

NSW school on the wrong side of \$500,000 fall

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An autistic student at a NSW public school has been awarded \$491,275.00 in compensation after falling some six metres from the roof of her school building.¹ The decision comes after almost four years of litigation and has sent shockwaves through the education community.

The case perfectly illustrates the challenges that schools face in discharging their duty of care obligations to students and in particular, their special needs students.

Background facts

Gem (a pseudo-name employed by the court), was a then 11-year-old child who had been diagnosed as having autism spectrum disorder and anxiety. The school was aware that Gem had a related difficulty in regulating her emotional responses to stressful triggers.

Relevantly, Gem's accident came just a few short months after she was sexually assaulted by a fellow special needs student at the school.

It was not disputed at trial that the assault resulted in the escalation of Gem's behavioural issues whilst at school. To the contrary, in early August 2013, Gem's paediatrician alerted the school to her increased anxiety around males, which affected her behaviour. The school counsellor was put on notice that Gem had been prescribed anxiety medication to combat this, but that the therapeutic effectiveness of the medication would not take effect for 6 to 8 weeks.

Broadly, Gem's behavioural issues involved instances of her climbing up onto heights in the school, including onto a high cupboard, a brick dividing wall, railings, mesh walls, and up onto the roof. A number of these incidents occurred in the days directly leading up to the accident.



In response to these behaviours, Gem was classified by the school as a pupil who required a high level of personal one-on-one supervision by an adult at all times whilst on the school premises.

The incident

On Thursday, 22 August 2013, Gem climbed up and fell from a classroom roof. At the time of the incident Gem was in the care of, and under the direct supervision of a member of the school's teaching staff within the school's special needs Support Unit.

The incident occurred after Gem had been led by hand to an isolated classroom for a "time out"

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session, as she was becoming agitated. Once in the classroom Gem was physically restrained until she was sufficiently calm. She was then seated on the floor of the unsecured classroom and provided with a box of toys to play with.

Following this, Gem is described as having suddenly bolted past the supervising teacher, through a door and out onto an adjacent balcony where she scaled a mesh wall onto the roof and subsequently fell. Her injuries included fractured ankles and bruising.

The fallout

In making its decision on liability, the court considered the extent to which school officials were fully aware of Gem's previous climbing incidents, the reliability of witnesses at trial and if suitable precautions were taken by the school to prevent the risk of injury to Gem.

Of note, the court was scathing about the school's record keeping system and its procedures for ensuring staff were made aware of student safety issues. In particular, the court noted that the database used to log student safety incidents was incomplete and most concerning, had not included a record of Gem having scaled the same roof on the day prior to her accident.

The court found that the school was negligent in the circumstances because:

- Gem's injury was reasonably foreseeable, particularly given Gem had a historical propensity to escape from supervision, run away and climb any type of available high structure;
- there was a "not insignificant" risk of harm to Gem; and
- there were a number of reasonable precautions that the school could have taken to prevent the incident, including:
 - Keeping Gem at home until such time that she was considered to be safe in the school environment. This was particularly relevant given that the school had been made aware that Gem's newly prescribed anti-anxiety medication was not expected to be fully effective for a number of weeks and this was obviously a factor in her escalating behaviours.
 - Locking the door to the classroom to prevent Gem from absconding.
 - Arranging remedial works to prevent Gem's access to the roof. The Court suggested that, in light of the fact that Gem had climbed the very same structure the day prior to her accident, it was "incredulous" that the school had not taken immediate action to address the risk of reoccurrence.

Takeaway lessons

Every school faces the challenge of creating a safe and supportive environment for students with

behavioural problems, disabilities and learning difficulties. Gem's case makes it clear that schools are now required to provide an unparalleled level of diligence in the discharge of their duty of care to these students.

It is clear from the facts of the case that the school was not idle in its management of Gem's behaviour. Rather, the school had previously undertaken a series of risk assessments, and was in the process of revising Gem's most recent safety management plan as at the date of Gem's accident. It had clearly documented Gem's propensity for loss of emotional control and related behaviours and had identified strategies for responding to Gem's triggers and supporting Gem. Of note, the school had even arranged one-on-one supervision for Gem.

Despite this, the school still failed to keep Gem safe and accordingly, the State of New South Wales found itself on the wrong side of a \$491,275.00 liability payment.

Gem's case makes it clear that if a school is aware of potentially dangerous behaviours of a student, they will not fulfil their duty of care to that student if they have not taken **all** appropriate steps to manage the risk. In the circumstances, simply requiring a student to be taken home on an ad hoc basis where recurrence of risky behaviours has occurred may be seen as a temporary and ineffective measure.

Your school **must** be satisfied that it can maintain a standard of care for its students that will allow them to safely attend school, free from foreseeable risk.

Final thoughts

Understanding duty of care obligations owed to special needs students and in particular, being mindful of their specific triggers, is just one tool a school can utilise to minimise the risk of legal liability. Although it is impossible to guard against every injury at a school level, prudent record keeping and risk management procedures will ensure a school is able to prevent injury to the best of its ability.

If your school fails to implement these strategies, it may find itself in the midst of unwanted, resource heavy litigation.

Footnote

1 *Gem v State of New South Wales* [2017] NSWDC 108, *Gem v State of New South Wales (No 2)* [2017] NSWDC 134.

Security is mostly a superstition. It does not exist in nature, nor do the children of men as a whole experience it. Avoiding danger is no safer in the long run than outright exposure. Life is either a daring adventure, or nothing.

Helen Keller