

WELCOME

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The Law and School Safety and
Security

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Criminal Law

- Turning first to criminal law, it must be appreciated that there is no law against bullying per se. The law only becomes relevant when the bullying behaviour itself constitutes a crime. This means that any attempt to invoke the law is really an attempt to fit the bullying conduct complained of into a legal framework that has been designed for something else. In the case of children, there are added complications in relying on the criminal law because of diminished responsibility between the ages of 10-14 and absolute immunity prior to that age.

- The most commonly relied upon crime that is relevant to bullying is the crime of assault, but for obvious reasons that only applies when bullying takes in a physical manner. There are no criminal remedies directed specifically at bullying in Australia and it is a mistake therefore to characterise it as a crime, as has been done on occasions. On the other hand, the increased number of statutes directed at stalking and harassment has widened the reach of the criminal law in this regard.

Limitations of Criminal Law

- Strict proof of criminal conduct is required, which involves proof beyond reasonable doubt of the guilt of the offender. This involves not only proof that the offender committed the act complained of, but that he/she did so intentionally, knowing that it was wrong to do so.
- Children may lack criminal responsibility and thus be incapable of committing a crime or, if between 10 and 14, have diminished responsibility and thus it may be impossible to prove the necessary intent to constitute a crime.

- A defence may be available to charges of assault on the basis that the children were engaged in 'rough and undisciplined play' even in the absence of the victim's consent to such 'play' provided that the perpetrators held a genuine belief that the victim was consenting, even if that belief was unreasonably held (Furniss, 2000).
- Legal processes are often protracted and may be traumatic for the child bullied as well as for the perpetrator.

- The law is only concerned with actions that constitute an offence and many aspects of bullying, such as emotional abuse, do not usually constitute an offence against the criminal law.
- The penalties for the commission of criminal offences are often quite inappropriate when applied to children.
- Police and prosecuting authorities may be unwilling to act, except in the case of what they regard as serious offences.

- In general, the use of the criminal law is practically confined to acts of violence, usually involving older children. It is important to note that it is the **acts** that are punished by the criminal law and not the fact that they may have taken place in a situation where bullying is present, although the latter fact may exacerbate the punishment imposed.

Examples of Prosecutions

- In Canada, on 26 March 2002, a 16-year-old girl was found guilty of uttering threats and criminal harassment following the suicide of one of her classmates two years previously. The judge's comments indicated that the victim had been bullied repeatedly giving her reason to fear for her life. The perpetrator was subsequently sentenced to 18 months probation, following a 'sentencing circle' involving the victim's mother and the convicted girl and her family (Joyce, 2002).

- In New Zealand, in 2003, six youths were sentenced to varying terms of imprisonment for anally assaulting a classmate with a broomstick at a party in 2001 and another was sentenced in 2002 ('The victim was aged 17 at the time of the offence, as were those convicted.) Again it should be noted that the offence concerned was not bullying but the commission of a serious assault.. It occurred outside the school environment and was attempted to be justified as some sort of rugby 'initiation'.

- All of these cases involved what would normally be described as 'serious' criminal activity. The question as to what is or is not serious in such a context. This is a difficult question and the answer must depend upon the particular circumstances, and a degree of common sense must be observed. The above cases were obviously serious. It seems to me that if the conduct in question either has led to or is likely to lead to serious consequences then appropriate action should be taken by teachers and the school authorities to inform police.

- Again however, it has its limitations, even in that area. It would obviously be unsuitable to involve police and prosecution authorities every time some physical contact amounting to assault occurs at a school. A degree of common sense has to be shown, but at the same time administrators and teachers need to be aware that schools are not immune from the operations of the criminal law and serious matters should be referred to police

- Bullying takes on many other forms than the physical however and those forms are likely to be much more wounding in a psychological sense. The law provides more limited remedies for such behaviour. If the conduct includes threats to kill or harm, these are offences against the criminal law and should be taken seriously. Stalking laws may also be relevant

Apprehended Violence Orders

- These orders are aimed at preventing criminal conduct, but are not strictly a part of the criminal law. However, breach of these orders can lead to criminal sanctions. This is important for, in Victoria at least, as we shall see, it is open for a child to seek an order against another child, which if breached exposes the child to the sanctions of the criminal law.

- The effect of such orders may be to prohibit the person complained of from having any contact with the victim and to prevent them from engaging in certain forms of conduct towards the victim.
- The purpose of these orders has traditionally been to protect family members from the actions or threatened actions of other family members. However, the definition has gradually been extended to protect persons against the behaviour of other persons, whether or not they are family members.

- In particular, stalking is now a crime in virtually all jurisdictions and it is usually possible to obtain orders of this nature in order to protect people against this behaviour whether perpetrated by a family member or someone else.

- The practical effect of the combination of these legislative provisions is that in Victoria an application may be made on behalf of a child in the Children's Court against another child or children who are not family members seeking intervention orders against them. It is unlikely that the legislation ever contemplated this outcome.

- In the years 2000/2001 there were 291 applications for intervention orders involving bullying issues relating to children and that these applications have doubled from the previous year.
- Most applications came from schools and neighbourhoods in metropolitan areas with very few from the country. There was no evidence of the value of this process, or whether it produces positive outcomes.

Cyber Bullying and Stalking

- Stalking laws can be adapted to cyber bullying. The Victorian Crimes Act provides that stalking is a crime punishable by up to 10 years imprisonment. It can include, following the victim, contacting the victim by e-mail or other electronic communication, publishing statements or material on the internet or by e-mail or other electronic communication. If this is done with the intention of causing physical or mental harm to the person, or arousing apprehension or fear in the victim for his or her own safety, or that of any other person, then an offence is committed.

- The section provides that a person is guilty of an offence if they knew or ought to have known that their conduct would cause such harm or apprehension.
- In the case of children the section has its limitations however, both because of the above proviso and because it is limited to conduct of a particular type and the sort of behaviour that constitutes bullying may not fit into such categories.

- Also, concepts of penalties of up to ten years imprisonment are not particularly helpful in the case of children. The fact that the offence is regarded as a serious one however, may be helpful in bringing home to children and particularly older children, that such behaviour is proscribed by the law and is unacceptable. The scope for inclusion of such material in an education campaign about the issue of the use of electronic devices for bullying is obvious.

- The Commonwealth Criminal Code also contains provisions creating offences for sending threatening or harassing material over communications devices and it is obviously desirable that these be brought to the attention of young people as well.

Crimes Compensation

- In most states and territories there is provision for crimes compensation where people suffer injury as the result of the commission of a crime. It is unnecessary to prove fault other than the fact of the commission of the crime. In circumstances where the bullying conduct amounts to the commission of a crime and the victim has suffered injury (including psychological damage), some compensation may be payable.

Civil Law

- Civil damages are also available for behaviour that constitutes an offence under the criminal law and the courts may also order that the conduct complained of not be repeated (an injunction). Proof is not as strict and it is only necessary to prove both the commission of the act complained of and (where intent is an element) the intention of the person concerned, on the balance of probabilities.

- In cases of negligence or breach of statutory duty, it is unnecessary to prove that the offender intended to do harm or even intended to do the act complained of. What must be proved is that the alleged offender failed to take reasonable care in circumstances where he/she/it owed a duty of care to the injured person, either by acting in such a way as to negligently cause the harm or by negligently failing to act to prevent the harm from occurring.

Negligence

- For our purposes, negligence may be broadly defined as a failure to take **reasonable** care for the safety of a person to whom a duty of care is owed. Whether the care taken has been reasonable is a question of fact in each case.

Duty of Care

- There can be no doubt that a school and its teachers owe a duty of care to their pupils to take reasonable care to protect them from injury. If a child is injured as a result of bullying, this can fall within the category of negligence if a failure to take reasonable care can be established and the fact that the child might be injured was reasonably foreseeable.

- In the case of a school authority the question would usually be posed as to whether the school authority had acted in all the circumstances in the way that a reasonable school authority would act. For example, it could be established that a reasonable school authority would now have adopted a policy on bullying and that such a policy would at least conform to that in common use in similar schools.

- In the case of a principal or teacher the test is the same, that is, has the teacher acted as a reasonable teacher would in all of the circumstances? Some English and Australian cases in the past have sought to equate the duty of care of a teacher with that of a parent. However, recent cases have suggested that the standard is that of 'exercising the ordinary skill of an ordinary competent man [*sic*] exercising that particular art'

- The issue in one case was whether a duty of care to a pupil arose in circumstances where she was injured by being struck with a softball bat in the school grounds some 10 minutes before school commenced. The evidence was that the children were unsupervised and the argument for the defendant was that as the school day had not commenced no duty of care arose.

- The majority of the High Court of Australia made it clear that there was no rule that there could be no duty of supervision outside 'ordinary school hours' or 'before school started'. The court took the view that the headmaster, by permitting entry prior to 9 am and knowing the risk of injury from children playing ball games in a small, crowded playground without supervision, had created a factual situation in which he was under a duty to ensure that there was adequate supervision.

- The standard of care required is reasonable care. Perfection is not expected and the circumstances are taken into account so that what might be expected of a teacher in one set of circumstances (for example, in the control of pupils in the classroom) might be more stringent than in another, such as when in charge of a large number of pupils on a school excursion.

- A recent High Court of Australia decision in the case of *Roman Catholic Church v Adair* is an interesting one in that it examined this duty of care in some detail. The plaintiff child was injured by other children while playing on a flying fox that had been operated at the school without incident for six years. The children were harassing her, but there was no evidence of prior behaviour of this kind.

- The school had a clear “no touching rule” that was breached on this occasion. The supervising teacher was distracted by other children entering classrooms that were off limits and the accident occurred when she was attending to this issue.

- The argument for the plaintiff was that the school had failed in its duty of care for her by not providing enough supervising teachers to give overall supervision to all children. The case had been decided in favour of the school and teachers at trial but on appeal the majority of the Supreme Court of the ACT held the school and teachers to be liable. The High Court of Australia, by a majority of four to one decided that negligence on the part of the school and teachers had not been proved.

- *“Perhaps the existing staff could have carried out supervision without increased expense and without complaint or damage to morale. But for them to carry out recess supervision duties on three, or perhaps four or more, occasions per week rather than two was a course which entailed difficulties and inconveniences. As was conceded on behalf of the plaintiff, the teachers, as much as the pupils, were entitled to the benefits of a break from work.”*

- *“Nor is it reasonable to have a system in which children are observed during particular activities for every single moment of time - it is damaging to teacher-pupil relationships by removing even the slightest element of trust; it is likely to retard the development of responsibility in children, and it is likely to call for a great increase in the number of supervising teachers and in the costs of providing them.”*

- In *Cox v State of New South Wales*, Justice Simpson, of the NSW Supreme Court, awarded a very substantial sum of damages in favour of a plaintiff who had suffered severe psychological injury because of bullying that had occurred in primary school some ten years before the trial.

- *He was enrolled in the kindergarten class of the Woodberry Public School. There he was exposed to an older schoolboy, to whom I will refer as TH. Over a number of months in 1994, and into 1995, TH subjected the plaintiff to repeated harassment, with various incidents of bullying. On at least two occasions these incidents included physical assaults of a relatively serious nature. The plaintiff's mother reported the events to the school authorities but the harassment and bullying continued. The plaintiff began to suffer from anxiety---Eventually, in September 1995, the plaintiff's mother removed the plaintiff from the school.*

- The judge goes on to record that although he made a temporary recovery and completed primary school, he was unable to cope with high school and his life had been effectively ruined.

- *In February 1995 Mrs Cox had a further conversation, this time with the principal of the school, Ms Walmsley. Ms Walmsley knew that the perpetrator of the harassment was TH, and told Mrs Cox that TH suffered from Attention Deficit Disorder and that that could be the explanation for his conduct towards the plaintiff. She told Mrs Cox that they would try to keep the plaintiff and TH separate at school times.*

- *Mrs Cox then recounted an occurrence of 23 February 1995. On that day she was telephoned by school authorities to advise of an incident. She went to the school. She found the plaintiff "shaking and crying" with red marks on the front of his neck and what looked like burn marks on the back of his neck. A teacher told her that a student had attempted to strangle the plaintiff with his hands and that Ben had actually "fallen onto the ground unconscious".*

- Following these events, Mrs Cox spoke to yet another member of the school staff, who again told her that TH suffered from Attention Deficit Disorder and postulated that condition as an explanation for his behaviour. He asked if the plaintiff had done anything to provoke the attack to which Mrs Cox replied in the negative.

- 29 Mrs Cox then spoke to two officers of the Department of Education, apparently administrative officers, one in Maitland and one in Newcastle. She recounted the strangulation incident and complained that the school authorities had not acted. Her evidence was that one of the officers, Mr Ian Wilson:
 - "... told me that bullying builds character and that he thought it was a good thing that Ben got bullied."

- Some time in the first half of 1995, but after the 23 February incident, the plaintiff told her again:
- "... that [TH] was scaring him, pushing him into the walls of the school as he walked past him, jumping out from behind buildings, including the school toilets, and scaring him so much that he couldn't even use the toilets at the time."

- *Mrs Cox spoke again to Mr Elliott, then the vice-principal. On this occasion she was told that TH's parents would be required to come to the school and supervise TH during recess and before and after school. The evidence does not disclose that this in fact occurred.*

35 The plaintiff developed a severe stutter. This manifested itself when anything to do with the school was raised. He also began to become panicky when out of the house.

- *On an occasion at the end of July 1995 Mrs Cox picked up the plaintiff from school at about 3.00 pm. He was crying. He was very red. When Mrs Cox asked him what had happened he replied:*

"The big boy has hurt me again."

He lifted his shirt and lowered his pants and she saw red welts across the back of his body. He told her that this had been done by TH. He also said that TH threatened that if he reported the matter to a teacher, he would be hurt again.

- *Mrs Cox walked with the plaintiff back into the school, and again saw the vice-principal, Mr Elliott. On this occasion Mr Elliott said that TH would be placed on detention, that a letter would be sent home by the school, and that one of his parents would be required to come to the school and supervise TH. Again, there was no evidence that this proposal had been implemented.*

- *The plaintiff did not return to school then for approximately two weeks. When he did return Mrs Cox was telephoned by the school to tell her that the plaintiff had been in a fight. On 8 August she went to the school to find the plaintiff in the office, crying, his mouth bleeding. A lower tooth was missing and his lip was swollen and cut and bleeding. Mrs Cox said that, when asked what had happened, the plaintiff told her:*

"... [TH] had tried to shove his jumper down his throat – like into his mouth."

- *41 Mrs Cox spoke to Mr Elliott, and the principal, now Mrs Corben. They told her (again) that a letter would be sent home to TH's parents, and that TH would be placed on detention.*

- *At this point the plaintiff refused to return to school. Mrs Cox reported the circumstances of the incident to the local police. She understood that a local constable visited TH's parents at home. She said that, two days later, when the plaintiff had returned to school, TH accosted him, saying:*

"It was funny how the police came to my house. And if they come again, I'll threaten to kill you."

- *In September of that year the plaintiff stopped attending school altogether. Mrs Cox had a conversation with Mrs Corben, to tell her that she was taking the plaintiff out of school, and why. She said that this was because the school could not provide a safe place for the plaintiff and that:*

"... I had just basically had enough of it."

- *She told Mrs Corben:*

“I am not going to submit my son to any more bullying and hurting.”

Mrs Corben replied:

“You lose some kids and keep some.”

- This story has an all too familiar ring and is a classic example of school staff who when faced with a problem of this kind have no training or capacity to deal with it. The fact that the child causing the trouble apparently suffered from ADD exacerbated the problem. How many of us would have done better in the circumstances?

- Yet the end result was catastrophic for the child who suffered the bullying and it is obvious that there must have been some better response available to the school and teachers. One hopes that there are not too many Education Department officials who still believe that bullying builds character

Expert Evidence

- *Dr Tronc identified a series of deficiencies in supervision and in the school's bullying prevention philosophy and methodology. He went so far as to express the view that, by reason of the persistence and seriousness of the assaults upon the plaintiff, TH ought to have been suspended from the school.*

- *“While I accept that the school had a delicate line to tread, it seems to me that there is considerable force in this view. Lurking in the background is the repeated suggestion that TH suffered from Attention Deficit Disorder. The defendant made no attempt to establish either that there was such a diagnosis, or even that the suggestion was reasonably based upon the observations of TH’s conduct, whether towards the plaintiff or otherwise.”*

- *But it must be recognised that, if there were even a reasonably based suspicion of that diagnosis, then the school had a difficult task in balancing its duty to TH against its duty to the plaintiff. If that diagnosis were correct, suspension may not necessarily have been the correct approach, or, at least, the only correct approach."*

- *“In my opinion an appropriate response would have been a fairly multi-faceted approach rather than mere reassurances of an oral nature. There should have been, in my view, conferences called with the parents of the alleged perpetrator of the bullying. In my view official reports should have been made to the Education Department by the school on the basis that such a serious incident as the causing of unconsciousness, that kind of assault is serious enough to constitute what is described as a critical incident in the New South Wales Department of Education’s policy at that time.*”

- *It would have been more appropriate, or it would have been appropriate in my view for a good deal of communication to have occurred within the school so that all teachers were alerted to what had been alleged, and required to take special concern in observing the boy who had been named on a number of occasions as the perpetrator of the bullying. It would have been more appropriate to arrange for some sort of counselling of both boys, again in accordance with the Department of Education's Critical Incidents Policy, where that is one of the fairly standard victim approaches that is recommended.*

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- *Some gauge of the attitude of the school (and departmental) authorities is to be found in two items of evidence. These are the assertions (not denied) by Mr Wilson, on two occasions, that bullying builds character, and the remark by the school principal to the effect that some pupils would be lost to a school. These are revealing because they denote an attitude that does not suggest that any attention was paid to the amelioration of a serious situation.*

102 The conclusion that the school authorities failed to discharge their duty of care to the plaintiff is therefore inevitable.

- Later in the day she spoke to the vice-principal (then Mr Valor) who told her that he would reprimand TH. Later still, she had a conversation with the plaintiff, who told her that TH had hurt him (the plaintiff) again, that TH had choked him. That night he was severely traumatised. He did not return to school for about two weeks. Mrs Cox took the plaintiff to see the local doctor, Dr Sprogis, at a practice the Cox family attended. She did this because of the sleeplessness and the marks on his neck, and also because she was concerned about the unconsciousness. She said nobody knew how long he had been unconscious.

Likewise it would be expected that the existence of such a policy would be widely known to teachers and pupils at the school and that it would be applied. If it could be established that the particular school either did not have such a policy, or that it was not widely known or was not applied, then this would be evidence of negligence which would leave the school open to an action for damages. Similar considerations apply to government departments such as the education departments of the various states and territories, for whose actions their respective governments would be liable.