UNDERSTANDING 'DUTY OF CARE' – BUILDING TEACHER CONFIDENCE IN THE 'RISK SOCIETY'

RACHEL PEPPER*

ABSTRACT

Literature describing the legalised educational context and its impact on teachers indicates that fear of falling foul of the law is leading to a crisis in professional confidence. It appears teachers are struggling to navigate the 'risk society' leading to the possibility of unnecessary narrowing of the curriculum. Empirical evidence suggests that this 'negative risk logic' can be challenged by educators improving their levels of legal literacy. There is much in Australian case law to assure teachers that courts are cognizant of the challenges they face being in the front-line of curriculum delivery. Although the law can be complex, it is argued that it is possible to provide a clear picture of how the 'reasonable teacher' avoids breaching their duty of care, while continuing to provide students with a full range of learning experiences.

I INTRODUCTION

Concerns have been raised about how well principals are navigating an increasingly legalised education context.[1] Many Australian principals report feeling stressed about their ability to manage within the 'risk society' where reacting to legal risks may in turn be putting educational outcomes as risk.[2] To raise confidence levels, calls have been made for principals to improve their legal literacy.[3] At the same time, principals point to the importance of teachers also having sufficient levels of legal literacy.[4] Ensuring teachers understand their legal duty of care is crucial in building the confidence required to reject a risk-averse approach to curriculum. It would also alleviate principals' fears regarding teachers' ability to balance the management of risk, with the provision of risk-taking learning opportunities. Although law can be complex, it is still possible to

* PhD Candidate, University of Technology Sydney, Australia. Email: Rachel.A.Pepper-1@student.uts.edu.au I thank my supervisors Visiting Professor Sally Varnham (Faculty of Law) and Associate Professor Gregory Martin (Faculty of Arts and Social Sciences) for their guidance and support. I would also like to thank the anonymous referees for their helpful comments on the first draft of this paper. This research is supported by an Australian Government Research Training Program Scholarship.

[1] Paul McCann, 'Principals' Understandings of Aspects of the Law Impacting on the Administration of Catholic Schools: Some Implications for Leadership' (PhD Thesis, Australian Catholic University, 2006); Douglas J Stewart, 'Principals' Knowledge of Law Affecting Schools' (1996) 1 *Australia and New Zealand Journal of Law and Education* 111; Allison Jane Trimble, 'Education Law, Schools, and School Principals: A Mixed Methods Study of the Impact of Law on Tasmanian School Principals' (PhD Thesis, University of Tasmania, 2017).

[2] Erica McWilliam and Lee-Anne Perry, 'On Being More Accountable: The Push and Pull of Risk in School Leadership' (2006) 9(2) *International Journal of Leadership in Education* 97; Karen Starr, 'Problematizing 'Risk' and the Principalship: The Risky Business of Managing Risk in Schools' (2012) 40(4) *Educational Management Administration & Leadership* 464.

[3] Mark Butlin and Karen Trimmer, 'The Need for an Understanding of Education Law Principles by School Principals', *The Palgrave Handbook of Education Law for Schools* (Springer, 2018) 3; Doug Stewart, 'Legalisation of Education: Implications for Principals' Professional Knowledge' (1998) 36(2) *Journal of Educational Administration* 129.

[4] Allison Trimble and Neil Cranston, 'Education Law, Schools and School Principals: What Does the Research Tell Us?', *The Palgrave Handbook of Education Law for Schools* (Springer, 2018) 23.

provide educators with a clear picture of how the 'reasonable teacher' avoids breaching their duty of care.

II THE LEGALISATION OF EDUCATION

Education law commentators have chronicled the 'legalisation' of education over the past 30 years, detailing a process whereby law is increasingly influencing educational practices and decision-making.[5] Stewart describes the phenomenon as 'a process by which decisions emanating from the courts as well as the statutory provisions of parliament or other administrative authorities, force new regulatory or controlling procedures on to educational institutions'.[6] The introduction of the *Australian Professional Standards for Teachers* ('*Standards*')[7] in 2010 is an example of such new 'regulatory or controlling procedures'.[8] Further evidence of this phenomenon emerges when identifying the legal literacy of teachers assumed within the *Standards*. With regards to teachers' responsibility to manage risk, *Standard 4.4* requires a 'proficient teacher' to 'ensure students' wellbeing and safety within school by implementing school and/or system, curricular and legislative requirements'.[9] This *Standard* suggests that teachers have an understanding of the application of negligence, workplace health and safety ('WHS'), and child protection laws to their role, as well as numerous policy and guideline documents including the *National Safe Schools Framework* and various staff codes of conduct. A recent review of the mix of governmental guidelines and curricula policies in relation to teachers and ICT found 54 directive statements about teachers' professional conduct, their knowledge and their practice; with one in five statements characterising teachers as 'legally literate'.[10]

Evidence of the legalisation of education can also be found in the rise of negligence suits against schools since the 1970's.[11] It is suggested that a greater awareness of legal rights and a willingness to pursue redress amongst students and their parents has led to the development of a line of precedent in school negligence matters.[12] Although the claims mostly allege a deficit of teacher supervision caused a student plaintiff to suffer physical injuries,[13] the demand for accountability in recent years has extended beyond purely physical injuries to include psychiatric harm.[14] Adding to the complexity in this

[5] David J Newlyn, 'The 'Legalisation' of Education: A Study of New South Wales Teachers and their Professional Development Needs in the Area of Law' (PhD Thesis, University of Wollongong, 2006); Stewart (n 3).
[6] Stewart (n 3) 131.
[7] Australian Institute for Teaching and School Leadership ('AITSL'), *Australian Professional Standards for Teachers* (2011) ('*Standards*').
[8] Stewart (n 3) 131.
[9] *Standards* (n 7).
[10] Aaron Schubert and Gerald Wurf, 'Adolescent sexting in schools: Criminalisation, policy imperatives, and duty of care' (2014) 24(2) *Issues in Educational Research* 190, 201.
[11] Mui Kim Teh, 'The Case for Legal Literacy for Educators' (2014) 15(4) *Education Law Journal* 252.
[12] Desmond A Butler and Benjamin P Mathews, *Schools and the Law* (Federation Press, 2007); Teh (n 11).
[13] Douglas J Stewart and Andrew Edward Knott, *Schools, Courts and the Law: Managing Student Welfare* (Pearson Education, 2002); Teh (n 11).
[14] Sally Varnham, 'Risk and Responsibility: Liability of School Authorities for Harm to Pupils', *The Palgrave Handbook of Education Law for Schools* (Springer, 2018) 59; Mui Kim Teh and Charles J

space is the overlap of common and statute law and the question of the interplay between the increasingly diverse set of industry standards, codes and guidelines which judges may consult during their assessment of whether a duty of care has been breached.[15]

Despite the legalisation of education, the reality of a teacher falling foul of the law remains remote. This is particularly true regarding negligence, as case law reaching back over 100 years demonstrates that schools and teachers are only found liable where there has been a 'total absence of appropriate supervision'.[16] More recent precedent also indicates that judges continue to be onside with teachers who act in the best interest of children in their care,[17] and courts have been appraised as taking 'a pragmatic approach to what is practicable and drawing back from imposing unreasonable expectations'.[18] Regardless of a seemingly realistic and accordingly, perhaps 'teacher-friendly' judiciary, the fact remains that in addition to the long-standing common law of negligence, there is now a complex array of statute law and policy documents addressing what teachers should know and do. Clearly education now operates in an increasingly legalised environment and some of the negative effects of this development are explored in the 'risk society' literature outlined below.

III THE 'RISK SOCIETY' AND ITS IMPACT ON TEACHERS

A number of Australian writers have described the impact of new perceptions of risk on principals and teachers.[19] Describing her work as a principal, Perry states that 'risk and risk management are part of our lives today and are embedded within the norms of our institutions including schools'.[20] Perry identifies a 'negative risk logic' within Australian schools and explores the change from earlier, more-positive perceptions of risk in terms of 'bravery' and 'boldness', to the current dominant understanding of risk as 'uncertainty' and ultimately as 'bad' as explained in sociological literature, including the writings of Beck[21] and Giddens.[22]

Ulrich Beck's seminal 'risk society' theory posits that there has not been an increase in risk, but rather that society is organised in response to risk.[23] In essence, it is the

Russo, 'Educational Negligence: Is It a Viable Form of Action?', *The Palgrave Handbook of Education Law for Schools* (Springer, 2018) 39.

[15] Maria Lee, 'The Sources and Challenges of Norm Generation in Tort Law' (2018) 9(1) *European Journal of Risk Regulation* 34.

[16] Joan Squelch, 'Playing Safe but Avoiding a 'Greenhouse Generation' of Children' (2013) 18(2) *International Journal of Law & Education* 7, 21.

[17] Butlin and Trimmer (n 3).

[18] Varnham (n 14) 77.

[19] Starr (n 2); McWilliam and Perry (n 2); Parlo Singh and Erica McWilliam, 'Pedagogic Imaginings: Negotiating Pedagogies of Care/Protection in a Risk Society' (2005) 33(2) *Asia-Pacific Journal of Teacher Education* 115.

[20] Lee-Anne Perry, 'Risk, Error and Accountability: Improving the Practice of School Leaders' (2006) 5(2) *Educational Research for Policy and Practice* 149.

[21] Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage, 1992).

[22] Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Stanford University Press, 1991).

[23] Francine Rochford, 'The Law of Negligence in a 'Risk Society' Calculating Ideas of Reasonable Risk' (2007) 16(1) *Griffith Law Review* 172.

perception of risk and the accompanying fear, which in turn creates its own reality.[24] Schools now operate in an unsettling modern risk climate where principals require teachers to undertake risk assessments in an attempt to 'stabilize outcomes, a mode of colonising the future'.[25] Beck argues however, that the more we try to 'colonise the future with the aid of the category of risk, the more it slips out of our control'.[26] Risk Society theorists call this process 'reflexive modernisation', where responding to risks may be creating a never-ending spiral of unintended new risks.[27] For example, organisations responding to the risk of litigation by using risk management processes 'gives rise to perceptions of increasing, uncontrollable potential for litigation'.[28] This reflexive spiral may be triggered even if risk management processes are not in place – all that is needed is the uncertainty as to whether such processes are necessary.[29] For organisations (including schools) this means that despite a small probability of litigation, the fear generated by uncertainty may have psychological effects and cause behavioural changes in those working in the organisation.[30]

IV THE ROLE OF LAW IN TEACHERS' RESPONSES TO THE 'RISK SOCIETY'

There are several studies exploring teachers' responses to the 'risk society' and the role of law remains largely in the background, particularly in research focusing on the risk of students suffering physical injuries (i.e. negligence and WH&S). The handful of studies examining teachers' approaches to planning outdoor learning experiences reveal that 'risk aversion' is leading to teachers circumventing the *National Curriculum*[31] and compromising educational aims.[32] Researchers in Australia[33] and Britain,[34] have found that teachers are shying away from taking students on field trips because they are worried about the risk of litigation, with some teachers citing a lack of trust in students to behave appropriately as a core reason for curriculum contraction.[35] Another study conducted in the UK found that teachers involved in outdoor education initiatives experienced great tensions between a desire to expose children to formative risk-taking, and their understandings of teachers' risk management responsibilities.[36] This tension resulted in teachers altering their practice by adopting a more risk-averse approach,

[24] Perry (n 20).
[25] Martin Shaw, 'The Development of the "Common Risk" Society' (2001) 38(6) *Society* 7.
[26] Susan Kenny, 'Terrify and Control: The Politics of Risk Society' (2005) 24(3) *Social Alternatives* 50, 51, quoting Ulrich Beck, *World Risk Society* (Polity Press, 1999) 139.
[27] Ibid.
[28] Rochford (n 23) 181.
[29] Ibid.
[30] Cass R. Sunstein, 'Terrorism and Probability Neglect' (2003) 26(2-3) *Journal of Risk and Uncertainty* 121.
[31] Victoria A. Cook, Deborah Phillips and Joseph Holden, 'Geography Fieldwork in a Risk Society?' (2006) 38(4) *Area* 413.
[32] Mark Connolly and Chantelle Haughton, 'The Perception, Management and Performance of Risk Amongst Forest School Educators' (2017) 38(2) *British Journal of Sociology of Education* 105.
[33] Kevin Donnelly and Kenneth Wiltshire, 'Review of the Australian Curriculum - Final Report', Commonwealth Education Department, (15 August 2014).
[34] Cook, Phillips and Holden (n 31).
[35] Ibid.
[36] Connolly and Haughton (n 32).

compromising the program's aims to teach children to interpret and judge risk. Teachers also report that fear of litigation results in concerns about even the most minor injury and that there was no longer scope for teachers to use 'common sense'. Other studies note that teachers view undertaking risk assessments and the wearing of high-visibility vests while supervising as their 'performance of risk',[37] or 'assurance strategies',[38] which may provide them with some protection from 'culturally embedded risk aversion'.[39]

It is perhaps not surprising that teachers are reportedly reacting in a fearful and defensive manner when faced with the increase of legislation and policy they are presumed to understand. Findings from a European study indicate that 'legal advice' to teachers has fuelled teacher uncertainty. Teachers reported documenting conversations with parents as part of their 'insurance strategies' against possible legal action.[40] Researchers noted that advice to teachers in a legal handbook recommended they document 'all measures' since 'it is difficult to know beforehand what may be of importance'.[41] The law in this study is portrayed as tricky and unknowable and in some ways the enemy of teachers. It is submitted that school leaders must take action to develop a 'positive risk logic' to counter the 'negative risk logic' within schools, and central to this quest would be endeavours to improve teachers' legal literacy.

A *Teachers' 'Legal Literacy'*

Researchers investigating teachers' knowledge of law refer to a concept of 'legal literacy'. However, this term lacks a well-established definition. One legal academic contends that 'legal literacy (is) that degree of competence in legal discourse required for meaningful and active life in our increasingly legalistic and litigious culture'.[42] When used in the context of educators, 'legal literacy' appears to be understood as a 'sufficient' understanding of law to equip the educator to carry out their professional duties.

Much research from the US and Canada that explores the concept of teachers' legal literacy establishes that teachers in these countries do not have sufficient knowledge about the law impacting on their practice.[43] US studies have revealed that teachers are labouring under serious misapprehensions about education law (or school law as it is

[37] Ibid 117.
[38] Per Lindqvist, Ulla Karin Nordänger and Joakim Landahl, 'Insurance and Assurance: Teachers' Strategies in the Regimes of Risk and Audit' (2009) 8(4) *European Educational Research Journal* 508.
[39] Connolly and Haughton (n 32) 118.
[40] Lindqvist, Nordänger and Landahl (n 38).
[41] Ibid 514.
[42] James Boyd White, 'The Invisible Discourse of the Law: Reflections on Legal Literacy and General Education' (1982) 54 *University of Colorado Law Review* 143, 144.
[43] David Schimmel, 'Legal Literacy for Teachers: A Neglected Responsibility' (2007) 77(3) *Harvard Educational Review* 257; Michael Imber, 'Pervasive Myths in Teacher Beliefs about Education Law' (2008) *Action in Teacher Education* 88; Julie F. Mead, 'Teacher Litigation and its Implications for Teachers Legal Literacy' (2008) 30(2) *Action in Teacher Education* 79; Matthew Militello and David Schimmel, 'Toward Universal Legal Literacy in American Schools' (2008) 30(2) *Action in Teacher Education* 98; Troy Allen Davies, 'The Worrisome State of Legal Literacy Among Teachers and Administrators' (2009) 2(1) *Canadian Journal for New Scholars in Education* 1.

referred to there)[44] as well as a myth about an 'explosion of litigation'.[45] The status of Australian teachers' understandings of education law has not been extensively investigated, although there is some indication that they too, have limited knowledge of relevant law. It would appear that many teachers have limited knowledge of education law, including mandatory reporting,[46] civil and criminal laws generally,[47] and laws around use of ICT.[48] A full picture of the nature of teachers' legal literacy and the extent to which Australian teachers may be labouring under serious misapprehensions about the law, is yet to be established.

B *Potential Benefits of Enhancing Teacher Legal Literacy*

Legal educators point to several beneficial outcomes of improving teachers' legal literacy. These include increased confidence in supervisory decisions and reduced feelings of intimidation from those who might unfairly try to point the finger of blame.[49] On completion of 'school law courses', teachers in the US and Canada reported not only being more willing and able to apply relevant legal rules, but also increased confidence levels and a sense of professional empowerment.[50] These findings are indeed positive and suggest that arming all teachers with improved, targeted education about the law, could provide a powerful counter-punch to the 'negative risk logic' said to be prevalent within schools.

Interestingly, efforts to provide Australian educators with basic legal information surrounding duty of care have been described as furthering a 'negative framing of risk'. Perry identifies the legal risk management approach taken by authors Stewart and Knott,[51] aiming to explain the laws around student safety as 'a negative framing of risk – risk [as] something to be avoided like icebergs in the ocean'.[52] Another view of the work of Stewart and Knott[53] is that arming teachers with a basic understanding of the law underpinning their work may in fact embolden them to embrace a positive approach to risk. That is to say, improving teacher legal literacy may help counter the current negative perceptions of risk within society.

---

[44] Ralph D Mawdsley and J Joy Cumming, 'The Origins and Development of Education Law as a Separate Field of Law in the United States and Australia' (2008) 13(2) *Australia & New Zealand Journal of Law & Education* 7.
[45] Imber (n 43) 90.
[46] Kerryann Walsh et al, 'Elementary Teachers' Knowledge of Legislative and Policy Duties for Reporting Child Sexual Abuse' (2013) 114(2) *The Elementary School Journal* 178.
[47] Newlyn (n 5).
[48] Lucy J York, 'Preservice Teachers: What do They Know about Cyberlaw?' (International Symposium: Future Focussed Teacher Education, 28-29 April 2014).
[49] Teh (n 11), citing S Sydor, 'Teacher Education Needs More Law' (Canadian Association for the Practical Study of Law in Education Conference, 29 April - 2 May 2006).
[50]Janet R Decker, Patrick D Ober and David M Schimmel, 'The Attitudinal and Behavioral Impact of School Law Courses' (2019) 14(2) *Journal of Research on Leadership Education* 160; Jerome G Delaney, 'The Value of Educational Law to Practising Educators' (2009) 19 *Education Law Journal* 119.
[51] Stewart and Knott (n 13).
[52] Perry (n 20) 151.
[53] Stewart and Knott (n 13).

As noted above, there is much in Australian case law to provide educators with confidence that courts are cognizant of the challenges they face and are inclined to find in favour of teachers who appear to be putting in their best efforts for the sake of their students.[54] The following provides a brief outline of the relevant law, emphasizing major Australian negligence precedents in order to provide a picture of the 'reasonable teacher'. Although teachers would benefit from developing their legal literacy in a number of areas, negligence law is arguably the most pressing in the current risk-averse context. It is submitted that negligence law should be made accessible to teachers, thereby dispelling myths around 'duty of care', and enhancing teachers' confidence navigating the 'risk society'.

V THE 'REASONABLE TEACHER'S' DUTY OF CARE

The term 'duty of care' is in common usage today. Arguably for many people it carries connotations quite different to its specific legal meaning. While teachers may readily accept that they owe their students a 'duty of care', what this looks like in law is often unclear to many of them, according to the literature surrounding teacher legal literacy outlined above. As we shall see, the word 'reasonable' appears frequently in laws relevant to teachers' duties regarding student safety and welfare. This is particularly true regarding the legal elements of negligence. In order to steer clear of negligent behaviour, a teacher needs to act in a 'reasonable' way and so for this reason, we look to identify what a 'reasonable teacher' should do.

A *Common Law and Statute Law Working Together*

It may be difficult for teachers to distil a clear picture of the actions of the 'reasonable teacher' from decided negligence cases. Case reports are usually lengthy and provide a definitive pronouncement on the application of law to that particular set of facts only. However, these binding precedents also contain general principles which can be applied in varying factual circumstances. The factual scenarios of these cases also provide real-life stories which can bring legal doctrine to life. In addition, many of these cases contain succinct and encouraging rulings from judges with regards to a teacher's duty of care. Therefore, as a whole, this body of precedent provides a nuanced picture of how the 'reasonable teacher' is able to uphold their legal duty of care.

Following what was termed the 'insurance crisis' at the turn of this century, state legislatures introduced many of the tort law reforms recommended in the *Ipp Review* of 2002.[55] As a result, negligence law in Australia encompasses both case and statute law. Although each state has different versions of this tort reform, there is much uniformity in the reform acts (mostly titled Civil Liability Acts). This paper will refer to provisions of the *Civil Liability Act 2003* (Qld) and equivalent provisions from other jurisdictions will be provided where possible in the footnotes. The body of precedent developed during the 20th century and prior to the tort law reforms, remains useful as an influential

[54] Butlin and Trimmer (n 3).
[55] David Ipp et al, to Commonwealth of Australia, *Review of the Law of Negligence* (30 September 2002).

interpretation tool. Hence, the common law of negligence remains a suitable guide to identifying the nature and extent of a teacher's duty of care. Many teachers would approve of the overall intent of the legislative reforms to push for more emphasis on individual responsibility for safety and there has been a corresponding trend in case law in this regard, both before and after the reforms.[56]

B *Nature of the Duty of Care*

The doctrine of negligence as applied to Australian teachers operates in similar fashion to other countries who have inherited their legal system from Britain.[57] In short, a teacher's duty of care requires the taking of reasonable steps to protect students from reasonably foreseeable injuries. Due to the doctrine of vicarious liability, a negligent teacher's employer (i.e. a 'school authority') will instead become liable to compensate the plaintiff (provided the teacher was acting in the course of their employment). Nevertheless, the actions or omissions of teachers involved in any incident will invariably be closely scrutinized and this may have implications for their future employment. Therefore, it is important for teachers to have an understanding of judicial assessments regarding 'the reasonable teacher' in particular situations.

It should also be noted at the outset that a school authority also owes its own duty of care to students (i.e. separate to the duty owed by a teacher). Following the High Court case of *Commonwealth v Introvigne* in 1982,[58] the duty has been regarded as non-delegable, ensuring that school leaders cannot simply hire teachers and leave decisions about the care of students in their hands. Murphy J in this case described the duty in terms of taking all reasonable care to provide:

> (1) …suitable and safe premises; …[and]
> (2) …an adequate system to ensure that no child is exposed to any unnecessary risk of injury; and to take reasonable care to see the system is carried out.[59]

This statement from Murphy J, referring, in effect, to a 'safety system', is an example of the clear parallels between negligence law and WH&S legislation[60] which will be explored in more detail later. At this stage, we should simply note that the 'reasonable teacher' also holds duties as 'a worker' under *WH&S* legislation. This includes the duty to uphold policies under the school's 'safety system' regarding the safety not just of students and school visitors, but also the teacher's own safety while undertaking school related activities.

To be successful in negligence, a student plaintiff must satisfy three elements: (i) the existence of a duty of care; (ii) that the teacher/school's acts or omissions breached the standard of care required; and (iii) that there is sufficient causal connection between the breach of duty and the student's injuries. In most school law cases, the existence of a

[56] Varnham (n 14).
[57] Paul Babie, Charles J Russo and Greg M Dickinson, 'Supervision of Students: An Exploratory Comparative Analysis' (2004) 9 *Australia & New Zealand Journal of Law & Education* 41.
[58] *Commonwealth v Introvigne* (1982) 150 CLR 258.
[59] Ibid 274–5.
[60] For example: *Work Health & Safety Act 2011* (Qld) ('*Work Health & Safety Act*').

duty of care to students is generally considered to be established from past cases, so the focus turns to the remaining two elements of negligence.

C *Breach of the Standard of Care*

The second element in determining negligence is central to understanding the nature of the 'reasonable teacher'. For this reason, it is covered in some detail here.

1 *Legislative Requirements for Breach of Duty*

The requirements for breach of duty are specified in section 9 of the *Civil Liability Act 2003* (Qld) and are mostly similar across all Australian jurisdictions.[61] A teacher is not negligent in failing to take precautions against a risk of harm unless:

> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
> (b) the risk was not insignificant; and
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.

Here again, the Civil Liability legislation could be viewed as emphasizing a more realistic picture of what a 'reasonable teacher' should do. Despite the continued use of the common law concept of foreseeability (a risk about which the teacher knew or ought to have known), this is tempered with the need for the risk to also be 'not insignificant', rather than the previous common law test of 'not far-fetched or fanciful' from *Wyong Shire Council v Shirt*.[62] The previous test was considered too expansive and the tort law reform means that the legal threshold is now lower[63] so that teachers may ignore 'insignificant risks'. It should be noted however, that despite providing a less expansive test for foreseeability, some commentators believe this reform does not impact greatly on the courts' expectations of the 'reasonable teacher.'[64]

2 *The 'Negligence Calculus'*

Perhaps the most pivotal tool for discovering the standard of care owed by a teacher in any particular case is the 'negligence calculus.' This common law framework has been incorporated into the *Civil Liability Act 2003* (Qld) in section 9 so that the reasonableness of the teacher's actions in taking precautions (or not) are to include consideration of:

> (a) the probability that the harm would occur if care were not taken;

---

[61] See, also, *Civil Law (Wrongs) Act 2002* (ACT) ss 42–3; *Civil Liability Act 2002* (NSW) s 5B; *Civil Liability Act 1936* (SA) ss 31–2; *Civil Liability Act 2002* (Tas) s 11; *Wrongs Act 1958* (Vic) s 48; *Civil Liability Act 2002* (WA) s 5B.
[62] *Wyong Shire Council v Shirt* (1980) 146 CLR 40.
[63] Elizabeth Bluff and Richard Johnstone, 'The Relationship Between "Reasonably Practicable" and Risk Management Regulation'(2005)' 18 *Australian Journal of Labour Law* 197.
[64] Butler and Mathews (n 12); David Ford, *'Tort Reform: Does it affect teachers and schools?'* Emil Ford & Co Lawyers (29 July 2004) <https://www.emilford.com.au/imagesDB/wysiwyg/TortLawReformandSchools(2).pdf>.

(b) the likely seriousness of the harm;
(c) the burden of taking precautions to avoid the risk of harm; [and]
(d) the social utility of the activity that creates the risk of harm.[65]

The common law provides many useful examples of the courts applying the 'negligence calculus' when deciding on the appropriateness of a teacher's actions in various situations. A much-cited precedent (and a particularly sad case) is that of *Konjajian*[66] which followed the death of an 11-year-old student involved in a game of modified hockey or 'minkey'. Despite the tragic outcome, the court found on balance that the 'social utility' of students participating in sport was a very important factor. After closely examining how the teacher had planned and managed the game, including the training provided to the children, the court was satisfied that this was an unfortunate accident that involved no breach of duty of care on the teacher's part. This precedent illustrates how negligence law supports the balancing of safety, with need for students to be provided with formative risk-taking opportunities.

3 *The Bolam Rule – Teachers to be Viewed as Professionals*

The 'Bolam rule' originated from medical negligence cases and is now codified in section 22 of the *Civil Liability Act 2003* (Qld).[67] It provides that a professional does not breach their duty for the performance of professional services, if they have '...acted in a way that (at the time the service was provided) was widely accepted by peer professional opinion...'. Teachers have long viewed themselves as 'professionals'[68] and the courts have also expressed this view of teachers' status.[69] The inclusion of the 'Bolam rule' in the Civil Liability Acts means that the decision as to what a 'reasonable teacher' should have done in the circumstances includes where relevant, an exploration of what is widely accepted by other teachers as competent professional practice.[70]

This should be an encouraging development for teachers, that it is seen as advantageous for judges to consult educators when deciding what actions should be considered appropriate. This is particularly the case when considering the challenging conditions teachers face in modern schools. It should be noted however, that if courts avail themselves of 'expert educator opinion' as to competent professional practice, they are not bound to accept this opinion.[71] It is also by no means the only consideration for judges in deciding what is reasonable in each case. Judges may, for example, consider the teacher's adherence (or otherwise) to any applicable standards. This would include

[65] See, n 61.
[66] *Trustees of the Roman Catholic Church of the Archdiocese of Sydney v Kondrajian* [2001] NSWCA 308 ('*Kondrajian*').
[67] See, also, *Civil Liability Act 2002* (NSW) s 5O; *Civil Liability Act 1936* (SA) s 41; *Civil Liability Act 2002* (Tas) s 22; *Wrongs Act 1958* (Vic) s 59; c.f. *Civil Liability Act 2002* (WA) s 5PB which only applies to medical professionals.
[68] Queensland Teachers' Union, 'Teachers' Liability in negligence to students - Queensland Government Schools' (February 2020) <https://www.qtu.asn.au/application/files/7815/8226/5441/Teachers_liability_in_Negligence_to_Students_QLD_Government_Schools_Feb2020.pdf>.
[69] *Ex parte Professional Engineers Association* (1959) 107 CLR 208.
[70] Ford (n 64).
[71] *Rogers v Whitaker* (1992) 175 CLR 479.

Standard 4.4 requiring teachers to follow school policies aimed at ensuring students' wellbeing and safety.[72]

4 *Utility of 'In Loco Parentis' Concept*

To further clarify the standard of care to be provided by a teacher, it is important to briefly discuss the term 'in loco parentis'. This concept has its origins in a very early case from the late-19th century. In this case the teacher is described as having to provide 'such care…as a careful father would take of his boys'.[73] By the mid-20th century, teachers were to take 'such precautions for [the child's] safety on that occasion in question as a reasonable parent would have taken in the circumstances'.[74] Traditionally this term was meant to illustrate that teachers are in the place of the parent, so that while the child is at school, the parents' authority over, as well as duty regarding, the child's safety, is placed with the teacher.

The usefulness of the doctrine of 'in loco parentis' in deciding on the appropriate standard of care has arguably been of limited utility for many decades,[75] particularly as the nature of schooling has changed substantially since it was first devised. Some commentators claim that due to the adoption of the 'Bolam rule' within the *Civil Liability* legislation, the concept of the 'reasonable parent' should be replaced in all cases by the 'reasonable teacher/school authority'.[76] It is submitted that the concept of 'the reasonable teacher' is more useful for illuminating teachers' duty of care. Teachers rightly consider themselves to be 'professionals' and references to 'in loco parentis' operate to obfuscate, rather than enlighten, regarding the law of negligence.

5 *Landmark Case – Hadba*

Perhaps the most significant illustration of the 'reasonable teacher' is provided by the High Court case of *Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn (as St Anthony's Primary School) v Hadba*[77] from 2005. Like the earlier landmark case of *Introvigne*,[78] the pivotal question was the appropriateness of the school's playground supervision. The court closely examined the school's overall safety system regarding its playground flying fox. This included their 'no touch' policy which the court found was effectively communicated to students by posters around the school, by teachers in the classroom and by the Principal on assembly. In addition, a positive assessment was made of the school's playground duty procedure and the teacher's adherence to it. The teacher on duty, in line with the school's policy, had moved away from the flying fox to attend to students misbehaving inside a classroom. It was at this

[72] *Standards* (n 7).
[73] *Williams v Eady* (1893) 10 TLR 41, 42 (Lord Escher).
[74] *Ramsay v Larsen* (1964) CLR 16, 27 (Kitto J).
[75] James G Jackson and Sally Varnham, *Law for Educators: School and University Law in Australia* (LexisNexis Butterworths, 2007) 187–8; Squelch (n 16) 11.
[76] Butler and Mathews (n 12) 23–4; David Ford (n 64).
[77] *Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn (as St Anthony's Primary School) v Hadba* (2005) 221 CLR 161 ('*Hadba*').
[78] *Commonwealth v Introvigne* (n 58).

time that 8-year-old Farrah Hadba suffered a serious injury after a couple of other students pulled her off the flying fox.[79]

Again, despite unfortunate injuries to the child, the claim of negligence failed. The High Court found that the school had in place an adequate system of supervision. Their Honours rejected the notion of constant supervision of children, stating that this approach would be 'damaging to teacher-pupil relationships by removing even the slightest element of trust…' and would likely 'retard the development of responsibility in children'.[80] Constant supervision would also 'call for a great increase in the number of supervising teachers and the costs of providing them.'[81] Relating this to the negligence calculus discussed above, the court is suggesting that the 'burden' of taking additional precautions, and the 'social utility' of allowing children to develop some sense of responsibility, outweigh the 'probability' and 'likely seriousness' of harm occurring from a briefly-unsupervised flying fox. That is, the teacher and school had acted reasonably in the circumstances, so there was no breach of duty.

Notwithstanding the rejection of the need for constant supervision in this leading case, it is important to again note that a 'reasonable teacher' adheres closely to policies making up the school's safety system. Highlighted as pivotal was adherence to playground duty expectations, including reminders to students about the school's 'hands off' rule prior to their use of the flying fox.

D *Causation*

Once proof of breach is established, the court must then be satisfied the breach caused the harm suffered by the plaintiff. Again, the *Civil Liability Act 2003* (Qld) mirrors the common law by requiring proof of 'factual causation' via the 'but for' test in section 11.[82] This means that the plaintiff student must prove that 'but for' the teacher's breach of duty, the harm suffered would not have occurred. The court must also consider whether or not the school/teacher should be held responsible for the particular harm and be required to provide compensation to the student. This can include the court having regard for 'policy' (that is, non-legal) considerations.

Habda provides a powerful illustration of the importance of proving causation. Here, the plaintiff was unable to prove that an alternate form of supervision, such as a teacher providing constant surveillance of the flying fox, would have prevented the incident.[83] Indeed, school negligence case law includes many cases where plaintiffs have been unable to show the causal link between the supervision provided and the injury suffered.[84]

---

[79] *Hadba* (n 77) 165–6 [6]–[7].
[80] *Hadba* (n 77) 170 [25].
[81] Ibid.
[82] See, also, *Civil Law (Wrongs) Act 2002* (ACT) s 45; *Civil Liability Act 2002* (NSW) s 5D; *Civil Liability Act 1936* (SA) s 34; *Civil Liability Act 2002* (Tas) s 13; *Wrongs Act 1958* (Vic) s 51; *Civil Liability Act 2002* (WA) s 5C.
[83] *Hadba* (n 77) 171 [27].
[84] Squelch (n 16) 15.

E *Particular Issues for the 'Reasonable Teacher'*

1 *Preventing Fights and Bullying*

The question as to whether the 'reasonable teacher' physically intervenes in student fights has long been of concern to teachers.[85] Despite obiter dictum in *Richards v Victoria* suggesting physical intervention in student fights may in some cases be a reasonable action on the part of a teacher,[86] the issue has not been definitively answered in subsequent cases.[87] There have been cases from lower courts suggesting it may be appropriate for a teacher to intervene in situations where their own safety is not in jeopardy.[88] These decisions, however, carry little weight as precedents. WH&S legislation is relevant here in that a teacher as 'a worker' must take reasonable care for his or her own safety.[89] From this perspective it would seem prudent that on balance, a teacher should refrain from physically intervening in a student fight.

Despite some uncertainty about whether a 'reasonable teacher' should physically intervene in student fights, it is clear that the law requires teachers to apply adequate disciplinary intervention techniques.[90] In the modern context, this would include effective application of the school's behaviour management policies.[91] On this point it is also clear that modern schools, in light of legislative reforms regarding human rights and equal opportunity, and child protection, would necessarily have anti-bullying policies with which all teachers must fully engage. This would include a comprehensive, school-wide system for preventing bullying which has in fact long been advocated for by the judiciary in earlier school law cases involving incidents of bullying.[92]

Recent cases in this area have highlighted the requirement for teachers to consistently implement preventative actions outlined in school anti-bullying policies. In *Cox v NSW*, the court awarded over one million dollars in compensation to a plaintiff who suffered long-term psychological injuries following serious bullying while at school.[93] The court found that the school failed to follow through on its undertaking to ensure teachers properly supervised the bully, to keep him away from the plaintiff. Similarly, in *Oyston v St Patrick's College (No 2)* the school was unable to show the court it had systematically applied preventative actions outlined in its anti-bullying policies.[94] Accordingly, it was found to have breached its duty of care to the plaintiff.

---

[85] Drew Hopkins, *The Legal Obligations of a Teacher: A Report for the Victorian Institute of Teaching* (Australian Catholic University, 2008).
[86] *Richards v Victoria* [1969] VR 136, 143 ('*Richards*').
[87] Hopkins (n 85).
[88] *Moran v Victorian Institute of Teaching* [2007] VCAT 1311; *Buvac v New South Wales* (District Court of New South Wales, 7 October 2005).
[89] See, eg, *Work Health & Safety Act 2011* (Qld) s 28(a).
[90] *State of Victoria v Bryar* [1970] ALR 809 ('*Bryar*'); *Richards* (n 86).
[91] Stewart and Knott (n 13).
[92] See *New South Wales v Griffin* [2004] NSWCA 17; *Haines v Warren* [1987] Aust Torts Reports ¶80-115.
[93] *Cox v New South Wales* (2007) 71 NSWLR 225.
[94] *Oyston v St Patrick's College (No 2)* [2013] NSWCA 310.

2 *Sport and Practical Subject Areas*

Subjects with a large practical component present specific challenges for the 'reasonable teacher' who must fulfil a high standard of care. Here, the law expects the teacher to apply special expertise in the planning and running of this curriculum. The substantial body of case law around school sport provides numerous clear examples of the 'reasonable teacher' in action. A comparison of cases, across the decades, reveals that expectations regarding teacher professionalism remain relatively consistent. Here again, there is ample evidence of judicial support for teachers providing students with formative risk-taking opportunities.

For example, *Kretschmar v Queensland*[95] in 1989 and *Sanchez-Sidiropoulos v Canavan*[96] in 2015 provide encouragement for teachers endeavouring to fulfil curriculum aims of building students' fitness and co-ordination through games that include the risk of collision. According to Thomas J, these sort of curriculum choices are legitimate because 'it is not in the interest of society to impose artificial standards that would encourage the rearing of a greenhouse generation'.[97]

In Kretschmar, the game of 'rob the nest' was seen to be appropriate for special needs students within a classroom setting,[98] and in Sanchez-Sidiropoulos, 'table soccer', a type of 'tag game', was appropriately played on asphalt. [99] Importantly though, the proviso remains that the teacher in charge must 'observe a high level of responsibility and … perform their functions thoughtfully and carefully.'[100] Depending on the circumstances in each case, this may involve:

(i) providing careful instructions including rules of the game and/or demonstrating manoeuvres;
(ii) ensuring students have fully understood the instructions;[101]
(iii) warning of risks;
(iv) matching students by ability and size; and
(v) closely supervising, ensuring rules are respected so that students play in a vigorous but not 'boisterous way'.[102]

Other subjects with large practical components, such as Art, Science, Technology and Hospitality, also involve inherent dangers. Despite this, there are relatively few school negligence cases stemming from these types of practical subjects.[103] For teachers in these areas, it appears that a failure to act in a reasonable way may result in legal action in the WH&S arena, where the 'reasonable teachers'' actions are assessed in terms of

[95] *Kretschmar v The State of Queensland* (1989) Aust Torts Reports ¶80-272 ('*Kretschmar*').
[96] *Sanchez-Sidiropoulos v Canavan* [2015] NSWSC ('*Sanchez-Sidiropoulos*').
[97] *Kretschmar* (n 95) [892].
[98] Ibid.
[99] *Sanchez-Sidiropoulos* (n 96).
[100] *Kretschmar* (n 95).
[101] *Duncan v Trustees of Roman Catholic Church of Archdiocese of Canberra and Goulburn* (1998) ACTSC 109.
[102] *Kretschmar* (n 95).
[103] Stewart and Knott (n 13). Note however that there are some relevant cases – for example *Bartley v Haines; Oliver v Haines* (Supreme Court of New South Wales, 15 March 1989) which involved an exploding model volcano in Geography class; *New South Wales v Moss* (New South Wales Court of Appeal, 24 May 2000) where sausage fat exploded in Home Economics class.

applying risk management practices. This will be discussed briefly in the WH&S section further on.

3 *Excursions and Extended Trips*

The measures to be taken by the 'reasonable teacher' taking students off-campus for excursions and extended trips are necessarily more demanding than those which relate to activities held in the familiar context of the school campus. Here, direction comes from a combination of negligence cases along with sobering Coroner's Court findings regarding deaths occurring during such activities.[104] Together these cases illustrate how the standard of care required to ensure the safety of students is increased while off-campus and although circumstances can vary quite dramatically, a picture of the 'reasonable teacher' is discernible.

Munro v Anglican Church of Australia highlights the importance of planning and briefing staff and students prior to outdoor activities, as well as the importance of teachers exercising enough foresight to cancel or stop an activity if circumstances change. Here a student was injured while helping to move a trailer of equipment down a steep embankment. The court found the teacher breached his duty of care by directing the manoeuvre when safer alternatives for moving the trailer were available.[105]

In contrast, more recent cases provide examples of teachers meeting the standard of the care required for conducting outdoor activities. In *Gugiatti v Servite College Council Inc*, a 16-year-old student on a leadership camp injured himself jumping across a shallow stream. Here the school was not found liable for the injury suffered. Not only was the risk not reasonably foreseeable, but it was not reasonable to expect teachers to provide instructions on how to cross the stream, particularly in the context of a leadership camp.[106]

Connolly J in *Regan v ACT Schools Authority* provides a succinct statement of how the school and its teachers had met their standard of care, despite a student being injured during an abseiling activity:

> The school had exercised appropriate care in the planning and preparation for the abseiling class. Mr McCarthy and Mr Thompson were experienced and well-qualified outdoor education teachers. I am satisfied that the students were properly instructed and supervised. I am satisfied that the equipment was all in good working order…I am satisfied that the requirements in the Outdoor Education Manual were followed. [107]

[104] David Ford, 'Managing the Risks in Off-Campus Activities' Emil Ford & Co Lawyers (4 June 2010) <https://www.emilford.com.au/imagesDB/wysiwyg/ManagingtheRisksinOff-CampusActivities_1.pdf>.
[105] *Munro v Anglican Church Australia* (NSW Supreme Court, Court of Appeal, 15 May 1987) .
[106] *Gugiatti v Servite College Council Inc* [2004] WASCA 5.
[107] *Regan v ACT Schools Authority* [2003] ACTSC 47, [31].

F *Defences*

Even if a teacher were found to have acted negligently, they may avoid (or reduce) liability on the basis of particular defences, discussed below.

1 *Obvious Risk*

The common law principle of voluntary assumption of risk has been incorporated into most of the Civil Liability Acts via the 'obvious risk' provisions.[108] The plaintiff will be presumed to have assumed a risk of harm where that risk is found to be an 'obvious risk', unless the plaintiff can prove on the balance of probabilities that they were not aware of the risk. The 'obvious risk' provisions operate as a complete defence as well as forming a relevant consideration for determining liability.

In the context of schools, an 'obvious risk' is one that would be apparent to a reasonable student in the position of that student. Here the rationale behind imposing a non-delegable duty of care on schools comes to the fore, as it is tied to the immaturity of students and their general lack of appreciation of risk.[109] It therefore seems unlikely that this provision will be successfully used as a defence or alter the standard of care owed by a teacher.

2 *Contributory Negligence*

The Civil Liability Acts have also modified the position regarding the partial defence of contributory negligence.[110] Traditionally this operated to reduce the plaintiff's claim by an amount in line with their contribution to the damage they suffered, due to a failure to take reasonable care for their own safety. Courts may now find a student plaintiff's actions contributed 100% to their injuries,[111] after applying factors aligned with the 'negligence calculus' outlined above. Despite this legislative reform, courts still appear to utilise much of the reasoning from earlier precedents.[112] Such precedents include *Horne v Queensland*, where a thirteen-year-old girl, egged on by her peers, rode a defective bike from school to a tennis activity and had an accident on a busy road. Despite being an 'intelligent girl', she had acted in a foolhardy way, knowing she was an inexperienced rider and was consequently found 25% responsible for the injuries she suffered.[113]

---

[108] *Civil Liability Act 2002* (NSW) ss 5F–5G; *Civil Liability Act 2003* (Qld) s 14; *Civil Liability Act 1936* (SA) ss 37–9; *Civil Liability Act 2002* (Tas) ss 15–17; *Wrongs Act 1958* (Vic) s 53–6; *Civil Liability Act 2002* (WA) ss 5E, 5N–5P.
[109] Butler and Mathews (n 12).
[110] *Civil Liability Act 2002* (NSW) s 5R; *Civil Liability Act 2003* (Qld) s 23; *Civil Liability Act 1936* (SA) s 44; *Civil Liability Act 2002* (Tas) s 23; *Wrongs Act 1958* (Vic) s 62; *Civil Liability Act 2002* (WA) s 5K.
[111] *Civil Law (Wrongs) Act 2002* (ACT) s 47; *Civil Liability Act 2002* (NSW) s 5S; *Civil Liability Act 2003* (Qld) s 24; *Civil Liability Act 2002* (Tas) s 24; *Wrongs Act 1958* (Vic) s 63; *Civil Liability Act 2002* (WA) s 5K. C.f. *Civil Liability Act 1936* (SA) s 50.
[112] Butler and Mathews (n 12).
[113] *Horne v Queensland* [1995] Aust Torts Reports ¶81-343 ('*Horne*').

VI THE REASONABLE TEACHER AND WH&S LEGISLATION

The 'negligence calculus' (discussed earlier) is an important aspect of the parallels between negligence law and WH&S legislation. The *Work Health & Safety Act 2011* (Qld) provides a similar 'calculus' when defining what would be 'reasonably practicable' steps in relation to a duty to ensure health and safety.[114] However, within the WH&S context, this might be termed a 'risk management process' because under the WH&S legislative scheme, including subordinate legislation and supporting industry codes, workers may be required to carry out formal risk assessments. These may include the documentation of 'control measures' implemented in order to provide evidence of the school's 'safety system'.

Many of the practical activities undertaken in schools today are impacted by WH&S legislation and from this perspective, it could be said that more is now required of the 'reasonable teacher' at least with regards to risk management documentation. That said, the documenting of one's risk management approach while undertaking practical activities is arguably a useful undertaking. It is also important to note that a failure to following through with safety duties as a 'worker', may result in a teacher facing criminal prosecution.[115]

It has been suggested that 'prudent' teachers should consider the 'negligence calculus' in their approach to managing the risk of injury to their students.[116] To think in these terms would reinforce the fact that within negligence and WH&S law, the 'reasonable teacher' aims to balance the provision of safety with appropriate risk-taking opportunities. However, if teachers have limited knowledge of relevant law, this balancing may not occur and teachers may instead resort to a risk-averse approach. It is therefore vital that the any shortfalls in teachers' legal literacy are addressed, so that teachers have the confidence to plan a full range of learning experiences for students.

VII CONCLUSION

Teachers are indeed working in a legalised context within a society increasingly attuned to risks and concerned about protecting vulnerable members of our society, including students. The literature indicates that teachers are struggling to navigate the 'risk society' and that fears of falling foul of the law are leading to a crisis in professional confidence. However, despite changes within society, a review of Australian legal precedent provides evidence of relatively stable and consistent expectations of the 'reasonable teacher' upholding their duty of care. Over the decades, the judiciary have made it clear that teachers should strive to provide students with curricula that involves appropriate risk and that if they do so in a careful and thoughtful manner, they will not breach their duty of care. It is likely that arming teachers with a good understanding of their 'duty of care' would provide them with much needed encouragement. Enhancing educators' legal literacy in this way would counter any risk-aversion amongst teachers and ensure learning outcomes are not compromised. This in turn, would assist principals

[114] *Work Health & Safety Act 2011* (Qld) s 18.
[115] See, eg, *All Souls St Gabriel's School Inc. v Thomas* [2006] QIC 59.
[116] Ford (n 64).

counter the 'negative risk logic' within schools, as they support teachers in navigating the 'risk society'.

Keywords: teachers' legal literacy, negligence, 'risk society'.