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IN THIS ISSUE:

How well and appropriately insured are you? Could you afford a costs award of R23 million against the school in a court judgment? Where does the Education Department stand in all of this? And are you being tempted to cut insurance as a cost-saving measure? For some new insights, read on.

HAVE YOU GOT ENOUGH SUPERVISION IN PLACE? AND ENOUGH INSURANCE ?

Background

An incident at a Pretoria school recently saw a court award of some R23 500 000-00 to a child who had been injured in a bit of horseplay during break.

The facts

The facts of the case were fairly straightforward. The boy, in grade 8 at the time, was 13 years old when he was hurt – and the injury was pretty serious, with the youngster suffering a cracked skull as well as a measure of brain damage. The injury occurred during a game in which the older boys flipped the younger ones into the air in a cricket net. The boy concerned was one of several tossed into the air in this way, but whereas the others fell back onto the net, he missed the net and fell to the ground.

The accident occurred away from the main buildings on the far side of the school fields, and behind the sight screen. There were no teachers on duty in that part of the playground at the time.

The school claimed that the area was out of bounds, that the boy should have known that the game was dangerous and that he should have refused to get involved.

The view of the court

The court ruled, however, that the teachers should have known that children can and do enter areas that are off-limits; that the child had succumbed to peer pressure when 'agreeing' to participate (which it found to be understandable and reasonable); that the school had a duty to supervise the learners to ensure they did not engage in dangerous activities; and that the teachers who were required to undertake playground duty during breaks should have noticed a gathering of children in the area.

The ruling (later upheld on appeal) awarded the child R23.5 million as damages, and also the cost of his legal fees and the fees of 17 experts.

So where would this have left your school if it had happened to you?

Important in this particular instance was that the courts **awarded the costs and damages against the Education Department, not against the school or the absent-from-playground-duty teachers.** This is hardly surprising, given that Section 60 of the South African Schools Act states clearly that "the state is liable for any damage or loss caused as a result of any act or omission in connection with any activity conducted by a public school ...".

So far, so good. The difficulties will really begin, as one legal beagle has suggested, if the Department, having lost its case, turns to the teacher, the principal or the school, takes them to court and **proves negligence against one, some or all of them individually.**

We are told that in reality this is a pretty unlikely scenario – though, of course, however improbable, it remains a possibility. **What is more likely is less daunting, but still not a pleasant thought.** Where the school has been found through the legal processes to have been negligent, and the state has carried the can financially, it could well come back at individuals in the school and charge them under its **disciplinary code**, rather than in law. It won't cost the staff concerned R23 million, but it remains an unpleasant prospect nonetheless, and could be somewhat career limiting in nature!

Some further riders

There are some additional riders to bear in mind when the Department's obligations are part of the equation. The first is that "where a public school has taken out insurance and the school activity is an eventuality covered by the insurance policy, the liability of the state is limited to the extent that the damage or loss has not been compensated in terms of the policy."

Further, "the state is not liable for any damage or loss caused as a result of any act or omission in connection with any enterprise or business operated under the authority of the school for purposes of [raising funds], including the offering of practical educational activities related to that business or enterprise."

One does not wish to be trite or insensitive, but clearly, then, you need to cover yourselves against losses or damages resulting from the activities of your tuckshop (e.g. food poisoning), injuries incurred while using the 'foefie-slide' during the school fete or a child dying of fright in the 'Chamber of Horrors' at the same event.

So what should the school be doing?

If you are dealing with a reputable insurer through a reputable broker, most of you will find that you have, in the Public Liability section of your standard policy, cover against eventualities such as those mentioned above. Your first step is to make sure that you have **indeed got a public liability clause in your policy**, and that the most common risks are covered. Also, the gurus suggest, **take out additional top-up cover, which is very reasonably priced.** You should be able to get R3 million of ordinary public liability for about R160-00 per month in an average-sized school, and top it up by another R30 million for an additional R50-00 per month. Remember, though, that your **insurer will make a payout only if it is proven that the school was negligent or at fault**, not simply because someone was hurt or suffered a loss, so **don't make any promises or admissions to any irate person threatening action against you.** Finally, it is prudent to **let your insurer know in advance of any big or unusual activity** you are undertaking, such as a fete, sports tournament or pop concert.

Finally, look at the following four bits of risk-sharing advice:

- ♦ We are told that some insurers in small pockets of the country (geographically speaking rather than numbers wise) are concerned at the exposure of schools to public liability risk and have loaded premiums as a result. If your so-called 'top-up cover' or 'broadform cover' costs have escalated significantly this year, we suggest that you shop around rather than jettisoning it. It remains cover which we think you really do need - at least morally, but probably also practically. If you are wondering about **how much cover** you need, experience suggests that in a well-endowed, reasonable-risk school (i.e. most of our wealthier ex Model Cs) somewhere around R30 to R35 million in total public liability cover seems reasonable - some R2 to R3 million in standard cover, and around R30 million in top-up cover.
- ♦ Secondly, make sure you have professional indemnity cover. It can help if the school lands up in court! Most good policies will have this as a built-in benefit - make sure yours does. We believe these first two are the risks which have the greatest potential to cripple the school financially, so check carefully.
- ♦ While you are about it, don't forget the D and O Insurance cover which we have explained previously - Undercurrents Vol. 1, No. 4 of 12 August 2011. (NB: copies of all back numbers are on the website.)
- ♦ Also examine your Occupational Health and Safety Act compliance. We covered this in Undercurrents Volume 2 No 14, published on 21 September 2012, so you might like to peruse it again, or go the Occupational Health and Safety documents under Documents - members only – ADVICE - STRATAGEMS - Guidance on Occupational Health and Safety - on our website.

All the above information was drawn from credible brokers who work in the field of schools insurance and risk mitigation - our thanks go to them. A danger in it all is that you may be tempted to decide that you don't need any cover, because the state is liable, but we feel that that is a dangerous path on which to embark. Rather **speak to a reputable company or broker, and make sure you are covered for all eventualities that could impact on you as a school.**