

# Schools under siege from parent litigation

ALEX KOHN talks to Anne Susskind about the implications of legal action against schools, teachers and all those connected with the education system.

SCHOOLS THESE DAYS, and teachers, are in an unenviable legal position because of the competing demands made on them and their resources, and the increasingly litigious nature of many parents, who seem to have few qualms about suing their children's teachers over what are sometimes unavoidable accidents.

This is the picture that emerged last month at the NSW State Legal Conference in a session on legal issues in schools, addressed by bar-

ers have started taking legal action themselves under Work-Cover laws because of what is involved in complying with all their legal requirements, and for the psychological or emotional injury they are incurring in the work environment. Schools are required not only to create a safe environment for the children, but teachers, both physically and psychologically.

For example, how are teachers to cater for one-on-one needs of the rising number of ADHD-diagnosed children, while also fulfilling their obligations to others in their care? What is a teacher to do when a young, uncontrollable ADHD student runs out the door and into the street? Leave the other 30 children in her care to fend for themselves?

Or the specific needs of a child who does not fit in with the school's discipline policy, designed to keep all the other children safe as well? Who

faculties, or any other, might indirectly discriminate against all the others.

Parents with diagnoses in hand are arriving at schools demanding that attention be paid to their child, and schools are only getting a nominal amount of government funding per child for this.

Or, what about when a teacher on playground duty turns their back for 30 seconds and an 8-year-old comes off a flying fox and injures herself because two other children were not mindful of the hands-off rule and grabbed her legs? Or an injured parent sues because a sliding gate collapsed on him when a small metal bracket to keep it in place came loose?

Those are the tip of the iceberg, and tribunals, in the words of one participant, are "quite pro-plaintiff", especially in the discrimination area, while not taking into account the practical operation and

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isters acting in the educational area and chaired by Alex Kohn, of Makinson and D'Apice, who has consulted to the education sector for 27 years and has a cabinet full – with about 50 or 60 files at any one time – of school liability cases and complaints. In many, he says, it is "very difficult to see what the school could have done differently".

Schools, it seems, are under so much duress that teach-

may, for example, have been diagnosed with "anger management" issues? Or the teacher accused of discrimination because he or she cannot cater sufficiently for the child with learning difficulties – or for that matter, the gifted child – without neglecting the rest? There's direct and indirect discrimination – where the struggle not to discriminate against one child, be they physically disabled, or with learning dif-

effect on schools.

Not to mention, Kohn says, the negative effect of having to be careful not to touch a child, even one who has injured him or herself and is in need of comfort, and never having the door closed when you are alone with a child. A certain aloofness is these days required of teachers concerned about professional responsibility and liability.

Kohn says school principals

are at risk of getting prosecuted under s.26 of the *Occupational Health and Safety Act*. "It's generally been the school authority, but the time is not too far away where we will have to advise principals, the school and the executive and OHS committees [that] there is a section of the OHS laws that now provides personal obligations on directors and managers of businesses, and transferring to schools, there



is the possibility that principals and others on the executive could be personally sued for OHS obligations."

What amazes him, he said in an interview with *LSJ*, is that parents have little compunction about suing over the most benign of incidents, and its effect on the future of the relationship that the school might have with them, or their child, with whom staff might become very self-conscious or

law impact on the running of schools: administrative law, employment contracts, tort ... Complaints and discrimination matters have become very widespread in schools. Disability discrimination has really taken off in last 15 years.

"Then there are family law situations where mum and dad are separated and there's a tug of war over children. Sometimes the court order is

chequebook.

#### Across the board

Complaints were coming across the board, from all socio-economic groups, even from parents of lower socio-economic backgrounds who were getting assistance from legal aid, and from solicitors doing the work on a no-win/no-fee basis.

"Parents speak to lawyers and the lawyers say, 'There's

very upset when an accident happens, or an unmeritorious complaint is lodged.

"Even though they are not personally sued, they have to come along to give evidence. Even if they have not seen anything, it's about the things they didn't see - they may be supervising 80 children in a playground, and little Johnny breaks his arm, and the teacher on playground duty gives evidence about how they carried out their duty. Teacher witnesses are coming to court, and get into the witness box and are hauled over the coals and made to feel inadequate, uncaring and incompetent by lawyers for the other party. I have heard from principals after cases have finished that a particular teacher who has given evidence is so appalled by the whole thing that they've given teaching away.

"I have a filing cabinet full of claims where it's very hard to see what the school could have done differently, it's pure accident. And the parents, with the assistance of lawyers, dress it up into a case of negligence, that the school failed to supervise, or take some other step. A lot of lawyers don't care about the broader social issues. They see potential claims and an opportunity to obtain compensation for their clients, so they proceed. I don't think anything will change unless and until courts and tribunals take a tougher view on unmeritorious claims.

"Tribunals and courts have to some degree been unrealistic in their expectation of what schools should reasonably do in satisfaction of their duty of care. There's sometimes a lack of understanding of what goes on in schools and unrealistic expectations and not understanding the competing interests that school have."

Parents who litigate, or threaten to do so, know that the school would dare not ostracise or treat the child differently than before. The human desire for money outweighs the human desire for an ongoing relationship with the teacher or school, and concern for the consequences for the school and the child.

It was important, Kohn said,



Lawyer Alex Kohn says that often it is very difficult to see what schools being complained about could have done differently.

inhibited or even resentful.

"In the old days, schools weren't a natural target for litigation but they're now considered to be a very favourable target for litigating personal injuries and many other issues, including contractual issues, intellectual property, with alleged breach of copyright. So many strands of

that school is the collection or drop-off point, and mum collects the child at a particular time and they argue at the school gates. It can take the school staff away from other important functions."

All this vigilance had started out as well-intentioned, Kohn said, and it would be different if a school had an open

a potential cause of action, let's lodge a claim or discrimination complaint and see how we go'.

"Some of the tribunals, particularly in the discrimination area, are accommodating of complaints because of their charter, and readily accept complaints even when they may be tenuous. They go through the process and organise meetings and it puts the schools through immense stress.

"In many cases, teachers get

for schools not only to have policies, but to see that these were implemented. Those advising schools needed to bear in mind that there needed to be good procedures for reporting bullying. Dedicated internet chatrooms and email addresses were among steps that might help in that regard.

#### Mediation

Another of the speakers, the barrister Campbell Bridge SC, who is also an accredited mediator, is finding that more and more of his work involves mediation. Mediation constitutes up to 60 per cent of his practice these days.

Speaking on the subject of sexual abuse in schools, Bridge said there were not many cases less suited to being sorted out by litigation than where minors were subjected to sexual or other abuse from those into whose care they had been entrusted.

When he had been doing the research for his paper, he said, he had not found many new cases that had come to court.

"I am not aware of any for a long time, I couldn't find any of those cases."

Most, he said, were instead resolved by mediation. The difficulties in conducting such cases included lapse of time, limitation issues, procedural

difficulties and emotional issues. Witnesses had sometimes died or disappeared, memory was impaired and there could be a loss of evidentiary material.

Cases like these were never, he said, fun for the plaintiff, and would involve their lives being entangled in a very complex, lengthy and expensive trial.

Confidentiality was also important. Publicity around these cases, he said, undermined people's acceptance of the educating authority and its reputation: "There may be much behind what the plaintiff says, but some things are spurious and the damage can't be undone ... The issue of pub-

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licity and the undermining of confidence in the institution which the defendant represents is a very significant factor. However badly some individuals have behaved, the organisations behind the defendant usually perform a great deal of good, and the somewhat intensive media circus which follows the conduct of such cases is not in the

interests of anybody."

It was important, he said, to set clients on the path to mediation. Apologies were all important, too. As in medical cases, people felt betrayed by someone in a position of trust, and wanted acknowledgment. There was a psychological need that had to be met, and until that was done, the case could not be settled.

There were mediators and mediators, Bridge said. A mediator needed skill and authority, and mediation would be successful if participants were genuinely desirous of the process. Mediation allowed each side to put their version of events as they saw it, and not just respond to a series of questions in a restrictive context. It also did not impose results.

"From a psychological point of view, the issue of apology and the atmosphere in which mediations are conducted is often far more conducive to settlement than contested hearings. Plaintiffs often need to get feelings off their chest in a way that cannot be done in a conventional litigation setting."