

A STEEP LEARNING CURVE

The decision about which school to send your children is an important and often agonising one.

For many parents who invest significant time, effort and in some cases, increasingly more money in choosing schools, the expectations are high. So much so, that if Johnny or Julie fail to meet desired educational outcomes, disgruntled mums and dads start looking for someone to blame.

Schools have long been held accountable to parents and students in those traditional areas where they have a duty of care to protect students from personal injury and bullying while at school. There have been a consistent number of cases where school management and teachers have been held liable to students who suffer injuries as a result of negligence.

Courts have readily awarded damages where the supervision systems or behavioural policies of a school have been inadequate and, as a result, the school has failed to reasonably protect its students. Similarly, schools have been held liable under anti-discrimination laws where they have sought to preclude the enrolment of students with special needs or not adequately provided for those needs during a student's attendance at school.

What we are seeing now, however, is the emergence of potential liability where a school is sought to be liable for the academic underachievement of a student. Parents who enroll their children in schools on the basis of the high achievers featured in the glossy prospectus received on Open Days want to point the finger at the school when their investment doesn't yield similar academic results for their own children.

Parents seek to make the school liable in negligence for failing to educate their child or, alternatively, for breach of contract in failing to deliver perceived promises relating to educational outcomes in exchange for exorbitant school fees.

In recent years, parents have sued two Melbourne private schools for failing to provide an adequate education for their children. Both cases settled out of court and confidentiality clauses were included in the settlement agreements reached.

As a result, the strength of these claims is yet to be tested in a courtroom. Similarly, the Victorian Civil and Administrative Tribunal is now seeing applications for the refund of private school fees paid by parents for their under achieving children. The full outcome of these applications will be watched with interest by all involved in the education sector.

It is easy to understand why most of these types of cases settle out of court. Schools would rather not have the publicity of a drawn out legal hearing, whatever the outcome. Similarly, from the parents' side, there is no precedent for this emerging area of law. Parents face significant financial risk in trailblazing a claim against a school based on the perceived underachievement of their child academically.

Lawyers agree that claims of this kind are risky because it is difficult to prove that a school has breached its duty to teach properly.

Students have several different teachers during the course of their school life and their educational journey is a complex set of integrated experiences involving many people. Who exactly is at fault when a child

has had various teachers, and sometimes various schools? Similarly, a child undertakes various subjects and courses at school – what about their own individual strengths and weaknesses, talents and abilities?

Does a “fail” in mathematics, but an “A” in English mean that a child has not been taught properly and the school has failed in its duty to teach? Hardly.

Interestingly, in the US, so called “educational malpractice” claims first started appearing in the 1970s and the courts have been steadfast in stating that it is not in the public interest to allow such claims to succeed.

There have been no successful negligence claims against schools. The courts have made it clear they will not interfere in the administration of schools and they don't want to open the floodgates to a deluge of copycat claims.

It will be interesting to watch the developments in this education area to see if any legal trends are established.

Principals' associations and state government schools have already flagged the issue of potential negligence between parents and schools, warning educators to monitor carefully marketing documents promising that specific skills or academic outcomes will be achieved.

As with most uncharted waters, caution needs to be exercised by all concerned.