

# **Bullying Is A Serious Issue - It Is A Crime!**

*Phillip T. Slee, School of Education, Flinders University  
Adelaide, Australia*

&

*David C. Ford, Senior Partner, Emil Ford & Co. - Lawyers  
Sydney, Australia*

## **Abstract**

Australian research into school bullying has increased our understanding of issues such as: (i) its frequency; (ii) its nature; (iii) its impact on those involved; and (iv) the effects of intervention programs. In the light of this research, it has become apparent that those bullied have various legal remedies. As a background to considering, in particular, the tort liability of school authorities, Australian research - based on surveys of over 25,000 students from more than 60 schools around the country - is presented in this article. The research indicates that approximately one in six students report being bullied on a weekly basis. Various developmental trends and gender differences are identifiable as part of the bullying experience. A range of Australian studies has identified the deleterious sequelae to bullying. The most recent research indicates a link with poor health and with suicide. The social impact of bullying is reflected in its association with poor quality peer relations. In terms of psychological well being it has significant negative associations with depression, loneliness and anxiety. In this article it is argued that bullying is an identifiable form of aggressive behaviour. The research clearly indicates that bullying is physically harmful, psychologically damaging, socially isolating and associated with poor school adjustment. Evidence is presented that intervention programs have been shown to be effective in reducing, if not eliminating school bullying. Further, literature is reviewed which strongly suggests that in the face of such evidence schools are under considerable pressure to take steps to address the issue of bullying. The article concludes by noting that failure to take such measures may be considered as a failure to fully discharge a school authority's duty of care.

## **Introduction**

The title for the article is taken in part from a letter written by a parent which stated in part: 'This (*bullying*) is a serious issue - it should be stamped on hard as soon as possible. It is a crime, these people should be severely dealt with'. The article considers a number of issues raised indirectly or directly in this letter including (i) the nature of bullying (ii) the extent of school bullying in Australia (iii) the effects of bullying and (iv) the effectiveness of school

interventions. Finally, the law of negligence is considered in order to identify any legal remedies available to a student who is bullied.

### **The Nature of Bullying**

To help orient us to the issue, the following case-notes involving a parent and her year six child are used. Their local doctor referred the family and the boy stated in the course of a first interview:

One thing that happened to me was that in year five I was bashed up at school by one of the kids. One day this kid just started bashing me up and he knocked me to the ground and kicked me in my legs and body. The worst thing though was that while I was being bashed up the other kids just stood around and did nothing to help. But it did not stop there and from term one week one the bullying went on. From the hitting it went to name calling and excluding me from groups. Rotten food was put in my locker, my sports equipment was stolen or broken. If I tried to play basketball the kids would tell me to 'get lost'. I hated it so much I hid in the computer room or library. It just went on and on through the year.

(Permission to cite these notes has been granted).

There is currently, a great deal of discussion regarding the level of violence in Australian society as attested to by media reports and more significantly major Federal (Sticks & Stones, 1994) and State inquiries (Australian Capital Territory, 1995; Western Australia, 1996). To appreciate why school bullying is fast emerging as an educational issue it is necessary to see it in the context of contemporary dominant themes of social change in Australian culture, including those of patriarchy, authoritarianism, masculinity, femininity and violence (Slee, 1998).

### **The Present Situation**

The best fun was to make Lenora cry. She was so pale and thin, she had none of the fat of her carnivorous class-mates. She swept across the yard like a little straw broom, trying to keep herself stiff and ready for attack. Playtime or classtime made no difference to Lenora. She had no friends and there was nothing she could do that was better or different from anything anyone else could do. The opportunities for taunting her were endless. She was a small grey magnet for bullies. In an instant she might be surrounded by jeering, laughing faces that did not leave until she cried. The moment her tiny eyes filled up with tears the crowd would begin to disperse. By the time her face was awash with salty water she was alone. It was not the crying anyone wanted to watch, it was just the fact they could make her do it that was funny. Danny McGee was in training to be a bully. He watched the bigger kids closely. He saw how they pinched and shoved in line until some kid got into trouble for turning around and shouting at them. How they lied like sweet-

faced little angels to the teachers. How they teased and tormented small defenceless kids, like Lenora Luffhead.

(Blacklock, 1995, p.54)

While the existence of bullying at school has long been recognised in Australian literature, the empirical study of the phenomenon really did not begin until 1989-90. In the last decade the term 'bullying' has become much more widely used although it is a much misunderstood term. The work of Dan Olweus from Norway and Peter Smith from England has provided a powerful impetus for Australian research into bullying. A good definition of the term which draws on their thinking is that bullying is:

Repeated intimidation, over time, of a physical, verbal or psychological (including indirect and relational bullying) nature of a less powerful person by a more powerful person or group of persons.

Bullying is now widely accepted to be a sub-set of aggressive behaviour which has its own defining characteristics.

The following information regarding the extent of bullying in Australia is based on research involving approximately 25,500 primary and secondary students from over sixty catholic, independent and public schools around Australia. Rigby (1997) has reported more fully on the analysis of this data and his work in making available the statistics for this article is gratefully acknowledged. The data have been collected using the Peer Relations Questionnaire (PRQ) which has been developed by Rigby and Slee (1995) in response to teachers' requests for a standardised method for assessing the nature and extent of school bullying. The psychometric properties of the PRQ have been assessed (Rigby & Slee, 1991) and evidence presented to the effect that it is a valid and reliable self report measure of school bullying. In gathering data anonymously care was taken to differentiate between bullying (in which there was a perceived imbalance of power) and other aggressive acts such as fighting and quarrelling between equals.

### **Frequency of Bullying**

Data from over 25,500 Australian students across more than 60 schools provides the basis for the following broad conclusions regarding bullying (Table 1).

Overall, between one in five and one in seven students reported being bullied several times a week or more. As noted in Table 1, younger students more frequently report bullying and girls generally report less bullying than boys. In secondary school the amount of bullying is highest in year levels eight and nine. The pattern of results found in the national data provides a basis for the development of school intervention programs.

**Table 1:** The frequency of bullying

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- Between one in five and one in seven students report being bullied ‘once a week or more’
  - More bullying occurs in primary than secondary schools
  - In primary schools bullying is highest in the lower years
  - In secondary schools bullying is highest in Years 8 and 9
  - Males typically report being bullied more than females
  - Females and males typically report being bullied in different ways (e.g. physical or verbal)
- (Based on Australian surveys of over 25,000 students from more than 60 schools)
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**Duration of Bullying**

A feature of the definition of bullying referred to earlier is that it involves repetition and data relating to duration are presented in Table 2.

**Table 2:** The duration of reported bullying by students (%) (N = 15255 boys; N = 10373 girls)

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	Boys	Girls
	Duration	Duration
	%	%
never	32.6	37.7
a day or two	35.9	32.7
week or so	12.1	12.0
several weeks	7.7	8.1
for months	5.2	4.7
for a year	2.3	2.1
for two years	1.5	1.1
more than two years	2.5	1.5
Total	100.0	100.0

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From Table 2 it can be seen that while most bullying lasts a ‘day or two’, for a disturbingly high percentage of students it lasts for weeks or more. Research now leaves us in little doubt regarding the cumulative negative effects of being subject to repetitive acts of violence (Rigby, 1997, Slee,1997). As such, it is imperative that school authorities act to reduce school bullying.

### Safety from Bullying

As already referred to in the definition provided earlier an important element of the definition of bullying relates to the question of a power imbalance between the bully and victim and so safety at school is a pertinent question. As Rigby (1997) has noted, the question of how safe Australian schools are for students depends on how we define 'safety'. In contrast to some cultures, violent and life threatening situations are relatively rare in Australian schools (Martin, 1994). Interestingly, Stewart and Cope (1997) make the point that there is a growing concern amongst teachers that 'some' students feel so unsafe at school that they have resorted to weapon carrying in order to defend themselves. The question of how safe students feel from bullying is another but perhaps related issue.

We asked students in the large scale sample if school is a safe place for 'young people who find it hard to defend themselves from attack' from other students. Among both males and females, less than 20% see school as a 'safe' place for vulnerable students. Of the students who report being bullied at school, over 9% report that they have truanted and over 15% report 'thinking' about staying away from school (Slee, 1997). School bullying then raises the question of equity and access for some students in relation to education. Stewart and Cope (1997) note the issue of school safety '...indicates the need for school administrators and classroom practitioners to initiate programs in their schools that will provide students with an awareness of – among others – their legal rights and responsibilities' (p.36).

### Types of Bullying

As part of the definition referred to earlier, bullying manifests itself in different ways. The data presented in Table 3 indicates types of bullying experienced 'often' by the 25,500 students in the Australian sample.

**Table 3:** Types of bullying experienced 'often' at school (N = 15255 boys; N = 10373 girls)

	Boys %	Girls %
called names	10.9	8.9
teased	12.0	11.5
left out	6.1	7.7

From Table 3 it can be seen that bullying may be physical, verbal or psychological (including indirect and relational bullying). Indirect bullying usually involves actions such as deliberately ignoring others. Relational bullying involves actions designed to disrupt or impair students' relationships with others. Physical bullying occurs more often amongst boys. The Australian research of Owens and MacMullin (1995) has provided new insight into the nature of girl's aggression and to the damaging effects of indirect and relational aggression in peer relationships. As Owens and MacMullin (1995,p.34) have concluded, '... there are gender and developmental differences in aggression among students. More specifically, boys used more

physical aggression strategies than girls and older girls used more indirect forms of aggression than boys’.

### The Effects of Bullying

The following profiles of bullies and victims (Table 4) are based on a summary of Australian research conducted principally by Rigby and Slee as reported in Slee (1997).

**Table 4:** Profiles of Bullies and Victims

<b>Outcomes</b>	<b>Bullies</b>	<b>Victims</b>
<b>Physical</b>	<ul style="list-style-type: none"> <li>• girls typically suffer poor health</li> </ul>	<ul style="list-style-type: none"> <li>• generally suffer poor physical health</li> </ul>
<b>Social</b>	<ul style="list-style-type: none"> <li>• are about average in socio-metric status</li> <li>• have some friends at school</li> <li>• usually dislike school</li> </ul>	<ul style="list-style-type: none"> <li>• are often rejected by other students</li> <li>• typically feel lonely and isolated at school</li> <li>• generally dislike school</li> </ul>
<b>Psychological</b>	<ul style="list-style-type: none"> <li>• are generally depressed</li> <li>• are not anxious</li> <li>• are average in self esteem</li> <li>• do not have strong tendency towards internal or external locus of control</li> <li>• generally have poor conflict resolution skills</li> </ul>	<ul style="list-style-type: none"> <li>• are generally depressed</li> <li>• typically suffer from anxiety</li> <li>• are usually low in self esteem</li> <li>• usually have an external locus of control</li> <li>• are average in conflict resolution skills</li> </ul>
<b>Academic Ability</b>	<ul style="list-style-type: none"> <li>• typically over-estimate their academic ability</li> </ul>	<ul style="list-style-type: none"> <li>• typically under-estimate their academic ability</li> </ul>
<b>Home Environment</b>	<ul style="list-style-type: none"> <li>• often come from homes lacking in cohesion and support</li> </ul>	<ul style="list-style-type: none"> <li>• often come from homes typified by too much closeness and over protectiveness</li> </ul>

Generally, the findings confirm that bullying is a physically harmful, psychologically damaging and socially isolating aspect of an unnecessarily large number of Australian children’s school experience. The damaging physical effects have been highlighted in Australian studies linking poor health, depression and suicidal thoughts with bullying. Evidence of a causal nature has been obtained from a recent longitudinal study conducted by Rigby and Slee in which the extent of reported peer victimisation and the health of Australian

secondary students was monitored over a three year period. The results indicated that there were significant long-term health consequences of being repeatedly bullied at school. Adolescents who were frequently victimised at school as junior students were more likely than others to report a range of physical health complaints as senior students. Psychological well being (for example, self-esteem and happiness) has been shown to suffer with bullying while loneliness and alienation from peers is also linked with victimisation. Recent Australian research (Slee, 1998) has clearly linked victimisation with poor school adjustment.

### **Interventions to Reduce School Bullying**

In 1994, a Federal Government inquiry into violence in Australian schools concluded that while violence was not a major problem in Australian schools, bullying was. A recommendation of the inquiry was for the development of intervention programs to reduce school bullying. At a state level, some governments (for example, Western Australia, 1995 and the Australian Capital Territory, 1996) have funded investigations into school bullying and similarly reported that it is a major concern.

### **Students' Beliefs Regarding Interventions**

To help understand what Australian students think should be done, students were asked regarding their opinion about school interventions to reduce bullying and these findings are presented in Table 5.

**Table 5:** Opinions expressed by students (%) about stopping bullying at schools (N = 15,255 boys; N = 10,373 girls)

	Boys %	Girls %
Teachers and students should be concerned about stopping bullying	72.3	78.1
Teachers should stop it	78.1	82.7
Students should help stop it	64.5	72.2
I personally try 'always' and 'usually' stop bullying	36.1	39.0
Teachers/students should work together to stop it	56.6	64.3
I could personally use help to stop being bullied	37.1	35.9
I would be interested in talking with other students about bullying	1.5	1.1

From the results in Table 5 it can be seen that students are strongly of the opinion that the school community should act to stop bullying, although responsibility for stopping it is largely attributed to teachers. A good third of students would personally be interested in talking about the problem although further treatment of this data shows that younger primary school students are more interested in talking about it than older secondary students. Research (Rigby, 1997; Slee, 1997) similarly documents a strong desire by teachers and parents for action to reduce school bullying.

### **Intervention Programs**

An increasing number of Australian schools are now taking action to address the issue of bullying and the general features of such school based interventions include the:

- gathering of information about bullying in the school using questionnaires or interviews with students and staff and the sharing of this information
- development of school policy specifically directed against bullying
- encouragement of classroom discussion as to how the practice of bullying can be reduced
- employment of various programs to help resolve conflict in school
- training of staff in the use of various counselling techniques for use with bullies and victims.

Unfortunately in the last five to six years in Australia, the push for ‘quick-fix’ solutions to school bullying has had some negative outcomes including undue pathologising of the individual. Construing bullying as aberrant behaviour with its origins in personality flaws or dark familial history has focussed attention on remedying deficiencies in the individual. The task facing Australian schools is to resist the temptation to solve the bullying problem by simply focussing on problem students’ behaviour. Interestingly, in the last year, a number of school communities have taken up the challenge and begun to examine bullying in a broader systemic sense. This has involved reaching out to the broader community and engaging agencies such as welfare, parent organisations and the police and involving them in the development of community based anti-bullying programs (Slee, 1999, unpublished). Such an approach construes bullying as a manifestation of the deleterious effects of broad social issues presently evident in Australian culture and alluded to earlier; for example, gender issues. Schools must confront how these issues impinge on school life, feeding and amplifying bullying problems. Instead of simply reflecting dominant cultural themes played out in behaviour such as bullying, schools must be agents for change. Schools are challenged to carefully examine their ethos and culture in the context of a socially critical curriculum as a means for reducing bullying. Certainly the push for the development of intervention programs is gaining momentum. For example, a recommendation of the Federal Government’s inquiry into violence in schools (Sticks & Stones, 1994) was for the development and evaluation of Australian programs to reduce bullying. One program that has been developed is the ‘P.E.A.C.E. Pack: A program for reducing bullying in our schools’ (Slee, 1997).

### **The P.E.A.C.E. Program**

The program is systemic in nature: the school is understood to comprise various systems and systems within systems; for example, community, home, year level, classroom and peer group to name but a few. From a systemic perspective an identified problem such as bullying or being victimised is not located solely within the individual. Rather people are viewed in terms of their relationships with each other. A student's misconduct at school (for example, bullying) is understood to serve some purpose within the system or reflects something about the system itself. The student's behaviour is like a window through which we can look to better understand the student's place within the system and the system itself. Interventions to reduce bullying can be understood in terms of first and second order change.

### **First-Order Change**

From this perspective a school may identify a bullying student and develop strategies to deal with the student and help the victim. For example, the bully may be involved in a social skills program to learn some conflict resolution skills while the victim may be taught about assertiveness. Changes may also be made in relation to monitoring classroom and schoolyard behaviour.

### **Second-Order Change**

This type of change occurs when the system itself changes. For example, the school may gain some insight through a review of school policy or through a survey of students as to how current procedures maintain and even amplify and encourage bullying. The school in modifying attitudes, perceptions and beliefs may approach a student's bullying from a very different perspective from that involving 'first-order change'. Instead of focussing on changing the 'bad' behaviour of the bully and 'helping' the victim, consideration might be given to roles, relationships, interactions and communication within the system itself which encourage or discourage bullying. When the system itself begins to change or re-align, 'second-order' change has occurred.

In South Australia, evaluation of the P.E.A.C.E. Pack has been conducted over three years with positive outcomes (Slee, 1994; Slee, 1996). The first of these interventions involving two schools (n=450) was successful in:

- reducing the amount of school bullying by 25%
- increasing student safety at school from bullying
- increasing students' awareness of who to talk to about bullying
- increasing students' knowledge of how to stop bullying.

Recently, the initial study has been replicated in three schools (n=511). The findings again confirmed that the interventions were successful in reducing bullying, increasing student's feelings of safety and improving their confidence in dealing with bullying themselves. The program is being used overseas and Japanese evaluations in a middle school program indicate that it is also effective in reducing bullying in that culture (Slee & Taki, 1999).

## **Bullying and The Law**

Many of the findings from the research outlined earlier are illustrated in *Amanda Clack and Secretary, Department of Employment, Education, Training and Youth Affairs* AAT No 13097 [1998] AATA 534 (16 July 1998).

Ms Clack was educated to Year 9 at Mulwaree High School, Goulburn, New South Wales. She was continuously picked on and harassed by boys and this was a painful experience for her. Such harassment was characterised by name-calling, personal insults and on occasions physical attack. On one occasion when she was approximately 14 years old, Ms Clack had been locked in a cupboard by a group of boys. She remained locked in the cupboard for some time until a teacher came back into the room and released her.

Ms Clack would often miss school for three or four days at a time because she did not want to face the harassment of the boys. This harassment was not confined only to school, but also occurred outside the school area. In this regard, Ms Clack felt that she could do nothing to stop the harassment. She felt unable to go anywhere without being harassed or having the fear of being harassed.

At the end of Year 8, Ms Clack decided not to continue at school. The authorities tried to convince her to remain at school and she actually did stay on for a further two months. Ms Clack could not, however, keep up her attendance and left school in Year 9. She subsequently commenced Year 10 work by correspondence.

During this period, Ms Clack saw Ms Walcott, a Clinical Nurse with the Child and Adolescent Mental Health Team at the Goulburn Community Health Centre. While she was at school, she had seen a number of counsellors including Ms Walcott. These health professionals were trying to assist her to establish what her problems were and how to deal with them. Ms Walcott reported that she had had a number of sessions with Ms Clack because Ms Clack had difficulties mixing with her peers, both male and female. Ms Walcott described Ms Clack as having anxiety which caused her sleep disturbance, headaches, poor social networks and the non-attendance at school.

Ms Clack's Half-Yearly Year 8 report in 1991 provides a picture of her non-attendance during the first six months of school. In this regard, the report indicates that Ms Clack had 62 absences during the half year with 58 unexplained absences. The report also records that in every subject it was difficult for the teacher to make an assessment because of her non-attendance.

In 1993, an incident occurred at the Southern Tablelands Education Centre (STEC) when she was 'attacked' by several boys who came up behind her, attacked her, 'harassed' her and were 'rude'. She has never been back to the STEC because of her fear of further attack. The thought of going to the STEC makes her extremely afraid and she becomes 'all shaky'. The three or four boys who attacked her at the STEC were the same boys and their friends who had harassed her at school.

The Tribunal was provided with a report in relation to Ms Clack's current functioning with some assessment of her previous psychological health. In this regard, Ms Hampson, a Clinical Psychologist and Psychotherapist provided a report. At High School, Ms Hampson reports that Ms Clack was:

... severely harassed for being overweight and her education 'got off track' ... Prior to this her academic performance had been good. ... I might add that I have seen several children who are 'casualties' of severe bullying and harassment from other students attending the three secondary schools in Goulburn.

Ms Hampson concluded that Ms Clack had:

low self-esteem, no friends, her family in turmoil, and suffering post-traumatic stress, Amanda's mental state understandably deteriorated, and as she describes it, she 'started thinking silly'.

While Ms Clack succeeded in her administrative appeal, the more interesting question for us is whether she would also have succeeded in a claim against the Department of Education and Training or any other person as a result of the bullying she endured at school. There are various possibilities: actions in negligence or contract, claims under the Trade Practices Act or one of the states' Fair Trading Acts, criminal or civil assault actions, or claims under various federal or state anti-discrimination laws. However, in this paper, we are going to examine the remedy the bullied student has in negligence.

For a student to succeed in obtaining compensation from a school authority for negligence the law requires these elements to be established:

### **1. That a duty of care exists**

Such a duty does exist where the relationship of school teacher and student exists. Ms Clack would have no difficulty showing the existence of the duty. However, it is important to realise that the duty exists at two levels. First, the school authority (whether an independent school or a government education department) is liable for injury to a student caused by the failure of a teacher to take reasonable care for the student's safety. This is a vicarious liability. Second, the school authority is liable where the injury is caused by a failure in the authority's administration of its education system. 'A school authority owes to its pupils a duty to ensure that reasonable care is taken of them whilst they are on school premises during hours when the school is open for attendance'. (*The Commonwealth of Australia v Introvigne* (1981) 150 CLR 258 at 269 per Mason J.)

### **2. That the duty of care has been breached**

The duty of care is breached if a teacher or school authority fails to act as the reasonable person would have acted in their position to eliminate the risk of injury or to prevent the injury from occurring. Breach of duty in negligence depends on whether the way in which the injury occurred was reasonably foreseeable. The decision of the High Court in *Wyang Shire Council v Shirt* ((1980) 146 CLR 40 at pp 44-49) establishes that a risk of injury is foreseeable, so long as it is not far-fetched or fanciful, notwithstanding that it is more probable than not that it will not occur. Is it foreseeable that a bullied child will suffer injury? In our view, it is. The research outlined earlier is available for teachers and school administrators to read. Intervention strategies have been devised and tested and found to be effective in minimising

the incidence and effects of bullying. For a school authority to ignore this research and the warnings implicit in it is to fail to discharge its duty of care.

A good example of the principle involved here is found in *Watson v Haines* ((1987) ATR ¶80-094). In this NSW case, a 15 year old boy suffered a broken neck and consequent quadriplegia in a school football scrum. Experts in the field had warned the Minister for Education of this very risk and yet nothing had been done by the Department. The warnings never reached teachers generally including the boy's teachers who therefore did not know and could not reasonably have been expected to know that it was unsafe to play boys with long necks in the front or second row of the scrum. Therefore, while the teachers were not negligent, the Department was for its failure to ensure that reasonable care was taken for the safety of school children.

A further example of the principle is found in *Birkholz v R. J. Gilbertson Pty Ltd* ((1984) ATR ¶80-538). Mr Birkholz was a supervisor in Gilbertson's abattoirs. It had been known for years that there was a possibility of humans getting infected from brucellosis-infected cattle. Gilbertson should have been aware of this and therefore should have foreseen that Mr Birkholz would be exposed to risk of disease. In fact, Mr Birkholz, in the course of his work, did develop the symptoms caused by brucellosis infection.

As we have shown, there is an emerging body of international and national research indicating that interventions can be made to reduce bullying. Accordingly, we would argue that Ms Clack's teachers either knew or ought to have known that bullying was likely to have a significant effect on her. The Department no doubt also knew of the strategies that the research showed could be instituted to minimise the problem. Ms Clack's experience suggests that nothing was done in this regard at her school. Of course, if the school authority had strategies in place and if its teachers had no knowledge of Ms Clack's situation and could have had no knowledge of it, the school authority would not have been negligent.

In *Walker v Derbyshire County Council* (Nottingham County Court, 13 July 1994 reported in *Childright Bulletin* 108 p 3 and 109 p 6 (reproduced in *Rights Now!* Vol 3 No 4 November 1995 p 7) Becky Walker, a 20 year old law student, sued her local education authority for damages for negligence resulting from the failure of her teacher and school to protect her from bullying by other students. Becky was disabled as a result of cerebral palsy. She was different from other children: her speech was slow and slurred and she walked with a distinctive gait. She was assessed as having special educational needs but was brilliant academically.

Becky was intimidated, mocked and insulted by a small group of students. When she could not get an apology from the school, she began an action for damages. She claimed that she had suffered psychiatric illness as a result of the bullying and that the teacher and school owed her a duty of care and should have foreseen that the bullying might result in psychiatric injury. Her claim failed. The judge held that although the incidents Becky complained of may have been distressing, they did not amount to intense and long-standing intimidation such that a teacher should have anticipated psychiatric damage might occur. He found that Becky had support from a close circle of friends and from parents who could have sought professional help.

Because the judge decided against Becky on the facts, he did not have to decide whether Becky's claim was one for which the law would in principle give compensation. However, there is no reason why, as a matter of law, a student could not recover damages in such circumstances if the school has failed to take reasonable care.

Does the duty of care simply require a level of supervision by the school authority or is more required? This issue arose in *Warren v Haines* ((1987) ATR ¶80-115). The trial judge held that a school, by failing to restrain the school bully, was in breach of its duty to a female student injured by the bully. He found that, as the bully's aggressive conduct occurred regularly in the school quadrangle (which was supervised by teachers), the teachers either knew or ought to have known of the bully's aggressive disposition. Accordingly, the judge said that the bully's conduct 'called for strict disciplinary measures ... together with careful supervision'. (at p. 67,634) On appeal, the judges discussed the issue of the school's responsibility for disciplining and supervising the bully. Glass J.A. argued that if the bully had been detained in the classroom until his behaviour improved then, by the time of the incident, his behaviour would have improved or he would have been detained inside. But Samuels J.A. felt that reasonable care did not entail the use of disciplinary measures which, if pursued, would have prevented the incident and that it was only speculative as to whether lesser measures, such as detaining the bully, would have succeeded in eliminating his anti-social behaviour. One concludes that a school's failure to discipline students who bully others will only give rise to liability if, on the balance of probabilities, disciplinary action would have prevented the injury.

We believe that the research clearly shows that the intervention strategies such as the P.E.A.C.E. Program reduce significantly the amount of bullying and increase students' knowledge of how to stop it. It follows that it is more likely than not that adopting such strategies will reduce or eliminate the risk of injury to students from bullying. We argue that careful supervision by itself is insufficient for school authorities to fulfil their duty of care.

Sexual harassment can be a form of bullying. Just as with non-sexual bullying, students who have suffered physical or emotional damage as a result of being sexually harassed by another student may also be able to sue the school for negligence. In *Davis v Monroe County Board of Education* (U.S., 74 F.3d 1186 [106 EDUC.L.REP.486] 11<sup>th</sup> Cir. 1996), a fifth class girl had been sexually harassed by a fellow fifth class boy for a period of six months. The boy was finally convicted of sexual assault. The girl had reported the boy to her teachers and her mother. However, nothing was done. School officials never removed or disciplined the boy in any manner for his sexual harassment of the girl. In their complaint to the Court, the girl's parents alleged that the boy's unrestrained conduct severely curtailed their daughter's ability to benefit from her primary school education, lessening her capacity to concentrate on her school work and causing her grades to suffer. The harassment also had a debilitating effect on her mental and emotional well-being, at one stage causing her to write a suicide note.

In finding for the girl and her parents, the court made the following points:

- A school is liable where it fails to take appropriate action in response to student-to-student sexual harassment of which it knew.

- A student should have the same protection in school that an employee has in the workplace. ‘The ability to control and influence behaviour exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalises sexual harassment as accepted behaviour’.

The research confirms that school authorities do have the ability, using appropriate strategies, to control and influence behaviour in their schools. Not to do so is as bad as ignoring blatant sexual harassment.

### **3. That the breach has caused the injury**

There are two elements to this. First, there must be some actual damage or injury suffered for which the law will compensate. It is well settled that physical injury will be compensated: for example, the girl who suffered at the hands of the bully in *Warren v Haines*. But will the law compensate for the psychiatric illness which is so often the result of being bullied? As medical and scientific knowledge has progressed, the law has become more aware of psychiatric illness. This increased awareness of the nature of psychiatric illness means that injuries which could not have been reasonably foreseen as a consequence of negligence one hundred years ago are now foreseeable.

In *McLoughlin v O’Brian* ((1983) AC 410 at 14), Lord Wilberforce said:

Although we continue to use the hallowed expression ‘nervous shock’, English law, and common understanding, have moved some distance since recognition was given to this symptom as a basis for liability. Whatever is unknown about the mind-body relationship (and the area of ignorance seems to expand with that of knowledge), it is now accepted by medical science that recognisable and severe physical damage to the human body and system may be caused by the impact, through the senses, of external events on the mind. There may thus be produced what is as identifiable an illness as any that may be caused by direct physical impact. It is safe to say that this, in general terms, is understood by the ordinary man or woman who is hypothesised by the courts in situations where claims for negligence are made.

When deciding whether a person has suffered a psychiatric injury which will be compensated, the courts no longer are concerned as to whether or not a medical witness will categorise the person’s condition as a ‘psychiatric illness’ (*Swan v Williams* (Demolitions) Pty, Ltd. (1987) 9 NSW LR 172). As Brennan J said in *Jaensch v Coffey* (1984) 155 CLR 549 at p 560): ‘Compensation is awarded for the disability from which the plaintiff suffers, not for its conformity with a label of dubious medical acceptability’.

In this area, the Courts rely heavily on psychiatric evidence, particularly in relation to causation. An injured person must establish first that he or she is suffering, not merely grief, distress or any other normal emotion but a positive psychiatric illness (per Lord Bridge in

*McLoughlin v O'Brian*. However, it is certainly possible to receive compensation for psychiatric illness.

The second element is that the injured person must show that the negligence has **caused** the psychiatric illness. In *Mount Isa Mines Ltd v Pusey* ((1970) 125 CLR 383 at 394-395), Windeyer J said:

It is, however, today a known medical fact that severe emotional distress can be the starting point of a lasting disorder of mind or body, some form of psychoneurosis or a psychosomatic illness. For that, ***if it be the result of a tortious act***, damages may be had. ***(Our emphasis)***

There will be a liability for psychiatric illness if it is reasonably foreseeable that a 'normal' person will be affected: *Jaensch v Coffey*. In *Council of the City of Campbelltown v Mackay* ((1989) 15 NSWLR 501), soon after a young couple moved into their newly built home, it began to fall to pieces. The house actually moved. A hole opened up in one wall. Cupboards came away from the wall and doors became stuck. Some rooms were not safe to enter. Finally, the house's demolition was ordered. In due course, the lady gave birth to a stillborn child. The stress of this and of the damage to the house caused her to have a nervous breakdown. The couple's marriage broke down. This was the last straw for the man who also had a nervous breakdown. The NSW Court of Appeal said that damages for the couple's psychiatric injury were recoverable as damages for vexation, worry, distress and inconvenience. McHugh JA (at pp 511-512) said:

The question is whether the consequential damage is the reasonably foreseeable result of the defendant's negligence. Proof that mental illness is the reasonably foreseeable result of negligent damage to property may often be more difficult to establish than proof that it is the reasonably foreseeable result of the negligent infliction of personal injury. But the same principles of causation and remoteness apply whether the cause of action in tort is for damage to property or harm to person.

If the psychological injury complained of does not result from another injury for which the defendant is liable, the person claiming will generally have to prove that the defendant owed him or her a duty of care. Establishing the existence of a relationship of proximity and satisfying the test of reasonable foreseeability does this. As we said earlier, a student easily satisfies the requirement that he or she is owed a duty of care by a school authority.

We believe that a bullied student in many cases may well be able to show each of the above three elements required to obtain compensation from a school authority. In Ms Clack's case on the facts known to us, she would have no difficulty in showing the existence of a duty of care and a breach of that duty. She may have some difficulty proving a sufficient psychiatric illness. Indeed, this is the greatest hurdle for the bullied student who seeks compensation for negligence.

## Summary

In Australia, there is an urgent need for some debate and consideration of the issue of bullying and for a better understanding of the legal implications of bullying. One positive outcome of such discussion would be a better understanding by school authorities of their rights and responsibilities in relation to the issue of school bullying. We would reduce the number of Ms Clacks graduating from our schools.

The sentiment of the mother of the boy, cited at the beginning of this article, clearly summarises the significance of the issue of school bullying:

It was by accident I found a book on bullying in a library identifying the behaviours of some-one experiencing bullying. I saw that my son was being bullied at school.

My son's sense of aloneness and disempowerment was enormous. He hid in the library whenever he could. He experienced bruising, namecalling, belittling, putdowns, property stolen or damaged, but most of all he experienced the lack of acknowledgment of not being included.

I wanted to wrap him up and stop the hurting. I wanted to beat the children who were harassing my son. I was so angry!

I want change. I want to be part of the process in dealing with my son as a victim of bullying. I don't want to be told that a policy is in place and we know best how to handle it. I don't want my silence to be seen as an acceptance of violence.

## Keywords

Bullying; Schools; Legal Implications; Management; Australia.

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