

# Book Reviews

## **The Australian Professional Liability – Education**

Dr Keith Tronc

CCH Australia: Sydney

1999

### **Introduction**

This new work emphasises the growing importance and regularity of litigation in the field of education and the law. It also encapsulates the growing community, educational authority, and legal profession's awareness of this expanding area of law.

### **Author**

The author, Dr Keith Tronc, is well known in Australia in both the legal and education professions. He is a practising barrister and former Associate Professor of Education at Griffith University, Brisbane, Australia. He has published 27 books including eight legal texts and has presented many papers and seminars on educational administration and schools and the law.

The CCH publication includes topics such as: education and the law; injuries in learning environments; precedents; leading cases; and new developments.

### **Education and the Law**

The first section of Dr Tronc's work outlines many of the legal issues that impact on schools. Whilst they are aimed primarily at legal practitioners, educators may find the advice beneficial. This section includes a discussion of such issues as:

- changing societal responsibilities
- integration of impaired learners with mainstream schooling;
- school transport;
- teaching as a profession;
- violence within schools;
- multiculturalism;
- changing management and financial structures of modern educational facilities.

The second section, concerning conduct of litigation, is aimed primarily at legal practitioners. This is a practical checklist of steps likely to be adopted if litigation is pursued.

The third section is highly relevant for schools and includes examples of documents such as permission forms for excursions and the gathering of medical information necessary at the school level.

The remainder of this section provides an example of an expert's report and an example of an interrogatory that can be used in the examination of a potential defendant.

### **Injuries in Learning Environments**

In this part of the Guide a comprehensive discussion of the duty of care owed to students by teachers, school administrators and education authorities is undertaken. The use of case law here is invaluable. The section is most beneficial to legal practitioners and includes a discussion of such issues as:

- non delegatability of educational duty of care;
- changing standards of care;
- contributory negligence;
- causation;
- defective premises and equipment; and
- impracticability of avoiding risks.

### **Injuries in Learning Environments**

This work dispels some myths concerning playground, supervision of school sport and *in loco parentis*. The style is easy to read and includes relevant case law. Of particular interest is the section on the changing standard of care. Traditionally the teacher – student relationship was based on the *in loco parentis* principle where teachers were required to treat students as 'good parents' would. A discussion of relevant cases dispels this myth and provides a sound guide to the standard of care required of schools and teachers.

Inherently dangerous activities involving young children and adolescents are well covered and link effectively to the standard of care required. Causation continues to be the most difficult element to establish as the amount of supervision teachers should provide depends on factors such as age, capacity, intelligence, impairment and inherent risks in the situation as well as teacher characteristics, past knowledge and experience.

Statutory obligations as well as those at common law are effectively addressed in the discussion of defective premises and equipment.

A realistic viewpoint of teachers believing they can avoid all risk provides an appropriate demonstration of Dr Tronc's knowledge of schools and the law.

The issue of sub professionals versus para professionals is an emerging area of interest and it is noted that schools are utilizing more and more help from outside specialists, especially in primary school classrooms.

An examination of the most likely locations and situations in which negligence may occur is made and this part of the work may be of interest to teachers and administrators in developing school procedures and policies designed to minimise exposure to legal liability. Hopefully such strategies will improve the safety and educational outcomes of students. Tables of cases, together with succinct case notes, provide useful background material and is an efficient way of providing the reader with the ability to quickly develop a picture of the relevant case law.

Dr Tronc also addresses in this section other actions that may arise within educational settings such as:

Breach of statutory duty, for example *Workplace Health and Safety Act (Qld)*; *Childcare Act (Qld)* and *Trade Practices Act 1974 (Cth)*;

- defamation;
- breach of contract;
- discrimination;
- educational malpractice.

The discussion of educational malpractice is timely as legal action alleging a failure to learn confronts schools at a time when teachers, as professionals, are confronted by ever increasing demands for higher levels of accountability.

### **Precedents**

This section of the work outlines a variety of sample statements of claim that provide a useful starting point for the drafting of pleadings, for example victimisation, sporting injuries, defective premises, bullying and injuries sustained at child care centres.

Of particular interest is the inclusion of kick boxing injury as an example of a misfeasance action against a sport's instructor alleging negligence and breach of contract.

### **Leading Cases**

Major cases from the High Court of Australia to do with schools and the law that are examined are:

- (a) *Geyer v Downs & Anor* (1977) 138 CLR 91;
- (b) *Ramsay v Larson* (1964) 111 CLR 16;

(c) *Commonwealth of Australia v Introvigne* (1981-1982) 150 CLR 258.

### **New Developments**

This section comments on issues that are emerging, are topical, and are a matter of community and parental interest and include, for example:

- New School Education Bill 1997 (Western Australia);
- Student information kit on educational rights from New South Wales;
- Statistical data from New South Wales on school violence;
- Queensland State Ombudsman's report 1997-98 regarding the State school uniform policy
- Queensland's proposed School Uniform Bill 1999 Queensland.

### **Conclusion**

Dr Tronc has prepared a timely and useful adjunct to the emerging field of education law. It is written with his usual readable style and accuracy. It provides a comprehensive guide for legal practitioners and provides excellent detail to commonsense research and draft pleadings. As school principals, educational administrators and classroom practitioners become more aware of the need for legal risk management, this publication will be seen to a most useful guide to sound practice.

Anthony Taylor, Barrister-at-law, Brisbane, Australia  
Julie Haughton, Education specialist, Brisbane Australia



### **Being Fair: a procedural fairness manual for Australian schools**

National Children's and Youth Law Centre

Sydney, 1999 [pp.54]

ISBN 0 9586463 7 6

The National Children's and Youth Law Centre (NCYLC) is Australia's only national community legal centre dedicated to the interests of children and young people in Australia. It advises and represents children and young people and is also actively involved in research and legal reform.

The publication under review draws on: (i) an earlier publication issued by the Centre in 1995 titled “School Exclusion: Student Perspectives on the Process”; (ii) the 1996 report of the House of Representatives’ Standing Committee on Employment, Education and Training titled “Truancy and Exclusion from School”; and (iii) on the Human Rights and Equal Opportunity Commission and Australian Law Reform Commission joint report “Seen and Heard: Priority for Children in the Legal Process” issued in 1997. It also draws on certain other research projects (see page 17) and on legal resources generally.

Part One, “Procedural Fairness in Schools” provides a discussion of legal principles related to natural justice and procedural fairness in a way that would be extremely helpful to educational administrators. The discussion is clear, related to the underlying principles and directed to the school environment. The degree of detail is appropriate for the likely readership.

Part Two, “Alternative Dispute Resolution in Schools” sets out the basic principles for negotiation, mediation (including peer mediation) and community conferencing, and concludes with a brief discussion of how to ensure procedural fairness during alternative dispute resolution.

Part Three, “A Model for Implementing Procedural Fairness in School Decision-Making” is really the heart of the publication. After a discussion of a number of issues of principle the article sets out, in considerable detail, the issues to be considered by persons charged with making decisions which may be adverse to the interests of students. It is important when reading Part Three to bear in mind that it contemplates the more serious decisions, particularly those which may result in enforced absence from school. The publication itself acknowledges at various points that the seriousness of the potential outcome for the student influences the legal requirements and, more generally, the appropriateness of procedural protections to the student. In addition to the orthodox approach there are a number of interesting references to alternative dispute resolution concepts, which should alert the decision-maker to the need to consider whether a disciplinary approach is necessarily the best approach.

Part Four contains a hypothetical example of “how not to do it”. The example itself, together with the seventeen questions about it, provide useful stimulus to thought for educational administrators having responsibility in this area.

Part Five contains a checklist and evaluation which would assist education administrators in reflecting on and assessing their own practices in this area.

Appendices 1-3 provide a summary of the principles of mediation, peer mediation and community conferencing, each set out in a one page table. These appendices complement Part Two on alternative dispute resolution in schools and should be read closely with that part.

Appendix 4 provides contact details for various alternative dispute resolution services.

Appendix 5, “Student and Family Evaluation” is designed to give students and their families the opportunity to give their version of the process. There is much to be said for this as an innovation. A school confident about its procedures and committed to fairness might well benefit from providing to students and their families an opportunity to respond in this way.

Appendix 6 contains a number of comments on the United Nations Convention on the Rights of the Child.

Many school administrators, and others, find the subject of procedural fairness daunting. This publication, written in a readable style (and readable length, bearing in mind the many pressures on teachers and education administrators), should increase awareness of the importance of the central issues, facilitate dealing with them and dispel some of the fear associated with them. Probably the most critical factor in this field is accepting the legitimacy and importance of procedural fairness for students rather than perceiving it as just an obstacle or a burden. It should also be seen as an opportunity for educators to model appropriate behaviour, desirable in all walks of life where important issues arise which have the potential to adversely impact on the interests of others. This point is well summarised in the Preface in the following terms:

“In a country where the teaching of civic community participation and mutual obligation is being urged at the highest levels, such attempts should be viewed as a positive example of teaching by example”

This publication will be extremely useful to schools and educational administrators, and fills a gap in the literature. Decision-makers cannot escape the need to judge what is appropriate in each situation facing them, but guidance such as this will certainly help.

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## **Schools Go to Court: Education Case Law for New Zealand Schools**

Patrick J Walsh & Josephine Ruth Bartley

Auckland: Longman

1999, pp vi, 82

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The law of education permeates the decisions of principals, school boards and their advisers, not to mention the increasing scrutiny to which unpopular school decisions are subjected by commentators inside and outside the school community. Further, the modern proliferation of specialist tribunals and agencies has created different forums for the redress of educational grievances. (1)

Patrick Walsh is a lecturer in law in New Zealand, the author of books in education law and deputy principal of De La Salle College in Auckland. Josephine Bartley is a barrister and solicitor employed by the Parliamentary Service as a Community Liaison Advisor. This short book on education case law was prompted by the author's realisation that the decisions of New Zealand courts and other agencies are not as well known within school communities as they ought to be (especially given the "devolved" structure of the education system.) As the authors point out, the importance of the cases is that they illustrate the types of issues being raised in school communities; clarify important points of law and define key terms in legislation. They highlight the errors made by schools whose practices the courts and agencies have found unacceptable and raise schools' awareness of the penalties or remedies which may result from such errors.

The first section deals with employment cases, where the Employment Court has ruled on matters of personal grievance between a teacher and the Board of Trustees as employer, or between a principal and the Board of Trustees. Most commonly, such cases brought under the *Employment Contracts Act 1991* have been concerned with unjustified dismissal or other action that disadvantages the worker's employment.

*Schools Go To Court* then turns to judicial review of decisions made by a principal or the Board of Trustees in relation to a student's education. Actions resulting in indefinite suspension or expulsion have been challenged on grounds such as whether applicable statute law was complied with, whether bias, predetermination or absence of natural justice intruded, or whether the facts relied on in making the decision were true and accurate.

The third section is concerned with cases brought under the *Human Rights Act 1993* and the *Privacy Act 1993*, the former being aimed at the prevention of discrimination on prohibited grounds and the latter at establishing principles relating to the collection, use and disclosure of information about individuals by agencies, as well as access by individuals to information about themselves. Both statutes have clear significance in the educational context.

The final section addresses decisions by agencies other than courts, particularly those of Ombudsmen and Privacy, Children and Human Rights Commissioners. Clearly the former will have a legitimate role to play in the mediation of complaints involving organisations such as school Boards of Trustees. The Commissioners will likely be involved since schools are social institutions and deal on an everyday basis with matters involving children's privacy and rights.

The authors have necessarily been selective in their choice of cases, but clearly they have touched on the more important issues and cases of recent times. One example is the landmark High Court case *M and R v Syms and the Board of Trustees of Palmerston North Boys' High School 1990*, which defined the meaning of "gross misconduct" in section 13 (1) of the *Education Act*. Each of the cases is concisely presented through a summary of the background facts; a listing of the legal issues raised; the reasoning and decision of the court or other agency; and, very usefully, a section on implications for schools to which the experience of Walsh as a practising administrator in schools lends authority.

A sample of the last can be found in the *Palmerston* case referred to above:

### **Implications for Schools**

- ❖ "Gross misconduct" involves conduct striking and reprehensible to a high degree which warrants removal of the student from the school despite damage that would result to that student
- ❖ Schools may have a general policy towards alcohol and drugs, but cases of alcohol and drug use must not be resolved automatically in accordance with such policy.
- ❖ Board and principals must consider all circumstances no matter how troublesome.
- ❖ Even where "gross misconduct" and harmful or dangerous examples have been found to exist principals must not suspend automatically.
- ❖ These statutory approaches are for the protection of children. They are not to be sacrificed to administrative or disciplinary efficiency or some supposed need for absolute certainty.
- ❖ Results must not be fixed. They must be fair. (p.35)

There were occasions in the perusal of the book when more detail on relevant statutory provisions would have been of use to this non-New Zealand reviewer. However, given the target audience of busy decision-makers in education such brevity is inevitable; and, as the authors themselves note, there is no substitute for reading the full cases or seeking expert opinion.



*Schools Go to Court* seeks “to inform and guide busy education managers who wish to avoid complaints to outside agencies and the prospect of expensive litigation.”  
(vi) The authors have succeeded admirably in this aim.

**Endnotes**

1. Rishworth, P.T., (1996) Recent Developments in Education Law in New Zealand. *Australia & New Zealand Journal of Law & Education* vol. 1 no. 1 1996

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