the negligence of the doctor, they have lost that chance? Such areas remain to be explored in greater detail than they have been in the past.



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DUTY OF CARE: QUESTIONS OF LAW AND QUESTIONS OF FACT IN A SCHOOL CONTEXT

The duty of care question is only one of the three questions to be answered before a person can succeed in a claim in negligence. It is the first question. It is determined, as I have outlined, by asking whether the person against whom the allegation is made should reasonably have foreseen that his or her particular act, or failure to act, was likely to produce a risk of injury, provided of course sufficient proximity (or such other criteria as is acceptable at the particular time) exists in the particular relationship

The second and third questions are questions of fact, which in Victoria are determined, (about half the time at least), by juries. In the other states they are mostly determined by judges. This is the area in which most of you, in the field of education, will be concerned.

There is no question that a school authority, a school and a teacher, all have duties of care to their students. That is beyond argument. The question you face as educational administrators is usually whether the duty has been breached.

What is the standard that is applicable to the particular duty of care imposed in the particular case? What is the content of the duty in any particular case? — These are questions of fact.

A successful defence to an allegation of a breach of a duty of care will always involve demonstrating that: *“I have acted as a reasonable teacher, a reasonable school authority, or a reasonable school administrator (as the case may be) would have in the circumstances”*, because that is the standard by which the question of breach of duty will be assessed.

What is reasonable? This does not mean falling into the trap exposed by *Rogers v Whitaker*; it is not for the reasonable teacher to say definitively what the standard is. But it is about looking at what the reasonable teacher would have done in the circumstances. Was the school excursion conducted in accordance with

the way most school excursions are conducted? Are there any relevant regulations? Were those regulations adhered to? And so on.

Sometimes you can look at it simply and say, in layman’s terms: *“Have we been careless?”*. That is a good starting point. If the answer is “yes”, it is probably fruitless mounting a defence to the particular allegation of negligence. However, there may be circumstances where you think you were not careless, but the court may still find that a duty of care has been breached.

Protection

In terms of protection, all I can suggest is education, observation and forward planning. You should have systems in place, (for example) to ensure that risk assessors are available to inspect schools and systems and help audit current risks and practices. An experienced school administrator or teacher should acquire a metaphorical antenna, which quivers when any area of risk is walked through, or observed. With experience, one should be able to see potential areas of risk. After all, one of the bases of negligence is reasonable foreseeability.

Common sense is vital. Should we move that step? Is it a hazard? Are the screws holding that basketball ring to the wall secure enough? If you were to look at a basketball ring and see that the screws were coming out, it would be an act of folly, if not an act of gross negligence, to walk past and do nothing about it.

An important aspect of protection is the keeping of accurate records. Often litigation occurs long after the event is over. It is not a useful answer to say that you did not keep a record. The maintenance of records may be onerous and a nuisance, but is of enormous assistance if you are required to state what occurred on a particular day at a particular time. It is also wise to remember that every record you create may ultimately be placed in the hands of those who seek to sue you. There is no such principle as “commercial in confidence” (whatever that means) in litigation.

In summary, the way to stay “un-sued” is to be careful.



There is no question that a school authority, a school and a teacher, all have duties of care to their students. That is beyond argument. The question you face as educational administrators is usually whether the duty has been breached.

CLOSING COMMENTS

Developments in the law of negligence are one thing. Courts look after those. Developments in the practice of litigation are another thing. They are looked after in all sorts of ways, and by the market, to some extent. We have seen the phenomenon of “No-win, No-fee” agreements in Australia in the last few years. The Americans call this kind of arrangement a “contingent fee”. They also have an arrangement pursuant to which the proceeds of the action is divided between the lawyer and the plaintiff; an arrangement not currently in use here.

Supporters of this practice say that such arrangements provide the “key to the courthouse” for plaintiffs who otherwise would not be able to sue. Critics say it promotes unnecessary expense and vexatious litigation for the benefit of lawyers. Again, it depends where you stand.

The promotion of litigation was frowned upon by the common law. It was frowned upon, perhaps, because the interests which stood to gain from the absence of litigation were often establishment interests, namely the insurers and the “big end of town”. These days there is more preparedness to promote litigation. Is that a good thing or a bad thing? A year ago I might have

waxed lyrical about that! Now I had better be more circumspect.

The other matter I wish to mention is what the Americans call “class actions”. These are a new phenomenon in Australia. We call them “group proceedings”. The idea that a number of people can sue through one person and all take the benefit of the action was quite foreign until recently but we are getting used to it. There are complex issues in this area which are still being developed. Again, the American supporters of such a system say that group proceedings or class actions enable proper justice to be delivered to those who otherwise might be unable to obtain it for lack of financial resources. Again, opinions on this will vary.

The law of negligence will continue to change. With each new examination of the fundamental principles by the High Court there will be further refinement of those principles. Whatever happens, you, as people connected with the education profession, must continue to be aware that you do have a duty of care, you do have to discharge that duty of care, and if you breach that duty of care, you may end up sitting behind your lawyer, in a courtroom looking up at someone like me grappling with the latest High Court judgment and trying to apply it to the factual situation into which you have fallen. I can assure you there are better ways of spending your time.



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APC Monograph Number 7

Justice Bernard D Bongiorno — *Contemporary Developments in the Law Relating to Personal Injury, Negligence and Compensation*

ENDNOTES

- 1 This paper was not originally prepared for publication. It is an edited version of an address delivered by Justice Bongiorno.
- 2 [1932] AC 562.
- 3 (1883) QBD 503.
- 4 [1893] 1 QB 491.
- 5 [1932] AC 562 at 579.
- 6 [1932] AC 562 at 580.
- 7 (1983) 155 CLR 549.
- 8 (1983) 155 CLR 549 at 578.
- 9 (1867) L.R. 1 C.P. 274.
- 10 (1866) LR 1 Ex 265.
- 11 (1984) 154 CLR 672.
- 12 (1982) 150 CLR 271.
- 13 (1964) 111 CLR 28.
- 14 (1986) 160 CLR 16.
- 15 (1984) 155 CLR at 662-3.
- 16 (1987) 162 CLR 479 at 487.
- 17 Wrongs Act 1958, Part 2A.
- 18 (1991) 171 CLR 506.
- 19 (1992) 175 CLR 479.
- 20 [1957] 2 All ER 122.
- 21 (1992) 175 CLR 479.
- 22 *Cook v Cook* (1986) 162 CLR 376 at 383-384; *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 35; *Weber v Land Agents Board* (1986) 40 SASR 312 at 316; *Lewis v Tressider Andrews Associates Pty Ltd* [1987] 2 Qd R 533 at 542.
- 23 See e.g., *Florida Hotels Pty Ltd v Mayo* (1965) 113 CLR 588 at 593, 601.
- 24 *F v R* (1983) 33 SASR 189 at 192.
- 25 (1992) 175 CLR 479 at 487.
- 26 (1983) 33 SASR 189 at 194.
- 27 (1994) 179 CLR 520.
- 28 (1985) 157 CLR 424.
- 29 (1998) 192 CLR 330.
- 30 [2001] HCA 29 (31 May 2001).
- 31 (1999) 198 CLR 180.
- 32 (1997) 188 CLR 159.
- 33 (1999) 198 CLR 180.



... you, as people connected with the education profession, must continue to be aware that you do have a duty of care, you do have to discharge that duty of care, and if you breach that duty of care, you may end up sitting behind your lawyer, in a courtroom looking up at someone like me ...

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