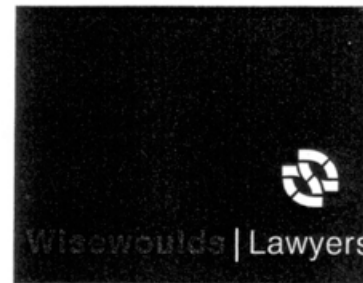
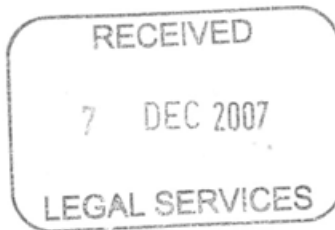


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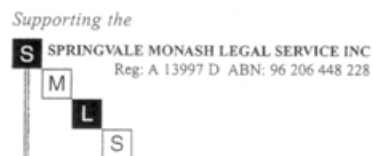
Wednesday, 5 December 2007

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Dear Kevin and Janet



Use of Low Harm Barriers in Government Schools

"Thorny Devil" is a capping device made of moulded PVC strips that contain rows of 13mm thorns. The product is marketed as a low harm means of protecting property by acting as a deterrent to people who would otherwise seek to inappropriately climb upon fencing and other structures.

DEECD is contemplating installing this product within Victorian Primary and Secondary schools. We understand the installation of such a product has a dual purpose:

1. To protect school property from damage by intruders;
2. To reduce the risk of injury to people who are gaining access to unsafe areas of school property.

You seek advice about the legal issues arising from the installation of this product in Primary and Secondary schools operated by DEECD. This advice therefore does not intend to evaluate the extent to which this product may meet the identified purposes.

The Law

DEECD has a duty of care to students who attend its schools. This duty arises from the relationship between students and teachers acting within the scope of their employment with DEECD. The High Court in *Commonwealth v Introvigne* (1982) 41 ALR 577 described this as a duty to protect students from harm while they are within the sphere of the teacher/student relationship. It includes a duty to provide safe and suitable premises and equipment. This duty takes into account the special vulnerability of students given their immaturity, inexperience and propensity for mischief, when a school is in a position to exercise considerable authority over that child. It requires that the school take all measures which are reasonable in the circumstances to prevent physical injury to the student. It is not a duty to insure against injury.

DEECD also owes a duty as occupier to persons entering school premises. This has been codified within Sections 14B and 14C of the Wrongs Act 1958. According to Section 14B(3), DEECD owes a duty to take such care as is reasonable, to see that

any person in the premises will not be injured or damaged by reason of the state of the premises, or of things done or omitted to be done in relation to the state of the premises.

The standard of care is responsive to the circumstances of a particular case but will incorporate such factors as the:-

- gravity and likelihood of probable injury;
- age of the injured party (the younger the child the greater the standard of care);
- the nature of the premises (beyond the mere fact it is a school environment and whether the environment creates an allurement);
- ability of the injured party to appreciate the danger (this partially relates to cognitive capacity);
- the burden of eliminating the risk compared to the risk of injury itself;
- The degree of knowledge about the attributes of the particular person (eg a known handicap);
- The past behaviour of the particular person (eg. the child is known to be disobedient or to climb upon school structures despite obvious dangers).

In the case of DEECD's duty as occupier, the following are also relevant:

- the school's knowledge of people being on the premises;
- circumstances of entry onto the premises;
- whether the person is engaged in an illegal activity; and
- whether the person is intoxicated.

It is apparent that a duty to protect people from their own poor decisions is incorporated into DEECD's duty of care to both students and the wider community. It is also apparent that in installing measures to deter or prevent people from accessing unsafe places, DEECD is engaging in an exercise of balancing competing risks of harm. In this context, if a person is injured as a result of a Thorny Devil device which was installed in an effort to prevent access to unsafe areas, a court will take into account DEECD's conflicting responsibilities when determining whether DEECD's breached its duty of care to that person.

Application of the law to the installation of the Thorny Devil product.

While the Thorny Devil is designed to be low harm, it is clearly foreseeable that injury may result if someone were to come into contact with it, particularly if that person were a child. We understand that the risk of injury from the product itself is small. However, the product may interact with the environment to increase the likelihood of injury. For instance the product may be positioned so that someone is likely to lose grip on a handhold as a reflexive response to unexpected contact with it, resulting in a fall. Similarly it is foreseeable that damage or vandalism to the product itself after

installation may increase the potential harm associated with the product. This is particularly so, if the product is being installed in response to high levels of vandalism on school property where the school knows or ought to know that interference with the product is more likely.

An injury may also arise from a defective product, a poorly maintained product or a poorly installed product. Whether the Thorny Devil requires particular skills to maintain or to install, or whether it has any particular design limitations is outside our area of expertise. However, in these cases the injury may be the result of the actions by a third party and possibly outside the control of DEECD or its servants. While this may be a response to a claim based on occupier's liability, it will not necessarily protect DEECD from liability arising from the student/teacher relationship as this duty is non-delegable and the school will be required it took steps to guard against the negligence of others.

Risk Management Strategies

Given some level of risk of injury is associated with the use of this product; the law expects that reasonable measures are taken to minimise this risk. The Court will analyse a particular case by balancing the magnitude of the risk, the degree of probability of its occurrence, the expense difficulty and the inconvenience of taking alleviating action.

Warning Signs

Warning signs are often touted as an effective means of reducing the risk associated with a possible hazard. However the High Court decision of *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42 reminds us the burden of proving a warning sign was a reasonable response to a risk of injury usually rests with the injured party and even where a proposed sign is inexpensive, it will not be required if its presence would not have made a difference.

Despite this, we believe warning signs are a prudent measure if you are going to install the Thorny Devil product in a school environment.

Drawing on our experience in cases involving warning signs we recommend the sign be:

- expressed in words and a pictograph (similar to the warning sign submitted by Securi-Cap);
- sufficiently large to be read from a distance of at least 5 metres;
- be coloured to stand out from the background (eg fluorescent yellow);
- be placed in a way that it is not obscured by foliage, shadow or other structures;
- should comply with any relevant Australian Standards for signage; and
- be placed in a manner that they would be visible from every point of approach to the premises.

We note you have received advice from the VMIA suggesting the signs be illuminated. In most cases, we do not believe the school would be required to specifically light a sign. However if possible, placement of the signs should take advantage of any existing illumination on the premises and an effort should be made to avoid the impact of any shadowing that may result from existing lighting.

Other risk management strategies

In the case of children, the placement and the appearance of the product may amount to an allurementsuch that the child is effectively 'encouraged' to come into contact with it. The placement of the warning signs and the placement of the product itself ought to take this into account. Upon installation the school may also consider making announcements to parents and children, and setting (and following through) disciplinary consequences for attempting to come into contact with the product.

We understand you intend to develop guidelines relating to use of the product. We believe this is a responsible measure. In so far as these guidelines relate to the installation of the product, we believe they will need to be responsive to the developmental level of students who are likely to come in contact with the product. This may mean the guidelines should be adjusted depending upon whether the product is installed in a Primary or Secondary school. You should be aware that any guidelines you produce will be discoverable in the event proceedings are issued by an injured person. We are happy to review the proposed guidelines if you require it.

If an injury results you may need to defend your choice of the Thorny Devil as the product. You may face allegations that an alternative product was safer and should have been used instead of the Thorny Devil. Clearly the Thorny Devil is preferable to barbed wire. However we assume you have considered a range of products in order to select this one. If so, we recommend you retain all documentation related to this selection process (including pricing considerations) which can be retrieved and produced if required. You may also wish to consider obtaining independent opinion of an Occupational Health and Safety expert to sign off on the product. If so, the consultants should assess:

- the degree to which this product will achieve the purposes of installation;
- the degree to which the product is susceptible to damage, deterioration and or deliberate interference;
- how it compares with the other options you considered, including barbed wire; and
- any Guidelines you produce particularly those which relate to installation and maintenance of the product.

Inspection of the Thorny Devil ought to form part of the regular maintenance audits conducted by the relevant school. If the school is known to be subject to high levels of vandalism, we recommend the maintenance audits be more regular than would otherwise be required.

While the school has a non-delegable duty of care, this does not prevent recovery from negligent third parties. In areas of increased risk, it is advisable to outsource in order to spread the risk. Therefore where possible it would be preferable for

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appropriately qualified consultants to supervise or perform the installation and/or maintenance of the device.

Please indicate whether there is any aspect of this advice which you would like clarified or expanded upon. Otherwise, we hope this assists in your decision making process.

Yours faithfully
WISEWOULDS

Per: