

CYBER BULLYING IN AUSTRALIAN SCHOOLS

The question of negligence and liability

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Bullying in schools is not a new phenomenon. The fact that children tend to ‘muck around’ and make fun of each other has meant that, historically, bullying has been viewed as a *fait accompli*, or something of a rite of passage for children and has not always been taken seriously by schools and adults.¹ However, as awareness of the risks and potential injuries has heightened, bullying has been recognised as ‘a serious, and insidious, form of violence that plagues the school system.’² Cyber bullying, though, is relatively new. Any ‘communication activity using cyber technology’³ that can be considered harmful, victimising, hostile or otherwise damaging to an individual or group of people, it can take many forms including harassment, threats, sexting, stalking, impersonation, predation, or any intimidating behaviour conducted using cyber technology.⁴

The rates of bullying, in all its forms, in Australian schools are among the highest in the world, affecting half of all students.⁵ Research has found that 15 per cent of school students said they had experienced cyber bullying.⁶ While cyber bullying appears then to be less common than traditional bullying,⁷ it is undoubtedly on the rise and may be even higher than we think. Indeed, non-disclosure is common among victims of cyber bullying, with up to 90 per cent of victims claiming not to tell an adult of their experience, often due to a fear of reprisal or uncertainty about the identity of their attackers.⁸ The ultimate tragic outcome may be suicide: Alleem Halkic, a seventeen-year-old from Melbourne, took his own life in 2009 after experiencing months of relentless cyber bullying at the hands of a former friend.⁹

As awareness of the increased prevalence, risks and potential injuries of cyber bullying has heightened, the question of schools’ potential for negligence,¹⁰ which we examine here, is (sadly) very timely. Victims of cyber bullying could seek common law damages in negligence from the school if the following four elements are established:

1. The school authority had a duty of care to the student;¹¹
2. The acts or omissions of the school authority did not meet the standard of care expected of a reasonable person in the circumstances, ie that there was a breach of the duty of care;
3. The student suffered a reasonably foreseeable damage; and
4. The damage was caused by the breach of duty.

In the absence of any judicial examination of these four elements in a cyber bullying context or finding on schools’ liability, there have been calls, including from Alastair Nicholson, former Chief Justice of the Family Court of Australia, for schools to be held responsible for cyber bullying, regardless of whether it occurs during school hours.¹² So should schools be liable though if the bullying takes place outside of school grounds or school time? In this article, we overview the existing common law in relation to the liability of schools for non-cyber bullying, extract the principles, apply them to cyber bullying and identify the contexts in which it is likely that schools will be deemed to be negligent. Indeed, we think the appropriate question is not whether a school authority owes a duty of care to students to prevent cyber bullying, but rather what is the extent of that duty?

Schools’ duty of care

Establishing the existence of a duty of care in relation to cyber bullying is the first step in establishing negligence. A general duty of care, at least in theory, might arise when a school authority accepts a student at one of its schools.¹³ In the case of a state or territory school authority, the duty arises through the government establishing a compulsory system of education, whereas in the case of a private school authority, the duty is founded in the contract between the student’s parents and the school.¹⁴ However, while this duty of care to protect students is not controversial, the question of where that duty begins and ends is an open one and hence the extent to which schools have a duty to protect against cyber bullying is uncertain.¹⁵

Schools have a direct duty of care to their students, irrespective of the acts or omission of their employees.¹⁶ It has been suggested that schools bear such responsibility because, while students are in the care of teachers, they are beyond the care and protection of their parents. This creates a relationship of dependency with the teacher¹⁷ who is in ‘a position to exercise authority over [the student] and afford him, in the exercise of reasonable care, protection from injury’, both ‘from the conduct of other pupils or strangers and from the pupil’s own conduct.’¹⁸ The duty owed is therefore ‘more stringent than a duty to take reasonable care; it is a duty to ensure that reasonable care is taken.’¹⁹ Of particular potential relevance to cyber bullying, protection must be afforded from not only physical injury, but also from a ‘recognised psychiatric illness.’²⁰

It seems apparent that the scope of the duty of care owed by schools in relation to cyber bullying is not clearly defined by the existing case law on bullying. It is likely that the duty of care will encompass cyber bullying that occurs on school grounds and

during school hours. What is not clear-cut, however, is the extent of the duty at other times.

By definition, cyber bullying is often not confined to the school premises as advances in technology allow victims to be targeted from anywhere, at any time, in front of a wider audience and outside of the normal parameters of school supervision and responsibility.²¹ Also the boundary between in school and out may not be clear with one Canadian study finding that 65 per cent of victims reported that the cyber bullying started at school and was then continued after school hours.²² What if the cyber bullying occurs, for instance, from a school hosted email address, website or computer? Should schools also be expected to intervene when their students engage in cyber bullying off school grounds, outside school hours and from home computers or mobile phones?²³ What if a student uses their own personal device to bully a fellow student while either (or both) are at school?

The answer may be that a school's duty of care in respect of cyber bullying is likely to depend on 'whether in the particular circumstances the relationship of school teacher and pupil was or was not then in existence.'²⁴ That 'relationship' and its accompanying duty of care have been extended to after school hours and outside school premises by Australian courts, in contrast to the United Kingdom.²⁵ For instance, the NSW Court of Appeal held, in a case where the physical bullying of a 12-year-old took place at a bus stop 400 metres from the school grounds, that the school authority was negligent given its knowledge that students routinely used the bus stop, which was located near a high school, and ought to have known of the mischief that was likely when children of different ages and from different schools mixed without adequate supervision.²⁶

Similarly, a Queensland school was held liable to a student who was injured cycling from the school to a school-sporting event.²⁷ The school had directed students to make their own way to the event, and had specified that cycling was an acceptable way to do so. The Queensland Supreme Court held that the school failed to supervise the student during her travel between school activities.

It can therefore be reasonably surmised that a school authority may owe a duty of care to students outside school hours and off school premises, as long as the circumstances give rise to the relationship between teacher and student.²⁸ The next question to consider is, what circumstances might give rise such a relationship and thus, a duty to prevent cyber bullying? It is no stretch of the imagination to suggest that a school might be held liable for cyber bullying that occurs on school grounds, within school hours, or using school owned technology. There seems little doubt that the requisite relationship between school and student would exist in those circumstances. In the authors' view, other circumstances that may give rise to the duty included when a school authority has knowledge of cyber bullying between students, and when a school authority regulates student conduct in regard to cyber bullying.²⁹

Breach of schools' duty of care

Assuming a plaintiff is able to establish the existence of a duty of care, the next step is to show that the duty has been breached. The standard of care owed by schools to their students is generally that of an ordinary and reasonable teacher rather than a good and careful parent.³⁰ Legislation now reflects the common law position that consideration of this standard involves two questions. Was the risk of injury reasonably foreseeable in the circumstances? And, if so, what (if any) precautions would a reasonable person such as a teacher or principal have taken to avoid or minimise that risk in the circumstances.³¹

In assessing the reasonableness of a response, a number of Australian jurisdictions have legislated that the Court is to defer to a 'responsible body' of expert opinion 'unless no reasonable court would do so.'³² Accordingly, the accepted practice among the teaching profession will be a relevant factor in determining the standard of care that may be expected from a reasonable teacher or school in relation to cyber bullying. The standard of care owed by schools has been qualified by certain conditions. For example, while a school has a duty to guard against behaviour that presents a serious risk to the physical safety of students, the duty will not be extended to protection from normal student behaviour.³³ Furthermore, constant supervision of students is not required and could in fact 'be damaging to teacher-pupil relationships.'³⁴

The degree of supervision owed by schools will likely involve a practical consideration of facts and circumstances of a particular case. In a 'real space' bullying case (*Gregory v State of New South Wales* [2009] NSWSC 559) the victim was awarded almost \$470 000. He had routinely been called 'sterile,' 'faggot,' 'paedophile' and 'Nazi' by his peers and prevented from entering the Year 12 common room or sitting on the Year 12 lawn. The court accepted that the teachers did nothing to deal with the victim's complaints, and did not intervene to protect him from being socially ostracised and were therefore in breach of the duty owed.

The facts and circumstances of cyber bullying will of course be a bit different. As an example, many schools are now providing a technological learning environment; the new Harrison School in Gungahlin provides an 'iPad ready playground' for its students, with wireless internet covering the school grounds.³⁵ If one student bullies another at recess or lunch using the school-owned server, it is possible the school will be held responsible for that cyber bullying given its need to supervise and protect — its duty of care. This idea was reflected by the Queensland Education Department's director for the Toowoomba region who said that Queensland state school principals had the power to discipline students if they were found to be using technology inappropriately 'both at school and outside of school hours.'³⁶ This followed an ultimatum that was issued to students under 13 by Harlaxton State School in Toowoomba in early 2012, to either delete their Facebook accounts, or face expulsion.

Resulting in reasonably foreseeable damage

Although cyber bullying often occurs outside school hours and off school premises, a school authority could be held liable for failing to prevent such conduct if they have knowledge of its occurrence and therefore the damage was reasonably foreseeable

and preventable by the school. This has been the reasoning in findings for the plaintiffs in a number of bullying matters such as *Cox v State of New South Wales* (2007) 71 NSWLR 225 in which the student's mother had repeatedly gone to the school and in *Warren v Haines* (1986) Aust Torts Reports 80–014 which involved a repeat offender.

There is bullying case law too, which indicates that if a school authority was aware of specific dangers to its students, the duty of care requires the school to take preventative steps.³⁷ However, not all seemingly preventative steps will be sufficient to avoid liability. For instance, in 2011, a Sydney school was ordered to pay \$300 000 in damages to a former student when the NSW Supreme Court found that the school had policies in place to protect against bullying, but it failed to adequately implement them.³⁸ The plaintiff alleged the school's policies and practices in relation to bullying failed to protect her from a recognised and foreseeable risk of harm when she was subjected to years of relentless bullying. The school relied on its 'Student Conduct Policies and Procedures' and 'Personal Protection and Respect Policy', which were printed in the annual school diary given to each pupil. The Court found that steps needed to be taken to ensure that policies were understood and implemented by staff and students.³⁹

However, we must emphasise that, if they do not report, victims of cyber bullying can be difficult to identify as they do not manifest the physical evidence of their 'traditional' bullying victim counterparts.⁴⁰ And, if a school authority is not aware of the occurrence of cyber bullying, it is difficult to see how this duty of care could be extended to hold a school responsible for failing to detect and prevent the abuse merely because one or more parties to the cyber bullying are students at the same school. Accordingly, in one English case the student was bullied and abused for three years. She had not disclosed either to her parents or the school; the latter did not have knowledge and was held not to have breached its duty of care.⁴¹ In addition, the 2011 NSW Supreme Court decision in *Oyston* is currently being appealed by the school, which is arguing that it ought not be liable because Ms Oyston did not report the bullying to the school.

Causation

The test for establishing causation has been enshrined in most Australian jurisdictions.⁴² In the ACT for example, it must be established that the defendant's negligence was a necessary condition of the harm that occurred, and that it is appropriate for the scope of the defendant's liability to extend to the harm so caused.⁴³ A defendant cannot be held liable for loss or damage that does not flow from their actions. Consequently, the plaintiff must establish a connection between the breach of duty of care and the damage.⁴⁴ This can be problematic, as it is recognised that different people have different degrees of tolerance for psychological stressors.⁴⁵

A court may also consider the 'but for' test in establishing causation, namely whether the damage would have occurred but for the defendant's negligence.⁴⁶ The UK case of *Bradford-Smart* [2002] EWCA Civ 7 suggests that a possible difficulty cyber bullying victims may face in seeking to establish causation, is distinguishing the cause of any psychological or psychosomatic injuries from other potential causes unrelated to the cyber bullying, such as a genetic predisposition to depression.⁴⁷

There are four principles that can limit the situations in which compensation is recoverable for purely psychiatric injury:⁴⁸

- Psychiatric harm is less objectively observable than physical injury and is therefore more likely to be trivial or fabricated and is more captive to shifting medical theories and conflicting expert evidence;
- Litigation in respect of purely psychiatric harm is likely to operate as an unconscious disincentive to rehabilitation;
- Permitting full recovery for purely psychiatric harm risks indeterminate liability; and
- Liability for purely psychiatric harm may impose an unreasonable or disproportionate burden on defendants.

To be held to have suffered damage in the absence of a physical injury, the plaintiff must establish the existence of a recognised psychiatric illness.⁴⁹ This includes, for example, depression and anxiety.⁵⁰ However, a defendant cannot be held responsible for upset caused to an overly sensitive plaintiff.⁵¹ Therefore, 'fright, distress or embarrassment, without more, will not ground an action in negligence'⁵² and one of the main effects of cyber bullying — low self-esteem⁵³ — would be a problematic 'damage.'

Since cyber bullying usually results in purely psychiatric injuries, and given that the common law in Australia (and the various statutory schemes in the states and territories) draws a distinction between psychiatric injury and physical injury, we expect that the likelihood of such high damages, as in *Cox*, is low.⁵⁴ However, cyber bullying can arguably inflict greater damage to victims than traditional bullying.⁵⁵ Verbal abuse has been found to possibly have longer lasting psychological damage than physical violence.⁵⁶ Additionally, written abuse may have more negative impacts than verbal.⁵⁷

Conclusion: Recommendations for schools

It does seem likely a school could be held responsible in circumstances where the bullying occurs on school grounds, during school hours or using school owned technology. A school might also be responsible if cyber bullying occurs after school but in connection with a school-related activity. It is also possible that schools may be responsible if they have knowledge of the cyber bullying, or if they regulate student conduct, including through student conduct or anti bullying policies, in such a way that they are subjecting students to its control but are inadequately implementing or monitoring anti-bullying policy regulations. They could be liable too if they have no policy as it is within their duty of care to protect students.

We strongly recommend that schools therefore should be proactive and take on increasing responsibilities to protect students from cyber bullying. This is a worthy goal in itself but also pragmatically minimises schools' risk of liability in any negligence action. Authorities at the moment can be helped by the Commonwealth government, which announced in the middle of last year \$4 million in funding to develop online resources to assist parents, teachers and students deal with bullying in schools.⁵⁸ The funding will

be used to expand the website <www.bullyingnoway.gov.au>, which although targeted at bullying in general, does also encompass cyber bullying.⁵⁹ The website currently contains resources for teachers, specific to students in different age brackets. The parents' section of the website includes tips to help identify whether their child is a victim, witness or perpetrator of bullying, where to go for support or further information, and provides resources for parents to learn more. The student section provides some facts about bullying, information for victims, witnesses and perpetrators, where to go for help, and other ways to assist in the fight against bullying. The effectiveness of this website is yet to be seen. It is definitely a good start, and commonsense suggests that a good way to combat cyber bullying is by using cyber technology.

Another recommendation for discharging their duty of care to students is for Australian schools to adopt Cyber Safety Use Agreements as implemented by South Australian government schools. Until the parent/s return a signed 'Use Agreement Form,' students are not permitted to use the school information and communications technology ('ICT') equipment. Parents and students must agree that the students will, inter alia, 'use the Internet, e-mail, mobile phones or any ICT equipment only for positive purposes, not to ... bully, harass, or in any way harm anyone else...' and will report any instances of cyber bullying, suspected or otherwise to the school.⁶⁰

Further, by signing the agreement, the school authority provides an undertaking to parents that 'material sent and received using the network may be monitored, and ... software may be used to restrict access to certain sites and data, including e-mail.' The school also agrees to advise parents of any breach of the agreement on the part of the student.

These agreements could be an effective way of increasing the likelihood of positive and responsible use of technology and thereby reducing cyber bullying among students. Further, given that the role of the school is clearly defined, the scope of the potential liability of schools for any cyber bullying that takes place despite the agreements could be limited: win-win.

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