SCHOOL BULLYING – THE LEGAL PERSPECTIVE

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"Bullying: deliberate, repeated, and hostile behaviour by an individual or group that is intended to harm others."

Bullying has long been a feature of human society in all parts of the world. The human impulse to harm, hurt, humiliate or embarrass others will often flourish unless it is checked by the leadership and guidance of stronger and wiser influences. Where bullying remains unchecked, either through negligence, weakness, or unthinking acceptance, the harm which it causes can be immensely destructive and is often long lasting. Schools, as microcosms of society, can either provide a fertile breeding ground for bullying or they can choose to create positive communities which give students strong messages of inclusion and respect. For this to occur, purposeful leadership, role modelling and intervention by adults in the school are essential.

There is a perception that bullying in schools is increasing, that physical bullying and assaults are becoming more violent, and that the potential for harm from verbal bullying has been significantly increased by the availability of the internet and mobile phones. In response to this trend there would appear to be less parental and societal tolerance of perceived "inaction" by schools in response to bullying incidents. Where a school's response to bullying is perceived as inadequate it is now more likely parents will take the matter further, either by approaching the media or by seeking some external review of the school's actions.

This paper does not look at practical strategies for dealing with school bullying, or at research on the prevalence and effects of bullying. There is now ample excellent advice and literature containing practical whole school strategies that schools can adopt to create a safe, inclusive environment.[17] There is also extensive research from many countries demonstrating that school bullying is both pervasive and harmful.[18] It is doubtful that either of these contentions can be seriously disputed any longer.

Instead this paper takes a narrower legal focus and looks at:

1. The school's legal obligations to prevent bullying
2. When and how a school might be found liable for bullying
3. Recent New Zealand investigations and reports on bullying in schools
4. Cyberbullying
5. Approaches to school bullying in other jurisdictions
6. Some final thoughts

[17] *Stop Bullying*! Guidelines for Schools, prepared by Mark Cleary for New Zealand Police. This also contains an extensive list of resources and programmes for schools.

[18] This research has been recently reviewed by the New Zealand Council for Educational Research (NZCER). See Sally Boyd, *Wellbeing@School: Building a safe and caring school climate that deters bullying* – Overview Paper (Updated 26 May 2011) NZCER Wellington New Zealand

School's legal obligations to prevent bullying

Statutory guidelines

National Administrative Guideline (NAG) 5 requires state and integrated schools to provide a "safe physical and emotional environment" for their students.[19] The NAGs are effectively an undertaking by the school Board of Trustees to the Minister to take "all reasonable steps" to ensure that the school is managed in accordance with the NAGs.[20]

Schools must therefore "take all reasonable steps" to provide "a safe physical and emotional environment". The crucial question here is what constitutes "all reasonable steps" to prevent harm resulting from bullying in a school situation.

Ministry of Education advice to Boards of Trustees is that "to fulfil National Administration Guidelines No. 5 boards are required to develop policies and procedures that ensure a safe learning environment for all students."

It is unlikely that "all reasonable steps" is limited to only having written policy and procedures in relation to bullying. Commentary here and case law overseas (discussed further below) suggests that it is necessary to have policies and procedures and to be actively implementing them. Where harm has occurred to a student the school's response to complaints of bullying will be interrogated in considerable detail in the light of the school's policies and whether those policies were appropriate and up to date. The Court will also take into account whether the school is implementing whole school programmes to pro-actively deal with bullying.

Health and Safety in Employment Act 1992 (HSEA)

All school boards in New Zealand whether state, integrated or private have duties as employers to take all practicable steps to ensure that no "action or inaction of any employee" while at work harms any other person.[21] In a school setting students automatically come within the category of "any other person". Harm includes both physical and mental harm.

All employers, including school boards must take "all practicable steps" to ensure that no hazard that is or arises in the workplace harms people in the vicinity of the workplace.[22] A "hazard" includes "a situation where a person's behaviour may be an actual or potential cause or source of harm."[23] Steps only need to be taken in respect of circumstances that the employer knows or ought reasonably to know about.

It is possible that a school which knew of bullying between students and allowed it to continue without taking all practicable steps to deal with it could face prosecution under the HSEA. Currently there is employment case law under the HSEA relating to bullying in the workplace[24] but there have been no prosecutions against any employer for allowing bullying to occur in the workplace and no prosecutions under the HSEA where bullying

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19 Section 60A Education Act 1989
20 Section 63 Education Act 1989
21 HSEA s 15
22 HSEA s 16
23 HSEA s 2
24 *Edmonds v Attorney-General* [1998] 1 ERNZ 1 (EmpC) and *O'Brien v Renton Chainsaws and Mowers Ltd* ERA Christchurch CA21/03, 27 February 2003. *Harbord v Waste Management Ltd* ERA Wellington WA30/05, 23 February 2005

has caused harm to students in a school. While the legislation would appear to allow for this to occur, in practice it requires either the Police or the Department of Labour (DOL) to exercise discretion to investigate and prosecute the school board. Where those authorities decline to do so a parent can still take a private prosecution against the school board under the HSEA, but this is difficult and expensive. One scenario where the Police or DOL might investigate and prosecute would be where the bullying resulted in serious injury or death.

Common law duty of care

Schools also owe a common law duty of care towards their students as well as having duties to the Minister under the statutory guidelines. The common law duty is to ensure that their students do not meet with foreseeable harm. A failure to act where the situation requires a school to do so will amount to a breach of that duty. Where the breach is that of an individual such as a teacher or principal, the school board will be vicariously liable for the individual employee's actions.

The Court will consider:

1. The nature and extent of the duty of care in the particular circumstance;
2. Whether the school was in breach of the duty (whether the school took all reasonable steps to prevent harm to the student);
3. Whether the harm suffered by the student was a result of the breach of duty;
4. Whether the particular harm caused was foreseeable;
5. Whether the harm was remote from the breach; and
6. Whether there was any contributory negligence.

We will consider how these would apply in a bullying situation in more detail below.

Human Rights Act 1993

A Board of Trustees could be found liable to a student under the Human Rights Act 1993 (HRA) if student bullying amounted to a breach of one of the grounds of discrimination in the HRA. An example could be ongoing bullying based on the race, ethnicity or sexuality of a student which the school was aware of but ignored or failed to deal with. Under section 68 of the HRA employers, including school boards, can be found liable for the acts or omissions of their employees which amount to discrimination. However, the school will not be found liable if it took "reasonably practicable" steps to avoid the act or omission by the teacher. The HRA specifically covers racial or sexual harassment in the area of education.

Fiduciary duty

It can be argued that the nature of a teacher's or school's obligations towards a student amount to a fiduciary duty. A fiduciary duty describes the duty that exists when a vulnerable party places very great trust in a more powerful party to act in the vulnerable person's best interests. It is often used to describe the doctor-patient relationship or lawyer-client relationship but can apply to quite a wide range of situations. It is possible

to sue for a breach of fiduciary duty but this cause of action may not add anything in terms of liability for bullying.

Teachers Council Code of Ethics

The New Zealand Teachers Council Code of Ethics places an ethical obligation on registered teachers to "promote the physical, emotional, social, intellectual and spiritual wellbeing of learners". The Code is aspirational and is a very useful starting point for teachers in discussions around all issues of student safety. However, it is most likely to be used in professional disciplinary situations and is unlikely to be the "first port of call" when a parent or student is unhappy with the way the school is dealing with bullying.

When and how a school might be found liable for student bullying

Civil liability – breach of the duty of care

In most common law jurisdictions (ie most countries with similar legal systems to New Zealand) it is possible to seek compensation from either the bully or the school for the harm suffered as a result of school bullying. Usually the student bully will have no money and in New Zealand parents are not liable for the harm or damage caused by their children unless the parents are in some way linked to or responsible for the wrongful act.[25] It is normally the school authority which is sued for a breach of a duty of care. Until recently overseas cases have had limited success, however this appears to be changing.

To date no school in New Zealand has been sued for breach of a duty of care to prevent harm as a result of bullying. In addition, the ability to sue for damages for physical harm is very limited in New Zealand because of the Accident Compensation legislation (ACC). This is discussed further below.

If a case were to be filed against a school board in New Zealand, the Court would look at the existing statutory obligations of schools when deciding what a reasonable standard of care was. It would also consider case law from other similar jurisdictions such as the UK and Australia. However, the Court is not bound by those decisions. In deciding whether there had been a breach of the duty of care it would consider the following matters.

Whether there is a duty of care

Based on the statutory guidelines it is likely that a New Zealand Court would find that the school had a duty to take "all reasonable steps" to provide a safe physical and emotional environment and/or to protect the student from foreseeable harm.[26]

As a comparison, it is well established in Australia that a school owes a duty of care towards its students.[27] This duty extends to protecting the student from the conduct of

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[25] This is not the case in the US where a number of states hold parents financially responsible to a greater or lesser degree for the damage or harm caused by their children.

[26] There have been recent cases where a Court found that a school/boarding school/orphanage did not have duty of care to promote a child's emotional well-being (*A v Roman Catholic Archdiocese of Wellington* [2008] NZCA 49; [2008] 3 NZLR 289 (CA). However, to the extent that it is relevant the case can probably be distinguished because the applicable legislation and social and educational standards of the time (early 1970s) were substantially different for those which now apply.

[27] *Commonwealth v Introvigne* (1982) 150CLR 258

other students. The duty covers not only physical injuries but also recognisable psychiatric illness.[28]

The standard of care

The duty of care of a school to a student in common law jurisdictions such as New Zealand has traditionally been "to take such care of the children in the school's charge as a careful parent would take of their own child."[29] However, more recently it has been held that the applicable duty is what is known as the *Bolam*[30] test - a duty to exercise the skill and care of a reasonable teacher on the basis of what would be acceptable to reasonable members of the profession at that time. For example, a teacher looking after 30 students may not be able to act in the same way as a parent looking after one child. The traditional description of the duty of care has been criticised as unrealistic for a principal in charge of a large number of students and in a time of teachers having tertiary qualifications.[31] In the UK and Australia the duty is expressed as being the care that would be exercised by a reasonable teacher or school. In deciding what "the reasonable teacher or principal" would do to prevent the bullying the Court would normally defer to a "responsible body of expert opinion."[32]

The scope or extent of the duty

Does the duty of care extend beyond the school gate or out of school hours? In the UK and Australia the existence of the duty depends upon whether in the particular circumstances "the relationship of schoolmaster and pupil was or was not then in existence".[33] In Australia the courts have said:

> The test therefore does not depend upon whether the student is on school premises or whether any accident occurs during school hours... In *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman*, a 12-year-old school boy injured in an incident involving older students successfully sued his school for breach of duty despite the incident occurring 20 minutes after the end of the school day and 400

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28 Campbell, Marilyn A., Butler, Desmond A., & Kift, Sally M. (2008) A school's duty to provide a safe learning environment: Does this include cyberbullying? *Australia and New Zealand Journal of Law and Education, 13*(2), pp. 21-32. http://eprints.qut.edu.au/14913/1/c14913.pdf

29 *Williams v Eady* (1893) 1- TLR 41: "...The schoolmaster was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a school master."
Richards v Victoria [1969] VicRp 16: "The reason underlying the imposition of the duty would appear to be the need of the child of immature age for protection against the conduct of others, or indeed of himself, which may cause him injury coupled with the fact that, during school hours, the child is beyond the control and protection of his parents and is placed under the control of the school master who is in a position to exercise authority over him and afford him, in the exercise of reasonable care, protection from injury."
Geyer v Downs 1977 HCA 64: "The duty which a schoolmaster owes to his pupil arises from the relationship between them and its temporal ambit will be determined by the circumstances of the relationship on the particular occasion in question. Children stand in need of care and supervision and this their parents cannot effectively provide when their children are attending school; instead it is those then in charge of them, their teachers, who must provide it."
The High Court of Australia has more recently confirmed that the duty of care arises as a result of the special relationship between teacher and student. Gleeson CJ stated in *New South Wales v Lepore* : "The legal responsibilities of [a school] include a duty to take reasonable care for the safety of pupils. ... The relationship between school authority and pupil is one of the exceptional relationships which give rise to a duty in one party to take reasonable care to protect the other from the wrongful behaviour of third parties even if such behaviour is criminal. Breach of that duty, and consequent harm, will result in liability for damages for negligence.

30 [1957] 1 WLR 582

31 *Geyer v Downs* (above)

32 Campbell, Marilyn A., Butler, Desmond A., & Kift, Sally M. (2008) A school's duty to provide a safe learning environment: Does this include cyberbullying? *Australia and New Zealand Journal of Law and Education, 13*(2), pp 21-32

33 *Geyer v Downs* see above fn 24

> metres from school grounds. Shellar JA went so far as to say that, depending on the circumstances, the duty could extend to pupils bullied on the journey on the bus or while they were walking to or from school.[34]

In the UK the courts have tended to take a more restrictive approach and to limit school responsibility for incidents that occur outside school time or off school property to a small number of cases that are likely to be "few and far between". In the UK in 2002 the Court of Appeal in *Bradford- Smart v West Sussex County Council*[35] found that a school was not responsible for bullying which occurred between school pupils in the neighbourhood where the victim lived, but which did not occur on school premises and which did not appear to affect the victim's educational performance. The form teacher had taken her pastoral care responsibilities seriously, and had protected the student on school grounds by letting her stay in the classroom during interval and lunchtimes. The UK Court of Appeal upheld a lower court finding that the school had the *discretion*, but not a duty, to be pro-active outside the school gates. The Court agreed with previous judgments that had held that a school did have powers to discipline a pupil who had attacked another pupil outside the school gate (for example). It commented further that there might be circumstances in which a failure to exercise those powers would be a breach of the school's duty of care to another pupil:

> "The question is whether it was a breach of this school's duty of care towards Leah to fail to take any action against the pupils she said were bullying her outside school. ... Like any parent, the school will often be faced, in this or in any other context, with the problem of balancing one child's interests with another's. There will also be difficult questions of judgment as to how far the school should seek to step in where the parents or other agencies such as the police and social services have not done so. Above all, an ineffective intervention may in fact make matters much worse for the victim because she cannot be protected while she is out of school. It cannot be a breach of duty to fail to take steps which are unlikely to do much good. All of these considerations are also subject to the *Bolam* principle: if a reasonable body of professional opinion would not take such steps, then this school is not liable for failing to do so.
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> Hence, although we accept that a school may on occasions be in breach of duty for failing to take such steps as are within its power to combat harmful behaviour of one pupil towards another even when they are outside school, those occasions will be few and far between. ... The experts did agree that where an incident between pupils outside school carried over into school a reasonable head teacher should investigate if it had a deleterious effect upon the victim. In this case there were no adverse effects upon Leah's educational performance and development clearly attributable to what was going on...."[36]

Was there a breach of the duty – what are "all reasonable steps"?

A recent Australian case which considered the issue of whether a school had taken all reasonable steps to prevent bullying is *Oyston v St Patrick's College* [2011] NSWSC 269 (13 April 2011).[37] The Supreme Court of New South Wales had no difficulty in finding that the school owed a duty of care and that in the particular circumstances of that case the school was liable for damages because psychiatric harm had been caused to the student as a result of bullying experienced while at the school. The risk that bullying

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[34] Campbell et al see fn 28 above

[35] *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 7 (23 January 2002) paras 35-36. http://www.bailii.org/ew/cases/EWCA/Civ/2002/7.html

[36] *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 7 (23 January 2002) paras 35-36. http://www.bailii.org/ew/cases/EWCA/Civ/2002/7.html

[37] The full report of this judgment can be downloaded from: www.austlii.edu.au/au/cases/nsw/NSWSC/2011/269.html

might result in psychiatric harm was foreseeable. The question was whether the steps taken were adequate to ensure the school's duty was met.[38]

Ms Oyston suffered relentless bullying while a student at the College from 2002 to 2005. At the same time there were also stressful family problems at home. She suffered panic attacks and anxiety and there were a number of incidents of self-harm, hospital admissions, and visits to psychologists and psychiatrists. She and her parents raised the issue with the College on a number of occasions, but while she was given counselling and advice about what to do to handle the bullying, very little was done to stop it.

The College claimed that she was not the subject of such bullying, or if she was, the College could not have been expected to know about it. At the very least, they claimed, there was contributory negligence by Ms Oyston.

The school was criticised for the following:

1. The school's policies were appropriate and adequate but significant aspects of the published policies were not in practical operation.
2. The year co-ordinator who had responsibility for dealing with complaints of bullying was aware of the particular group of students who were doing the bullying, but the steps she took in response to Ms Oyston's complaints were neither consistent with the College's policies "nor adequate to ensure that she was protected from this ongoing misbehaviour".[39] The focus of the school was on what Ms Oyston should do to solve her problems and not on the behaviour of the bullies.
3. The school had supported the bullies at the expense of not protecting the victim:

   > "At the College at the time that Ms Oyston was a student, the evidence suggests that there was an overemphasis on supporting certain students, while they continued to engage in misbehaviour, in order to help overcome that conduct. The policy at one point emphasised ensuring that the bullies themselves were not bullied. Unquestionably the College faced a difficult task. Nevertheless I am satisfied that it did not achieve the right balance as far as Ms Oyston was concerned."[40]

4. Not keeping adequate records of its response to complaints:

   > "...It became apparent that no clear record was maintained as to the course followed when complaints were received, what conclusions were drawn from any investigation conducted and, importantly, what was done by way of response." [41]

5. Not monitoring whether Ms Oyston was continuing to be bullied.
6. The expert witnesses for each party disagreed over the interpretation of the evidence, but were agreed as to what should happen if any complaints about bullying arose:[42]
   a. The complaints should have been investigated;
   b. If shown to be true then any or all of the following actions may have followed:
      i. Conflict resolution procedures such as restorative conferences or peer mediation arranged;
      ii. Counselling for the plaintiff and for the perpetrators by the relevant pastoral care personnel;
      iii. Arrangement of suitable peer support for the plaintiff;

[38] Ibid para 15
[39] Ibid para 32
[40] Ibid para 34
[41] Ibid para 36
[42] Ibid para 42

iv. Parental notification to carers of all parties;
v. Counselling sessions by trained counsellors, remembering that participation in counselling is voluntary;
vi. If appropriate, punishment sanctions should have been imposed, such as the detention system and restorative questionnaires evidently in use. This could have included short suspension, but only in the case of repeated harassment of the plaintiff and only as a last resort.
vii. Follow up monitoring of both the plaintiff and alleged perpetrators.

c. Appropriate records should have been maintained on the student files of all concerned.
d. Consideration should have been given to cohort or school assemblies to address personal relationships.

The Court held that:

> Counselling a victim to withstand the bullying...without also acting to ensure that the bullying ceases, will put a school at obvious risk of failing in its duty of care to the victim.
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> Insisting that bullying cease, and taking steps which ensure that happens if the conduct does not cease voluntarily, cannot, in my view be viewed as wrongly "bullying the bully", but rather as exercising an undoubted right to insist that conduct which bullying policies provides students are not to engage in, must cease.[43]

The Court considered that the College had spent more time and energy enforcing its uniform policy than it did its anti-bullying policy.

Was the harm foreseeable?

In *Oyston* the Court said that it was: the College had ample knowledge that bullying was occurring; staff had had training and knew that psychological harm could occur in such a situation; the school knew that she was being seriously affected and was receiving treatment for her mental state; and, it had sufficient information to require it to intervene and stop the behaviour. The steps taken were not adequate to eliminate the foreseeable risk of injury that had arisen. The College failed to implement its own policies.

Causation – was harm suffered a result of the breach of duty

The Court must decide whether harm was suffered as a result of the breach of duty. In the case of mental/emotional/psychological harm, the harm suffered must be a "recognisable psychiatric condition" such as depression, anxiety, agoraphobia, obsessive compulsive behaviour and so on.

In *Oyston* the Court held that Ms Oyston's injuries (being the psychiatric illness) were the result of the bullying. This was so even though the family environment was also stressful and dysfunctional and may have partly contributed to her problems:

> The experts were of a common view as to Ms Oyston's vulnerability to psychological injury and that what she suffered was contributed to by her experiences at home and her parents inability to effectively deal with the ongoing bullying to which she was subjected to at school. The College's failure to bring the misbehaviour of other

[43] Ibid para 57-58

> students to an end was the other major contributing factor, in my assessment of the evidence, the significant cause of that injury.[44]

An earlier New South Wales decision in 2007[45] looked at a situation where an 18 year old boy was suffering from an ongoing psychiatric condition allegedly as a result of being bullied as a six year old by a boy several years older. On at least two occasions this included relatively serious physical assaults including beating and choking incidents. The plaintiff's mother reported the bullying to school authorities on numerous occasions and was told the bully had ADHD. The boy suffered from severe anxiety with symptoms such as bed wetting and stuttering. His mother withdrew him from school on various occasions. Further complaints to the school were met with promises of action but there was no evidence that any of those actions occurred. Complaints to the Department of Education were met with the response that bullying was "character building". Once the boy transferred to a new school his condition improved but he relapsed again in later years. The Court found that the school's responses to the complaints were "dismally inadequate". This case also involved a situation where the plaintiff's ongoing psychiatric condition was likely to have been influenced by other factors; in this case his mother's own psychiatric difficulties. The defence argued that this, rather than the bullying, was enough to cause Mr Cox's problems. However, the Court found the bullying was a "major precipitating factor" or a "substantial contributing factor" and the school authority was found liable.

In both the above cases the Court was prepared to find the school liable for psychiatric harm caused by bullying even though there were other possible contributing factors.

Contributory negligence

Under this heading, once liability is found, the Court considers whether the victim contributed in some way to their own problem. In other words the victim may be blamed for partly causing the harm that befell them. The questions are what would the "reasonable child" have done in the circumstances and what precautions would such a child have taken for his or her own safety.

It has been suggested that precautions might include reporting the bullying to the relevant authority and perhaps seeking professional assistance to address psychiatric symptoms. However, when dealing with children and young people it is doubtful that such a high standard of reasonableness and objectivity would be required. The Court would also have to consider the effects of peer pressure and the belief (often the result of experience) that the bullying may intensify if there is complaint or may subside if nothing is done.[46]

In general it will be difficult for a school to argue that a student is at fault for not avoiding the harm. In any event the victim is often a vulnerable child in the first place. In Oyston the Court had no hesitation in deciding that Ms Oyston had not failed to take reasonable care for her own safety. She had complained on a number of occasions and had eventually given up hope that it would ever make any difference. The Court did not accept the College's argument that the complainant should have complained more persistently.

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[44] Ibid para 320 to 321

[45] *Cox v State of New South Wales* [2007] NSWSC 471 http://www.autlii.edu.au/au/cases/nsw/NSWSC/2007/471.html

[46] Campbell et al. see fn 28 above

Comment on *Oyston*

There seems to have been a thread of reasoning throughout the judgment that because what the school and the teacher did was ineffective to stop the bullying, the logical conclusion was that they had not done enough to meet the school's duty of care. It is saying that to meet the duty of care the school must do whatever is necessary and in its power to stop the bullying.

In the *Oyston* case, the plaintiff was awarded just over $100,000 for general damages for suffering and specific damages. The specific damages covered loss of past earnings and future earning capacity as a result of the psychiatric illness as well as payment for past and future treatment costs. In Australia such awards are not made against the school board (except in the case of private schools), but rather against the State Government which is the relevant school authority. Such an award if made against a school board in New Zealand would significantly impact on the school's financial position.

Could a similar case occur in New Zealand? The effect of the Accident Compensation Legislation (ACC)

In New Zealand a complainant who sues a school for damages arising from school bullying must first consider:

1. Whether the harm is a physical injury or a mental injury resulting from physical injury; or
2. Whether the harm is purely mental/psychological?

In the first situation Accident Compensation legislation in New Zealand (ACC) covers all physical injuries and also mental harm arising from physical injuries. This means that medical care, and perhaps the cost of counselling for the injury will be covered under ACC, but no other damages will be paid and the victim is barred from suing for compensation in the courts.

However, although a complainant cannot sue for general damages and costs incurred as a result of the harm, ACC legislation does not prevent a victim suing for *exemplary damages* in personal injury cases. These are damages designed to punish the offender. They are not intended to compensate for the injury. Awards are only made for truly outrageous conduct which cannot be punished in any other way. There have been no such cases arising from school bullying and exemplary damages in other cases have been difficult to obtain.

However, where the harm is purely mental or psychological and amounts to a recognised psychiatric condition it is not covered by ACC. This means that there is legally nothing to prevent a case such as the *Oyston* case being taken in New Zealand.

Other avenues of redress

It is difficult and expensive to use the legal system to get protection for students. Litigation is a clumsy tool and a court's findings and judgments, although useful as a guide to schools, usually come far too late to have any useful effect in preventing the suffering of the individual complainant.

In addition to the possibility of suing for breach of duty of care, or taking a prosecution for breach of the Health and Safety in Employment Act, there are other less costly avenues open to parents whose children may have suffered or be suffering harm as a result of bullying.

The Human Rights Tribunal

There have not been any cases against schools related to student bullying in the Human Rights Review Tribunal in New Zealand. However, it would be possible for a claim to be taken in the right circumstances. The Tribunal can order compensatory awards and make other orders for actions to be taken by a defendant. However, in general the focus of the Commission' work is educative and mediation will almost always be the first line of response.

An example of a human rights case that was successful was in Canada. In the case of *Board of School Trustees of School District No 44 (North Vancouver) v Jubran*[47] Azmi Jubran, was repeatedly subject to insults and harassment of a homophobic nature during the five years he spent in high school even though he did not identify himself as homosexual and his harassers did not actually believe he was homosexual. Before he graduated he complained to the British Columbia Human Rights Commission. The Human Rights Tribunal concluded that Mr Jubran was discriminated against on the basis of sexual orientation, and found that it was irrelevant whether or not he was actually homosexual or his harassers believed that he was homosexual. The Tribunal found that Mr Jubran was subjected to a course of conduct that constituted harassment on a prohibited ground of discrimination. The school board was responsible because it had failed to provide an educational environment free from discriminatory harassment. The decision was upheld in the British Columbia Court of Appeal.

The Ombudsman

Parents who believe their bullying complaint has not been dealt with properly can complain to the Ombudsman. This does not require a lawyer, and compared to civil litigation is a free or at least much cheaper option.

The Ombudsman's findings are advisory only, and his/her decisions are not binding against the defendant. Nevertheless the Ombudsman's findings are not lightly ignored. Bear in mind that although cheaper, the Ombudsman may not necessarily be any faster than the courts.

Children's Commissioner Act 2003

The Children's Commissioner has a statutory responsibility to:

- be an independent advocate for children and young people in New Zealand
- investigate any matters affecting children and young people (unless the matter is before the Court).

The Office of the Children's Commissioner (OCC) has received an increasing number of complaints from parents over the last few years as awareness of its existence increases.

[47] 2005 BCCA 201 http://www.canlii.org/en/bc/bcca/doc/2005/2005bcca201/2005bcca201.html

Where complaints cannot be resolved satisfactorily with the school, the Commissioner may write to the school.

Recent New Zealand investigations and reports on bullying in schools

As a result of the particular obstacles posed by the ACC legislation and the general undesirability, stress and expense of civil litigation, New Zealand parents have turned to the Human Rights Tribunal, the Commissioner for Children and the Ombudsman. In the last four years each of these entities has published reports addressing the issue of school bullying.

The reports do not have the status of legal judgments and are not binding on the Court. They are nonetheless likely to be used in argument and might be taken into consideration by the Court. Recent reports are all strongly worded. They are possibly an indication of a shift in public opinion and a declining tolerance of a perceived school focus on counselling the bully versus protecting the victim.

Ombudsman's Report 2011[48]

The Ombudsman investigated complaints related to a series of violent incidents that occurred at a Wellington high school in December 2007. The incidents attracted considerable media attention. The complaints were prompted by the school's refusal to retract a public statement made about it having handled the incidents "reasonably and responsibly". The Ombudsman's report addresses one of the key inquiries of this paper, ie what is a "reasonable" response to a complaint of bullying. The report is important reading for all school boards and teachers.

In December 2007 there were a number of incidents of assaults on male pupils by a group of other pupils. These involved orchestrated violent sexual assaults using a variety of sharp objects described by students as "bum rapes". These were initially investigated by the acting principal and six boys were given stand downs, three for five days and three for three days. Following complaints from a parent, the Police commenced a criminal investigation.

In January 2008 there were media reports where the Board chair was quoted as describing the assaults as "minor" which was why they had not been referred to the Board for disciplinary action. The acting principal was reported as saying that he had no regrets about how he had handled the assaults and that "it wasn't an assault where somebody had spilt blood". The school subsequently issued its own press release explaining the measures it had taken to promote a safe environment at the school and met with parents of some of the victims. The boys who had been stood-down in December returned to the school on a staggered basis and steps were taken to monitor them.

Meanwhile other agencies became involved. A team from the Ministry went to the school to help it prepare for the reopening of the school in February. When the school did reopen the Education Review Office (ERO) conducted a week long on-site review leading to a special report on safety at the school.

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[48] Report of David McGee, Ombudsman, on complaints arising out of bullying at Hutt Valley High School in December 2007. Presented to the House of Representatives 2011 http://www.ombudsmen.parliament.nz/index.php?CID=100011&AID=100039#RP

However, a group of parents remained dissatisfied with the way the school and other authorities had handled the incidents and their aftermath. They complained to the Ombudsman.

Complaints against the school

Altogether 11 specific complaints were made against the school of which the following were upheld:

1. The Board of Trustees did not have in place recommended Child Abuse guidelines.
2. The school may have inaccurately stated in its Board Assurance Statement to ERO in June 2006 that it had reviewed its procedures on Child Abuse (preventing and reporting), given that it did not have in place the recommended Child Abuse guidelines.
3. The school did not immediately inform parents of the victims about the assaults, and in most cases never informed them.
4. The then acting principal miscalculated the level of abuse suffered by victims when he determined the disciplinary steps to be taken against the offenders.
5. The Board's decisions on communications to parents put its concerns about the financial implications of bad publicity on international student enrolments, and other less important matters, ahead of the harm done to victims. The Board did so by making statements that minimised the seriousness of what happened and saying the school had acted "reasonably and responsibly" in the handling of the incidents.

The Ombudsman found that:

> ...the serious assaults that occurred in late 2007 at the school were not one off incidents. They were part of a systemic problem of violence which, although recognised by the school, was not being addressed satisfactorily. Serious incidents of bullying were not being fully investigated or punished appropriately. The school's discipline policies were not being applied consistently, resulting in systemic under punishment of violent incidents. Anti-social children were being retained within the school system, without a viable wider strategy for addressing the resulting safety issues. Teachers were not performing scheduled duty, some for fear of their own safety.
>
> The school had not adopted the recommended Child Abuse policies, meaning that situations amounting to child abuse were not being reported to Police or Child, Youth and Family, and the needs of victims were not being met.
>
> The school was not alone in its knowledge of the situation. Violence at the school had come to the attention of the Ministry of Education, through the Eliminating Violence survey, and the Education Review Office in the course of its 2006 review. ... [49]

The Ombudsman also reminded schools of their obligations under s 77(b) of the Education Act 1989. This requires the school to take all reasonable steps to ensure that a student's parents are told of matters that in the principal's opinion are:

1. Preventing or slowing the student's progress through school; or
2. Harming the student's relationships with teachers or other students.

[49] Ibid page 3

Another important comment related to an issue often raised by schools: the Ministry "requirement" to only use suspension or exclusion as a last resort. The Ombudsman's said:

> I accept that the use of suspension as a tool of last resort accords with advice from the MOE ... This is consistent with the desirability of maximising educational opportunities for all pupils, including those with behavioural difficulties. However, when the anti-social behaviour involves violence towards other pupils, the overriding consideration must be ensuring the safety of those other students. ...

The Ombudsman recommended that:

1. NAG 5 should make it mandatory for all schools to implement an anti-bullying programme.
2. The Ministry should give schools specific guidelines as to what level of punishment is appropriate for various behaviours. Lack of appropriate sanctions can contribute to and risk normalising a culture of violence.
3. Principals and Boards of Trustees should be required to consider the views of victims when making decisions on discipline, when the infringement at issue is bullying or violence.

The Human Rights Commission Report 2008

The same incident also resulted in a report from the Human Rights Commission (HRC).[50] The human rights analysis and findings of the HRC were similar to those of the Ombudsman but with a particular focus on the balancing of the rights of different groups of students in a bullying situation. In addition to the obligations of schools to ensure student safety that we have already discussed in this paper, the HRC also referred to the United Nations Convention on the Rights of the Child to which New Zealand is a signatory. These rights include the child's right to:

- Protection from physical, emotional and sexual harassment or abuse from peers or others while in the school's environment (art 19);
- Be treated with respect and dignity by other people (arts 2, 29 and 40);
- Be disciplined in ways which are positive (arts 3, 28, 37 and 40);
- Express their views, have a say in matters which affect them, present their side of the story and be treated fairly (arts 2, 12-14, and 40);
- Have matters of privacy protected (art 16);
- Be protected from discrimination of any sort (art 2).

Balancing rights

Both the bullied and the bully have a right to an education. If the victim is too anxious to go to school, or is regularly fearful while at school, his or her right to an education is jeopardised. If the bully is suspended or expelled, their right to an education is jeopardised.

[50] Human Rights Commission: *School violence, bullying and abuse,* A human rights analysis

In balancing the rights of these two groups the HRC made strong statements to the effect that "prioritising the rights of those most vulnerable is central to a human rights approach. The needs of the students who have been bullied, abused or violently assaulted have to be the starting point for a school's response."[51] It considered it a defect of the current Ministry guidelines that while there are mandatory requirements to report to the Ministry when a student is stood down, suspended or expelled, there is no equivalent requirement to report on steps taken to keep the victim safe where bullying is involved. "As a result, Boards of Trustees may infer that keeping students in school is the most pressing issue, rather than ensuring the safety of victims."[52]

Right of the victim to be heard

The HRC also considered that Boards of Trustees needed to be aware that the principles of natural justice apply to all those affected by its decisions, not just those being disciplined. Victims have the right to be heard and further consideration is required about ways to ensure this right is realised within New Zealand's legal and policy framework. The HRC argued that this also encompasses the parents' right to be informed, and to state their views, when a principal decides not to take disciplinary action against a student who has bullied, abused or attacked their child.[53]

Right not to be discriminated against on the basis of age

The HRC argued that the principles of non-discrimination which underpin the Act would logically require that bullying between students at school is treated at least as seriously as incidents involving adults or that occur outside the school environment. There may be even greater need for these protections when children are required to attend school and therefore cannot easily remove themselves from an unsafe environment. "A child who is bullied, abused or assaulted has rights, regardless of the age of the perpetrator or where the incident occurs. Any failure to treat bullying abuse and violence seriously because it occurs between students, within schools, is a violation of a child's human rights." [54]

The Office of the Children's Commissioner (OCC)

The OCC also brought out a comprehensive report on school safety in New Zealand in 2009[55] and a further summary report in 2010.[56] Amongst many useful findings and guidelines the writer, Dr Carroll-Lind, points out that bullying, violence and abuse are separate acts requiring different definitions, policies and procedures. Different responses are required in each situation. Often incidents that draw the most public attention are one-off violent assaults which may be not fit the definition of bullying because they are not part of an ongoing pattern of behaviour. The approach for dealing with such incidents may be different from the approach for dealing with bullying.

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51 Ibid para 59
52 Ibid para 29
53 Ibid para 32
54 Ibid para 56
55 Carroll-Lind, Dr Janis, *School safety: An inquiry into the safety of students at school*, Office of the Children's Commissioner, February 2009
56 Carroll-Lind, Dr Janis, *Responsive Schools*, Office of the Children's Commissioner, March 2010

Ministry of Education action plans and further guidelines

In discussions with the Ministry it would appear that not all the above recommendations have been taken up. In particular the proposal to have guidelines about levels of punishment appropriate for various behaviours is seen as undesirable in an educational situation where children may be at very different ages and developmental stages. The circumstances of each incident of violence or bullying can be very different and schools have to have the flexibility to assess all the circumstances and make appropriate judgments.

Advice and support

The Ministry advised that, in collaboration with the wider education sector, is currently implementing the following initiatives to support positive learning through the Positive Behaviour for Learning (PB4L) Action Plan.

- **School-Wide** is an ongoing framework that supports schools to create a culture where positive behaviour and learning thrive. The School-Wide framework is consistently applied across both classroom and non-classroom settings (such as playground, corridors, buses and toilets). Expectations of each other within the school are clearly defined and taught.
- **Incredible Years** is a suite of programmes that helps reduce challenging behaviours in children and increases their social and self-control skills. Programmes are currently being offered to both the parents and teachers of three-eight year old children whose behaviour is difficult to manage.
- **Well-being at Schools toolkit**: The Ministry of Education and New Zealand Police are funding the development of an online survey that will be made available to all schools on 7 May 2012. The survey will enable schools to use information provided by students and teachers to understand the safety of the school environment and to then respond to any issues that may be identified.
- **Behaviour Crisis Response Service** is intended for students in years 1 to 10 whose behaviour creates an immediate crisis for the school. It is designed to help stabilise the situation, ensure the safety of students and staff and put in place a safety plan around the student.
- **Restorative Practice:** The current evidence for Restorative Practice is being documented to inform its development as an effective behaviour intervention. Once completed, a restorative practice model for implementation in secondary and intermediate schools, under the PB4L umbrella, will be developed together with systems for on-going monitoring and evaluation.

Legislative expectations and requirements for schools

The Ministry advised that is also looking at re-focussing and strengthening the way government sets expectations and requirements for schools. As part of this work it will be reviewing the effectiveness of the NAGs. This will probably see the introduction of more specific guidance around NAG 5. As part of that the Ministry is currently developing Core Governance Knowledge Base material around NAG 5 specifically for Boards of Trustees. The aim is to give Boards of Trustees the knowledge and tools to ask the right questions of school leaders about health and safety. It will also guide principals in the

management of health and safety issues with effective support from their Boards of Trustees

These materials are likely to include references to the need for principals and boards to take the views of the victim and his or her ongoing safety into account.

Cyberbullying

Cyberbullying has been defined as "the use of information and communication technologies to support deliberate, repeated, and hostile behaviour by an individual or group that is intended to harm others."[57]

It has been suggested that cyberbullying potentially has more serious consequences than face to face bullying because of the way in which the technology increases the power of the bully and the sense of helplessness of the victim. Some examples of this are given by Campbell et al[58] and include:

- the potential to include a wider audience;
- the more enduring nature of the written word;
- the ability to reach the target at any time and in any place;
- significant breaches of privacy through the use of photos;
- bullies cannot see their victim, which reduces the possibility of empathy;
- the intensity and length of the attacks may be greater than if they were face to face;
- bullies believe their anonymity protects them; and
- inadequacy of changing schools as a remedy because of the far-reaching nature of cyberbullying.

An interesting comparison has been made between the behaviour of children in cyberspace and the behaviour of children on the island in William Golding's (1954) *Lord of the Flies*.[59] The common feature is the absence of adult imposed rules and controls;

> Cyberspace has become a real locale without rules and without civilization ... [Children] often have the technological capacity and skill to run electronic circles around their elders; but, [they] lack the internal psychological and sociological controls to moderate their behavior. Maintaining civilization and civil behavior is difficult enough in organized society, even where the rule of law is supposed to prevail, and where order and authority exists to protect innocent citizens. But what happens...when the rules and the authority are removed? This is the dilemma that schools confront as they attempt to navigate the legal and moral challenges around responding to cyberbullying, and ultimately, develop in student's appropriate moral compasses for an electronic age."

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57 Bill Belsey *Always on? Always aware!* <www.cyberbullying.org >

58 See fn 28 above

59 Shareef Shaheen, Hoff Diane L *Cyberbullying: Clarifying Legal Boundaries for School Supervision in Cyberspace* International Journal of Cyber Criminology, Vol 1 Issue 1 January 2007, http://www.cybercrimejournal.com/shaheenhoff.pdf

Can a school be liable for harm caused to a student by cyberbullying?

Here the Court will ask the same questions as it would ask if the bullying were not on the internet or by cell phone. The main difficulty will be deciding where and when the bullying occurred, and whether the school had control of that situation in some way that meant they had a duty of care.

While the duty of care normally covers the school grounds during school hours, we have seen that there may be circumstances where the school is still in some way regarded as having some sort of supervisory role. For example, the duty of care could extended to the situation where the bullying occurs on websites and blogs hosted on a school server, whether accessed in or out of school hours and on or off the school site.[60] This is because the school has control of the server and grants access to students under conditions of use which may be an indication that the relationship of teacher and student is in existence. It may also extend to bullying occurring via social networking pages where those pages are accessed from school computers. This is based on the likelihood that there will be rules relating to the use of the computers which evidence the existence of the relationship of pupil and teacher from which the duty of care may be said to arise.

However, it is likely that cyberbullying which occurs when the school is not in control of either the medium or the students will be considered the responsibility of the parents and, if necessary, the police.

Who should tackle cyberbullying?

There is a considerable body of material on the internet from many countries about the challenges of cyberbullying. It is clear that, in all jurisdictions, governments, the courts, society and schools are struggling to cope with the pervasive reach of this technology and the ease with which victims can now be harassed and publicly humiliated. News media have devoted many column inches to the phenomenon which has been blamed for student suicides in these countries.

Because schools have daily contact with students they may be in a better position than police to challenge and influence the harmful behaviours of the bully. On the other hand the school's actual powers to control some forms of cyberbullying may be limited. In particular, where the cyberbullying is not linked to the school in some way the police may have to be involved. In certain circumstances the nature of the bullying can be classed as a criminal act such as harassment, stalking, intimidation, indecent conduct or assault (where assault includes threats of harm) and the perpetrator may be charged.

Recently, in some jurisdictions (NSW, Victoria, and some states of the USA), legislation has been passed to specifically include some types of school bullying within the relevant Crimes Act. The scope and effect of this type of legislation varies widely, but if there is a perception that it is now necessary this may be confirmation of the increasing level of concern about cyberbullying as well as bullying in general. On the other hand concern has been expressed about the idea of prosecuting and criminalising students for behaviours to which they may have given little thought and of which they may not have anticipated the consequences.

[60] Campbell et al see fn 28 above

The response to school bullying in other juridictions

In Australia the *Cox* (2007) and *Oyston* (2011) decisions in New South Wales are two examples of a spate of school bullying cases against school authorities. A 2010 article in the Melbourne Age[61] reported that school bullying victims in Victoria had received almost $1 million in compensation from the Department of Education in the previous two years. One student who was harassed over 10 years won $500,000 in a court settlement and another $290,000 in an out of court settlement. Most awards were in the thousands or tens of thousands. The claims included both physical and severe psychological injuries. It remains to be seen if we are witnessing an "opening of the floodgates" and whether decisions against the school authorities will be appealed to the High Court of Australia.

In the UK it has historically been very difficult to win cases of negligence against schools for bullying incidents. Where plaintiffs have succeeded awards have been around £1500. Courts have taken a conservative line in limiting the scope and extent of school's responsibility. The government has intervened to some extent and, as a result of the UK Education and Inspections Act 2006, schools now have statutory power to discipline children and impose sanctions for breaches of school rules. They also now have statutory power to impose discipline beyond the school site, for example for bad behaviour on the journey to and from school. All of these powers are subject to reasonableness provisions, so it is doubtful that the legal arguments would be substantially different as a result of the Act.

In the US in the last few years around 45 states have passed laws dealing with bullying in schools. Schools are now required to report annually to state authorities on bullying, and to develop policies and guidelines and appropriate codes of conduct. In the Courts, the threshold for establishing breach of duty of care by schools has been high even for physical injuries. Courts have been reluctant to find that schools may have breached a duty of care to protect students. There are laws in many states giving government entities, including school authorities, immunity from suit. Therefore cases of bullying are often framed as claims for breach of the student's constitutional or due process rights. These are rights such as the right to be free from unwanted intrusions on personal security, breach of the right to free appropriate public education (FAPE) or breach of sexual or racial harassment laws. In these also the bar tends to be set high. Despite this, cases continue to be filed and the number of cases in Canada has also risen noticeably in the last two years.

Some final thoughts

Managing perceptions

The social and legal pendulum appears to be swinging away from prioritising the rights of the bully or assailant to an education over the rights of the victim to be safe at school. Parents' expectations now are that a school will use its authority to ensure student safety.

Thus, in addition to restorative justice processes, wherever harm has been caused to a victim, parents and the community have the expectation that there will be consequences for the bullies and a priority placed on the safety of the victim. It is the perceived absence of these two features which is currently the focus of community concern. The challenge

[61] http://www.dailytelegraph.com.au/news/school-bully-victims-paid-1m/story-e6freuy9-1225973555354

for school management and boards dealing with bullying and incidents of violence is to fairly balance the rights of the different parties and to manage the perceptions the school community. The question that has to be asked is:

- What message will students/staff/parents take from our management of this incident/problem? Will their perception be that nothing, or nothing very much, has been done? If so, then there is potential for dissatisfaction and lack of confidence in school management.

If the perception is likely to be negative but the actions taken by the school cannot be discussed or divulged for privacy reasons, the Board should consider other ways of conveying the school's position to the community. This may involve discussing this issue with the participants and getting their agreement as to what public statements can be made.

Community perception that a school is not dealing with bullying, inflamed sometimes by media attention, has been one of the main drivers for Ministry intervention in some schools.

Are legal solutions the answer to school bullying?

The view has been expressed in other jurisdictions that schools and school boards will not start taking bullying seriously until it becomes *their* problem (because they have to pay out as a result of a civil lawsuit) rather than the victim's problem.[62] Overseas, liability is usually sheeted home not to the individual school but to the district board or state authority. In New Zealand, where liability stops with the individual school board, the cost to an individual school of a finding of liability could be very significant.

Some see a successful law suit against a school as necessary to motivate real change in schools. The thinking is that parents and taxpayers will put pressure on the school to be more pro-active so that the school does not risk losing valuable funds in court payouts. Others have pointed out the risk, particularly in a small community, that if a school's finances were seriously depleted as result of a civil suit the family of the victim might then become the target of community resentment.

It would be undesirable if parental lawsuits were to become a regular feature of the New Zealand education scene. Courts will no doubt be wary of encouraging this and, given the costs and time involved in litigation, such lawsuits are unlikely to occur very often.

In the view of those who work in this field, we need to take a broader view of our responsibilities as educators than merely a "how do we comply with the law" approach. The school's role should not just be to ensure minimum standards of student safety. Its more important role should be to develop our young people into members of society who are each capable of reflecting on and restraining their own behaviours. Schools have many things to teach students but in a crowded world, and in an era where the internet is the main spiritual and social influence for many, how students are guided to manage their relationships with others must be high on our list of priorities.

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[62] McKinlay J, Konopasky R, Konipasky A, Mackay A and Barrett T, *Education's perfect storm: outmoded or no bullying policies, grievous bodily harm to victims, and justifiable civil litigation*, Conference Paper Canadian Association for the Practical Study of Law in Education http://www.londonabc.ca/CAPSLE-Perfect-Storm-2011-05-02.pdf

A school where the leadership focuses on this aspiration and pursues it with compassion and conviction, is a more desirable place than a school which has had to be coerced by the courts or ERO into creating a standard set of policies and procedures and which only reacts when serious incidents arise. Community tolerance for schools which are lagging in this area is clearly declining.