# A question of negligence

***Dennis Sleigh** discusses teacher negligence. This is the second article in a series aimed at increasing awareness of important legal issues*

Today, teachers often encounter bush lawyers – sometimes parents, sometimes students. We recognise them by their haunting cries: "If you do that, I'll sue" or "That behaviour was negligent – I'm going to take you to court."

Of course, just because someone is seen to be a bush lawyer, it doesn't mean they don't know what they are talking about. Their threats might be valid and we might be at risk – so as teachers, we should know some legal basics ourselves.

## Negligence

A common word in conversations with bush lawyers is *negligence*. What does it mean?

To understand it, we need to see the difference between a *crime* and a *tort*. In simple terms, the first is a criminal action, such as murder, rape or theft, while a tort (a French word meaning fault) is a civil matter, such as negligence, libel or battery. In dealing with crimes, the court emphasises punishment of the criminal; in civil matters, the emphasis is on compensating the victim. With negligence, we are dealing with a tort.

Negligence is defined as failing to act with the level of care considered reasonable under the circumstances, with a resultant injury to another party. It is easy to think of situations in our normal school day where we could be negligent, and the fact that this list is so easy to compile is one reason we are sometimes scared by the prospect. However, if we approach the matter sensibly, we realise that life is not as perilous as we might first think.

The first point we need to address when considering questions of negligence is: Who is liable when things go wrong? In a previous article (*Education Today*, Term 1, 2009) I wrote about duty of care, and this concept is important when we discuss liability for negligence.

### *Three standard conditions*

I can be said to be negligent (and therefore liable to be sued) only if certain conditions exist. The three standard conditions are:

- There must be a duty of care owed by the defendant (the person being sued) and the plaintiff (the person claiming to be injured);
- This duty must have been breached in the alleged incident; and
- Resulting from this breach, someone (called the plaintiff) must have been harmed.

To this list we can also add *forseeability* – the court cannot protect people from far-fetched or fanciful circumstances or events so unlikely that no reasonable person could have predicted their occurrence.

If even one of these conditions is missing, the action for negligence is unlikely to get very far. Let's apply this to an incident where someone in the playground has been hurt while we were on duty. In brief, as I mentioned in the previous article, teachers owe their students a duty of care while they are at school, so the first condition is already present.

The courts must then decide (if a parent decides to sue us to gain compensation for the injury) whether we have breached our duty of care. Common sense tells us that a lot of things that happen in the playground, even when they result in injury, are not due to anyone being negligent. Each case, then, must be taken on its merits. The presence of an injury, of itself, does not mean we have breached our duty.

Imagine, say, we are on playground duty, and the students are playing football in a safe area and with due regard to the rules. A student, trying to avoid a tackle, falls over and breaks his arm – is this a breach of duty? Probably not.

However, if the students were not following the rules and someone tripped another student, leading to a broken arm, the situation could be very different. Here it might be argued that our failure to enforce the rules (and thereby protect the players) was a breach. It must be repeated, however, that each case reaching a courtroom will be judged on its own facts, so generalisations can be unhelpful.

The third condition – resultant injury – means that someone has actually been hurt in some way (physically, emotionally, financially, etc.) and there must be a connection between the breach of a duty of care and the injury.

If I fail to show up for playground duty and in my absence a fight breaks out, where a student is seriously hurt, it would be logical for the court to link the injury with my carelessness. On the other hand, an extreme example might illustrate that such a link is not always present: if I fail to turn up as rostered (a breach of my duty of care) and in my absence a child stands on a land mine planted in the middle of the oval by a confused terrorist, I might argue that my presence or absence was immaterial – I would not have been able to do anything anyway. Again, it would be up to the court to decide whether there was a link between my action (arriving late) and the injury (an explosion).

## The negligent teacher

I've been negligent – so what happens now?

The first thing to note is that not all negligent actions get to court. Sometimes a decision is

made not to go ahead with the action. Students themselves, unless they are 18 or older, do not sue us – that is left to the parent or guardian, referred to as *The Next Friend*. (If a parent fails to sue, the injured party can actually initiate the action when he or she turns 18 or for six years thereafter). This means that even if a parent decides, for whatever reason, not to take any action, it doesn't mean that nothing will happen.

If you are involved in an action where negligence is suggested, keep your notes – they might come in very handy later on.

If a teacher has been negligent, and the parents do sue, what will happen? This is clearly an important question for any teacher facing the threat of a negligence action. You may find yourself suddenly recalling all those cases you have read about in the past where millions of dollars were awarded and you would be wondering just where you were going to get that sort of money on a teacher's salary.

The good news is that it probably wouldn't come to that. Let's say that the courts had made a judgement that a student had been hurt because of your negligence and they had decided that appropriate compensation in this case was half a million dollars. Even though you had been found responsible, the payment would be made by your employer, under what is known as the *principle of vicarious liability*.

In brief, this means that if you commit a negligent action in the course of your work, your employer ends up picking up the bill. I must stress here that this relates to negligence, a civil offence, but not to a crime. If you commit a crime at work, the principle does not apply. In some jurisdictions, the employer can counter-sue, so it is worth checking with your solicitor or your union's legal office to discover whether this applies in your situation.

## Contributory negligence

We sometimes hear the phrase *contributory negligence* – what does that mean?

It refers to a situation where the plaintiff (the injured party) does something or fails to do something that adds to the risk in such a way that the result is not entirely the fault of the defendant.

Imagine a situation where a teacher is so negligent that his or her action is immediately viewed as stupid, for example, a science teacher deliberately drops a sizeable piece of phosphorus into a student's beaker of water to demonstrate its volatility. In this case it is not much use looking for contributory negligence. The action is so clearly beyond the pale that the court would be unlikely to be bothered looking for other causes.

***In civil matters, the emphasis is on compensating the victim***

However, let's imagine a case where a teacher – in violation of established school policy – sends a student onto the roof to get a ball, and while he is up there, the students starts to show off by doing a little dance. If the student falls and is hurt, the teacher (or the school) could claim that the incident was not entirely due to the negligence of the teacher.

A consequence of contributory negligence could be that the damages awarded to the plaintiff are reduced to account for the part played in the incident by the injured party.

## Self protection

Since none of us wants to face court, charged with acting negligently (regardless of who pays the bills when the case is over), we clearly need to seek some guiding principles that will help us overcome this threat.

The first and most obvious rule is: act professionally. The court assesses each case on the basis of the behaviour expected of a reasonable teacher. The days when we were judged by the standard of the "reasonable parent" seem to have gone. Today, we are assessed, it seems, on the basis of a what a reasonable teacher would do – and this appropriately considers the fact that we are trained professionals. If we act professionally, we won't avoid accidents, but we should be able to steer clear of negligent actions.

Another thing to do (as mentioned earlier) is to make sure that you keep any records that might have some bearing on the case, such as diary notes or comments by other parties. If you are taken to court several years after the incident, it is not always possible to remember all the details that might be used in your own defence.

Above all, if you are concerned that something you have done, or failed to do, might be construed as a negligent action, seek qualified legal advice, either through your union or through your lawyer. You may find yourself receiving lots of advice from well-meaning colleagues or relatives, but remember: the advice of an expert is worth every cent you pay for it. Incidentally, this article, along with others in this series, is not expert advice; it is merely a general introduction to a very important topic. To get deeper awareness, consult expert lawyers.

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