

# What is the legal liability, if a child is injured at my programme?

In most cases of personal injury caused by accident, the Accident Compensation Corporation (ACC) will provide coverage. This means that when a child is injured, ACC is likely to cover the costs of treatment and rehabilitation. In addition, where ACC provides coverage, legislation prohibits any legal action for damages, except in rare cases where exemplary damages may be sought.

*Please note: this information has been provided in good faith to highlight some of the legal issues when a child is injured at your programme. We hope this information will be a useful guideline but OSCN is not qualified to provide legal advice. We strongly recommend that expert legal assistance be obtained to properly manage the risk of legal liability for your organisation.*

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## ACC coverage and liability

Under the ACC legislation (currently the Accident Compensation Act 2001), insurance coverage is provided for "personal injury by accident". There are exceptions to what the Act will cover (e.g. there is no coverage for mental injury that is not a consequence of a physical injury) but it would be safe to say that most typical childhood injuries, especially those associated with physical activity, are likely to be covered by ACC.

<http://www.acc.co.nz>

<http://communitylaw.org.nz/community-law-manual/chapter-19-accident-compensation/injuries-and-conditions-covered-by-acc-chapter-19/>

ACC legislation also prohibits legal actions that seek compensatory damages – for example on the grounds that the injury was caused by staff negligence at the programme where the injury occurred. In other words, where ACC coverage applies, a law suit aimed at further compensation cannot proceed.

*"No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of ...personal injury covered by this Act."* Source: Accident Compensation Act 2001

There are situations where this limitation may not apply – in cases where exemplary damages are sought. The purpose of exemplary damages is to go further than compensating for all the costs of injury. Exemplary damages (also called punitive damages) aim to punish a defendant who is guilty of a very high ("outrageous") degree of misconduct (involving recklessness, purposefully ignoring expected practices and/or blatant wrongdoing.)

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## Waivers

Programmes often seek to further limit potential liability through the use of waivers (sometimes called "disclaimer clauses".) [This is discussed at a separate FAQ.](#)

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## Statutory liability

While ACC legislation limits civil litigation under common law, a programme or its staff could be prosecuted by Worksafe (under Health and Safety legislation) or by the Police (e.g. a charge of criminal nuisance or criminal negligence – see links below.)

Potential liability would depend on the circumstances of the injury and generally a prosecution would only proceed if there was seen to be a high level of misconduct or a serious error of judgement. How the law differentiates between actions which are genuine errors, the result of carelessness or caused by a more blatant disregard for proper practice is a fairly complex issue. (Refer to links below.)

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## Potential legal liability for children's injuries - summing up

### \* **The threshold for successful litigation in New Zealand is high.**

ACC legislation limits civil actions to those injuries it does not cover. In Police or Worksafe cases, proving negligence (an omission or mistake) is usually not sufficient to establish liability. Criminal negligence charges require there to be reckless and/or highly irresponsible behaviour. For this reason, the specific circumstances where charges have been made are worth considering (see links below.) but these are generally uncommon, exceptional cases.

### \* **Professional / sector standards will be taken into account.**

The MSD Standards for OSCAR services provide a widely accepted benchmark for the sector, which is likely to be a key consideration in determining what actions or procedures would be appropriate in a given situation. In addition, the "reasonable person test" asks what a reasonable person in this situation should have done or should have known. Someone in the role of an OSCAR staff member, would be expected to meet the professional requirements of that role (often detailed on a [Staff Code of Conduct](#).)

It is also important that staff members are aware of the limitations of their knowledge, capabilities and experience. It is reasonable to expect that staff take responsibility to seek help or notify their colleagues as necessary. Where staff require support, training or supervision, there is usually a clear legal obligation for that to be provided.

### \* **Employers are likely to be held liable for the actions of their employees.**

Simply requiring an employee to sign off on a policy & procedure manual does not devolve all responsibility to that employee. The programme owner / employer has clear obligations under health and safety law that cannot be avoided.

### \* **We do not have a duty of care to protect children from all possible harm.**

Just because children's play introduces the possibility of children behaving recklessly and possibly harmfully, this does not mean that letting children play is, in itself, negligent. However appropriate supervision and monitoring is expected. ([Refer to this link below](#).)

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## **Steps to reduce the risk of legal liability**

- Support your staff on the job: actively check that safety procedures are being followed and provide direction and coaching as required. Don't just leave it at: "staff have been told, so they should be doing it." Carry out regular spot checks.
- Follow a planned induction process for new staff and keep a record of this process. Identify skill gaps - allocate roles and provide training accordingly.
- Ensure that any activity requiring specialist skills/knowledge is supervised by a person with those skills/knowledge
- Take note of and follow sector standards and any guidance issued by professional bodies
- Share information with your peers - establish an understanding of "best practice" and keep up to date.
- Inform parents of essential policies relating to your duty of care and programme supervision. Keep parents well-informed about programme activities.
- Take note of specific circumstances where negligence/recklessness has been highlighted. These include: staff failing to heed warnings; not undertaking required checks; proceeding when an activity should have been stopped; operating beyond the level of staff ability/experience; inadequate consideration of the special needs of participants.

Negligence cases often hinge on questions of judgement. Any concerns voiced by management/staff need to be given full and proper consideration – especially those voiced by those with relevant expertise/experience.

## **Risk assessment is expected**

Where activities involve higher risk, including perhaps an off-site location, it is widely recognised by legal authorities that a written risk assessment should be undertaken. It's also a requirement under the MSD Standards for OSCAR.

Staff need to be well-informed about the risk assessment and should follow its recommended strategies unless there is a strong reason not to. There should also be consideration of how participant behaviour will be managed if it falls outside the safety parameters set out in the risk assessment.

For higher risk activities, the planning requirements are more complex and time-consuming. This will usually require the co-ordination of different groups, including perhaps outside agencies. It can be challenging to ensure all the planning and tasks required get done properly but this doesn't lessen the obligation to either properly risk assess or opt for a less demanding activity.

You also need to be ready to "weather some storms" (through emergency/contingency plans.) Acting promptly and with certainty is a critical factor in managing the risk of serious harm. This takes preparation, good communication and practice, involving your entire staff team.

We recommend careful consideration of expert guidance, such as the [Health and Safety guidelines on our resources page](#).

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## Legal liability: further topics

- **Duty of Care** ([link to another resource](#))
  - **Negligence**
  - **Criminal nuisance – relevant cases**
  - **Employer liability for staff conduct**
  - **Australian case law on playground injuries**
  - **Worksafe investigations and prosecutions**
  - **Insurance coverage** ([link to another resource](#))
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## Negligence

Negligence is a common law tort. 'Tort' is a legal term meaning "a civil wrong". In the case of a tort, a judge has the power to award monetary compensation ("damages") to the person who has suffered the wrong.

*Wikipedia definition: Negligence (Lat. negligentia, from neglegere, to neglect, literally "not to pick up something") is a failure to exercise the care that a reasonably prudent person would exercise in like circumstances. The area of... law known as negligence involves harm caused by carelessness, not intentional harm.*

To prove negligence the following must apply:

- There was a duty of care
- There was an incident, action or inaction that caused a breach of the duty of care
- There was a harm or loss as a result of the breach.
- The incident, action or inaction was reasonably foreseeable or preventable

It is important to note that what is "reasonably foreseeable and preventable" will vary depending on the situation. When a person is engaging professional services they will expect supervision and safety practices to be in line with the standards and requirements of that profession i.e. should this incident have been reasonably foreseeable and preventable for an OSCAR service and/or their staff members? (This legal test makes no reference to the particular knowledge or actual intent of those being held liable.)

For example, where an OSCAR programme takes a group boating, the court may determine that a reasonable staff member would have ensured that the participants were each supplied with a life-jacket, and took reasonable steps to ensure the life-jackets were worn correctly. If the staff member failed to ensure adequate safety equipment was worn, they may be found to have fallen short of the reasonable person test, and breached their duty of care.

In other words, if the activity requires some specialist skill or knowledge, the person will be measured by the reasonable person possessing those skills or knowledge. Also note that the test is based on a standard of "reasonableness" – meaning, not such a high level of care that would guard against all possible harm.

*Parts of this adapted from: "From Liability to Student Safety in Education Outside the Classroom" Cathye Haddock and Matthew Sword Ministry of Education, New Zealand*

All of this highlights how important it is for OSCAR services to have clear procedures, especially where there is higher risk (e.g. on outings, or when picking up and transporting children after school) and ensuring that all parents are well-informed of these. Proper risk management processes help to clarify:

- what standard of care a parent can expect
  - what are the responsibilities of all parties involved (especially where parents need to inform the programme of any changes or other important information, such as allergies)
  - that the parent can ask questions and ultimately make a well-informed decision about their child's participation (or not) in a particular activity, or in the programme as a whole.
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### **Criminal nuisance - relevant cases**

Criminal nuisance is defined in Section 145 of the Crimes Act 1960:

*"Every one commits criminal nuisance who does any unlawful act or omits to discharge any legal duty, such act or omission being one which he knew would endanger the lives, safety, or health of the public, or the life, safety, or health of any individual."*

#### **Le Race Cyclist Fatality (2001)**

A cyclist died after colliding with a car during a section of a bike race where the cyclist believed the road was closed to traffic, when in fact it wasn't. The police prosecuted the race organiser, who was initially found guilty by jury of the charge of criminal nuisance.

The crux of the case was that the pre-race information was ambiguous about whether the road where the accident occurred was actually closed to traffic. In initially finding the defendant guilty, the court agreed that key safety measures were not carried out and safety experts at the event did not have the opportunity to check information that pertained to this stage of the race, prior to the race.

The decision was overturned on appeal because it was found that the Judge had misdirected the jury on a key issue. For the law under which the race organiser was charged, she would have to be found to have acted recklessly. But the judge had only "invited the jury to convict if satisfied the appellant was negligent", which is a lesser degree of culpability. Because the prosecution could not prove that the race organiser "had actual knowledge that she had given the participants unclear and ambiguous information", the conviction was overturned. (Source: NZ Herald 23.09.2004)

#### **Le Race - wider impact**

The main point of controversy at the time was that the race organiser had a mostly very sound health and safety system. But based on the facts of the case, the system seemed to have failed in a few key areas which were enough to see the organiser facing a criminal charge. Many in the voluntary and sporting sector found this a harsh consequence. There was also some commentary that raised concerns that prosecutions in NZ for criminal nuisance were being carried out in response to ordinary human error, rather than gross negligence.

A key issue raised during the case was the lack of clear industry guidelines for this kind of event. (In previous prosecutions of a similar nature, there had been a clear breach of relevant industry safety requirements.) As a result, more information did become available about appropriate procedures to follow in this situation. When the conviction was eventually overturned (3 years after the accident) the distinction was reinforced, between an error/oversight (which better guidelines would have helped prevent) and actual recklessness (as it applies in a criminal prosecution).

### **Relevance to OSCAR – communication of safety information**

Compared to OSCAR, there are some key differences in this situation: OSCAR does have clear standards and a different relationship with the participants being children in a care situation, not adults. But the issues raised in the case around safety briefings have some relevance to OSCAR operations (particularly as regards preparing for holiday programme excursions).

Source: <http://www.sportslaw-uk.co.uk>

*"The safety instructions are the single most important material that the organiser of any event must draw to the attention of all those taking part in that event. It is also of crucial importance that the competitors are given ample time to assimilate this information in an appropriate environment.*

*"The start point of the race with all the accompanying excitement and hubbub was clearly an unsuitable venue at which to discuss safety provisions. The start itself is a time when the attention of participants would not be on the organiser. This issue was discussed at some length in the Canadian case, *Smith v Horizon Aero Sports Ltd*, where the duty upon a parachute instructor to ensure the assimilated learning of safe jumping technique was of crucial importance. In this case, the plaintiff, making her first parachute jump sued with respect to injuries she received ... She alleged that insufficient checks were carried out to establish that the appropriate information given had been understood and more importantly fully retained by the students. The Court drew attention to the importance of taking extra care when imparting crucial safety information in a stressful environment." (emphasis added)*

Sources: <http://rivers.org.nz> <http://www.nzherald.co.nz>

### **Prosecution for quad bike fatality (2006)**

"Farmer found not guilty over daughter's quad bike death" (Source: NZ Herald 09.03.06)

*"Molly Vanner was killed when the 368kg bike rolled on top of her after her father stopped to make a cellphone call. The Crown told the court that Molly lost her life because her father had been negligent in allowing her to ride down a paddock on the four-wheel vehicle specifically designed for adults. [John] Vanner's counsel argued that the tragedy was simply the result of an accident... Outside the court, Crown solicitor Timothy Brewer said the prosecution was brought because Molly Vanner died in a way which was killing children on farms every year."*

The defendant admitted his mistake and that he broke his own safety rules. But did he actually know that his daughter would be injured? Because this was clearly not the case, the defendant was found not guilty. The charge of criminal nuisance requires there to be a high degree of negligence, in fact recklessness. In legal terms, a consideration of "recklessness" includes that the person must have considered a safer option and opted not to take it. As with the Le Race case, this shows that to successfully prosecute under criminal laws, a very high degree of misjudgement needs to be proven.

(In contrast, a finding under common law of "negligence" requires only that the person failed to take steps that a reasonable person would have taken... which means that what the particular person actually knew or thought is not relevant.)

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## **Employer liability for staff conduct**

### **Nelson Dive School – diver fatalities (2000)**

Three diving students drowned and another three suffered serious harm while on a diving course run by Nelson Dive at French Pass, which was known to be a "turbulent and energetic piece of water". The investigation by Occupational Safety and Health (OSH, now known as Worksafe) concluded that French Pass was an unsuitable site for student divers to undertake a "drift dive" and that the diving instructor, who was an employee of Nelson Dive, lacked the appropriate qualifications and experience.

In response to the charges laid by OSH, Nelson Dive argued that it was not responsible for the accident and the diving instructor was not its employee. However, the District Court found that the diving instructor was Nelson Dive's employee (not, as was argued, an independent contractor) and that Nelson Dive had failed to take all practicable steps to ensure that the diving instructor was appropriately experienced and competent. The District Court further said that Nelson Dive should have prohibited student diving at French Pass.

### **Implications for employers – staff responsibilities & assumed competency**

The case highlights that an instructor manual, signed off by the instructor, did not transfer total responsibility from the employer to the individual instructor. It is common in OSCAR for staff to sign a declaration that they have read and understand certain policies. This should not be seen as a means for employers to hand all responsibility (and potential liability) to staff.

Additionally, where a staff member holds a particular qualification or has previous experience, cases like this remind employers to consider carefully what an appropriate level of responsibility for that staff member should be and to not simply assume (based on qualification and previous experience) that the person actually has the indicated level of competency. This includes the possibility that, at least in the initial stages of employment, direct supervision by a suitably skilled member of staff may be required.

## Playground injuries and liability - Australian case law

A number of civil actions in Australian courts have helped clarify how judges view accidental injuries in school playgrounds. The following judge's decision relates to a case brought after a student died after being accidentally struck with a hockey stick by another student.

*"The question of what amounts to reasonable care in a given case must be seen in the context that it is neither practicable nor desirable to maintain a system of education that seeks to exclude every risk of injury... Nevertheless, although student participation in games may result in breaches of discipline and irresponsible behaviour, our society recognises that that is no reason, of itself, not to encourage and teach young children to engage in such activities.*

*"Risks of serious injury while playing games ... while real and not far-fetched, are remote. They can be reduced further by training and supervision, and catering for the needs of the individual child. Because the risks are unlikely to materialise when the games are properly controlled, merely to allow children to participate in them will not, in the absence of special circumstances, be regarded as negligent.*

*"It follows that the mere fact that a serious injury or even death may occur while children are playing a game at school will not automatically result in a finding of breach of the duty of care. It remains for the plaintiff to show that the school or teacher involved did not take such reasonable precautions for the safety of the child as would have prevented harm."*

From: *The Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Kondrajian* [2001] NSWCA 308

In other words, we don't have a duty of care to protect children from all harm.

*"The fact that parents might sue, or threaten to sue, is a reality - but it does not mean that every civil action for negligence is successful. An examination of case law over several decades... overwhelmingly demonstrates that schools and teachers will not be liable for negligence when they have acted 'as a reasonable person' of normal disposition and have taken reasonable steps in the circumstances to minimise the risk of harm or injury. In cases where schools and/or teachers have been held liable, there has generally been clear evidence of a total absence of appropriate supervision or wholly inadequate supervision."*

Source: *Playing Safe But Avoiding a Greenhouse Generation of Children* Joan Squelch, *The University of Notre Dame Australia International Journal of Law & Education* Vol 18, No 2, 2013, pp. 7-25

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## Worksafe investigations and prosecutions

While there are no recorded cases of an OSCAR service being prosecuted under Health and Safety legislation, anecdotal accounts confirm that the regulatory body has had cause to investigate accidents at OSCAR services. (Where other concerns are raised, such as where a service has lost a child, or there is a “near miss” injury incident, it is more likely to be investigated by the MSD Accreditation team, but that is outside the scope of this discussion on liability for actual injury.)

It would appear that Worksafe and its predecessor bodies have discretion on whether or not to investigate but that they are more likely to investigate “playground type” injuries where there has been a more serious injury, or where there has been several accidents at the same location or involving the same activity, equipment etc. A number of investigations seem to have been prompted by parents raising concerns directly with the agency.

Based on feedback from services where these investigations have been undertaken it seems that the approach of the regulator was constructive, with the main aims being to:

- establish the full facts surrounding the accident – hence the importance of complete incident reports and witnesses
- determine if there were any steps that could have been taken that would have reduced the likelihood of the injury occurring
- recommend reasonable steps to be put in place to reduce the risk of a similar accident occurring again.

In regards to prosecutions, Worksafe weigh up the level of risk/harm; level of knowledge about the risk; what options were available to manage the risk and what was actually being done to manage the risk. Officials would also consider if this was a one-off incident or a recurrence.

Current Worksafe policy in determining whether to prosecute includes the following clauses:

- there has been a disregard of health and safety requirements that is reckless, or negligent, or both;
- there have been repeated breaches which give rise to significant risk, or persistent and significant poor compliance