



Leader Support Guide

UNDERSTANDING YOUR DUTY OF CARE

The principles of negligence these days constitute a vast, complex and ever-growing body of law, and there is a widespread tendency in the community at large to resort to these principles. In plain English more people are being taken to the cleaners for less.

Briefly what are the leaders' liabilities in regard to 'duty of care' which the law treats as negligence?

Whilst the legal term is 'duty of care', think of it as scouting's '**standard of safety.**'

The word to remember is **REASONABLE**. What in the community's opinion would be **reasonable** in the situation?

The simplest way to maximize protection is to follow our Policies and Guidelines. The State team, combining their combined legal and scouting expertise go to great lengths to provide policies and guidelines that provide a high degree of protection to all members, youth and adult alike. This strategy is ongoing, taking note of those legal judgments that could impact on leaders and youth members.

Disclaimers, consent forms etc signed by parents are not of great value in court. In the often quoted case of the *Nicholas vs Osborne & Others (County Court Vic 85)* a student was taking action against a teacher and the school for injuries sustained when a bush track collapsed and she fell (the teacher & school lost). The court held that the consent signed by the parent, permitting the girl to go on the outing did not absolve the school or teacher from blame as it lacked "**INFORMED**" consent; a person must be in possession of **all** the facts before they can give informed consent. Especially important so that we may avail ourselves of the protection of the recent changes to the Civil Liability Act .

Consent forms can discourage people from taking action, as they may believe their chances of winning in court are slimmer because they signed a consent form.

There is a distinct difference between schools and scouting. School attendance is compulsory by law while scouting attendance, and adventure type activities, is by choice and therefore it is **reasonable** that parents would imagine a different type of risk than that at school.

However this doesn't mean we shouldn't provide sufficient information for the guardians to make an informed decision. Following trends in other organisations, it would be wise to include in the letter home to parents, notifying an activity or camp, a line such as "for further information don't hesitate to contact me on 555 5555"

There are four basic areas of negligence (Duty of Care) that could affect leaders.

1. DUTY OF CARE: (Scouts Standard of Safety)

This is the duty to another person which arises out of a person's relationship with the other person. eg. Teacher/ pupil relationship: A court has held that **Duty Of Care** is inherent in that situation, and that the duty the teacher owed to the pupil was to act in the same way as a good and careful parent would act in the same circumstances. The same could be argued regarding a leader/ youth relationship.

Age and circumstances would determine the degree of care.

On an outing to Palm Beach the amount of supervision and care you give to a group of 12 year old country scouts, on their first visit to the sea, would be quite different if the group were city surfer types of the same age who had swimming qualifications. Different supervision applies, to a mixed overnight outing if the boys and girls are about 7 years old compared with 15 year olds. What degree of supervision would be required with a group of 15 year olds with girl members camping near a group of 19-year-old surf lifesavers??

A **Standard of Safety** is also owed to members of the public who might reasonably be expected to be affected by things a leader does or does not do. e.g. our care in the swimming pool when the public are in the pool at the same time as we are, and the scouts are playing a rough house ball game in the pool.

A similar situation exists at normal meetings. Where does your responsibility start and end? (See *Appendix A*)

2. STANDARD OF CARE:

This is a very objective one, and can simply be expressed as to what a **reasonable** person, who owed a similar **Standard of Safety**, would do in the circumstances. The standard of care is always based on the facts of the relevant situation, and can't always be drawn from what happened previously.

For example no matter what the age, the leader should insist on life jackets being worn in canoe activities and the 8 year olds would be restricted to being fairly close to shore. However it would be reasonable for the leader with a group of 15 year olds, who were experienced canoeists, to let them paddle off into the distance but would still insist they wear life jackets.

Again the amount of supervision is important. In *The Commonwealth vs Intovigne (High Court 82)* a boy was badly injured when, as a result of him swinging on a flagpole halyard the turnbuckle came loose from the top of the flagpole and hit him on the head. The court held there was insufficient supervision in the playground at the time, and that the area where the injury occurred had been left unsupervised.

3. BREACH OF DUTY.

The breach of this duty can only occur if the consequences of that breach be **reasonably** foreseeable.

It is **reasonably** foreseeable, for instance, that if a leader does not insist on life jackets being worn then an overturned canoe could result in injury or death. The same could be said for the wearing of safety helmets whilst abseiling. However it would not be seen as foreseeable if a boy not wearing a safety helmet in a canoe were hit by a piece of metal falling from an aircraft.

A risk assessment of an activity or event should always be carried out to ensure you understand the safety issues and associated risks. Ensure you take appropriate steps to minimize those risks and provide a level of safety appropriate to the activity. In the case of Patrol hikes and camps etc you should discuss with the P/L the likely problems and have the P/L consider some possible solutions. (e.g. Getting lost - injured member- hypothermia – escape routes etc)

If we have people under the age of consent, we have to be much stricter with safety, curfews, chaperoning, and the like. At activities for over 18 year olds we should always advise participants not to take part in authorised activities if they feel there is danger or it is beyond their ability or health.

4. INJURY OR DAMAGE

The person must show that there has been some injury or damage to the person or property. Remember a lot of these cases hinge on "emotional" (psychiatric) damage as well.

"I have been unable to sleep and have been too upset to work since this happened, it was only a small incident but it has drained me emotionally and cost me a lot for psychologists & counsellors".

Dealing with health problems is another issue that falls under our **Standard of Safety**. If it is a problem you haven't been advised of, then it is reasonable that you treat them to the best of your knowledge. However if you are advised of a particular health problem (say peanut allergy) you should take reasonable steps to ensure that what you are doing doesn't pose a risk to the person (no peanut products), and that you have sought guidance from the guardian on what they believe you should look for and how to handle a problem if it should arise. (How to use the 'epipen')

LET'S KEEP THINGS IN PERSPECTIVE.

This may all appear very daunting but the reality of it is that **they must prove you are at fault**. Because you belong to some organisation, this does not stop you being sued individually as well as the organisation being sued. This can be costly in terms of time, reputation, and legal fees. Follow our procedures and policies, keep in touch with the Leader Guidelines (at www.nsw.scouts.com.au) all specifically designed to maximize the protection and legal coverage to you as well as our youth members.

AN UPDATE ON TWO DEEP LEADERSHIP (*Having two leaders as a minimum*)

Boy Scouts of America lost a recent law case concerning a demand for compensation. One of the main reasons for them losing could easily be applied in cases against us here in Australia. It concerned the consistent lack of two leaders (*two deep leadership*) in the Troop involved. Further, it couldn't be shown that they had taken **reasonable** steps to get parent helpers or additional leaders for their troop.

The same legal principle is now being applied in NSW. (*see Appendix B*) The problem is quite a serious one as the various Government departments charged with the protection of young people require adequate number of adults for the number of youth members, and balanced leadership in the cases where the membership is both male and female.

Reasonable provision exists for the care of the members if the Leader became incapacitated in some way (*a stroke – heart attack or some other disabling illness etc*), or if a child (say an asthmatic) had to be very suddenly rushed to hospital. Do you take the child and leave the rest of the section alone? Ensure you continue to make regular efforts to get parent helpers or an additional leader, ensure you document these efforts. (Newsletters – notes etc)

ASK YOURSELF THESE QUESTIONS FOR EACH ACTIVITY.

"Did I take **reasonable** steps to identify any **reasonable** risk that might be expected, and minimize the risk of injury or damage?"

"Are **reasonable** steps in place to identify and assess the risk of injury or damage and follow-up actions to minimize that risk?"

WHY TAKE UNNECESSARY RISKS?

USE OUR POLICIES AND GUIDELINES

FULLY INFORM PARENTS SO THEY CAN GIVE INFORMED CONSENT

AND ENJOY YOUR SCOUTING.

The Association is not giving a legal opinion but a guide to acquaint you with the possibilities and steps you should consider to protect yourself

APPENDIX A

CARE AT MEETINGS

1. The parent is responsible for delivering and collecting their child to/from 'scouts'
 - **They** can entrust the care to someone else to drive them or allow their child to get there themselves.
 - **They** can decide if they want their child to walk any dark, threatening path up to the hall door.
 - It is **their choice** to leave the child at the hall even if it is shut
 - It is **their choice**, whether their child be brought into the hall or not, irrespective of any leader request
 - BUT it is **reasonable** to assume, if the hall is open and lights are on, that there is someone there to care for their child.

2. Once the child is in the hall the leader has responsibility for the reasonable safety of the child, taking the reasonable care a reasonable person would expect.
 - The parents also have a reasonable expectations that there will be enough adults to oversee the safe keeping of their child
 - It would be reasonable to expect that on **rare** occasions one of the trained leaders couldn't make it and thus one trained leader will be left alone to look after the children.
 - It would be reasonable to expect your child wouldn't be sent home early or stood outside the hall, unsupervised, as a punishment.

3. At the normal finishing time, once the children leave the hall to go home, it is reasonable for the leader to expect that the parents understand the risks of them going from the hall to the car or directly home and it is therefore the parents' responsibility to make arrangements.
 - If finishing early (when parents have not been previously notified) it is reasonable that a parent would expect that a leader stays until the time the parents expect the meeting to finish

- 4 HOWEVER if a child returns to the hall or is **noticed** standing alone, having not been picked up, the leader still has an overall responsibility for the child.
 - If you telephone the parents and they tell you its all right to leave the child, consider, if anything does happen, will they remember they told you it was OK, will they even remember, in court, that you rang?
 - If you live alone, and cannot wait at the hall or leave them with another parent, you shouldn't take them to your own home: it is preferable to take them to the home of another leader, where there is another family member present. Leave an appropriate note at the hall

Note;

- This presumes that leaders haven't set up an expectation that the leaders will have someone standing outside waiting for their arrival and departure. If parents demand such a service, the parents can establish a roster.

- Youth members **MUST NOT** be used to act as watchers for members' arrival and departure. If there is a risk of harm we cannot put this responsibility on a minor,

- A way out is to send an advisory note to parents, along the lines of *"the demands of test passing and having to provide care for those **IN** the hall means we cannot watch for youth members as they arrive at the hall or when they leave the hall to go home."* (For Joeys and Cubs etc... *We would prefer you bring your child inside and say hello, and collect them from in the hall after, so we can update you on how your child is going.*)

APPENDIX B

IMAGINE YOU ARE BEFORE THIS COURT BECAUSE IT IS ALLEGED:

That you didn't observe a proper duty of care and were negligent in not providing adequate supervision of such a large number of active 8 to 11 year olds.

That as a result there was a considerable delay in providing adequate care from my client. **MARMADUKE SMYTHE**, when he fell and broke his wrist at a cub meeting on the 15th day of November 2004.

It has ruined the chance of this bright intelligent only child of becoming a world class guitarist, his sole desire in life.

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Despite changes to the Civil Liabilities Act, people can still take their own action to sue. It means they have a greater difficulty in proving the case. Imagine what you would have said, if you were a sole leader, and Marmaduke's barrister said to you:

I suggest to you that you were negligent in that...

- Being the only leader you failed to follow the community and authorities standards on minimum numbers of youth per supervisor.
- You did not follow the Scouts policy on always having a minimum of two leaders, or a leader and a parent helper. (*two deep leadership*)
- .That this was not just a one off situation as far as leaders were concerned, it has been over twelve months since there was more than one leader, or parent, constantly in attendance.
- Did you advise the parents that, whilst two leaders was a requirement your section only had one adult leader. So they could be fully informed of a potential increase in risk that this may cause?
- That there is no documented evidence that you or your Group have attempted to recruit another leader or establish a parent roster.
- That you allowed him to go to hospital alone worried and frightened, whilst you stayed with the other cubs.
- That you saw yourself in such a light that you believed your abilities at least equalled those of two other leaders.
- You did not allow for the fact that the parents were not answering the phone and then your battery failed.
- It was your own negligence that caused this delay in getting my client treatment...

IT WOULD HAVE BEEN QUITE DIFFERENT, IN FACT YOU MOST LIKELY WOULDN'T EVEN BE IN COURT, IF:

You had a parent roster and the rare situation arose where the parent suddenly took sick and couldn't get there and they couldn't find a stand in quickly. Especially if you had a plan in place for just such an emergency..

There had been an emergency plan in case a child had to go to hospital. (Telephone the GL or SL and let them contact parents and organise things, or baby sit the Pack whilst you went in the ambulance...)

If your Group had published a note in the newsletter and recently held a drive trying to recruit a leader (*possibly in last 9 months*).and as a result parents were made aware of the problem that your section only had one leader, instead of the recommended two or more.