

THE LEGAL OBLIGATIONS OF A TEACHER

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EXECUTIVE SUMMARY

Under the law in force in Victoria, teachers and schools have a well-established duty to take reasonable care to prevent students sustaining injuries, including injury as a result of fights or physical violence. This is certainly so where a teacher becomes aware of the fight, but the duty is also proactive; teachers are obliged to try and prevent fights or situations where violence or bullying is reasonably foreseeable. Whether this obligation is met depends on what the reasonable teacher would have done in the circumstances. The standard of care owed, therefore, is always dependent on all the surrounding facts and circumstances of the fight. The common law and the *Wrongs Act 1958* (Vic) provide criteria against which the teacher's actions are to be judged.

Though there is a general duty of care to prevent injuries, there do not seem to be any cases which have positively required the physical intervention of a teacher to quell a fight. Nevertheless, the non-intervention by a teacher may, in certain circumstances, be considered a failure to discharge their general duty of care. This is especially likely where the combatant students are very young, or physically outmatched by the teacher or otherwise unlikely to present any danger to the intervening teacher, for example, if the students are not armed.

If an intervention attempt is likely to be futile or to endanger the teacher – the fighting students being uncontrollable or physically superior to the teacher – then it is unlikely there is any requirement to intervene. In fact, an intervention which would endanger the teacher is likely to breach the teacher's duty under section 25 of the *Occupational Health and Safety Act 2004* (Vic) to take reasonable care for their own safety. In those circumstances, it is unlikely that a common law duty inconsistent with the statutory duty would be imposed and therefore no intervention would be compelled if perilous to the teacher. This proposition is supported by the decisions of various courts.

Where teachers do intervene in fights, they will not generally become criminally liable for assault where their actions are reasonable. In the first place, a teacher's actions will rarely be characterised as possessing the relevant intent, recklessness or negligence in harming the student, given their aim is to minimise harm, rather than to directly inflict it. The clearest position exists for teachers in government schools, who have specific protection under regulation 15 of the *Education and Training Reform Regulations 2007* (Vic) to take reasonable action in restraining students acting dangerously towards themselves or others. By contrast, legislation in the United Kingdom provides more comprehensive protection, covering both staff and volunteers of the school. In Victoria, and outside situations protected by regulation 15, teachers may avoid liability through either common law defences or by exercising their ordinary powers to arrest. In either case it is of utmost importance that the force used to quell the fight or restrain the perpetrator be reasonable and proportionate, which again hinges on the surrounding circumstances. Excessive force will prevent a teacher from being able to invoke these defences, as will actions directed at students defending themselves, rather than the perpetrator.

Similarly, a teacher is not likely to be liable in tort – whether negligence or trespass to the person – where the force used in physically intervening was reasonable and a common law defence can be established – whether self-defence, defence of others or necessity.

Anecdotal evidence suggests that many teachers are not clear on the law relating to tactile contact with students. This could be due to the laws on this area being largely contained in court decisions, which are often less certain and less accessible than rules contained in Acts, as well as the widespread absence of clear guidelines in schools. One example of an attempt to create greater certainty here is the advice issued by the New South Wales Teachers Federation to its members. Generally speaking, supportive or social contact with students, provided there is no intentional touching of a sexual nature, is permissible, though a student may expressly or impliedly withdraw consent to being touched. Consent is not required,

however, to lawfully intervene where students are fighting – rather the common law defences or arrest powers noted above will need to be invoked to avoid liability. Touchings of a sexual nature in the course of quelling a fight will only attract liability if proved to be intentionally sexual.

Any claim of assault against the teacher – whether criminal or civil – is subject to the rules of evidence. Teachers the subject of a malicious allegation and/or teachers who made the intervention or contact in the presence of few witnesses may be in a more difficult position vindicating their actions before the court.

Non-government schools with “no touching” policies can create difficult situations for teachers. The policy is likely to form a term of the teacher’s employment, such that if it is breached, by making contact with students to break up a fight, it lends the teacher to dismissal. On the other hand, the teacher’s inaction could be characterised as a breach of their duty of care in tort.

Non-staff personnel who volunteer, for example students’ parents, at the school or for school functions are exempted from civil liability for actions done in good faith. The criminal liability of such volunteers, however, remains and must be defended through one of the methods described above. Though volunteers will not incur civil liability, the relevant school is not immune from proceedings and can still be sued for negligence.

The teacher’s duty of care does not extend to preventing property damage at the hands of students, though the teacher’s obligations to their employer probably compels at least some level of action – using voice control and/or reporting the incident to senior staff at the very least. Since the student’s actions are likely to constitute criminal damage, a teacher could probably invoke their powers of arrest to prevent the offence or stop its continuation. Any force used to intervene must be, as always, reasonable and proportionate.

OVERVIEW

This paper will examine the legal issues surrounding the intervention, or non-intervention, of teachers where a student or students are involved in violent behaviour during school time. The key questions relating to teachers' behaviour in these circumstances are:

1. If they encounter a fight, or other violent behaviour, are they obligated to intervene?
2. If they are obligated to intervene, are they also obligated to intervene physically in order to break up the fight?
3. Are teachers permitted to touch students? If they do intervene physically, are teachers leaving themselves open to criminal prosecution?
4. If teachers do intervene physically in fights, are they leaving themselves open to being sued by a student?
5. What is the effect of a "no touching" school policy?
6. What is the position of non-staff members of the school community who intervene in fights?
7. Are occupational health and safety laws relevant to these circumstances?
8. Damage to property by students: should teachers intervene?

These are complex legal questions and involve several areas of law. In order to explore answers to these questions, some background on the relevant areas of law and the types of law we have in Victoria is necessary.

BACKGROUND

The Distinction between Civil and Criminal Law

Laws can be broadly divided into two categories: civil law and criminal law.

The criminal law is concerned with prohibiting intentional acts which are so dangerous, or dishonest, or disruptive to the smooth functioning of society that the state, on behalf of the victim, is justified in prosecuting and punishing the perpetrators of those acts. Prosecutions are usually conducted by the State usually through the agency of the police initially, then through crown prosecutors in the higher courts. In the case of more “specialised” offences, another government agency will conduct the prosecution. For example, prosecutions under the *Occupational Health and Safety Act 2004* (Vic) are conducted by the Victorian WorkCover Authority. An example of a crime committed in a school setting would be a playground or classroom assault carried out by either a student or a teacher. Where a crime has been found to be committed, the court will impose a sanction which can range in severity from a good behaviour bond, to a fine, to a term of imprisonment. The severity of the sanction will depend on a number of factors including the nature of the crime, the defendant’s criminal record, and how the court wants to balance considerations such as punishment, rehabilitation and deterrence.

The civil law, on the other hand, is generally not concerned with punishing or imposing sanctions on the individual, but rather with providing mechanisms for resolving disputes, and for compensating people who have suffered some loss as a result of the inappropriate or unlawful acts of another. While in a criminal action the state initiates the prosecution of the wrongdoer, under the civil law it is the person with the grievance who must initiate the legal proceedings. In a school setting a typical civil action would involve an injured student suing (through a parent or guardian)¹ the school or educational authority for physical

¹ Until year 12, a student is likely to be under age and therefore not able to commence litigation on the students own behalf.

injuries arising from an incident such as a fight, or a fall from a piece of dangerous playground equipment. Where the student's legal action is successful, the court might award a sum of money as compensation for the injuries. In the case of a government school, the compensation will be paid out of government funds, and in the case of a non-government school, there will usually be an insurance policy covering such incidents.

Some actions can amount to a breach of both the civil law and the criminal law. For example, if a teacher assaults a student, the teacher could be prosecuted by the police, and if convicted by the court, subjected to a criminal sanction. The injured student could then also sue the teacher for the civil wrong of assault, and seek a civil order for compensation for the injuries suffered as a result of the assault. Another example of criminal and civil liability arising out of the same facts would be where a student has been injured in a chemistry class because of the careless way in which an experiment has been carried out. The injured student might sue the teacher and the educational authority in negligence and seek financial compensation, arguing that the injury was caused by the teacher's breach of his or her "duty of care" to the student. The WorkCover Authority might also prosecute the school, and the teacher, pursuant to the *Occupational Health and Safety Act 2004* (Vic), for failing to take care for the health and safety of *others* (which includes students) at the workplace, who might be affected by their actions at the workplace.²

Torts

Both the criminal law and the civil law impact on the role of the teacher who has to deal with fighting students. The main area of civil law involved is known as "torts". A tort is a "civil wrong" and someone commits a tort when they interfere with another person's rights, or they fail in their legal obligations to that person, and this causes the person to suffer. The torts relevant to the teacher who is dealing with a fight are:

² See sections 23 and 25 of the *Occupational Health and Safety Act 2004* (Vic). See also section 32 which makes it an indictable offence for a company, or an individual, including an employee, to recklessly engage in conduct which places another in danger of serious injury.

- the tort of negligence: negligence has been committed where a teacher breaches his or her duty of care owed to a student
- the torts of assault and battery: these are separate torts. An assault occurs where someone is placed in fear of being physically contacted, and the battery occurs when there is an actual application of force.
- the tort of false imprisonment: this tort has been committed where someone has been unlawfully detained against their will. False imprisonment, assault and battery are all forms of trespass against the person.

Crimes

The main area of criminal law which affects the teacher dealing with a fight is the crime of assault. The Victorian *Crimes Act 1958* provides for four separate offences for causing injury to another,³ which together constitute 'criminal assault.' The offences vary according to the gravity of injury occasioned and the requisite *mens rea* (intent) for their commission. The penalties attaching to each offence vary accordingly:

- Intentionally causing serious injury (s 16): maximum penalty 20 years imprisonment;
- Recklessly causing serious injury (s 17): maximum 15 years;
- Intentionally causing injury (s 18): maximum 10 years;
- Recklessly causing injury (s 18): maximum 5 years;
- Common assault (s 31(1)): maximum 5 years. In s 31(2), common assault is defined very broadly as the direct or *indirect* application of force by a person to the body of, or to clothing or equipment worn by, another person where the application of force is:

³ *Crimes Act 1958* (Vic) ss 16-18, 31.

- (a) lawful excuse; and
- (b) with intent to inflict or being reckless as to the infliction of bodily injury, pain, discomfort, damage, insult or deprivation of liberty –

and results in the infliction of any such consequence (whether or not the consequence inflicted is the consequence intended or foreseen).

Note that in the case of common assault, there does not have to be intent to inflict injury – intent to inflict insult is sufficient to constitute the offence. Unlike the law of torts, the *Crimes Act 1958* (Vic) does not distinguish between assault and battery.

Common assault is also an offence under the *Summary Offences Act 1966* (Vic) section 23.

A touching which has a sexual quality to it because of the part of the body which has been touched can amount an indecent assault under section 39(1) of the *Crimes Act 1958* (Vic), punishable by a maximum of ten years imprisonment. In order to find an accused guilty of the offence, the prosecution must prove beyond reasonable doubt that the accused intended to indecently assault the victim.⁴ In other words, the sexual quality to the touching must be proved to be intentional rather than an accident.

The law recognises some defences to a charge of assault. The most obvious ones are “self defence” and “defence of others” where you use force against someone (that is, you assault them) but do this to protect yourself, or another person, from an assault by that person. If a defence is established, the assault is no longer unlawful. These defences will be explored later.

⁴ *Parish v Director of Public Prosecutions (DPP)* [2007] VSC 494 (Unreported, Robson J, 29 November 2007).

Sources of Law: Judge Made Law and Legislation

Our laws are derived from two sources:

- (1) Parliament which passes Acts of Parliament (or statutes) which contain rules. These Acts are also referred to as legislation. (Parliament can also delegate law-making to subordinate authorities such as local councils, statutory authorities, and the “Governor-in-Council”.)
- (2) Judge made law, which takes two forms:
 - (a) Common law which is law originally derived from England and which the judges have developed over centuries. Common law is contained in precedents which are the written decisions made by judges in previous cases. Whenever a case comes before a court for decision, if there is no appropriate legislation applying to the case, the judges will turn to the common law precedents to find a rule to apply to resolve the dispute. The “doctrine of precedent” requires courts to apply the decisions of the higher courts; that is, where a court of high authority has established that a principle of law applies in a particular case, the lower court is expected to apply that principle in cases where the material facts are similar to those in the precedent.
 - (b) Statutory interpretation: judges also influence the development of the law when they interpret the meaning of words in statutes.

The law relevant to intervention in student fights is sourced from both statute and common law.

QUESTION 1: ARE TEACHERS OBLIGATED TO INTERVENE WHERE THERE IS VIOLENT BEHAVIOUR?

The relevant law here is the tort of negligence which provides for the teacher's "duty of care". This section will examine the nature and scope of the duty of care, and the rules which have developed to determine when the duty has been breached. The report will then examine some decided cases involving student fights and assaults, and then address the question of the teacher's duty to intervene where a fight or an assault is occurring.

The Teacher's "Duty of Care"

It has been established for well over 100 years that a teacher owes a duty of care to his or her students to take reasonable steps to protect them from reasonably foreseeable injuries. In 1893, Lord Esher observed that 'the schoolmaster was bound to take such care of his boys as a careful father would take of his boys.'⁵ Like the duty a doctor owes to a patient or an employer owes to an employee, the duty arises out of the nature of the relationship itself. The existence of the duty has been restated a number of times by courts throughout Australia, and by the High Court in several key cases.⁶ The courts have also established that the educational authorities controlling them also owe a duty of care to the student, and that this duty cannot be delegated to anyone else.⁷ Accordingly, when a school camp is taking place at a venue run by a firm of "outdoor education" specialists, and that firm is organising and running all the activities, the school's duty of care is still in existence.

The justification for imposing the duty was expressed by Chief Justice Winneke in a decision of the Full Court of the Victorian Supreme Court in *Richards v Victoria* ('*Richards' Case*') as follows:

⁵ *Williams v Eady* (1893) 10 TLR 41, 42.

⁶ See, eg, *Ramsay v Larsen* (1964) 111 CLR 16; *Victoria v Bryar* [1970] ALR 809; *Geyer v Downs* (1977) 138 CLR 91; *Commonwealth v Introvigne* (1982) 150 CLR 258.

⁷ *Commonwealth v Introvigne* (1982) 150 CLR 258.

The reason underlying the imposition of the duty would appear to be the need of a child of immature age for protection against the conduct of others, or indeed of himself, which may cause him injury coupled with the fact that, during school hours the child is beyond the control and protection of his parent and is placed under the control of the schoolmaster who is in a position to exercise authority over him and afford him, in the exercise of reasonable care, protection from injury.⁸

At various times the courts have commented on '[t]he foreseeable folly of youthful exuberance',⁹ 'the well-known mischievous propensities of children',¹⁰ and also observing 'rash little boys who stay alive by luck and Heaven's favour',¹¹ and that the 'immaturity of a child - especially a young child - makes the child insensitive to danger to him or herself and other children.'¹²

For all these reasons, teachers and schools owe a duty of care to their students. However, the courts have emphasised that it is not a duty to *ensure* that students do not suffer any harm at all, but rather a duty to take *reasonable care* to protect students from harm which is reasonably *foreseeable*.¹³ Accordingly, an action brought by a student against a school or teacher for compensation for personal injuries will only succeed where the student can establish that there has been *carelessness* by the teacher or school. A negligence claim is not like a worker's compensation claim where the employee injured at work receives payment for medical expenses and lost wages regardless of whether there has been any fault on the part of the employer. An action will also not succeed if the harm results from an unanticipated accident – the harm must have been reasonably foreseeable. When students are playing certain sports (for example football or hockey),

⁸ *Richards v Victoria* [1969] VR 136,138.

⁹ *Commonwealth v Introvigne* (1982) 150 CLR 258, 280 (Brennan J).

¹⁰ *Ibid* 274 (Murphy J).

¹¹ *Ramsay v Larsen* (1964) 111 CLR 16, 27 (Kitto J).

¹² *Roman Catholic Church Trustees for the Diocese of Canberra and Goulburn v Hadba* (2005) 221 CLR 161, 175 (McHugh J).

¹³ 'It is not, of course, a duty of insurance against harm but a duty to take reasonable care to avoid harm being suffered': Winneke CJ in *Richards' Case* [1969] VR 136, 138.

harm is foreseeable. However, liability in negligence will only arise if the sporting activity has been conducted and supervised in a careless manner.¹⁴

There have been a great many cases before the courts over the years in which the scope of the duty has been discussed, and the cases dealing with assaults by one student on another will be examined in detail below. The impact of all these cases on the scope of the teacher's duty can be summarised by stating that the duty can involve taking reasonable care to:

- adequately supervising students;
- protect students from dangerous situations and activities;
- maintain safe premises and equipment; and
- protect students from bullying and violence.

How Careful Does the Teacher Have to Be?

The traditional test was that, in regard to students, the teacher had to take as much care as the 'reasonable parent'¹⁵ would take. At other times this has been expressed as the care that a reasonable person would take; in more recent times the standard expected of the 'reasonable teacher' is generally thought to be the appropriate test, given that teachers, unlike parents, have specialist training and are in charge of much larger groups than a parent normally is.¹⁶ If a student is injured in circumstances where there is duty of care owed, the court has to determine whether there has been a breach of the duty of care; that is, the court must determine whether the teacher has acted as the reasonable teacher would have acted in that situation.

¹⁴ For example, in *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Kondrajian* [2001] NSWCA 308 (Unreported, Mason P, Giles JA and Ipp AJA, 24 September 2001), a student died after being struck with a hockey stick during a game of "minkey" hockey. The Court was satisfied that this was an unfortunate accident which, although foreseeable, must be regarded as unexpected and accidental and involved no breach of duty of care on the teacher's part.

¹⁵ *Williams v Eady* (1893) 10 TLR 41, 42. See also *Ramsay v Larsen* (1964) 111 CLR 16, 27 (Kitto J).

¹⁶ The test has been discussed in cases such as *Geyer v Downs* (1977) 138 CLR 91, 102 and *Commonwealth v Introvigne* (1982) 150 CLR 258, 275. For a full discussion of why the 'reasonable teacher' test is the most appropriate, see Des Butler and Ben Mathews, *Schools and the Law* (2007) 23-4.

In October 2002, following an inquiry into the reform of the law of negligence, the Ipp Report¹⁷ made a number of recommendations which were taken up by most Australian States and Territories. In response, Victoria inserted into the *Wrongs Act 1958* an elaborate, step-by-step process for determining whether there has been a breach of the duty of care in any negligence case, not just those involving schools. Firstly, section 48(1) sets out the following:

- (1) 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 person's position would have taken those precautions.

Section 48(3) offers some explanation regarding what is a 'significant risk':

- (3) For the purposes of subsection (1)(b)—
 - (a) **insignificant risks** include, but are not limited to, risks that are far-fetched or fanciful; and
 - (b) risks that are **not insignificant** are all risks other than insignificant risks and include, but are not limited to, significant risks.

Once it is established that a risk is foreseeable, and that it is a significant risk, and that a reasonable person would have taken precautions, the court must then engage in what has been called the "negligence calculus". This involves the following inquiry, provided by section 48(2):

- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—

¹⁷ David Ipp et al, *Final Report of the Review of the Law of Negligence* (2002). The report is accessible at: <<http://revofneg.treasury.gov.au/content/reports.asp>>.

- (a) the probability that the harm would occur if care were not taken;
- (b) the likely seriousness of the harm;
- (c) the burden of taking precautions to avoid the risk of harm;
- (d) the social utility of the activity that creates the risk of harm.

These rules bear some similarities to the pre-Ipp Report common law approach to determining whether teachers and school authorities were in breach of the duty of care. In those cases the courts had taken into account factors such as the age, experience and capacity of the students, the known behaviour of a class, the gravity of the risk faced by students and the probability of injury occurring weighed against the expense of preventing risk of injury, and the educational worth of the activity.¹⁸ We can use these cases in two ways:

- (1) as precedents establishing the sorts of factors or principles to be taken into account in determining whether there has been a breach of the duty of care; and
- (2) as examples of the application of those general principles to a particular fact situation to determine whether there has been a breach of the duty of care.

The High Court's 2005 decision in *Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Hadba*¹⁹ illustrates how courts weigh all these factors to see whether there has been negligence. Here the High Court found no breach of the school's duty of care where a year 3 student was injured when two other students pulled her off a flying fox. At the time there were four teachers supervising the 540 primary school students, with one teacher supervising the area where the flying fox was situated. The school had a strict "no touching in the playground" policy, and children had been instructed

¹⁸ For more examples of the application of these factors to determine whether there has been a breach of the duty of care, see *Trustees of the Roman Catholic Church of the Archdiocese of Sydney v Kondrajian* [2001] NSWCA 308 (Unreported, Mason P, Giles JA and Ipp AJA, 24 September 2001); *Miller v South Australia* (1980) 24 SASR 416; *Barnes v Hampshire County Council* [1969] 1 WLR 1563; *Kretschmar v Queensland* (1989) Aust Torts Reports 80-272; *Barker v South Australia* (1978) 19 SASR 83; *Parkin v Australian Capital Territory Schools Authority* [2005] ACTSC 3; *Australian Capital Territory Schools Authority v Raczkowski* [2001] ACTSC 61.

¹⁹ (2005) 221 CLR 161.

not to touch anyone on the flying fox, and there had been no misbehaviour on the flying fox in the past. An experienced teacher was supervising the activity, and the accident happened in the brief time when she was investigating a matter in another part of her area.

All these factors suggested that the probability of injury was slight and did not justify the expense and inconvenience (staff were entitled to a “break from work”) of rostering more teachers on playground duty. The High Court also commented that it is not reasonable to observe children ‘every single moment of time’ as this retards the development of responsibility in children and is ‘damaging to teacher–pupil relationships by removing even the slightest element of trust’.²⁰

Hadba provides us with an example of, and a precedent for, the application of particular principles to determine whether there has been a breach of the duty of care. It is not a precedent stating that a school will not be liable in negligence where a child is pulled off a flying fox. Each negligence case turns on its own particular facts, and in another flying fox case where the facts are slightly different (for example, where the “no touching” warnings have not been given) there could be a finding of liability. The precedents indicate which principles to apply to the facts to determine whether a particular set of facts amounts to a breach of the duty.

*Johns v Minister of Education*²¹ provides a good example of how the decision of whether reasonable care has been taken will turn on the particular facts of the case. Here students were catapulting ball point pens around the class. The teacher ordered all the catapults to be placed in the bin, but one student secreted his away and then fired it later hitting a student in the eye. The Court accepted that, in the circumstances, it was reasonable for the teacher to assume that her instruction had been followed, and it was not necessary for her to check under desktops to see whether anyone had kept a catapult. The catapults had not appeared in class before that day. The required standard of

²⁰ Ibid 169-70.

²¹ (1981) 28 SASR 206.

care had been met. The Court might have reached a different conclusion if that class had a history of misbehaving with the catapults, and the teacher's instructions to "bin" them had been ignored previously.

Cases Involving Fights and Student Assaults and/or Bullying

While there have been many negligence cases in Australia involving student accidents and injuries arising out of sport, excursions and other activities in the playground and classroom, there have been relatively few reported cases arising from an intentional assault by one student of another. Most of these cases have revolved around the issue of whether the incident could have been avoided if the school had provided more supervision, or whether the school should have made a more considered response to a danger which was not imminent. Some of those cases are summarised here. There have been only two cases from courts of high authority – *Richards' Case* and *Victoria v Bryar (Bryar's Case)* (coincidentally both are Victorian cases) – where the teacher appeared to be aware of the imminent danger, and the injury occurred because the teacher failed to intervene.

As the use of juries in a negligence case is optional in Victoria, it is important to quickly note the distinctions between the respective roles of judge and jury in those cases. The judge's role is to explain the law to the jury (referred to as the judge's "charge" to the jury), and the jury then evaluates the evidence presented in court to determine what actually happened – this could involve determining which witnesses should be believed and which are unreliable. The jury then applies the facts of the case to the law to determine whether there has been a breach of the duty of care. The judge assists the jury in this process by explaining which factors should be taken into account to determine whether there has been a breach. If the matter is appealed, the appeal court is usually considering issues such as whether the judge correctly explained the law to the jury, and whether there was sufficient evidence to enable the jury to reach the decision it made. If the original trial is before a judge alone (the

choice is in the hands of the parties), the judge decides questions of fact as well as questions of law.

Cases Involving Imminent Danger

In *Bryar's Case*, the plaintiff was injured when he was hit in the eye with a paper pellet fired by another student using an elastic band. There was evidence that the teacher 'had virtually disregarded unruly conduct on the part of a large number of his class in firing paper pellets at one another throughout more than half an hour of the teaching period'²² and that the plaintiff's injury was the result of the teacher's failure to use his authority to stop the dangerous and unruly behaviour. When commenting on the teacher's duty of care Chief Justice Barwick stated:²³

The duty of care is distinct and apart from the obligation of the school teacher to maintain that degree of discipline which will enable him effectively to perform his function as a teacher. It will not be every breach of the obligation to maintain discipline which will be a breach of the duty of care: but in many instances, eg *where the breach of discipline involves a foreseeable risk of injury to a pupil or pupils, the failure to check or prevent the breach of discipline will afford evidence of a breach of the duty of care* (emphasis added).

In *Richards' Case*, a 16 year old in a year 10 class received a very serious head injury as a result of a blow struck by another student when the two students were fighting in the classroom. The fight had been preceded by an argument, which had developed into a scuffle and then a fight. The teacher had not intervened at any of these stages of the altercation, and had certainly not intervened to stop the fight. At the original trial of the matter the jury had concluded that the teacher had breached his duty of care. The State of Victoria had appealed the decision to the Full Court of the Victorian Supreme Court, and argued that the judge had misdirected the jury on several aspects of the

²² [1970] ALR 809, 811 (Menzies J).

²³ Ibid 810 (Barwick CJ).

relevant law. The Full Court ordered a retrial of the matter, and during the course of the judgment, they explored the law relating to the teacher's duty of care. The Court made it clear that a duty of care was in existence, and that (as mentioned earlier) it was a duty to take reasonable care, and not a duty to insure against any injury. It was then a matter for the jury to decide, after taking into account all the circumstances surrounding the fight, including the ages and physique of the fighting students, whether the teacher in exercising reasonable care for the safety of the students, should have intervened. The Court indicated that there was sufficient evidence for the jury to conclude that the teacher should have intervened – that is, that there was evidence to support a finding of breach of the duty of care, and a finding that this breach led to the student's injury. The Court spent some time discussing what reasonable action was, and this will be looked at below when it is considered whether the teacher should have intervened physically to stop the fight.

Cases Where There Was a Lack of Supervision or an Inadequate Response to a Danger Which Was not Immediate

*Australian Capital Territory Schools Authority v El Sheik*²⁴

A “friendly” fight in the playground stopped when a teacher appeared. After the teacher left the scene, the fight resumed (the play fight became serious) and the plaintiff student suffered a head injury (he was congenitally predisposed to bleeding and bruising). The trial judge found that the principal had not been negligent as there was one teacher on duty for every 50 students (that is, a sufficient number of teachers in the circumstances), and that there was no failure on the part of the teachers to supervise the grounds. The facts suggested that there was no reason to suspect that the fight would resume. The student appealed the decision, but the appeal court concluded that there was no evidence that more supervision would have prevented the fight. As the school had no knowledge of this particular student's predisposition to bruising

²⁴ (2000) Aust Torts Reports 81-577.

and bleeding, there was no requirement that the teachers should supervise that boy more carefully.

New South Wales v Griffin²⁵

Here a student was injured in a fight in a part of the school grounds where it was known that students congregated. The fight was prearranged, a notice to that effect was placed on the class whiteboard, and the belief that the fight would occur had spread throughout the school. The Court found that the school had been negligent in failing to provide adequate supervision in the area of the fight, being an area where it was known that students congregated.

Haines v Warren²⁶

A boy who was well known as a bully and was known to operate in a particular part of the playground, injured another student during a recess. There were teachers on playground duty, but they did not supervise that part of the playground. The school was found to have been negligent, and one New South Wales Court of Appeal judge commented that the school had failed to discipline a troublesome child, while another judge found a breach of the duty of care because of inadequate supervision of the playground.

Cox v New South Wales²⁷

This case attracted a lot of publicity in 2007 when the plaintiff, Cox, now a young man, was awarded compensation for severe, debilitating and ongoing psychiatric injuries he suffers as a result of the trauma experienced when being bullied at primary school. Evidence was given in Court that Cox, partly as a result of the trauma induced by the bullying, is not in a fit state to work. The Court was satisfied that Cox had been victimised by an older boy who regularly bullied him physically and emotionally. The judge observed that evidence

²⁵ [2004] NSWCA 17 (Unreported, Giles, Ipp and McColl JJA, 13 February 2004).

²⁶ (1987) Aust Torts Reports 80-115.

²⁷ (2007) Aust Torts Reports 81-888.

showed that the bully's conduct was expressly and repeatedly brought to the attention of various teachers, including at the highest level of the school. Accordingly, the conduct was not an isolated incident but was known and foreseeable, and the school should have taken steps to eradicate it. The judge commented that, on the basis of the evidence outlined above, he could find that the school authorities failed to exercise reasonable care.

Eskinazi v Victoria²⁸

This case provides another example of where there was insufficient action taken by a school to prevent bullying. The Court found that the student suffered quite vicious verbal and physical abuse at her secondary school during years 7 and 8, before she finally left the school in August of her year 8. When the bullying began, the girl was reluctant to tell anyone about it – teachers or parents. Once she told her parents, the matter was taken up with the school welfare co-ordinator, the year 8 co-ordinator and the principal, but none of these took adequate steps to deal with the problem. All three were found by the Court to have been in breach of their duty of care.

Causation

You can supervise as much as you like, but you will not stop a boy being mischievous when your back is turned. That, of course, is the moment that they choose for being mischievous.²⁹

In addition to determining whether there has been a breach of the duty of care, the courts must also determine whether it was the breach which caused the injury, or whether the injury might have occurred even if the breach had not occurred. This was the key question in *Bryar's Case*, where the High Court found evidence that the teacher's failure to stop the pellet-firing fight led directly to the injury which was inflicted. Causation is a matter which the court will consider when determining whether sufficient staff have been rostered on

²⁸ This is an unreported decision of the County Court of Victoria: No 06471 of 1999.

²⁹ *Rich v London County Council* [1953] 1 WLR 895, 903 (Hodson LJ).

yard supervision, as they are aware that more staff will not automatically prevent an incident, given that the mischievous or dangerous act could still occur when the teachers' backs are turned.

Summary

All these cases make it clear that, where it is reasonably foreseeable that a student might be injured by an assault from another student, there is a duty on the school, and any teacher involved with the matter, to take reasonable care in order to prevent the injury. In other words, teachers should attempt to stop fights. What steps or actions amount to taking reasonable care is a question of fact to be determined by considering all the facts and circumstances surrounding the incident. The next question, then, is: could “reasonable steps” include a physical intervention to stop the fight?

QUESTION 2: IS THE TEACHER OBLIGATED TO INTERVENE PHYSICALLY IN ORDER TO BREAK UP THE FIGHT?

What the reasonable teacher should do when exercising reasonable care to deal with a fight is a question of fact which a court has to determine after taking into account all of the relevant circumstances. If the jury option has been exercised, this is a question for the jury, and if it is a trial by judge alone, it is a question of fact for the judge. In deciding the question of fact, the jury (or judge alone) must engage or apply the “negligence calculus” outlined earlier, and weigh, amongst other relevant considerations, the probability and seriousness of harm if care were not taken against the burden of taking precautions to avoid harm, and the social utility of the activity which has created the harm. *Richards’ Case* is the only Australian case which has discussed how a teacher should weigh these factors when considering how to stop a fight and, as the following extract from Chief Justice Winneke’s decision indicates, the Court saw physical intervention as one option the teacher could consider:³⁰

³⁰ [1969] VR 136, 143 (Winneke CJ).

At the stage when the scuffling began and more clearly so when the fighting began both pupils had on the evidence lost their tempers. What could Traill [the teacher] have reasonably been required to do at such a stage which could have averted injury to the plaintiff? Was physical intervention on his part called for? There is no evidence before us as to the height or weight of Traill but it does appear that he was a young man of approximately 25 years of age and was no match physically for either the plaintiff or Lubach (the other student), each of whom was approximately six feet in height and 12 stone in weight. It would be a matter for the jury to say whether some physical intervention even if called for in the exercise of reasonable care would on the balance of probabilities have prevented the fight or ended it before injury was inflicted. Might a jury not have concluded that any attempt by him to intervene physically would only have exacerbated the situation, let alone have resulted in some assault upon himself? At this stage would some form of verbal intervention have, on the balance of probabilities, served any useful purpose? Unless the jury were satisfied that some form of intervention reasonably open to Traill would probably have produced such a result, it could not properly find that his negligent failure to intervene was a cause of its occurrence. We would think there was much force in the contention that on the evidence there was in this class little respect for his authority and that any practicable and reasonable intervention on his part was unlikely to have proved effective. The jury's attention was not directed to these matters in the charge on the issue of causation, as we think it should have been.

As mentioned earlier, the Full Court did find that there was evidence for a jury to find that an intervention by the teacher would have prevented the injury. However, several points in this extract require further examination. First, the Court indicated that the judge should have drawn the jury's attention to the possibility that, given the loss of temper by both students, any intervention would have been ineffective, and that, if the jury reached that conclusion, then there would be no causal link between the breach of the duty of care and the injury. Accordingly, there would be no liability in negligence, as the injury would

have occurred even if the teacher had acted as the reasonable teacher would by intervening. Second, it appears that the Court did see physical intervention as one option for a teacher when confronted with a fight, even though it saw it as inappropriate in this situation, given the sizes of the students in comparison to the teacher. Furthermore, the Court mentioned that a physical intervention might only result in the teacher being assaulted as well. But these comments from the Court suggest that, where smaller students are involved, a court might regard it as appropriate to intervene physically. This, of course, is what has often been done in fights in primary schools.

Two relatively recent decisions – *Moran v Victorian Institute of Teaching*³¹ and *Buvac v New South Wales*³² – lend support to the notion that in particular circumstances it will be appropriate for teachers to physically intervene in fights, but not where their own safety would be threatened. Neither of these cases is from a court of high authority, so they do not have the status of binding precedents. In *Moran*, the Victorian Civil and Administrative Tribunal, when considering whether a teacher's behaviour constituted professional incompetence, commented:³³

In our view, there is no immutable rule that a teacher should physically intervene in a fight between students. There are many occasions when it would be physically dangerous to the teacher, or to one of the students, to do so. A teacher is not required to risk his physical safety, or that of another student in the discharge of his professional responsibility.

There may be some occasions where a teacher can intervene physically in a fight without risk to his or her safety or to the safety of other students. This must be a judgment call on the teacher's part.

In *Buvac* (a New South Wales District Court decision), where one student attacked another in a classroom with an iron bar, the judge regarded it as unreasonable to expect the teacher to intervene physically, given that the

³¹ [2007] VCAT 1311 (31 July 2007) ('*Moran*').

³² This is an unreported decision of the District Court of New South Wales: 7 October 2005 ('*Buvac*').

³³ [2007] VCAT 1311 (31 July 2007) [85] - [86].

student was carrying the iron bar. However, the judge found there was negligence on the teacher's part for failing to effectively discipline the assailant at an earlier point in the confrontation.

At this point it is relevant to mention section 25 of the *Occupational Health and Safety Act 2004* (Vic) which imposes a duty on teachers to take reasonable care for their own health and safety when carrying out their work. If they fail to do this, they can be prosecuted under that Act and convicted of an offence. Accordingly, the teacher who ignores danger to stop the fight, and incurs injuries then, might be committing such an offence. In practice, the Victorian WorkCover Authority (VWA), which is responsible for managing Victoria's workplace safety system, including the instigation of prosecutions under the Act, is unlikely to prosecute a teacher in those circumstances. The VWA's Constructive Compliance Strategy is primarily focused on 'the active involvement of employers and employees in hazard identification, management, and elimination'³⁴ and there are very few prosecutions launched under section 25.

³⁴ Details of the Constructive Compliance Strategy are available at the VWA website: <www.workcover.vic.gov.au>.

Summary

The common law decisions, including *Richards' Case*, suggest :

That there could be occasions when it is appropriate for a teacher to intervene physically to stop a fight.

The size of the teacher in relation to the sizes of the fighting students is a factor to be considered when determining whether this is a suitable course of action.

The fact that the teacher might be assaulted by the students is a factor for the teacher to take into account when determining what are reasonable steps to take to stop the fight.

However, it cannot be said that the common law, through the decisions of the courts, has provided teachers with clear instructions on how they should respond to student fights.

Nor can it be said that the common law decisions from superior courts, to date, indicate that the duty of care requires teachers to intervene physically in fights where the circumstances indicate that physical intervention will stop the fight, but that it also might bring a risk of injury to the teacher. It seems unlikely that the courts would regard the exercise of reasonable care as requiring the teacher to place him or herself in danger. When teachers take students on camps in the bush, the duty of care operates. But if a student fell into a river, it seems unlikely that the courts would regard it as necessary for the teacher to risk his or her own life to rescue the student. However, there is no clear ruling on these points. There are decisions of tribunals of less authority which support the position that, where the circumstances are appropriate, a teacher should intervene physically to stop a fight, and that it would not be appropriate to intervene where this would threaten the teacher's safety.

The *Occupational Health and Safety Act 2004* (Vic) imposes a duty on teachers to take reasonable care for their own health and safety when carrying out their work. Failure to take such care can amount

to an offence. The existence of this provision reinforces the notion that teachers are not required to put themselves in danger in order to stop fights.

It is now necessary to consider any other legal issues which could arise from the teacher's physical involvement with the students.

QUESTION 3: PHYSICAL INTERVENTION: ARE TEACHERS VULNERABLE TO A CRIMINAL PROSECUTION?

Background: The Law and "Touching" Students

There is a concern amongst many teachers that an intentional touching of students in any way at all can lead to legal complications. (An intentional touching can be distinguished from an unintentional touching such as occurs on a crowded tram which is stopping and starting suddenly in peak hour.) In general terms, there are three sorts of ways in which people might intentionally touch another:

With intentional force to coerce or restrain someone, or because there has been a loss of temper. This sort of touching can amount to an assault if it is in unlawful circumstances (discussed below);

A touching with a sexual quality to it: if it is intentional and the other party does not consent to it, or is below the age of 16, it will probably amount to a criminal offence; and

A social or supportive touching which can occur when friends meet or interact, or when one person comforts or congratulates another, or for emphasis in conversation.

The law regarding these three types of touching is the same for teacher-student touching as it is for touching by other members of the population (penetrative sexual intercourse is not included in this discussion). There was virtually no case law on the third type of student-teacher touching until a very

useful decision was handed down by the Queensland Court of Appeal in 1995 in *Horan v Ferguson*.³⁵ The Court had to consider whether several touchings of female students by a teacher amounted to an assault. It was alleged that some of the touchings had a sexual quality to them (for example, encouraging girls to move along by patting them on the buttocks). The teacher had been convicted of assault in the Magistrate's Court, but the conviction was overturned by the Court of Appeal. Demack J of the Court of Appeal took the opportunity to make the following general comments about the law relating to tactile contact between teacher and student:³⁶

[T]here is every reason to accept the concept that a child attending school tacitly consents to receiving from a teacher tactile expressions of encouragement. The traditional pat on the shoulder for a significant achievement falls within this concept. To deny this concept would be to insist that schools become sterile, unemotional and devoid of normal expressions of friendly human interaction.

Demack J described one of the touchings (a touching on the shoulder), which was the subject of an assault charge, as 'a friendly greeting' and found that this touching 'does not amount to an unlawful assault, such greeting being tacitly consented to.'³⁷ Later Demack J elaborated on his reasons for asserting that a child attending school consents to receiving tactile expressions of encouragement from a teacher:

First, I used the word "tacit", meaning "unspoken", rather than "implied", in order to emphasise that this "consent" may be withdrawn by a word or, indeed, a gesture. In other words, I do not suggest that children consent to receiving prolonged or effusive expressions of encouragement. The child must be allowed to respond negatively if that is that child's wish. What is involved in this case are instances of brief, gentle touching without any element of a sexual nature.³⁸

³⁵ [1995] 2 Qd R 490.

³⁶ Ibid 502.

³⁷ Ibid.

³⁸ Ibid 504.

Demack J concluded with the following comments:

[O]rdinary commonsense requires that children be encouraged in the process of learning. That is fundamental to the learning process. Tactile expressions of encouragement are not essential but they are a common form of human expression. So, in my opinion, it is consistent with the aims of the statutory scheme for primary education to allow as justification for the appropriate, non-sexual touching of a student by a teacher, the student's tacit consent to receiving encouragement.³⁹

This case suggests that social and supportive touching, such as encouraging pats on the shoulder or arm, are a normal part of everyday interaction between people, not just in schools, and it is common, and not against the law, for teachers to comfort emotionally distressed students by touching in a supportive way. Students, like adults, can withdraw that consent through word or gesture, and teachers must be sensitive to whether it causes the student any discomfort, and must stop if it does. The problem for teachers is that, whilst the motive for their touching might be to support or encourage a student, the student might interpret the touching as 'sleazy' or sexual. For this reason, many teachers adopt a policy of never touching students, or avoid placing themselves in a situation (for example, alone in a concealed area) where an allegation of sexual impropriety might be difficult to refute.

This is a rather lengthy explanation of the law to demonstrate that social and supportive touching of students will only be unlawful where the student has communicated a withdrawal of consent. The angry student who bellows at the teacher, "You can't touch me!", is probably correct, as the student is communicating a withdrawal of consent to being touched. The touching in that situation would only be lawful if it was in the context of preventing violence, which will be discussed in the next section. However, it is worth noting that most teachers are unaware of what is the law relating to touching. This is not surprising, given that it is largely common law, and hence not very accessible,

³⁹ Ibid 505.

and given that employers and professional bodies have been reluctant to issue guidelines.

The gap has been filled by advice from experienced teachers about the perils of touching, and by statements from bodies like the New South Wales Teachers Federation which is concerned to protect its members. The Federation's current website provides the following advice (this is an abbreviated version of the advice):

Try not to touch students.

It is unfortunate that a hug or pat aimed at encouraging or comforting a student may be misinterpreted by the student, or a staff or community member as "unwarranted or inappropriate touching".

Apart from inevitable situations, such as first aid, a teacher should avoid touching children.

...

An area of particular difficulty for teachers is how to intervene to prevent students causing physical harm to themselves, other students or to teachers. Your school should adopt a policy to be followed in these circumstances. The carrying of emergency cards or using a mobile phone to gain help while on playground duty, stating clearly and loudly in front of witnesses the action you are about to take and the use of minimal force can lessen the opportunity for your appropriate action being misconstrued.⁴⁰

The last piece of advice is very sound in the light of the examination of the law in the following section.

⁴⁰ See the Federation's policy statement: *Protecting Teachers as Well as Students* (2005) New South Wales Teachers Federation. It is accessible at: <http://www.nswtf.org.au/journal_extras/cprotect.html>. The full advice is attached as Appendix A.

If a Teacher Intervenes Physically in a Fight Does This Amount to a Criminal Assault?

The *Education and Training Reform Regulations 2007* (Vic) regulation 15 provides:

15. Restraint from danger

A member of the staff of a Government school may take any reasonable action that is immediately required to restrain a student of the school from acts or behaviour dangerous to the member of staff, the student or any other person.

This provision authorises staff, not just teachers, at government schools to use reasonable force to restrain dangerous students. If they use excessive force, they might lose the protection of this regulation, and be vulnerable to an assault charge. However, the regulation does not offer any protection to staff at Catholic and independent schools. This raises the question whether they are vulnerable to a criminal prosecution for assault if they physically intervene in a school fight.

The offences set out in sections 16, 17 and 18 of the *Crimes Act 1958* (Vic), which were detailed above, create several different forms of assault based on the seriousness of the injuries suffered by the victim. A common assault does not require injury to be inflicted, rather there simply has to be an application of force that, for example, has restrained the victim. When a teacher intervenes physically to break up a fight, he or she will at least, on the face of it, be committing a common assault. Where considerable force has to be applied, and as a result a student suffers some injury, it could amount to an assault causing injury, or even serious injury. The student might initiate either a criminal prosecution for assault, or sue in tort for assault, or initiate both of these proceedings.

There are two elements to the crime which must be established before an accused person can be convicted of any of these assault offences:

- there must be an intent (called the *mens rea* element); and
- the assault must have been made 'without lawful excuse'

The requirement of proving intent, or *mens rea*, means that, where the accused is charged with one of the serious assaults (under sections 16, 17 or 18) of causing injury or serious injury, the prosecution must prove that the assailant intended to injure or seriously injure the victim, or was reckless as to whether injury or serious injury was the outcome. Recklessness occurs where an accused person does not intend the particular serious consequences, but is indifferent as to whether those consequences occur, and consequently goes ahead with the activity regardless. It would be difficult to prove either recklessness or intent where the teacher's purpose was not to cause injury but to stop the fight. Accordingly, a prosecution under sections 16, 17 or 18 of the *Crimes Act* against an intervening teacher is unlikely to succeed because the *mens rea* element would be difficult to establish. An exception might be where there were no witnesses to the fight, and the students involved invent a story that the teacher's assault was unprovoked. Where a charge of common assault is brought against an intervening teacher under section 31(1) of the *Crimes Act*, it might also be difficult to prove the mental element of assaulting with 'intent to commit an indictable offence' as required by that provision. However, such an intent is not an element of the offence of common assault provided for under section 23 of the *Summary Offences Act*.

In any event, even if the *mens rea* element of the offence is established, the proviso still exists that the assault must have taken place 'without lawful excuse', and this enables the accused to raise the defence of self defence, or defence of others.

Self Defence and Defence of Others

In some Australian States, the criminal defences are set out in the criminal code.⁴¹ In Victoria they are not, and we have to look to the common law for an explanation of their scope and applicability. The leading High Court decision is *Zecevic v Director of Public Prosecutions (Vic)*.⁴² Though this case involved a homicide, the Court stated that the test was one of general application to crimes of violence where force was used in self defence. The High Court stated the test to be applied to determine whether the defence applies as follows:

It is whether the accused believed upon reasonable grounds that it was necessary in self defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.⁴³

This is both an objective and a subjective test. Accordingly, if the accused goes beyond what he believes is necessary to prevent the danger, or if, when examined objectively, there were no reasonable grounds for believing that the response was necessary for self defence, the defence will fail. In *Zecevic*, the High Court pointed out that one of the factors to be taken into account by a jury when considering whether there were reasonable grounds for believing that those actions were necessary for self defence, was whether the force used was proportionate to the threat offered.⁴⁴ In *R v Portelli*, the Victorian Court of Appeal discussed this test in *Zecevic* and pointed out that proportionality does not mean that 'a blow with a fist can only be answered with another blow of the fist.'⁴⁵ It requires the prosecution to prove that the response of the accused was 'out of all proportion' to the nature of the attack to which the response is being made.⁴⁶ In *Zecevic*, the High Court suggested that it will 'often be desirable' for judges to tell a jury that it 'should approach its task in a practical

⁴¹ See, eg, *Criminal Code* (Qld), *Criminal Code* (WA) and *Criminal Code* (Tas). Though South Australia is a common law jurisdiction in respect of criminal law, self defence has been specifically codified, with the effect of displacing the common law rules regarding that defence: see *Criminal Law Consolidation Act 1935* (SA) s 15.

⁴² (1987) 162 CLR 645 ('*Zecevic*'). *Zecevic* was recently followed by the Victorian Court of Appeal in *R v Portelli* (2004) 10 VR 259.

⁴³ *Zecevic* (1987) 162 CLR 645, 661 (Wilson, Dawson and Toohey JJ), 654 (Mason J).

⁴⁴ *Ibid* 662.

⁴⁵ (2004) 10 VR 259, 272.

⁴⁶ *Ibid*.

manner and without undue nicety giving proper weight to the predicament of the accused who might have had little time for calm deliberation or detached reflection.⁴⁷ In *Portelli*, the Court commented that here the High Court in *Zecevic* were doubtless thinking of that ‘succinct and pointed aphorism of [Justice] Holmes’ of the United States Supreme Court (and repeated by Chief Justice Dixon of Australia’s High Court):

“Detached reflection cannot be demanded in the presence of an uplifted knife.”⁴⁸

The defence of self defence applies equally to actions taken in defence of others.⁴⁹ Accordingly, the teacher who uses force to break up a fight will be protected by the law of self defence, provided the test in *Zecevic* is satisfied.

This common law protection of teachers has been codified (incorporated into statute) in the United Kingdom, with the result that this legal rule is clearer and more accessible to those who want to know of its existence. The United Kingdom *Education Act 1996* c 56, section 550A provides as follows:⁵⁰

(1) A member of the staff of a school may use, in relation to any pupil at the school, such force as is reasonable in the circumstances for the purpose of preventing the pupil from doing (or continuing to do) any of the following, namely–

- (a) committing any offence,
- (b) causing personal injury to, or damage to the property of, any person (including the pupil himself), or
- (c) engaging in any behaviour prejudicial to the maintenance of good order and discipline at the school or among any of its pupils, whether that behaviour occurs during a teaching session or otherwise.

(2) Subsection (1) applies where a member of the staff of a school is–

⁴⁷ *Zecevic* (1987) 162 CLR 645, 662-3.

⁴⁸ *Portelli* (2004) 10 VR 259, 271. (Ormiston JA), quoting Holmes J in *Brown v United States*, 256 US 335, 343 (1920), as reiterated by Dixon CJ in *R v Howe* (1958) 100 CLR 448, 463.

⁴⁹ This was recently discussed and confirmed in *Portelli* (2004) 10 VR 259, 264-9.

⁵⁰ *Education Act 1996* (UK) c 56, s 550A, inserted by *Education Act 1997* (UK) c 44, s 4.

(a) on the premises of the school, or

(b) elsewhere at a time when, as a member of its staff, he has lawful control or charge of the pupil concerned;

but it does not authorise anything to be done in relation to a pupil which constitutes the giving of corporal punishment within the meaning of section 548.

(3) Subsection (1) shall not be taken to prevent any person from relying on any defence available to him otherwise than by virtue of this section.

(4) In this section—

"member of the staff", in relation to a school, means any teacher who works at the school and any other person who, with the authority of the head teacher, has lawful control or charge of pupils at the school;

"offence" includes anything that would be an offence but for the operation of any presumption that a person under a particular age is incapable of committing an offence."

Note that the very broad definition of "member of staff" would include volunteers assisting with a school camp, excursion or sport.

In Victoria, the "power" of the teacher in a non-government school to restrain the pupil in order to prevent the student from harming him or herself in circumstances other than a fight is stated less clearly by the law. Again, the teacher has to rely on a common law defence to assault to make the actions a lawful application of force. The defence of "necessity" is available where there is a threat or danger of "irreparable evil", which includes serious bodily harm.⁵¹ This defence would also cover scenarios such as children with mental disabilities causing self harm. The assault must be done in response to the

⁵¹ *R v Loughnan* [1981] VR 443; *R v Martin* [1989] All ER 652, 654 (Simon Brown J).

emergency, must be reasonable, there must be no reasonable opportunity for alternative action, and the conduct cannot exceed the perceived threat.⁵²

⁵² *R v Loughnan* [1981] VR 443, 448-9, 460.

A Common Law Right to Use Force?

Robert Horton, in a paper presented at the Australia and New Zealand Education Law Association Annual Conference⁵³ has raised the possibility that the common law permits teachers to use reasonable force not just for self defence and protection of others and the student, but also for the “discipline and control” of the student. As authority he cites a recent New South Wales Supreme Court decision, where, when reviewing an Ombudsman’s investigation into a school incident, Justice Young, Chief Judge in Equity in the New South Wales Supreme Court, stated:⁵⁴

Indeed it seems to have been assumed by everyone that dragging a disobedient child from a classroom must be an assault. The authorities would not support this proposition. So in *Murdock v Richards* [1954] 1 DLR 766 it was not an assault for a teacher to pull a resisting female pupil by her arm out of the classroom to the hall to receive the strap. The circumstances are all important.

In *Murdock*, the Nova Scotia Supreme Court found that the teacher has authority to use reasonable force, including corporal punishment, for discipline and control, as this is necessary for maintaining order at school. Horton also cites the 1970 Canadian decision of *R v Trynchy*,⁵⁵ where a bus driver was found not guilty of assault after he disciplined a misbehaving boy on a bus by picking him up and dropping him back into his seat. The Yukon Territory Magistrates Court found that the degree of corrective force used was not unreasonable. It should be noted that these decisions date from an era when corporal punishment was lawful and still regularly administered in schools. It is respectfully submitted that, despite the support for the position from Justice Young in *Smith*, these cases cannot be relied upon as authority for a common law right of teachers in schools in Victoria in today’s post-corporal punishment

⁵³ Robert Horton, ‘Civil Liability of Teachers and Educational Institutions for Physical Intervention, Restraint and Non-intervention’ (Paper presented at the Australia and New Zealand Education Law Association Conference 2007, Hervey Bay, 26-28 September 2007).

⁵⁴ *Smith v Mater Dei School* [2007] NSWSC 820, [31].

⁵⁵ (1970) 11 CRNS 95, cited in Horton, above n 52, 15.

era⁵⁶ to administer reasonable force when exercising discipline and control in a class. The matter would need to be considered in more detail by a court and a clear decision made before schools and their staff could rely on the existence of the right.

A Citizen's Arrest

Teachers, like any citizen, have the power to effect a citizen's arrest where they find someone committing an offence. This common law right is now contained in section 458 of the *Crimes Act 1958* (Vic), and this is the power which security guards and store detectives use to arrest people stealing or committing other offences. To use this power, under section 458(1) the teacher must find the student committing the offence and believe on reasonable grounds that the arrest is necessary for a reason such as preserving public order, or preventing the continuation or repetition of the offence, or the commission of a further offence or for the safety or welfare of members of the public or of the offender. An arrested person should be handed over to police or, under section 458(3), released if the reason for apprehension no longer continues.

Furthermore, section 462A of the *Crimes Act 1958* (Vic) provides that any person may use such force 'not disproportionate to the objective as he believes on reasonable grounds to be necessary to':

- prevent the commission, continuance or completion of an indictable offence; or
- lawfully arrest a person committing or suspected of committing an offence.

Under this provision, reasonable force could be used to prevent the commission of an offence, without an arrest having to be made. However, care must be taken that the force used is proportionate to the particular objective.

⁵⁶ See *Education and Training Reform Regulations 2007* (Vic) regulation 14 and *Education and Training Reform Act 2006* (Vic) section 4.3.1(6)(a) for prohibition of corporal punishment in Victoria.

Disproportionate force will amount to an assault. The power is available to use where an offence is being committed. If a court subsequently determines that an offence was *not* being committed, then the arrest will be unlawful. Stores have been sued where their security staff have apprehended a customer wrongly accused of stealing. In a school setting, the teacher might use force on a student who appears to be fighting only to find that that student had not committed an assault, but was merely defending himself.

Negligently Causing Serious Injury

Section 24 of the *Crimes Act 1958* (Vic) provides for the offence of negligently causing serious injury. This is similar to the civil action of negligence, but has a criminal penalty attached, being a maximum term of five years imprisonment. Here the accused's actions must fall so far short of the standard of care expected that it shocks the conscience and is deemed to warrant criminal sanctioning.⁵⁷ Negligent behaviour is less culpable than reckless behaviour. While it involves such a great falling short of the standard of care which a reasonable man would have exercised and involves such a high risk that serious injury would follow, the risk does not have the inevitability which attaches to reckless conduct. The reckless individual is aware that he or she is creating a risk and that injury is the likely result, but carries on regardless.⁵⁸ The injury is such a likely result of the recklessness, that it is almost intended. A teacher intervening in a fight would have to be highly negligent and acting quite unreasonably to warrant prosecution under section 24. It would require the sort of behaviour which, in the United Kingdom, would not be covered by the legislative protection under section 550A mentioned above, or the reasonable action which is permitted for government school staff under regulation 15 of the *Education and Training Reform Regulations 2007* (Vic).

⁵⁷ *R v Newman* [1948] VLR 61, 67; *R v Shields* [1981] VR 717, 723.

⁵⁸ *R v Nuri* [1990] VR 641, 643.

Where the Physical Intervention Involves an Unintended Touching of a Sexual Nature

As was mentioned earlier, in order for a court to find an indecent assault proved, the prosecution must establish that the accused intended to assault the victim indecently. Accordingly, where a teacher grabs a student in an attempt to stop a fight, and the grabbing unintentionally has a sexual quality to it, because, for example, the teacher makes contact with a female student's breast, the teacher's actions will not amount to an indecent assault. As Lord Ackner commented in *R v Court*: "It cannot, in my judgment, have been the intention of Parliament, that an assault can, by a mere mistake or mischance, be converted into an indecent assault, with all the [opprobrium] which a conviction for such an offence carries."⁵⁹ The mens rea element of the offence would not be present. However, again, a teacher could be in difficulty if there were no witnesses to an incident, and the student alleges that a sexual touching was made.

Summary

Staff in government schools are permitted, by regulation (which is a form of legislation delegated by parliament to a subordinate law-making authority) to take any reasonable action that is immediately required to restrain a student of the school from acts or behaviour dangerous to the member of staff, the student or any other person.

It is not unlawful for teachers to touch students in a social or supportive context unless the student has expressly or impliedly withdrawn consent to being touched. Where a teacher intervenes physically to stop a fight, he or she is unlikely to be convicted of assault, as the teachers' actions will attract the defence of self defence or defence of others. A teacher may also be able to rely on the "citizen's arrest" power in section 462A of the *Crimes*

⁵⁹ [1989] 1 AC 28, 41. This case and other authorities dealing with the elements of indecent assault were discussed recently in the Victorian Supreme Court case *Parish v Director of Public Prosecutions (DPP)* [2007] VSC 494 (Unreported, Robson J, 29 November 2007).

Act 1958 (Vic) to use such force ‘not disproportionate to the objective as he believes on reasonable grounds to be necessary to prevent the commission, continuance or completion of an indictable offence’.

In the United Kingdom, legislation provides broad protection for teachers, and others involved with running school activities, from prosecution for assault by providing that they may use reasonable force to protect students from harming themselves, others or property, or from committing offences. A teacher breaking up a fight who accidentally makes a contact of a sexual nature could only be convicted of indecent assault if the prosecution could prove beyond reasonable doubt that the teacher intended a sexual contact.

QUESTION 4: IF TEACHERS DO INTERVENE PHYSICALLY IN FIGHTS ARE THEY LEAVING THEMSELVES OPEN TO BEING SUED BY A STUDENT?

The relevant torts which might have been committed by the intervening teacher are:

- assault
- battery
- false imprisonment
- negligence

Assault, battery and false imprisonment are all forms of the tort of “trespass against the person” (the other form of trespass is “trespass to property”).

Trespass against the Person

Trespass is an intentional tort in that the actor must have intended that his or her actions would have the consequences which resulted. The victim can sue for these torts even if no actual physical injury results – injury to dignity can be compensated, unlike negligence where personal injury is an essential element of the tort. The three forms of trespass can overlap:

assault is the threatened application of force to a victim;
battery is the actual application of force;
false imprisonment is causing the total restraint on liberty of the other person.

There must be no lawful justification for the acts to amount to trespass.

The common law defences available to an action for trespass to the person are similar to the defences for a criminal charge of assault - self defence, defence of others and necessity.⁶⁰ The test for self defence and defence of others is not whether an actual need for defence has arisen, but whether the defendant reasonably thought there to be such a need. Whether the response is proportionate to the threat will be a factor taken into account when determining whether the defendant reasonably thought there was peril.⁶¹ Necessity can apply where some minor discomfort is inflicted on a person who is a danger to the public⁶² or to him or herself.⁶³

Accordingly, a teacher is not likely to be successfully sued in tort unless excessive force has been used in circumstances that did not justify it. However, once again, convincing a court which version of the facts should apply could be problematic if there were no witnesses present when the application of force, or restraint, occurred.

Negligence

The teacher might be sued if the intervention resulted in injuries being sustained because of the teacher's lack of care. This could arise, for example,

⁶⁰ In New South Wales, the defences have been codified – *Civil Liability Act 2002* s 52 provides that it is permissible to use force to defend oneself, or another, provided that it is in response to an unlawful act, and the defending person believed the conduct to be necessary and reasonable in the circumstances. Victoria does not have a similar statutory defence.

⁶¹ See, eg, Sam Blay, Andy Gibson and Bernadette Richards, *Torts Law in Principle* (4th ed, 2005) chapters 5, 8 and Danuta Mendelson, *The New Law of Torts* (2007) chapters 4, 9.

⁶² *Rigby v Chief Constable of Northamptonshire* [1985] 2 All ER 985.

⁶³ *Watson v Marshall* (1971) 124 CLR 621.

if a teacher pulls or pushes a student to disengage them from a fight, and the student falls and suffers an injury, such as a broken arm, or a head injury from a rock on the ground. To prove negligence, the student would have to establish that the manner of disengagement was carried out with such carelessness that it amounted to a breach of the duty of care. This requires the court to be satisfied that the teacher had failed to act as the reasonable teacher would have acted in those circumstances. This is determined through application of the “negligence calculus” that was outlined earlier.

Summary

A teacher will not be sued successfully in tort where he or she intervenes in a fight, and the intervention could be justified on the grounds of self defence, defence of others or necessity, and the teacher used reasonable force during the intervention.

QUESTION 5: WHAT IS THE EFFECT OF A “NO TOUCHING” SCHOOL POLICY?

The position of a teacher employed in a school where staff are forbidden to touch students will be briefly discussed, as such a policy is relevant to both the civil and criminal liability of the teacher who physically intervenes in a fight.

If a school establishes a policy of not touching students except in an emergency, and not intervening physically in fights, the policy becomes a term of the teacher’s employment contract. Accordingly, any unauthorised touching will amount to a breach of the contract by the teacher. In *Puccio v Catholic Education Office*⁶⁴ the school developed a strict “no touching” policy of both male and female children, except in emergencies. Puccio, who disapproved of the policy, continued to touch children, despite warnings. He was eventually dismissed, and brought an unfair dismissal claim which was unsuccessful. In dismissing his case, the judge commented that ‘where a teacher commits a clear breach of a direction squarely related to safety and welfare issues after

⁶⁴ (1996) 68 IR 407.

due warning, the school, generally speaking will be left with no option but to terminate the services of the teacher.⁶⁵ Hence a school with a policy of not intervening physically to break up fights creates potentially conflicting duties for a teacher where a fight erupts, and, given the size and strength of the combatants, the teacher believes he or she can stop the fight without endangering themselves, and thus avoid possible injury to the students.

Furthermore, if a student is injured by the intervention, the issue could be raised regarding whether the school with a “no touching” policy is vicariously liable for the teacher’s actions, as the teacher’s actions would be unauthorised. The general rule is that an employer will be vicariously liable for the torts committed by an employee, provided the wrongful acts were carried out during the course of employment, and were within the scope of the employee’s authority. If the employer is found not to be vicariously liable, then any compensation awarded to the victim would be awarded against the teacher alone. A school authority’s vicarious liability where a teacher’s unauthorised act amounts to the commission of an intentional tort was discussed by the High Court in *New South Wales v Lepore*.⁶⁶ Unfortunately, there was no single line of reasoning from the members of the High Court. It is not appropriate here to explore the ramifications of the *Lepore* decision. However, by taking elements from the differing tests applied by the judges, it seems that a school with a “no touching” policy could still be vicariously liable for the teacher’s actions if the teacher intervenes in a fight, as the teacher is acting in the employer’s interests, and with apparent authority and there is a close connection between the teacher’s actions and what the teacher was engaged to do.⁶⁷

Government school teachers could probably still be protected by regulation 15 of the *Education and Training Reform Regulations 2007 (Vic)* (mentioned above) which permits the use of reasonable action to restrain a student where

⁶⁵ Ibid 417.

⁶⁶ The full title of the case is *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* (2003) 212 CLR 511.

⁶⁷ *Lepore* also explored the question of whether the school’s non-delegable duty applied where a teacher had gone beyond what was authorised to be done and had committed an intentional tort. This is not so important in Victoria, as the *Wrongs Act 1958 (Vic)* s 61 provides that liability based on the non-delegable duty of care is to be determined as if the employer were vicariously liable for the actions.

there is danger. Accordingly, it is once again the teachers in non-government schools who are more vulnerable, although teachers in government schools will be vulnerable also if the amount of force they use goes beyond “reasonable action.”

Summary

A school which has a policy which forbids teachers from physically breaking up fights creates potentially conflicting duties for a teacher where the teacher believes he or she can stop a fight without endangering him or herself, and this will avoid possible injury to the students.

QUESTION 6: WHAT IS THE POSITION OF NON-STAFF MEMBERS OF THE SCHOOL COMMUNITY WHO INTERVENE IN FIGHTS?

As was mentioned earlier, the basis of the teacher’s duty of care is the special nature of the teacher-student relationship. It is the existence of the relationship which requires the teacher to take effective action to try and stop a fight. The position the teacher is in can be contrasted with the duty on a stranger, for example a parent at the school, who comes across the fight when visiting the school. The common law regards those not in a special relationship with an endangered person as having no obligation to come to someone’s rescue. In the High Court decision of *Sutherland Shire Council v Heyman*, Justice Deane explained that as a principle of tort law, there is ‘no prima facie general duty to rescue, safeguard or warn another from or of reasonably foreseeable loss or injury to take reasonable care to ensure that another does not sustain such loss or injury.’⁶⁸ His Honour then pointed out that exceptions to the rule exist where there is a special relationship between the plaintiff and the rescuer. If there is no duty to rescue, but a rescue is attempted, the common law imposed a duty on the rescuer to take reasonable care. But this rule has now been overridden by the “Good Samaritans” rule introduced following the Ipp Report into tort reform, which was mentioned earlier. “Good Samaritans” are people

⁶⁸ (1985) 157 CLR 424, 502.

who, for no fee, come to the aid of others who have been injured or are at risk of being injured. They now do not incur any civil liability for anything done, or not done, when acting in good faith in providing assistance, advice or care at the scene of the emergency or accident.⁶⁹

If the parents are acting as volunteers in a school camp or other activity, and whilst doing that they attempt to break up a fight, they will be exempt from liability in tort if they are acting in good faith, and without recklessness.⁷⁰ This protection for “volunteers” was also introduced in response to the Ipp Report. Protection is lost if they are impaired by alcohol or drugs taken voluntarily, or they are acting outside of their area of responsibility. (The exemption does not apply to defamation actions, or injuries resulting from motor car accidents.)

Whilst these provisions protect good Samaritans and volunteers from tortious liability, they do not protect them from a criminal prosecution in the event that the defences of self defence, or defence of others, fail.

Beyond the School Gate?

The above discussion on the liability of teachers applies in circumstances where the teacher’s duty of care has come into existence. This occurs when the student has come under the control of the school authority,⁷¹ and extends to the supervision of bus or tram stops near the school which are used by the students and ought to be supervised by the school.⁷² The school’s duty of care does not extend beyond the school boundaries and nearby bus or tram stops, unless there are “exceptional circumstances”.⁷³

⁶⁹ *Wrongs Act 1958* (Vic) section 31B.

⁷⁰ *Wrongs Act 1958* (Vic) sections 34-8.

⁷¹ With regard to determining when the duty commences before school, see *Geyer v Downs* (1977) 138 CLR 91.

⁷² *Roman Catholic Church for the Diocese of Bathurst v Koffman* [1996] Aust Torts Report 81-399.

⁷³ *Graham v New South Wales* (2001) 34 MVR 198 (Meagher J). A similar view was expressed by Mahoney P and Sheller JA in *Koffman* [1996] Aust Torts Report 81-399. In *Reynolds v Haines*, the school authority was found liable for an injury inflicted by year 12 students on a younger student just outside the school boundary. As it was year the 12 “muck up day” the misbehaviour was foreseeable (this is an unreported decision of Master McLaughlin of the New South Wales Supreme Court, BC9305229, 27 October 1993).

Summary

Volunteers at the school, such as parents, or other non-staff personnel, who intervene to stop violence will not incur civil liability. Their criminal liability, however, is the same as a teacher's.

QUESTION 7: ARE OCCUPATIONAL HEALTH AND SAFETY LAWS RELEVANT TO THESE CIRCUMSTANCES?

The *Occupational Health and Safety Act 2004* (Vic) is mainly concerned with the duties imposed on employers, but it also imposes some duties on employees, and accordingly it is relevant to teachers.

Duty on Employers

Section 21(1) provides that an employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health. Section 23 imposes the same obligation on employers with respect to others at the workplace, and this would include an obligation to students. A breach of these provisions is an offence. In *Barry Johnson v New South Wales (Department of Education and Training)*,⁷⁴ a year 9 student with a known history of psychological disorder and harmful behaviour held a knife to a year 7 student's throat. When staff released the year 7 student, the boy with the knife ran out to the playing fields where a physical education class was being conducted. That class and its teacher were chased onto an adjacent roadway, and the armed student was eventually brought to the ground by a worker on a nearby building site. The Department of Education and Training was prosecuted under the New South Wales equivalent of s 21 for failing to provide a safe place of work by not taking adequate steps to deal with a student who was known to be prone to violence.

⁷⁴ [2006] NSWIRComm 109.

Duty on Employees

The duty on employees is imposed under section 25 and provides that, while at work, an employee must:

- (a) take reasonable care for his or her own health and safety; and
- (b) take reasonable care for the health and safety of persons who may be affected by the *employee's* acts or omissions at a workplace (emphasis added).

This provision imposes a duty on the teacher to go about his or her tasks at work in a way that takes reasonable care of the safety of students. If a teacher, as in *Richards' Case*, fails to take action to stop a classroom fight, or when on yard duty fails to stop a fight during lunch, it could amount to an act or omission affecting the safety of other students. This is a duty similar to the common law duty. If the obligation is breached, the teacher could be liable to prosecution under the *Occupational Health and Safety Act 2004* (Vic). The duty under the legislation is to *eliminate risks* to health and safety *so far as is reasonably practicable*. Accordingly, what is reasonably practicable is unlikely to include intervening in a way which places the teacher in danger, particularly in view of the other section 25 obligation on the teacher to take care for his or her own health and safety. In the event that an intervention is undertaken, that task should be carried out with reasonable care for the health and safety of the students. These duties do not add to the duties already imposed on teachers by the common law duty of care discussed above, but they do add to the teacher's lot the burden of possibly being prosecuted under the Act for a breach of section 25.

Reckless conduct was a new offence created by the 2004 *Occupational Health and Safety Act*. Section 32 provides that a person who, without lawful excuse, recklessly engages in conduct that places or may place another person who is at a workplace in danger of serious injury is guilty of an indictable offence. The penalty can be up to five years imprisonment, or a fine not exceeding 1800 penalty units (that is, \$198 216), or both. Note the provision applies to *any* person at the workplace - employers, managers, employees and independent

contractors. A teacher would have to be behaving in a very reckless manner to be found guilty of this offence. As discussed earlier in the context of criminal assault, recklessness requires foresight of the probability or likelihood of seriously harmful consequences, but a willingness to go ahead regardless. This provision is more likely to be relevant to teachers where dangerous experiments are carried out in a science laboratory in a reckless way, or dangerous outdoor education activities are undertaken in a reckless way. No actual harm has to occur for there to be a prosecution.

Summary

These laws do not add a significantly different obligation on the teacher from the obligation already imposed by the common law. They add an additional burden on the teacher of a possible prosecution under the *Occupational Health and Safety Act 2004* where the teacher fails to exercise reasonable care.

The obligation on the teacher, imposed by the Act, to take care for his or her own safety, could be interpreted as imposing an obligation on teachers not to become physically involved in fights if they are likely to be injured.

QUESTION 8: DAMAGE TO PROPERTY BY STUDENTS: SHOULD TEACHERS INTERVENE?

The law of negligence imposes a duty of care on teachers to protect students from reasonably foreseeable injuries, but the duty does not extend to protecting school property from injury. However, a teacher's duty as an employee would require them, at the least, to intervene through voice control to discipline the student who is damaging school property. The Canadian cases and *Smith*, mentioned earlier, suggest that teachers can intervene physically to enforce school discipline, but as was discussed earlier, the authority of those cases on this point is not clearly established. The common law defences of self defence and defence of others and necessity might not be available to protect a teacher in this situation. On the other hand, as was mentioned earlier,

teachers, like any citizen, have the power to effect a citizen's arrest where they find someone committing an indictable offence. Intentional damage to school property would constitute the offence of criminal damage pursuant to section 197 of the *Crimes Act 1958* (Vic). The power to arrest is contained in section 458 of the *Crimes Act 1958* (Vic). Furthermore, section 462A provides that any person may use such force 'not disproportionate to the objective as he believes on reasonable grounds to be necessary to':

prevent the commission, continuance or completion of an indictable offence; or

lawfully arrest a person committing or suspected of committing an offence.

However, care must be taken that the force used is proportionate to the particular objective. Disproportionate force will amount to an assault.

Summary

The teacher's duty of care does not oblige teachers to take action to protect property, but the teacher's duty as an employee might require some action to be taken. Physical intervention to prevent criminal damage to property will be lawful provided excessive force is not used.

DRAWING IT ALL TOGETHER: THE FINAL CONCLUSION

It is clear that, when a teacher becomes aware of a student fight, the teacher's duty of care, which is founded in the law of negligence, requires the teacher to take reasonable care to protect the students involved from reasonably foreseeable injuries. This means that the law expects the teacher to take some effective action to try and stop the fight. What amounts to reasonable care is a question of fact judged according to how the reasonable teacher would have responded in that situation, taking into account all the circumstances surrounding the incident. The *Wrongs Act 1958* (Vic), and common law precedents provide a set of factors to be taken into account to help determine what amounts to reasonable care in the circumstances.

There are no decisions indicating that a teacher is expected to intervene physically in a fight, but comments from judges indicate that there might be circumstances where it is appropriate for the teacher to intervene physically (for example, where small children are involved).

Comments from judges, and section 25 of the *Occupational Health and Safety Act 2004*, suggest that teachers are not expected to intervene physically to quell student violence where to do so would endanger the teacher.

Where a teacher physically intervenes to stop a fight, teachers receive some protection from civil and criminal liability through common law defences, the *Crimes Act 1958* (Vic) provisions relating to citizen's arrest powers, and in the case of government teachers, through regulation 15 of the *Education and Training Reform Regulations 2007*. Protection from liability may be lost where the teacher's actions were not reasonable in the circumstances, in that they involved the use of excessive force, or were directed at the student who was defending him or herself, rather than perpetrating the violence. The teacher's position is more difficult where a malicious allegation is made by the student. It becomes a matter of proof, and which version of events is accepted by a court.

Anecdotal evidence suggests that teachers are unaware of the law relating to the legality of touching of students by teachers in a social or supportive manner, or where the touching is to protect students from harm. It is not surprising that there is confusion surrounding this area of law, given that it is largely common law, and cannot be found expressed in a clear and succinct way in any official publication, and clear guidelines are not issued to teachers.

The obligations on teachers, and their legal powers, with regard to preventing students from damaging property are less clear than their powers and obligations with regard to protecting students from personal injury. Again, the use of reasonable force to stop a student from damaging property is unlikely to result in the civil or criminal liability of the teacher.

The United Kingdom *Education Act* permits teachers to use reasonable force in a range of protective situations, and as such provides a set of very general guidelines for teachers. This level of generality is probably appropriate for legislation, but still leaves many questions unanswered regarding what is appropriate behaviour in a range of situations. This is not surprising given the huge range of situations which can appear in a school setting, with no one incident having the same facts as another. However, the New South Wales Teachers' Federation guidelines, whilst not a model set of guidelines, provide an example of how guidelines can be made to have quite a degree of specificity, whilst still remaining general enough to cover a range of situations.

APPENDIX A: NEW SOUTH WALES TEACHERS FEDERATION POLICY

Protecting teachers as well as students

Advice you need

The Federation's work in support of members who find themselves the subject of allegations gives us a state-wide picture of the types of allegations which our members have to confront and the circumstances in which such allegations are likely to come forward. From this perspective the Federation can provide the following advice which you cannot ignore.

- Make it an absolute rule never to be left alone with a child of either sex no matter what their age. It is best always to have as many children with you as possible.
- In rendering first aid to students, take care to see that another member of the staff and/or senior students are present. If the injured child is female and if there is a woman on the staff, under no circumstances should a male teacher attend to her injury and first aid administered to male children should always be administered in the presence of responsible witnesses.
- Never detain a single child if there are no other staff members or children present.
- Never allow yourself to be alone with a child or two children in the school building before school or after school. A habit can grow up of having senior students perform various tasks in the classroom or around the school. It is much safer not to allow children to develop a privileged position as this can result in a dangerous situation for the teacher.
- If you have to discuss a personal problem with the student, and this may particularly apply in small schools where students are in various stages of maturity, ensure that a discussion of this kind takes place in a conspicuous situation in the playground, that is, out of hearing but in sight of as many people as possible.

- Avoid at all times conveying children in your own car even where parents have given their consent. This situation can provide an opportunity for allegations of inappropriate conduct. Also, should the child be injured due to your negligence you may be liable for such injuries.
- If you are involved in coaching small groups, especially of the opposite sex, always have another adult present and wherever possible conduct the coaching session in a public place.

The types of complaints and reports received by the Child Protection Investigation Directorate fit broadly into three categories: sexual, physical and non physical (psychological).

1. Avoid allegations of sexual abuse

Federation advises that teachers should always avoid:

- unwarranted and/or inappropriate touching
- conversations of a sexual nature (other than in accordance with syllabus)
- jokes of a sexual nature
- suggestive remarks or actions
- obscene gestures
- obscene language of a sexual nature
- showing of publications, electronic media, illustrations which are sexually suggestive
- showing of inappropriate videos (make yourself aware of DET policy on the use of videos in classrooms)
- deliberate exposure of a child or young person to sexual behaviour of others, other than in the case of curriculum material in which sexual themes are contextual
- personal correspondence with a child or young person in respect of the teacher's feelings (including sexual feelings) for the child or student

- comments about a student's appearance which may be misconstrued or considered offensive by the student.

Teachers should always be aware that even if their intentions are innocent, this may not be how they are perceived by others.

2. Avoid allegations of physical abuse

Try not to touch students.

It is unfortunate that a hug or pat aimed at encouraging or comforting a student may be misinterpreted by the student, or a staff or community member as "unwarranted or inappropriate touching".

Apart from inevitable situations, such as first aid, a teacher should avoid touching children.

A slap, a push or a shake can give rise to serious legal charges and/or departmental disciplinary action and it is usually most difficult to defend a teacher who, through impatience or exasperation loses self control, even momentarily.

Avoid placing yourself in a position, for example, a doorway, where a student may have accidental or deliberate contact when entering or exiting the room.

Avoid touching a student to gain their attention or to censure their behaviour.

The DET has stated in disciplinary proceedings against a number of teachers that it does not consider it proper or acceptable to permit students to rub or touch teachers physically. If you allow students to touch you, it may be misconstrued.

An area of particular difficulty for teachers is how to intervene to prevent students causing physical harm to themselves, other students or to teachers. Your school should adopt a policy to be followed in these circumstances. The

carrying of emergency cards or using a mobile phone to gain help while on playground duty, stating clearly and loudly in front of witnesses the action you are about to take and the use of minimal force can lessen the opportunity for your appropriate action being misconstrued.

3. Avoid allegations of non physical abuse

Misconduct or improper conduct which involves non physical or psychological abuse may also be the issue of a complaint or report.

In this regard, teachers are urged to avoid practices which may be construed as:

- targeted and sustained criticism, belittling, teasing or excessive staring
- excessive or unreasonable demands
- using inappropriate locations or social isolation as punishment
- persistent hostility and verbal abuse, rejection and scapegoating
- frightening a student because of an overbearing physical presence.

Some complaints have involved allegations that teachers of larger physique and loud voices have caused psychological abuse to students. Whilst few of these allegations are sustained the experience of being subject to an allegation and investigation is extremely stressful for a teacher. Teachers, especially those in promotions positions, who have special responsibility in disciplining students, need to be sure that they always act in accordance with the schools documented student welfare and discipline policy.

The neglect of a child, young person or student such as refusal to render aid to a student who is injured or act to reduce the risk of injury or harm will be construed as non physical abuse.

Teachers should, in this situation, be aware of the advice offered above regarding the application of first aid. Wherever possible call an ambulance or involve staff specifically trained in first aid.

4. Avoid situations which can increase the risk of a complaint or report

Friendships with students can be misinterpreted.

Some teachers have formed friendships with students where they participate frequently in activities outside school. Teachers are seen to be in a more powerful or influential position in these situations and are still considered to have a duty of care.

Some examples of situations that have resulted in investigations of improper conduct include:

- drinking in a bar where students known to be underage are drinking and not reporting this to the publican
- corresponding with students including by e-mail
- discussing personal relationship
- dating senior students. Remember that even if the student welcomes the friendship, it may still be deemed improper conduct of a sexual nature and result in legal or disciplinary action. Relationships at or over the legal age of consent will not stop a Child Protection Investigation Directorate investigation or action being taken against the teacher.
- Overnight excursions can place teachers in positions of additional risk of complaint or report, particularly in cases where teachers have had interrupted sleep and relax standards they would normally adopt in the more formal environment of the school.

The informal nature of excursions means that actions are more likely to be misconstrued.

Federation advises that teachers should never drink alcohol with, or in the presence of, students whether on or off duty.

Because excursions do involve greater risks for teachers they should know that they cannot be compelled to participate in overnight excursions. When it is decided to have an excursion, teachers must insist that there is adequate staff so that no teacher is ever required to be alone with students.

5. Extra curricula activities which involve coaching individuals or small groups of students before or after school place teachers in positions of potential risk.

Teachers involved in the following situations should establish practices which eliminate their working in isolation with students:

- coaching sporting teams especially where physical contact may be involved
- coaching debating teams, mock trial teams or public speakers
- supervising music lessons for individuals or small groups
- any situation where you would have difficulty defending your behaviour should it be misconstrued
- activities which occur before or after normal school hours.

6. Special education settings

Documented policies in relation to the management of students should be discussed with and well understood by parents where the student's behaviour routinely or even occasionally requires a teacher to restrain the student.

Whenever possible, teachers should ensure another teacher or adult is present when there is a need to restrain a student.

If you believe the circumstances at your school such as:

- poorly designed buildings
- inadequate staffing levels
- inadequate numbers of teachers' aides, or

- the failure of DET to provide you and your colleagues with appropriate training and development increase the risk of allegations, you should call a Federation meeting at your school and consult with your Federation Organiser.