



National  
Guidance

## Underpinning Legal Framework

This document sets out to provide an overview of what the law requires and how to comply with it. It also explains what may happen following an accident or incident.

### Criminal and Civil Law

In England and Wales, two types of law may come into play following an accident or incident on an activity or visit – criminal and/or civil.

*Criminal law* is about society punishing an offender for committing an offence, which could arise from not meeting their legal duty. Sanctions can include fines, community penalties and imprisonment.

*Civil law*, on the other hand, is about compensating a victim for loss, injury or damage **caused** by another party. If a case is successful the Court will award an amount of money (often paid by the defendant's insurance policies).

Following an accident or incident it is possible that there will be a criminal investigation by the Police and/or the Health and Safety Executive (HSE). If there has been a fatality or serious incident, the initial investigation will normally be carried out by the Police. They may be looking (amongst other things) for evidence of 'gross negligence' to support a charge of involuntary or corporate manslaughter. In addition, the HSE may investigate to look for evidence of any breaches of Health and Safety law. Prosecutions may be for Health and Safety offences or, where there has been a fatality, manslaughter.

In criminal cases the investigation may not be limited simply to the events surrounding the accident, but could look at the wider operation of the establishment or employer. The actions of the injured person during the incident are unlikely to be important to the outcome. The charges brought may be related to the particular incident but may also be related to other failings uncovered by the investigation.

Regardless of whether or not there is any criminal investigation, there may be a civil case if an injured participant or their family makes a claim against a member of staff or their employer.

In civil cases the actions of the injured person during the incident are highly relevant and may affect the outcome of the case and the amount of any damages awarded.

## Relevant criminal law

The main statutes affecting outdoor learning, off-site visits and learning outside the classroom include the:

- Health and Safety at Work etc. Act (1974)
- Management of Health and Safety at Work Regulations (1999)
- Activity Centres (Young Person's Safety) Act (1995)
- Children Act (2004)
- Childcare Act (2006).

## Standards of behaviour and evidence

Criminal and civil law require different standards of behaviour and evidence. The key concepts are:

Negligence – this is a “failure to do something that a reasonable man (i.e., an average responsible citizen) would do, or doing something that a reasonable man would not do” *Oxford Dictionary of Law*.

Gross negligence – defined as “a high degree of negligence, manifested in behaviour substantially worse than that of the average reasonable man” *Oxford Dictionary of Law*.

So far as is reasonably practicable – The Health and Safety at Work etc. Act 1974 (HSWA) places different responsibilities on employers and employees.

- *Employers* are required to “ensure, so far as is reasonably practicable, the health safety and welfare at work of all employees” (section 2). In addition, employers must ensure, so far as is reasonably practicable, that others who may be affected (e.g. school students, visit or activity participants etc.) are not exposed to risks to their health and safety (section 3). So employers may be prosecuted under section 2 and/or 3 of the HSWA or under any of the associated regulations.
- *Employees* are required to ‘take reasonable care for the health and safety of themselves and others who may be affected by their acts and omissions at work’ and to cooperate with their employer (section 7). So individual employees may be prosecuted under section 7 of the HSWA for failing to take reasonable care or for failing to follow their employer’s policy and guidance.

Beyond a reasonable doubt - To lead to a criminal conviction, the Court must be satisfied beyond reasonable doubt that the evidence shows that the offence was committed.

Balance of Probabilities - In a civil case the test for evidence is lower and needs to be ‘on the balance of probabilities’ or ‘is it more likely than not’.

## Who is the employer?

Who the employer is, varies with the type of establishment or setting.

- For community schools, community special schools, voluntary controlled schools, maintained nursery schools and pupil referral units the employer is usually the local authority.
- For city technology colleges, foundation schools, foundation special schools and voluntary aided schools, the employer is usually the governing body or trust.
- For academies, the employer is usually the academy trust.
- For independent schools, the employer is usually the governing body or proprietor.
- For statutory Youth Support services and local authority services such as those provided by Children's Services, the employer is usually the local authority.
- For voluntary sector youth groups and services, the employer is usually the governing body or trustees.
- For companies, the employer is usually the board of Directors.

The increasing use by local authorities of partnership working and commissioning should be on the basis that those commissioned will be tied by legal agreements to work to risk management standards not less than those required by the local authority, or as if the local authority were the employer.

## Test for negligence

The law has a threefold objective test for negligence:

- a. That a duty of care is owed to the injured person - there is no automatic duty of care between individuals under English law, but clearly visit/activity leaders and participants do have a duty of care to each other.
- b. That there was a breach of that duty of care - i.e. the defendant did not act as a 'reasonable person', or a 'reasonable professional', would have been expected to act.
- c. That the breach of the duty of care caused (or significantly contributed to) the injury, loss or death of the victim. For example, if failings of supervision did not lead to the accident then it may be harder for the claimant to prove negligence. This does not protect either the employee or the employer from charges under Health and Safety law, as charges under this legislation may not be limited to the particular incident.

## Duty of care – the concept

Both organisations and individuals (including volunteer helpers), who assume a responsibility for the supervision of young people, take on a legal *duty of care*. This means that the law requires them to take reasonable care to avoid acts or omissions, which can be reasonably foreseen as likely to injure anyone that they ought reasonably to have consideration for. The law does not expect perfection or even best practice but simply reasonable care, or behaviour in accordance with that expected of an averagely responsible person or fellow professional.

Where a non-specialist or non-professional adult takes on responsibility for supervision of young people, the legal expectation of the standard of care is

described as that of a 'reasonable person' (the person traditionally described as "the man on the Clapham omnibus").

When the adult taking on the duty of care has a particular expertise or specialist knowledge, then the law may expect a higher standard of care – that of the 'reasonable professional'.

For an employer the standard is somewhat higher, as they are required to have safety management systems in place to ensure 'as far as is reasonably practicable' that people are not harmed by their activities. Those establishments which undertake the care, supervision or control of vulnerable people (including children) have, in certain circumstances, a non-delegable duty of care and so are not merely required to 'take reasonable care' of those in their charge but to ensure 'that reasonable care is taken'.

## Non-Delegable Duty of Care

English negligence law is based on principles of fault, i.e. an organisation or individual can be held responsible for their own actions or omissions and not those of others. In the case of employers this is extended, through the principle of 'vicarious liability', so that employers can be held responsible for the actions of their employees.

In October 2013 the UK Supreme Court ruled that, in particular circumstances, schools and other public bodies have a non-delegable duty of care. This is an exception to the normal fault-based principles of law. It means that, in these particular circumstances, schools and other organisations are liable to be sued for the negligence of a third party.

For example: a school contracts with a third party provider to deliver swimming lessons within school time. If, through the negligence of this third party, a child is injured, the child can sue the school for compensation. The fact that the school was not responsible for the actions of the third party is irrelevant as, in this case, the school's duty of care is non-delegable.

**This non-delegable duty of care is purely about who may or may not be sued following an accident caused by the negligence of a third party. It does not apply to, or affect, individual employees or volunteers working as visit leaders or supervisors.**

## Duty of Care and the use of Third-Party Providers

Where a third party provider is to be appointed/contracted to deliver activities or provide services, then the employer must have a robust system to ensure that only appropriate providers are selected, and a method for monitoring the effectiveness of this system. Employees or visit leaders must be aware of, and comply with, the requirements of this system. A clear agreement should be put in place, setting out the details of what is to be provided and the level of supervision or control of young people to be delegated to the provider.

When working with a third party provider the visit leader must ensure that it is always clear who is responsible for what and when – there must be no 'grey areas'. So, for example, when a specialist activity is being delivered there must be clear handover arrangements, at the start and end of any session, between the

visit leaders and the specialist instructors. Where the activity is such that the visit leaders are themselves involved in a supervisory role alongside the provider's staff, then all concerned must be clear about who has responsibility for which aspect of the session.

In some cases 'effective supervision' may require specific knowledge of an individual participant's special needs – in this case, unless the third party provider has spent sufficient time with that person to develop such knowledge and awareness, the visit leader should ensure an appropriate member of their team is on hand.

Where an appropriate third party provider has been appointed, it is usually good practice for establishment staff to involve themselves, when possible, in the activities (or to observe the activities). This provides opportunities to: build relationships with participants; support the provider in facilitating learning, managing behaviour and meeting individual needs; share in the experience and so enable more effective post-visit learning; and monitor the quality of provision. It is poor practice to simply 'hand over' a group on an educational visit to a third party provider, unless this is in the best interests of the participants, has been planned and agreed in advance, and the visit leader is still comfortable with the arrangement.

## What does all this mean?

What this means is that following an accident where member(s) of a group are killed or seriously injured, the employer/establishment/staff team may face investigation and possibly legal action on different levels:

1. A Police investigation to determine whether a fatality was caused or contributed to by criminal acts or by 'gross negligence' of individual staff, sufficient to warrant prosecution, or whether an organisation's management failings were so serious as to justify a charge of Corporate Manslaughter.
2. An HSE investigation to determine whether there has been a breach of Health and Safety law, or whether an accident was caused by an employee's failing to take 'reasonable care', or whether the employer's systems were insufficient to ensure safety 'so far as is reasonably practicable'.
3. A civil claim for damages. This is most likely to be taken against the establishment/employer as they have more money and more insurance. The purpose of such a claim is compensation for the victim.

## Responsibilities of an Employer to its Employees

The employer has a legal duty to ensure that suitable and sufficient risk management systems are in place. This requires employers to provide such support, training and resources to employees as is necessary to implement policy, including access to competent advice. See the documents "Risk Management and Risk-Benefit Analysis" and "Requirements and Recommendations for Employers" in this guidance.

While this legal duty rests with the employer, many of the underpinning functions can (and will) be delegated to employees. Such delegation must be set out in procedures and processes that provide a clear audit trail.

Regardless of the delegation process, under the principle of vicarious liability, the employer may remain legally responsible for the actions of its employees, ensuring that in the event of a civil claim, it will be the employer that is normally sued and not the employee.

Employees are responsible for complying with the policies, training and guidance provided by the employer.

## Guidance

Guidance documents are published by a variety of organisations, including government departments, professional associations (e.g. NAHT) and professional bodies (e.g. OEAP, AfPE). However, most of the legal responsibilities sit with employers. This means that the employer's guidance and its supporting training requirements must prevail over other sources of guidance.

The exact content of an employer's guidance document is determined by the employer, but should reflect or adopt the core requirements and recommendations of any national guidance recognised across the sector to which it applies. It is critical that those drafting guidance make it clear when a course of action is a requirement, or a recommendation, so that those using the guidance are aware of whether they have a choice.

- *Recommendations* demonstrate good practice (e.g. "preliminary visits are recommended").
- *Requirements* are instructions and must be obeyed (e.g. "all off-site activities must be formally approved").

The employer should either recommend or require any training regimes that are available to support their guidance.

## How can you avoid prosecution and claims for damages?

### 1. Discharge your duty of care

**Employers** should ensure that they have done all that is reasonably practicable to:

- provide appropriate guidance to their employees (including the requirement for effective supervision).
- ensure that the guidance they provide is understood (e.g. provide guidance training).
- provide a system of staff engagement and deployment, supported by advice and training, to ensure that staff are appropriately competent to carry out their duties.
- monitor (on a sample basis) employee compliance with policy and guidance.

- ensure that the process of selecting external providers includes robust checks.
- ensure that clear contracts are in place with external providers, setting out the level of supervision or control of young people to be delegated.
- keep records showing compliance with all the above.

**Employees** should take reasonable care at all times and cooperate with their employers to:

- follow any policy and guidance provided.
- take advantage of any training offered by their employer (this may be recommended or be a requirement).
- keep up to date with currently acceptable professional practice.
- implement the requirements of effective supervision.
- look after their own health & safety and that of their colleagues and companions.

## 2. Effective Supervision

To fulfil their duty of care, visit/activity leaders should ensure that young people are supervised in accordance with the principles of "Effective Supervision", requiring them to take account of:

- The planned learning outcomes or benefits of the activity/visit.
- The nature of the activity (including its duration).
- The location and environment in which the activity is to take place.
- The age, maturity and gender of the young people to be supervised.
- The ability of the young people (including their behavioural, medical, emotional and educational needs).
- Staff competence and experience.

This means that every group should be considered in relation to its individual component parts and the supervision plan should reflect the group's unique nature. It is, therefore, important that when planning a repeat or on-going series of activities, the previous plan (no matter how well it worked) is reviewed to ensure that it meets the current group's needs. With the exception of the Early Years Foundation Stage (EYFS) there is no such thing as a definitive ratio for a particular age group undertaking a specified activity. See the document "Ratios and Effective Supervision" in this guidance.

