



## DUTY OF CARE

This document has been inspired by information supplied by AIS (NSW) and is primarily intended for the Principal, the Board of Directors and teaching staff who are involved in managing the duty of care and risk assessment for particular activities that students will potentially participate in, while enrolled at the school.

The document summarises the issues in managing the duty of care in:

- **supervision**
- **sports**
- **excursions**
- **exchange programs**
- **bullying (as well as preventative steps that schools can take to mitigate risks).**

### What Duty of Care JVS Owes its Students

1. In Australia, a person owes a duty of care to others to not cause injury as a result of their negligent act or omission.
2. The nature of the duty as it applies in New South Wales has now been set out in legislation. The *Civil Liability Act 2002* ('**Civil Liability Act**') applies in relation to any claim for damages for personal injury, death, damage to property or economic loss resulting from negligence. The Civil Liability Act provides that a person is not negligent in failing to take precautions against a risk of harm unless:
  - a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known);  
**and**
  - b) the risk was not insignificant; **and**
  - c) in the circumstances, a reasonable person in the same position would have taken those precautions.
3. However, the law also imposes a special duty on certain categories of relationships, giving rise to more onerous duties. The relationship between a school and its pupils is one such relationship. JVS has a duty to **ensure** that reasonable steps are taken to prevent harm to students. This is a positive duty - that is, it requires that positive steps be taken.
4. This does not mean that JVS is under an obligation to **ensure** that its pupils never suffer injury, but that the school **must take reasonable steps** to prevent the children being harmed.
5. The duty of care owed by a school to its students has been held by the courts to be a non-delegable duty. This means that the JVS cannot discharge the duty simply by putting a responsible third party, such as a teacher or a third party provider, in charge.

6. A school always has a responsibility to ensure that reasonable steps are taken for the safety of its students. This does not, however, mean that JVS need always take these steps itself. It may be sufficient for the school to satisfy itself that the appropriate steps are being taken by others.

### **What is a Foreseeable Risk?**

7. A foreseeable risk is one which a reasonable person would have foreseen the action or non-action constituted a real risk to a particular student, or a group of students.
8. A school will not be liable unless a student can establish that the school ought to have foreseen that the negligent action of the school might endanger the student.
9. In the context of schools, since the *Civil Liability Act* was enacted, the Courts have held that the following risks were reasonably foreseeable:
  - a) the risk of injury to a student climbing a 3.8 metre high obstacle course with wet clothing and wet shoes;
  - b) the risk of injury to a student playing touch football on a school oval;
  - c) the risk of injury to students left unsupervised;
  - d) the risk of injury as a result of bullying.

However, such cases do not mean that the risks will always be 'reasonably foreseeable'. Whether they are, depends on a careful analysis of the facts of each case.

If a school is aware that a student has a condition that may make that student particularly vulnerable, it should alert staff to that condition and establish procedures to deal with it.

### **What is Causation?**

10. The Joseph Varga School needs to ensure that it has taken reasonable specific steps to prevent the injury, otherwise it can be legally argued that it was more likely than not that the negligent acts of the school that caused the injury.

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

11. In taking reasonable steps, the school:
  - does not just have the burden of avoiding a particular risk of harm, but the burden of taking precautions to avoid a similar risk of harm for which the person may be responsible;
  - must take into account the fact that the steps a school is able to take are limited by the financial and other resources that are reasonably available to the school for the purposes of exercising its functions;
  - must have regard to evidence from the school that its evidenced practices complied with the general procedures and applicable standards for the exercise of its duty of care functions.

### **What is the Scope of the Duty of Care?**

12. Whether or not JVS has discharged its duty of care will depend on the particular circumstances in each case.

JVS generally has a duty of care in relation to its students in respect of activities engaged by students at school or activities engaged in by students outside school, but which are facilitated by the school.

## Supervision

While students are on school premises, school authorities and teachers owe students a duty of care of general supervision concerning their physical safety.

General principles in relation to supervision are as follows:

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

## Sports

Sports are an important part of school life, but can lead to an increased risk of injury. Schools should be vigilant to ensure that sporting activities are properly supervised and, as far as possible, supervised by appropriately qualified teachers.

Just as in the playground, dangerous activities should be prevented and school authorities should ensure students are aware of, and follow the rules.

Schools must also take account of, and distribute, information that could prevent injuries.

It would be prudent for a school to take account of what it knows about students before allowing them to play sport. If the school is concerned that a student is not fit to participate in a particular activity, the school could require the student to obtain a medical clearance from a doctor or physiotherapist before participating in the sport.

A school and its teachers have a duty to reasonably ensure that its fields and sporting equipment pose no danger to its students. A school also has a duty to reasonably ensure that any fields upon which its students play (whether owned by the school or by some other authority) are fit and safe for that purpose.

If pupils play inter-school competitions, then the issue of shared responsibility may arise. Just as a school cannot delegate its duty to its teachers, it cannot abdicate that duty to another school.

A school also owes a duty of care to the students of another school playing upon its premises. A school must reasonably ensure its fields are safe for all who play on them.

A school should give a risk warning under the *Civil Liability Act* in relation to sporting activities in which students participate. This should reduce the school's liability for physical harm and/or loss to a student arising from the materialisation of an obvious risk associated with the sporting activity.

### **Before and After the Break Times, Travelling to and from School.**

The duty of care owed by JVS and staff extends to the hours that the school is open for attendance.

A duty of care arises when the school gates open at 8:30am whereby children are allowed on the school premises. JVS therefore considers supervision for students to begin when the first student enters the gate and when they have left the premises at the end of the school day.

The general rule is that once children have left the school premises, no duty of care exists on the part of the school authority or its teachers **unless it has been formally negotiated or voluntarily assumed**.

A school must reasonably provide adequate supervision on transport to and from school when that transport is provided by the school.

For students who access the NSW Government Taxi Scheme, the school's Duty of Care is on assuring students are supervised exiting taxis in the morning and entering taxis at the conclusion of school.

Where students travel on public transport, whether JVS owes a duty of care depends on the circumstance and the knowledge of JVS.

Where JVS has knowledge of a particular risk to students, it may be obligated to take reasonable steps to prevent harm to those students by establishing a risk plan in consultation with parents/carers.

For example, if the JVS was aware that:

- a) a particular bus driver, who transported its children, was a dangerous driver;
- b) that on a particular journey older children habitually and violently bullied younger children;
- c) of a busy and dangerous road outside the school; or
- d) that pupils have been habitually accosted at a certain place along the route to school,

the duty requires the school to take reasonable preventative steps by warning parents and formulating an action plan or alternative route/transport strategy.

### **Excursions**

JVS owes students on excursion a duty of care. JVS's duty of care is non-delegable, and does not discharge its duty of care by placing students in the control of an excursion provider.

However, this does not mean that JVS can never permit its students to participate in excursions operated by others. Rather, it must be vigilant to ensure that excursion providers with whom it deals with are competent and safe.

If JVS or a teacher becomes aware of a risk to its students in the course of the excursion (and this responsibility also involves satisfying itself that sporting equipment, for instance, is safely maintained), the school or teacher should take reasonable steps to eliminate or minimise that risk.

In most cases it will not be reasonably practicable for JVS to inspect all of the equipment provided by an excursion provider, nor will school personnel have the necessary experience to do this. However, JVS staff should make appropriate enquiries of an excursion provider to satisfy itself that equipment and machinery (including personal protective equipment) is maintained, repaired and in good working order.

In determining the extent of the school's duty of care, regard must be had to the purpose of the excursion.

Risky activities need not be avoided, provided that proper precautions and safety measures are implemented.

## **Bullying**

School bullying has been recognised as a serious problem in schools in Australia. In addition, bullying is becoming an increasingly important public policy issue, following concern about the negative effects of bullying on pupils' academic attainment and emotional well being.

The JVS's duty of care extends to reasonably protecting a student from the reasonably foreseeable conduct of other students or strangers and from the student's own conduct.

The Joseph Varga School must remain aware of instances of bullying, take all reasonable or adequate steps to prevent or eliminate bullying, and constructively act, in accordance with its policies and procedures, when bullying does occur, otherwise it runs the risk of being held liable for injuries sustained to students as a result of bullying.

As the problem of bullying is now well recognised, it is reasonable to expect all schools to:

- a) have policies and procedures in place to deal with bullying; and
- b) take all reasonable steps to ensure that these policies are put into practice.

Without such policies and procedures, it is more likely that JVS will be found to have failed in its duty of care to a student who suffers compensable harm as a result of bullying.

**Even if such policies and procedures are in place, JVS may be found to have breached its duty of care if these POLICIES AND PRACTICES ARE NOT IMPLEMENTED, UNDERSTOOD AND CARRIED OUT by Students and STAFF.**

**The Joseph Varga School should, therefore, also MAINTAIN EVIDENCE OF THE STEPS taken in implementing and enforcing such policies and procedures.**

The Joseph Varga School must appreciate that it could be held liable, if it can be shown that, on the balance of probabilities, the steps proposed by the bullied or harmed student would have been effective in preventing or reducing the bullying.

## **Injuries to Teachers**

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

## **Injuries to Third Parties**

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

## **Obvious or Inherent Risks**

The provisions of the Civil Liability Act mean that:

- a) a school does not owe a duty of care to warn another person of an obvious risk (being a risk that in the circumstances would have been obvious to a reasonable person in the position of the injured person even if it has a low probability of occurring) unless a person asks for information about the risk or a law otherwise requires it; and
- b) a school is not liable for harm suffered as a result of the materialisation of an 'inherent risk' (being a risk that cannot be avoided by the exercise of reasonable care and skill).

## Resource Allocation

JVS can breach its duty of care by failing to allocate resources to, for example, the engagement of sufficient staff, training and maintenance of equipment.

The following can be a breach of the duty of care:

- a) failure to engage sufficient staff to safely conduct a school;
- b) failure to send sufficient teachers on a school excursion;
- c) failure to devise a safe system of playground supervision;
- d) failure to properly train staff; and
- e) failure to purchase and maintain safe playground equipment.

## Recreational Activities and Risk Warnings

JVS will not be liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the person. This principle applies whether or not the person was aware of the risk. A '*dangerous recreational activity*'<sup>i</sup> means a recreational activity<sup>j</sup> that involves a significant risk of physical harm.

JVS does not owe a duty of care to a student or other person who engages in a recreational activity to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the student or other person.

Risk warnings:

- a) need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk). It is important for the Principal here to strike a balance when reporting what the specific known risks of the activity are in the risk warning, as this may lead to 'gaps' in the warning, as all of the known risks might not be reported.
- b) must be given by or on behalf of JVS to be effective; and
- c) must be given to both students and parents (although JVS need not prove that the students or parents actually received the warning, simply that it was delivered in a manner reasonably likely to result in people being warned of the risk before engaging in the recreational activity).

It is important to note that the provisions of the *Civil Liability Act* make it clear that a school is not entitled to rely on a risk warning if a student was required to engage in the recreational activity by the school. Accordingly, a risk warning cannot be effective in relation to compulsory school activities.

## Preventative Steps

Considering the nature of children to injure themselves and the limited benefit of parental indemnity, JVS endeavours to protect itself by:

**Creating a safe environment:** JVS and teachers should be meticulous about ensuring that the school environment is a safe and danger-free one. School grounds and buildings are to be properly maintained, safety-checked regularly, and be free of spillages and dangerous toys. Dangerous toys and implements are to be discouraged and confiscated if found to be present. Dangerous chemicals must be clearly labelled and locked away.

**Supervision:** Children are supervised as continually as possible. Teachers are competent (particularly in relation to science and physical educational activities) and must provide appropriate supervision of pupils. Any safety manuals or guidelines should be carefully followed.

**Insurance:** Unfortunately, even with the best preventative measures, injuries will happen. It is not possible to prevent claims, but the school maintains adequate levels of insurance to ensure that the interests of JVS, the teachers and its pupils are protected.

**Communication:** In order to take advantage of the provisions of the Civil Liability Act, JVS should continue to research and discuss with appropriate organisations, approaches adopted to manage the risks facing pupils. Feedback could assist the JVS in ensuring that it will not be in breach of its professional duty.

**Risk warnings:** Where appropriate, JVS will issue risk warnings in relation to recreational activities engaged in by students.

**Instruction:** Students are to be clearly and regularly warned not to engage in specified behaviour that is considered to be dangerous or risky.

**Risk Assessments:** With regards to the students at JVS, risk plans should be formulated, especially for students identified as high risk, or in risk of harm given the context and/or location, in order to plan for and minimise/eliminate foreseeable risk.

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