Tackling the Bullies:
In the Classroom and in the Staffroom

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Introduction

This article is about bullying in general terms, behaviour that may usefully be defined as 'repeated intimidation over time of a physical, verbal or psychological nature of a less powerful person by a more powerful person or a group of persons'.[1]

It is not about sexual harassment or harassment based on discrimination (ethnicity, gender, sexual orientation, disability or the like), although the bullying *continuum* encompasses both forms of harassment. As subjects in their own right, these more specific forms of harassment are worthy of separate treatment, and are beyond the scope of this article.

Bullying is a complex, harmful, and insidious phenomenon. It pervades all levels of society and is not confined within national or jurisdictional boundaries. It affects schools everywhere, regardless of size, gender or talent pool, social or cultural background, whether in rural or urban settings. This article considers the legal obligations of schools to protect both students and staff from bullying, and their potential liability for failing to do so. It focuses on the New Zealand legal context, although other jurisdictions are referred to from time to time. The article includes several reported examples of bullying behaviour to provide a context. It also highlights some of the main points from the literature on bullying, about the nature and extent of the problem, and identifies some prevention and management strategies.

Depending on the age of the perpetrator, and the seriousness of the offending, the police may be involved and criminal charges laid. This article does not specifically deal with criminal liability for bullying, other than in terms of prosecution under Health and Safety legislation.

Bullies In The Classroom

It is well known that school bullies exist, and cause problems. They have been around for ever. They are the familiar villains of rollicking schooldays yarns, from Harry Flashman in *Tom Brown's School Days* to Draco Malfoy in *Harry Potter*. In real life, however, bullying can have devastating, long-term consequences for both the victim and the bully, as well as for their families, friends and the community at large.

The Taradale Broomstick Case

The potentially profound consequences of bullying were recently brought home to New Zealand with chilling effect. In October 2001, seven seventh form students at Taradale High School in Hawke's Bay sexually violated a fellow student with a broomstick, although as the Judge in the

case noted, the incident had nothing to do with sex. The incident was described by most commentators, and in the press, as an extreme case of bullying, which by its very nature was also a ghastly criminal offence. The incident occurred away from the school at a private party. This meant that the school was not implicated in terms of liability, although there were reports in the press that subsequently the parents of the victim laid a formal complaint with the school about the way the school had handled matters after the incident and about previous alleged bullying incidents at the school[2]. The case is a stark reminder that bullying of any kind cannot be condoned.

In sentencing one of the boys who pleaded guilty to the criminal charges, the Judge described events that occurred earlier in the evening, including *'what is colloquially said to be giving him [the victim] a hard time*[3]*'*. In the Judge's view:

> It really amounted pretty much to verbal bullying. At some stage during the evening you and some others assaulted this boy by man handling him into the bathroom and shaving off one of his eyebrows. This was thought by a number of persons present to be a great joke but of course not to the victim. No charge arises out of that event but it is part of the overall narrative of a developing seriousness of bullying and violent behaviour.*[4]*.

After describing the attack with the broomstick, the Judge observed that one of the boys had told the victim, after the assault, that the same thing had happened to him in the past, that it was painful, but that he would get over it.

> He said it was a rugby prank. That may well have been part of the motivating thought but it was no prank. Nor was it as some suggest a prank gone wrong. It was the commission of a cowardly crime involving serious violence and degrading, humiliating violation of a young man. Let me make it quite clear that if young men, through what is euphemistically known as peer pressure, but is really group thuggery, believe or regard such acts as acceptable behaviour within the culture of sporting social activities, or other orientation or initiation ceremonies, then the time has come for all to be disabused of that idea. It is not within the scope of civilised behaviour in a civilised community for young men to believe that such is permissible. If they adopt such attitudes, if such exist in the community, then it is a disgrace and they will cease because of the sanctions that must be imposed in order to deter others.[5]

The perpetrators who included the school's most senior student leaders were all sentenced to imprisonment, with sentences ranging from two, to two and a half, years each. Ironically, the victim had enrolled at the school at the beginning of 2001, after leaving a previous school as a result of vicious bullying and studying by correspondence for several years.

An article published in *The Dominion* newspaper on 25 April 2002 quoted extracts from a speech by the victim of the broomstick attack in a senior school speech competition earlier that year:

> I have … had to cope with an issue that is, unfortunately, quite strong in this world … bullying. For years I have been stereotyped as a typical 'nerd'. The way a nerd is often stereotyped is as follows: tall, skinny, wears glasses, reads a lot, has a quest for knowledge and is not very sports oriented. Unfortunately I seem to fit into most of the above categories and hence I was known as the local nerd or geek for many of my schooling years. I used to hate going to school on some days as the teasing got worse and worse …
>
> Suicide was a frequent thought. The thought of ending it all was quite frequent after being badly bullied by my peers but I didn't carry it out for the thought of hurting my family. The feeling of being worthless and not fitting in often for stupid reasons like not playing rugby or my being tidy and well dressed was quite strong. The constant bullying and abuse got too much and I left the college in June 1987.[6]

Although the Taradale broomstick case was an extreme example of group violence, it provided a timely wake-up call about bullying generally. New Zealand's Commissioner of Children, Roger McClay was quoted in one press report: '*I think it will perhaps make people more aware of what can happen if things aren't dealt with when they should be. Here was the so-called cream of the school who got caught up in what was a gang mentality. That's woken a lot of people up'*.[7]

Whatever its manifestation, (kicking, punching, spitting, sabotaging projects, taking personal possessions, ripping clothes, stealing lunch money or extorting pocket money, name-calling, insulting, excluding from groups) bullying is physically harmful, socially isolating and psychologically damaging. The research indicates that the effects of sustained bullying can result in inevitable psychiatric injury (for example, post traumatic stress disorder). Consequences for the school community may include poor attendance records, damage to school property, discipline problems, reduced teaching and learning time, increases in student/staff stress, sickness, student/staff transfers, staff resignations, and legal action.

Worrying Statistics

New Zealand

As a consequence of the Taradale broomstick case, and the wide media coverage generated, there have been renewed calls to address the problem of bullying in schools in New Zealand. A news report in *The Dominion*, dated 6 May 2002[8], revealed that about 5000 children, aged 5-18, had called a national youth line ('*What's Up*'), since it was introduced in September 2001, seeking counselling on bullying issues. Bullied children as young as 5 years old were among the callers. The report indicated that out of more than 73,000 calls answered, 38% of complaints were about bullying in the 5-12 age bracket. 30% of those callers reported frequent harassment. The executive director of the Kids Help Foundation Trust which operates the youth line indicated that bullying was a significant contributor to anxiety, lowered self-esteem and decreased learning opportunities in young people. '*If it is not addressed in a timely and sensitive manner, bullying can lead to*

depression and thoughts of self-harm. We need to keep reminding the community that this is a serious issue that has serious downstream consequences'. He pointed out that bullies also need to be dealt with carefully. Reacting with anger or punishment was self-defeating.[9]

A major study of bullying reported in *The New Zealand Herald* on 25 January 2002[10] indicated that of the 821 students, aged 15 and 16 from 107 schools, who took part in a three year research study at Otago's Children's Issues Centre, half said that they had been bullied while a third admitted that they had bullied others. 9% of students surveyed said that they were bullied once a week or more. This compared with two European studies in 1990 and 1989 which showed that 18% of students in Britain and 5% in Norway said they were bullied regularly. The study found that name calling was the most common type of bullying mentioned, followed by passing rumours, excluding individuals from groups, and physical and racist bullying.

Britain

Bullying is a problem that affects all schools everywhere at some point. In the United Kingdom when the trustees of Bullying On Line[11] compiled their statistics for the first two years of the charity's operation (April 1999-March 2001) they discovered that they had received over 6,000 emails in that time many from parents and children desperate for help. Some of the children were or had been suicidal. 40% of emails complained of violence involving assaults and 59% of psychological bullying like teasing, name calling and ostracising. 64% of parents who had contacted Bullying On Line for help reported that they had already complained to the school, 11% had contacted their Local Education Authority, and 1.4% had thought it worthwhile complaining to the Department for Education. 6% indicated that they had contacted the Police with varying degrees of success given that sometimes the bullies were too young to be dealt with.[12]

Bullycide

In April 2000, 8 months after it became a legal requirement for British schools to adopt an anti-bullying policy, the teachers' union, ATL (Association of Teachers and Lecturers), published a survey revealing that a third of all school children in Britain are bullied each year. A quarter have been threatened with violence and 13% have been physically attacked.[13] Even more horrific is the statistic that at least 16 children commit 'bullycide' in the United Kingdom every year[14]. 'Bullycide' is a word coined by Neil Marr and Tim Field, the authors of '*Bullycide: Death at playtime, an expose of child suicide caused by bullying*'[15], to describe when children choose suicide rather than face another day of relentless bullying. The book contains interviews with bereaved families, survivors and people who have overcome the trauma of bullying at school. It makes grim reading.

Long Term Effects

The authors include statistics[16] from two other child protection agencies in Britain that are equally frightening. Kidscape is a nationwide child protection charity founded in Britain in 1984. Kidscape's '*Long Term Effects of Bullying*' study, published in *Bully Free* in 1999, involved the participation of over 1000 adults who had been bullied during their school days. The survey indicated that bullying affects not only a person's self esteem as an adult but also their ability to make friends, succeed in education, in work and in social relationships. 46% of the bullied victims

involved in the survey had contemplated suicide, 20% attempted suicide, some more than once. In comparison, a mere 0.07% of non bullied respondents had contemplated suicide and 0.03% had attempted it. For the majority, bullying started between the ages of 7 and 13, peaking at ages 11 or 12. On average, the bullying went on for between 2 and 6 years with several respondents being bullied throughout their entire school career.

Increase In Violence By Girls

Among males 61% were bullied by children of the same sex, 34% by both sexes and only a small number by members of the opposite sex. 75% were physically bullied, 85% were verbally bullied, 30% were excluded or ostracised, and many suffered from all three forms of intimidation. 62% of female respondents were physically bullied, 93% were bullied verbally and 60% were excluded or ostracised. What emerged from the survey was the increase in violence by girls, that appears to have occurred over the past five to 15 years. Severe physical attacks, stabbings, being kicked in the head, stoned, slapped, having bones broken and other injuries requiring hospitalisation occurred to girls in the last 5 to 15 years, whereas previously hair pulling and being tripped over or pushed were the most common forms of physical attack. However, verbal bullying by girls seems to be the most common form of girl-on-girl intimidation, and boys are still more likely to be violently or physically bullied, than girls.

Responses By Adults

ChildLine is a phone counselling service for children in distress. It was set up 15 years ago. Over a 10 year period, ChildLine counselled more than 60,000 children with bullying problems. They also set up a special experimental bullying line for a 7 month period. 77% of children who called the line, who had told teachers or staff, were phoning because the bullying was still going on. The responses they had received from adults included: 31% telling had resulted in no action; 13% were advised to ignore it; 6% were not believed; 3% were told *there is no bullying here*; 39% reported action being taken and 8% that the bullies had been excluded from the school. The ChildLine report *'Why Me'* concluded that *'promoting a culture of decency within a school seems to be the bedrock on which real success depends. The role of the head teacher in this process appears to be pivotal'*.[17]

New Forms Of Bullying

One in four children in the United Kingdom are now said to be victims of on line bullying. A survey commissioned by the United Kingdom charity NCH, reported in The Scottish Daily Record on 4 July 2002[18], indicated that children are being bullied via their mobile phone or PC. 16% of young people surveyed indicated that they had received bullying or threatening text messages. This is followed by 7% who had been harassed in Internet chat rooms, and 4% via e-mail. When asked who they had reported the bullying to, 29% of those surveyed said that they had told no-one. Of the 69% who did tell someone, 42% turned to a friend and 32% turned to a parent. A major concern was that children as young as 11 were being faced with taunts or threats from an often anonymous source.

Australia

Closer to home, in their article *'Bullying is a Serious Issue – It is a Crime.!'*[19] the authors (Slee, Ford) draw broad conclusions regarding bullying based on data drawn from over 25,500 Australian students across more than 60 Catholic, independent and public primary and secondary schools. They conclude that overall, between one in five, and one in seven, students report being bullied several times a week or more; younger students more frequently report bullying; and girls generally report less bullying than boys; females and males typically report being bullied in different ways, for example, physical or verbal bullying.

The statistics mentioned above are drawn from three jurisdictions only. Yet it is likely that they are representative of a global pattern, leading to the inevitable conclusion that bullying is a serious educational and health and safety issue facing schools as they embark on the 21st century.

What Are The Legal Obligations Of Schools? What Is Their Potential Liability?

The New Zealand position

In New Zealand, locally elected boards of trustees of state and integrated schools, and the equivalent governing bodies of independent schools, have the ultimate legal responsibility for the students in their care. This responsibility continues even when outside helpers, parents or instructors are involved and when students participate in course packages offered by commercial operators. Schools are required to look after their students' safety while they are at school or engaged in school based activities, and to maintain a safe and effective learning environment. The National Administration Guidelines, which are deemed to be incorporated into every school charter, specifically direct schools to *'provide a safe physical and emotional environment'*.[20]

Accident Compensation

In New Zealand, the ability of parents/students to sue a school for damages, for example, for negligence, for failing to prevent bullying, is severely limited by The Accident Compensation Scheme which bars compensatory awards for personal injury, other than for mental injury not suffered as the result of physical injury or harm. '*Personal injury*' for the purpose of the Accident Compensation regime also includes mental injury caused by sexual assault. For the sake of completeness, personal injury does not include injuries caused by gradual processes, infections or diseases unless they are work related. However, work related injuries for the purposes of accident compensation do not include injuries attributable to air-conditioning symptoms, passive smoking or non-physical stress.

Civil Remedies

In most cases, civil remedies for personal injury are restricted to damages for mental trauma (not caused by physical injury) and exemplary damages. This means that where a student suffers a mental injury (for example, post traumatic stress disorder) as a result of sustained psychological bullying at school, the student will not be covered by accident compensation, and therefore, would be entitled to sue the school for compensatory damages.

Exemplary Damages

On the other hand, if the student sustains a mental injury as a result of physical injuries, for example, sustained physical bullying, they will be covered by accident compensation. In this case, unless the student can establish that the school demonstrated an outrageous disregard for their safety, warranting punishment in the form of exemplary damages, they will have no further recourse to damages against the school for negligence. Exemplary damages serve to punish those who cause harm (by acting in a high-handed and irresponsible way) rather than to compensate the victim, and on that basis are not caught by the no-fault accident compensation legislation. The courts, however, are alive to the issue of exemplary damages being used as a 'backdoor' method of obtaining compensation for personal injuries.

Prosecution Under Health And Safety Legislation

There is also the potential for a school to be prosecuted under New Zealand's Health and Safety in Employment Act 1992 ('HSEA') if a court finds that a school has not taken '*all practicable steps*' to eliminate, isolate or minimise '*hazards*' in the school environment, that are an actual or potential cause or source of harm to employees or people in the vicinity, including students. Sentencing provisions in the Criminal Justice Act 1985 enable a Judge to order that the whole or any part of a fine imposed under the HSEA be paid to the victim of the accident. A prosecution under the HSEA does not preclude a subsequent (or concurrent) claim for exemplary damages in respect of the same conduct giving rise to the harm. The National Administration Guidelines require schools to comply in full with any legislation currently in force, or that may be developed, to ensure the safety of students and employees.

At the time of writing, no school has been prosecuted by the Department of Labour (ie. Occupational, Safety and Health ('OSH')) on grounds that bullying behaviour constituted a hazard, and that by reason of a school's failure to eliminate, isolate or minimise the offending conduct, a student or teacher suffered harm. Theoretically, there is nothing in the existing legislation to prevent OSH from intervening in this way. To date, however, OSH has tended to focus on compliance in relation to employee safety, in particular, in relation to employees in industries where serious workplace accidents have occurred, for example, in the forestry and construction industries. Under proposed amendments to the HSEA (discussed below), which include the removal of OSH's monopoly on prosecutions, the prospect of recourse to the HSEA in relation to student safety appears more realistic.

Breach Of Contract/Breach Of Fair Trading Act Claims

Bullied students attending an independent school and their parents may also have a claim for damages against the school for breach of contract and/or under New Zealand's Fair Trading Act 1986. (Similar remedies would be available in other jurisdictions.) To succeed, bullied students would need to show that the school had in some way held out that it would provide a safe and supportive environment free from bullying, for example, in marketing materials or the school prospectus. Misleading or deceptive conduct is insufficient. The student would need to show that he or she had suffered injury as a result. Causation is likely to be an obstacle. In his paper, *The Law, A Help or a Hindrance for a Bullied Student?*[21] Ford makes the point that although

misleading conduct may have induced the students' parents to enrol the student at the school, it is unlikely to have been the cause of the bullying behaviour by other students, or even of the failure by the school to properly supervise and provide a safe environment. He also makes a valid point that claims under Fair Trading Act legislation:

> … are more likely to be referred to in papers like this than successfully made in practice.[22]

Sunrise Causes Of Action

There are potentially other claims that could be brought against a school, in the context of a school's failure to prevent bullying, including, for example, the prospect of claims for failure to exercise proper skill and care in the education process (which is akin to a negligence claim, has been recognised in Britain, and is discussed briefly below, although as yet there are no reported New Zealand cases) and claims that a school has breached 'fiduciary obligations' owed to students (ie obligations of good faith, trust and confidence – where the fiduciary has a special ability to exercise rights and powers to the benefit or detriment of the other party).

In New Zealand, attempts have been made to argue that the Department of Social Welfare/social workers, for example, have breached fiduciary obligations owed to children in their charge. The New Zealand Court of Appeal has ruled that a fiduciary claim is at least arguable, in terms of the duty of the Department of Social Welfare to '*act in the child or young person's best interest and with the utmost good faith towards that child or young person*' [23]. The ruling was in the context of a strike out application, so there is no clear precedent in New Zealand, regarding the existence of a fiduciary relationship between social workers and the children in their care, or taking it one step further, between teachers and students.

Given the restrictions imposed on New Zealanders by The Accident Compensation regime in terms of claims for personal injury suffered as a result of negligence, claims for breach of alleged fiduciary obligations owed by teachers to students may be an attractive option for claimants to pursue, at least with a view to achieving a settlement, if neither party wants to risk a definitive ruling by taking such a claim to trial. This potential cause of action is simply noted here as a likely development to follow.

For the sake of completeness, there is now an authority in England[24] establishing the following propositions:

- specialist educational psychologists or psychiatrists and educational professionals owe a duty of care in the performance of their professional services to students. If students suffer harm or injury through the lack of exercise of due skill and care, damages may be awarded;
- such duties also apply to teachers in specialised areas, for example, teachers of children with special educational needs;
- the duty also applies to education officers within the administration system in regard to children with special education needs;

- it is recognised that all teachers owe a duty of care to their pupils in regard to the way they discharge their teaching responsibilities.

As noted above, to date there have been no significant claims relying on this line of authority in the New Zealand law reports. That may be only a matter of time.

Establishing Negligence – General Principles

Putting aside the issue of accident compensation which restricts New Zealanders' rights to sue for personal injuries along the lines outlined above, the main avenue currently open to parents/students in other jurisdictions who wish to take legal action against a school for failing to prevent bullying is to bring a claim in negligence.

Duty Of Care

It is well established that a school owes a student a duty of care not to cause injury to the student if, in the circumstances, a reasonable person would have foreseen that the school's actions or failure to act might result in the student being harmed. In England and Canada, the duty of a school teacher has often been expressed as the duty '*to take such care of the children in his charge as a careful parent would take of his own children*',[25] based on the assumption that a teacher/school is acting *in loco parentis* (in place of the parent) and is therefore expected to act like a diligent and prudent parent.

In a decision of the High Court of Australia, *Commonwealth of Australia v Introvigne*[26] (a case of a negligent omission by a school authority to take reasonable steps to protect a student), Murphy J said:

> The notion that a school teacher is in loco parentis does not fully state the legal responsibility of the school, which in many respects goes beyond that of a parent. A better analogy is with a factory or other undertaking such as a hospital … the school has the right to control what happens at school, just as an employer has the right to control what happens in its undertaking.

In order for an injured student to succeed in general terms in a claim of negligence against a school, the student must establish that:

(i) the school owed the student a duty of care;

(ii) the school was in breach of that duty;

(iii) as a result of the school's breach of its duty, the student suffered damage/harm;

(iv) the damage/harm suffered was not too remote from the school's breach of its duty.

A school's duty of care arises from its acceptance of a child as a student in the school. In *Ramsay v Larsen*[27] Kitto J described the duty in the following way:

> The relationship of teacher and student involves a situation where the duty of care arises as a consequence of the relationship itself. A teacher owes a duty to take care not to cause injury to a student, if, under the circumstances, a reasonable person would have foreseen that the teacher's action or failure to act might result in the student being harmed.

It is sometimes said that the fact that education is compulsory imposes on teachers/schools a far greater duty of care to students than the duty of care that ordinary members of the community owe to others.

Duty Owed By School Authorities

A school is vicariously liable for all acts of negligence performed by its employees and volunteers acting within the scope of their employment.

Commonwealth of Australia v Introvigne[28] is a leading Australian case on the liability of school authorities for negligent acts and omissions of teachers at schools maintained on the authority's behalf. In *Introvigne*, a 15 year old student was severely injured when the truck that was fastened to the top of a flagpole became detached, striking him on the head. The truck fell because a group of boys, including Introvigne had been swinging from the halyard which ran through the pulley on it. The accident occurred in the school yard shortly before school started. At the time of the accident, all the teachers, except one, were attending a staff meeting called by the acting principal to inform staff that the principal had died in the early hours of that morning. Usually there would have been between five and twenty teachers supervising the school grounds at the time the accident happened.

Introvigne established that, in addition to its vicarious liability, school authorities owed a separate duty of care similar to that owed by teaching staff/schools to students. The High Court of Australia held:

> The liability of a school authority in negligence for injury suffered by a pupil attending the school is not purely vicarious liability. A school authority owes to its pupils a duty to ensure that reasonable care is taken of them whilst they are on the school premises during hours when the school is open for attendance.[29]

The Court found that the Commonwealth of Australia was liable for the acts and omissions of its teaching staff. Under sections 8 and 9 of the Education Ordinance 1937 (ACT) parents are obliged to have their children aged between six and 15 years enrolled at a school in the Territory '*maintained by or on behalf of the Commonwealth*' or a school registered under the Ordinance. By establishing a school that was '*maintained*' on its behalf, the Commonwealth came under a duty of care to students attending the school.

In finding that such a duty existed, Mason J referred to a House of Lords decision, *Carthmarthenshire County Council v Lewis*[30], which he said proceeded on the footing that:

> …the duty is not discharged by merely appointing competent teaching staff and leaving it to the staff to take appropriate steps for the care of the children. It is a

> duty to ensure that reasonable steps are taken for the safety of the children, a duty the performance of which cannot be delegated.[31]

Mason J went on to say that in the instant case:

> The fact that the Commonwealth delegated the teaching function to the State, including the selection and control of teachers, does not affect its liability for breach of duty. Neither the duty, nor its performance, is capable of delegation. It is not enough for the school, to leave it to the State to take care for the safety of the children attending the school …The Commonwealth does not cease to be liable because it arranges for the State to be liable on its behalf.[32]

Standard Of Care

Murphy J further defined the duty in *Introvigne*:

> (1) To take all reasonable care to provide suitable and safe premises…[taking] into account the well-known mischievous propensities of children, especially in relation to attractions and lures with obvious or latent hazards.
>
> (2) To take all reasonable care to provide an adequate system to ensure that no child is exposed to any unnecessary risk of injury; and to take all reasonable care to see that the system is carried out.[33]

Notwithstanding the above, the courts have generally refused to accept the proposition that a school is an 'insurer' of its students. A school's duty to provide supervision and protection is generally fulfilled if the school exercises reasonable skill and care in seeing that its students are kept reasonably safe.[34]

Richards v Victoria[35] involved a negligence claim brought in relation to injuries suffered by a 16 year old boy as a result of a classroom fight. Richards was in a classroom maths lesson when an argument developed between Richards and another student and then escalated into a fight. There was evidence that the teacher took no steps to quell the argument before it developed into the fight, and then did not intervene to stop the fight. The fight ended when Richards was struck by a blow from the other student which hit him on the left side of his temple and (as was subsequently discovered) ruptured the meningeal artery. Blood escaped from the artery which in turn built up pressure on the brain and resulted in a condition of spastic paralysis.

The Supreme Court of Victoria held that:

> [T]he duty of care owed by [the teacher] required only that he should take such measures as in all the circumstances were reasonable to prevent physical injury to the pupil. This duty is not being one to insure against injury, but to take reasonable care to prevent it, requiring not more than the taking of reasonable steps to protect [the student] against the risk of injury which ex hypothesi [the teacher] should reasonably have foreseen.[36]

The leading Canadian case on the standard of care is *Myres v Peel County Board of Education et al.*[37] *Myres* concerned an accident suffered by a 15 year old boy when he attempted to dismount from the rings in a gymnastics class at his high school. At the time of the accident, Myres was practising his routine in the exercise room with six or seven other students, without supervision. The supervising teacher was in the gymnasium with about 30 other students. From that position the teacher could not see the students in the exercise room.

The Supreme Court of Canada upheld the findings of the trial judge, that the school board and the teacher had not provided the requisite degree of supervision, and there was insufficient protective matting placed beneath the rings at the time of the accident. The Court affirmed that the test for the standard of care is, as described in *Williams v Eady*,[38] *'that of the careful or prudent parent'* but that the test is *'…somewhat qualified in modern times because of the greater variety of activities conducted in schools, with probably larger groups of students using more complicated and more dangerous equipment than formerly'*. McIntyre J emphasised that the standard of care is not the same in every case and will vary from case to case and may depend on the following considerations:

- the number of students being supervised at any given time;
- the nature of the activity or exercise in progress;
- the age and degree of skill and training which the students may have received in connection with such activities;
- the nature and condition of the equipment in use at the time;
- the competency and capacity of the students involved; and
- a host of other matters which may be widely varied.[39]

Generally the courts impose a higher standard of care where the situation is more hazardous. Where the activity is considered inherently dangerous closer supervision is required. It is common sense that if a situation is potentially more hazardous, or the students are particularly vulnerable on account of their age or mental capacity, then a school has to be more vigilant and more ready to take precautions.

The courts also generally recognise that the greater the number of students, the less direct supervision each student will receive on an individual basis. In general, the younger the students, the higher the standard of care required and the greater the likelihood that negligence will be found. The lower the age and level of experience of the students compared with the sophistication of the activity, the greater the expectation of close supervision.

In *Richards*[40], the Court considered the argument that students of a relatively mature age (16 years in the *Richards'* case) must be regarded as competent to protect themselves against injury and thus not be in need of special protection:

> Impulsiveness, lack of fear, or full appreciation of risks and inhibitions are characteristic of such adolescents. True it is that an age will be reached when it would seem quite inappropriate to regard a teacher as under a duty of care to his

> pupil merely arising out of the relationship as, for example, a university professor and a student of mature years and status. That, however, is not the case of a schoolboy subject to the control and discipline which the 'school' and the teacher as an integral part of it, are in a position to exercise over him and his classmates.[41]

In the case of *Williams v Eady*,[42] a boy was badly scarred from chemical burns when another student took a bottle of phosphorus from the science cupboard and put a match to it causing an explosion. The boy sued his teacher for negligence. The Court did not accept the teacher's defence that the chemical cupboard had been locked:

> …if a man keeps dangerous things, he must keep them safely, and must take such precautions as a prudent man would take and to leave such things about in the way of boys would not be reasonable care.

Williams v Eady illustrates that if students breach the school's safety rules, the teacher/school must intervene immediately. If a teacher or school does not enforce their existing safety rules, there is more likely to be a finding that the teacher or school was negligent for failing to take the necessary precautions to prevent the foreseeable injury.

The case of *Close v Minister for Education*,[43] however, demonstrates that a school does not discharge its duty of care merely by setting up a safe system and giving warnings. Positive action must be taken by the teacher/school in order to prevent harm. A student was severely injured when he was splashed by molten aluminium during a practical demonstration by a metal workshop teacher. The teacher had directed the students to remain at a safe distance away from the pot containing the molten metal. However, the court held that the teacher knowingly allowed his safety rule to be ignored and permitted the students to come in close to watch the demonstration.

Foreseeability Of Harm

As a general principle, a defendant is not liable for negligence if his or her conduct does not give rise to a foreseeable risk of damage to the plaintiff. If no harm at all is foreseeable, there is no duty and if the particular damage is not foreseeable, it is too remote.[44] However, if a foreseeable risk exists, the likelihood of damage must be taken into account in deciding what, if anything, the defendant ought to do about it.

In *Introvigne*, Mason and Murphy JJ rejected the lower court's *'overly stringent test'* for foreseeability and applied the Court's previous decision in *Wyong Shire Council v Shirt*[45] 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 occur*'. The Federal Court in *Introvigne* found that there was no unusual danger. However, the High Court did not see that this finding was inconsistent with a finding that the school was negligent because of inadequate supervision.

Remoteness

In establishing negligence, the student must be able to show that, as a result of the school's action or inaction, he or she has suffered harm. Not only must the student be able to prove that the harm

was the result of negligence, but also that the harm was not too remote from the actions or inactions of the school. It is important to remember that an injury is not too remote merely because it turns out to be much more severe than could have been expected.

The reasonable person is not expected to guard against every conceivable risk. The danger must be of a significant magnitude to justify precautions. In *Bolton v Stone*[46] a leading case on remoteness of harm, the plaintiff was struck by a cricket ball when standing on a road adjoining a cricket ground. The ball travelled a distance of about 100 metres and cleared a fence, which was more than five metres above the level of the pitch. The evidence was that it was extremely rare for a ball to go over the fence, although it had occasionally happened. The Court held that although the possibility of an accident might reasonably have been foreseen, the cricket club was not liable for failing to guard against, what, in the circumstances, was a very remote risk. Lord Reed said the test to be applied was whether the risk of damage was so small that a reasonable man in the defendant's position considering the matter from a safety point of view would have thought it right to refrain from taking steps to prevent the danger.

In any situation that is potentially hazardous for students, a teacher must adopt the Court's test to decide if it is safe to proceed. In other words, the teacher must look at the situation objectively to foresee if there is any likelihood of injury.

Mental Injury Not Arising From Physical Injury (Psychological /Psychiatric Injury)

As noted above, the legislative bar in New Zealand to compensatory claims for personal injury, does not apply to claims for mental injury that does not occur as a result of a physical injury. A common law action for damages for mental injury, which is not the result of physical injury, is based on the ordinary principles of negligence.

In *L v Robinson,*[47] the plaintiff was a patient of the defendant psychiatrist. A sexual relationship developed between them and the plaintiff became attached to and dependent upon the defendant. The plaintiff terminated the relationship and laid complaints against the defendant with the Medical Council. The plaintiff claimed compensatory and exemplary damages for psychological and emotional trauma. The Court held that the plaintiff had not suffered a '*personal injury*' within the meaning of the prevailing accident compensation legislation and that as she was never entitled to cover under the scheme, she was not barred from pursuing a claim for damages. The Court also found that the plaintiff suffered a recognisable psychological and/or psychiatric injury as a result of the defendant's breach of duty of care. Further, the defendant's sexual misconduct had a profound impact on the plaintiff's already troubled mind. The plaintiff was awarded compensatory damages of $50,000 and exemplary damages of $10,000.

There is clearly the potential for mental injury, for example, where students are exposed to harmful consequences causing mental injury as a result of non physical bullying. The increased use of the internet in schools also raises the potential for damages claims based on mental trauma suffered by students exposed to bullying by email, text messaging and the like.

Leah Bradford-Smart Case

The English Courts recently considered liability for bullying in *Bradford-Smart v West Sussex County Council.*[48] Student, Leah Bradford-Smart, claimed that the defendant Council was liable for the psychiatric injury that she alleged she suffered as a result of bullying when she was a student at a local school.

The teenager claimed she had suffered post-traumatic stress disorder after being subjected to *'persistent and prolonged bullying'* at school from the age of nine for at least 3 years. The bullying had occurred at school, outside the school gates, on the bus to and from school and near her house. On the issue of a school's duty of care to its students, the Court referred to propositions established by the House of Lords.[49]

> A head teacher and teachers have a duty to take such care of pupils in their charge as a careful parent would have in the circumstances, including a duty to take positive steps to protect their well being. Those responsible for teachers in breach of that duty may be vicariously liable for their negligence.
>
> A head teacher and teachers have a duty to exercise the reasonable skills of their calling in teaching and otherwise responding to the educational needs of their pupils.
>
> The duty is to exercise the skill and care of a reasonable head teacher and/or teachers applying the Bolam test, namely whether the teaching and other provision for a pupil's educational needs accord within that which might have been acceptable at the time by reasonable members of the teaching profession.

The school clearly owed Leah a duty of care. The school argued that it was not in breach, that it was up-to-date in its anti-bullying policy and was actually in advance of what was expected at the time.

The Judge was unable to conclude on the evidence before him that Leah had been bullied at school in her first year, let alone that the school knew about it, and failed to take appropriate action. In her second year, while the Judge accepted that there was some name-calling and uncouth behaviour on the bus, there was nothing of the targeted and persistent nature required to constitute bullying. As to her third year, the Judge found that Leah had been seriously bullied at home and on the bus to and from school, and that threats were made as to what would happen in school.

The Court found that the school had taken reasonable steps to safeguard the student while she was at school, most importantly by having an effective anti-bullying policy in place. The Judge also found that Leah's teacher's defensive actions prevented bullying in school, although Leah was fearful as a result of what happened outside school.

On the facts, the High Court found that if the student had suffered psychiatric illness caused by bullying, the causative bullying had occurred at home and on the bus to and from school, not at school itself. However, the Judge also ruled against the teenager in relation to the bullying that occurred outside the school. He found that the school did not have a duty of care to prevent bullying which had taken place outside its premises:

> I would regard the duty as going no further than to prevent bullying actually happening within the school, in other words, to table effective, defensive measures… In my judgement a school cannot reasonably be expected to do more than to take reasonable steps to prevent a child being bullied while it is actually at the school.

The teenager appealed the decision[50], arguing that the Judge had applied too restrictive a test in limiting a school's duty of care to bullying occurring inside the school. This argument was in line with a decision in 1994, where an argument that a principal could not use disciplinary powers against a student who attacked another student outside the school had been rejected (*R v London Borough of Newham ex parte X [1995] ELR 303)*. The Court of Appeal found that a reasonable body of professional opinion would have concluded that the school had done enough to combat the bullying (applying the test in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582). Even if the judge had directed himself less restrictively, he would have reached the same conclusion.

Nevertheless, the Court of Appeal recognised that a school would often be faced with the problem of balancing one child's interests with another's. There would also be difficult questions of judgment as to how far a school should step in where the parents or other agencies and social services had not done so. The Court of Appeal acknowledged that **usually** the duties of the school to protect students from bullying would end at the school gate, but they could think of exceptional circumstances where it might go beyond that. They mentioned that it would be reasonable, for example, for a teacher to intervene if they saw one student attacking another outside the school.

The Court of Appeal confirmed that usual factors are relevant in determining what a reasonable school might be expected to do. The extent to which it was foreseeable that failure to do so would result in actual harm to the victim; the extent of the risk; the magnitude of the harm; and the practicability and likely effectiveness of any steps which might be taken.

The Court of Appeal's final comments are instructive in terms of a school's potential liability for negligence for bullying:

> We would add that in all these cases it is necessary to identify with some precision any breach of duty found. It is also important to consider whether the steps proposed would have been effective in preventing the bullying. It is not enough to find that there has been bullying, to find some breach of duty, and then to find that the bullying caused the injury. There must be a causal connection between the breach of duty and the injury. That will often be difficult to prove'.
>
> 'There is no magic in the term bullying. Any school has to have sensible disciplinary policies and procedures if it is to function properly as a school at all. It will no doubt take reasonable steps to prevent or deal with one-off acts of aggression between pupils and also recognise that persistent targeting of one pupil by others can cause lasting damage to the victim. In seeking to combat this, it is always helpful to have working definitions such as those contained in the documentation we have seen. The problem is now well enough recognised for it to

> be reasonable to expect all schools to have policies and practices in place to meet it; indeed the school developed just such a policy in 'Working Together'. We agree that such policies are of little value unless they are put into practice. But in order to hold the school liable towards a particular pupil, the question is always whether the school was in breach of its duty of care towards that pupil and whether that breach caused the particular harm which was suffered.[51]

Reality Check

As the Court of Appeal warned in the *Leah Bradford-Smart* case, it can often be difficult to establish a successful claim in negligence. *The Birmingham Post* in July of this year[52], reported that two British former pupils, who were bullied at school, have lost their claim for damages. The two former students, now both 20, alleged that they had suffered years of physical and verbal abuse at Shotten Hall Comprehensive School, in Peterlee, County Durham. They claimed the County Council and school governors had not done enough to protect them from their tormentors. The claimants were seeking £25,000 damages each for psychological suffering as well as the loss of future earnings.

Mr Bright, one of the students, also claimed compensation for physical injuries he suffered during regular attacks at the school. He was beaten unconscious on one occasion, and was also subjected to name calling, had chewing gum put in his hair, and had property damaged or stolen. His co-claimant, Caroline Newby, was spat at, shunned and verbally abused by a gang of girls. Both claimants were taken out of regular lessons and eventually withdrawn from the school. Although the Judge said it was clear that they had both suffered bullying which had caused anxiety, stress and depression, they had not established that the defendants had failed to protect the pupils, as they had implemented anti-bullying policies and investigated when allegations were made.

Occasionally a case goes to trial and the claimant is successful. In October 2000, a former pupil of Sale Grammar School was awarded £1,500 by a Manchester County Court which ruled that the school had failed to protect the student from eighteen months of verbal abuse/name calling.[53] The question arises, though, how much did it cost to prosecute the claim?

As well as the difficulty of establishing that the school has been negligent, there are the additional burdens involved in taking any litigation, namely, the cost of the litigation and the time and energy involved. Sometimes, these factors may work in favour of a victim. For example, in November 1996, in *Sharp v London Borough of Richmond Upon Thames*, Sebastian Sharp, 20, reportedly accepted an out of Court settlement of £30,000 for four years of bullying while he was at Shene School, Richmond, London. He said he was regularly insulted, kicked and punched by other pupils who also tied him up with string in a four year campaign starting when he was 11. The Borough said it wanted to contest the allegations vigorously, but its insurance company wanted to avoid a costly and time consuming Court process[54].

In *Carnell v North Yorkshire County Council*, the first legal victory since it became mandatory for British schools to have anti-bullying policies, former Harrogate Grammar School pupil John Carnell received a settlement of £6,000 in relation to a year of bullying.[55]

Exemplary Damages

In *Donselaar v Donselaar*,[56] the New Zealand Court of Appeal established that accident compensation legislation does not prevent an award of exemplary damages in personal injury cases, given that such damages arise out of the conduct of the defendant not from the injury to the plaintiff. The Court held that, although the Accident Compensation Act 1972 ('ACA') precluded the recovery of compensatory damages *'arising directly or indirectly out of'* a person's injury or death, there was good reason to retain exemplary damages since compensation under the ACA had no punitive element.

Cooke J (as he then was), warned in Donselaar,[57] that the courts would have to keep a 'tight rein' on such actions 'with a view to countering any temptation, conscious or unconscious, to give exemplary damages merely because the statutory benefits may be felt to be inadequate'. In hindsight, Lord Cooke's warning appears prophetic. In the twenty years since Donselaar, compensatory claims under the guise of exemplary damages have increasingly come before the courts to combat inadequate entitlements.

In New Zealand, no action for exemplary damages may be brought by the estate of a deceased in respect of his or her death. The Law Reform Act 1936[58] excludes exemplary damages from those which may be brought by the estate of a deceased plaintiff. Claims for exemplary damages are personal to, and die with, the victim. This position was reaffirmed in the case of *Re Chase*.[59]

Exemplary damages are also now available in New Zealand in circumstances where there may have been a criminal prosecution and/or conviction for the act(s) giving rise to the harm for which exemplary damages are sought.[60] For example, a student who has been sexually abused by a teacher or employee of the school, may in a separate civil trial, claim exemplary damages against the teacher/school even though the teacher may have been dealt with by the criminal law. The fact that the teacher has received a sentence in the criminal courts would be taken into account by the Judge in the civil trial when he or she determined the level of exemplary damages necessary to sanction the teacher's conduct.

Having said that, the courts have continued to echo Lord Cooke's warning in *Donselaar* that claims for exemplary damages ought not be used to gain compensation. Master Thompson, in *Akavi v Taylor Preston Limited*,[61] stressed the '*danger*' that *'the [c]ourts could be flooded with common law claims for damages for personal injury disguised as claims for exemplary damages'*. In *McLaren Transport v Somerville*,[62] Tipping J recognised that it is:

> not a proper function of the [c]ourts to develop the law of exemplary damages so as to remedy any perceived shortcomings in the statutory scheme.

In *Bottrill v A*,[63] a claim for exemplary damages brought by a patient against her former pathologist who misread and misreported results of cervical smears, the New Zealand Court of Appeal considered whether exemplary damages might be awarded in negligence cases, in the absence of an intention to harm or put the affected person at risk and in the absence of conscious disregard for the plaintiff's interests. The Court held that:

> Exemplary damages for negligence causing personal injury may be awarded if, but only if, the negligence is at such a level and is of such a kind that it amounts to conscious, outrageous, and flagrant disregard for the plaintiff's safety, meriting condemnation and punishment. The concept of conscious disregard means that the defendant consciously appreciated the risk to the plaintiff's safety caused by his or her conduct but nevertheless deliberately chose to run that risk.

The Court also stated that considerations of principle and legal policy underlying exemplary damages in New Zealand weigh heavily in favour of confining the remedy to those cases where the defendant is subjectively aware of the risk to which his or her conduct exposes the plaintiff and acts deliberately or recklessly in taking that risk.[64]

Dr Bottrill appealed to the Privy Council[65] which held that the Court of Appeal put the test too highly. Intentional or conscious risk taking is not required. A very high level of negligence, amounting to 'outrageous conduct' is all that is required. Having said that, the Privy Council made it clear that exemplary damages will be exceptional.

In New Zealand, awards of exemplary damages have been rare to date, given that the level of negligence required to sustain such an award is particularly high. The Court noted in *Ellison v L*[66] that because negligence is an unintentional tort, cases where exemplary damages are awarded are likely to be rare. The Legal Services Board has reported an increase over the last two to three years of the number of legal aid applications for exemplary damages cases. The Board says that, based on past awards for exemplary damages, it expects that future damages awards will not exceed $50,000 with average payments between $15,000 to $20,000.[67]

In *L v Robinson,*[68] the plaintiff claimed compensatory damages of $200,000 (psychological emotional trauma) and exemplary damages of $150,000 arising from professional misconduct by her psychiatrist. The defendant admitted that he engaged in sexual misconduct with the plaintiff while she was his patient and also admitted writing sexually explicit letters and engaging in sexual intercourse with the plaintiff after she ceased to be his patient. He also acknowledged breaching his duty of care. The Court awarded compensatory damages of $50,000 and considered that the case justified an award of exemplary damages as the defendant's conduct was outrageous and deserving of condemnation of the Court. An award of $10,000 was considered to be sufficient to reflect the Court's condemnation of the defendant's conduct.

In the case of *B v R,*[69] the plaintiff sought exemplary damages of $225,000 for physical, sexual and emotional abuse allegedly inflicted upon her by her uncle when she was aged between seven and sixteen years old. The Court found that the uncle's actions were an outrageous abuse of his position vis a vis the plaintiff and awarded exemplary damages of $35,000.

In the case of *McLaren Transport Ltd v Somerville,*[70] a customer suffered a serious personal injury after an employee of the company over inflated a tyre contrary to warnings on the tyre itself and on the nearby wall. The tyre burst, causing the customer serious injury. The Court found that the employee's conduct was reckless and that the level of negligence was so high that it did amount to an outrageous and flagrant disregard for the respondent's safety, meriting condemnation and punishment. The respondent was awarded $15,000 in exemplary damages, upheld on appeal as a reasonable amount in the circumstances.

To obtain an award of exemplary damages, the offensive conduct must be high handed, reprehensible, or illegal. In the case of a school, it would be necessary to show that the school's failure to take care amounted to outrageous and flagrant disregard for the student's safety, meriting condemnation and punishment.

Health And Safety In Employment Act 1992

The Health and Safety in Employment Act 1992 ('HSEA') came into force on 1 April 1993. Section 5(1) of the HSEA states that the principal object of the legislation is to provide for the prevention of harm to employees at work. (It is important to note that the proposed amendments, now before Parliament, include a new 'objects' section, which sets out the objects of the legislation in more detail, and reflects the amendments to the principal act. In particular, the objects are broadened *'to promote the prevention of harm to all persons at work, and other persons in, or in the vicinity of a place of work …'*[71].

The principal object of the HSEA is intended to be achieved by promoting excellence in health and safety management by employers, prescribing and imposing on employers and those in control of workplaces, duties in relation to the prevention of harm to employees, and by providing for the making of regulations and the development of codes of practice relating to hazards to employees, and in particular significant hazards (section 5(2)). The HSEA places responsibility for health and safety of employees, students and other visitors to a school on school boards of trustees (or equivalent governing bodies) as employers. They also have responsibilities under the Health and Safety in Employment Regulations 1995 and the Health and Safety Codes of Practice for schools.

The HSEA imposes on employers and/or persons in control of a workplace, duties in relation to the prevention of harm to employees or other persons on, or in the vicinity of, the work site. Employers must ensure that they have in place effective methods of identifying new and existing '*hazards*' (ie. sources or potential sources of harm). Where the hazard is '*significant*', the employer must take all practicable steps to eliminate the hazard or, if that is not possible, to isolate it or at the very least minimise it.

Currently employers may be fined up to $100,000 and/or sentenced to imprisonment for up to one year for breaches of section 49, where they act or fail to act, knowing that such act or failure to act is likely to cause serious harm to any person. The maximum penalty for a breach of section 50 (where failure to comply with the HSEA causes a person serious harm) is a fine of $50,000 and/or imprisonment for up to three months. As at June 1999, there had only been 41 prosecutions under the HSEA.[72] Only three prosecutions have been brought under section 49. The average fine under the Act has been $6,196.[73] Under the proposed amendments to the HSEA, maximum fines for breaches of section 49 will be increased from $100,000 and/or one year's imprisonment to $500,000 and/or two years imprisonment. Maximum penalties under section 50 will be increased from fines of $50,000 to $250,000 and/or three months imprisonment.

As mentioned above, under the current legislation, only the Department of Labour may prosecute employers for breaches of the HSEA. The Amendment Bill removes OSH's monopoly on administering the legislation, by allowing the Prime Minister to designate a Crown agency to administer the HSEA for a particular industry, sector or type of work. This provision could mean, for example, that the Ministry of Education is designated to administer the HSEA in relation to the

education sector. The Government has also indicated that any person will be entitled to bring a private prosecution against an employer for breaches of the HSEA, where OSH fails to do so.

The Bill also extends the definitions of *'harm'* and *'hazard'* so that they expressly include mental harm and hazards arising through physical or mental fatigue. These amendments are discussed in more detail below, given that they are more likely to be of significance in relation to teachers who undergo bullying at the hands of students or other staff, and thereby suffer work-related stress, than in relation to students who suffer bullying.

Section 15 of the HSEA provides:

> **Duties of employers to people who are not employees**- Every employer shall take all practicable steps to ensure that no action or inaction of any employee while at work harms any other person.

This means that employers (ie school boards) must take all practicable steps to ensure that no harm comes to people who are at the place of work (the school) but are not employees, including members of the school community, the public and other visitors to the school. This provision is not specifically designed to protect students, but rather should be seen in the context of an employer's obligations to provide a safe working environment and to guard against any harm being done to any person in the workplace, as a result of an employee's action or failure to act.

Taking *'all practicable steps'* to achieve a result, is the extent to which an employer is obliged to go in terms of fulfilling its obligations under the HSEA. Section 2 defines *'all practicable steps*' as meaning '*all steps to achieve the result that it is reasonably practicable to take in the circumstances having regard to*:

(a) the nature and severity of the harm that may be suffered if the result is not achieved; and

(b) the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and

(c) the current state of knowledge about harm of that nature; and

(d) the current state of knowledge about the means available to achieve the result and about the likely efficacy of each; and

(e) the availability and cost of each of those means'.

While section 15 prescribes duties of employers to people who are not employees, it is not the stated intention of OSH to become directly involved in specific cases of harm to students unless the harm is directly attributable to the board's non-compliance with the HSEA. An example of non-compliance under the HSEA could arise where play equipment has not been safely or properly installed or maintained, and a student suffers an injury as a consequence of the school's breach. A school could also potentially face liability under section 15 of the HSEA where a teacher fails to intervene in the prevention of an accident or fails to provide adequate supervision of an activity at school or away from school on a school trip or camp.

There is no reason why section 15 should not cover bullying (physical and/or psychological) which is permitted to occur, due to the inaction of teachers, with the result that students suffer harm as a consequence of the school's non-compliance. In light of the proposed amendments to the HSEA, which will enable parents to bring a prosecution if OSH chooses not to do so, boards will need to be more vigilant in taking all practicable steps to ensure that teachers do not allow bullying to occur and thereby cause harm to students.

Section 16 provides:

> **Duties of persons who control places of work.**
>
> 16(1) **[People in the vicinity or at work] a person who controls a place of work** … must take all practicable steps to ensure that no hazard that is or arises in the place harms:
>
> (a) People in the vicinity of the place (including people in the vicinity of the place solely for the purpose of recreation or leisure): …

Given that 'hazard' means any 'activity … circumstance, event, occurrence, phenomenon, process, situation … that is an actual or potential cause or source of harm; …' there is no reason why bullying should not constitute a hazard. As noted above, there have been no prosecutions to date for non-compliance by schools in relation to the harmful effects of student bullying. The proposed amendments, when enacted, may prompt changes in this regard.

A prosecution by OSH does not preclude the possibility of the school also being liable for exemplary damages. In the case of *Caldwell v Croft Timber*,[74] an employee's arm was amputated at his workplace as a result of an accident with a square pile saw. He claimed exemplary damages of $500,000 against his employer for negligence, breach of statutory obligations under the HSEA and breach of fiduciary duty. The Court held that the employee/victim was entitled to claim exemplary damages against his former employer, even though the employer had already been ordered to pay a fine under the HSEA.

Under section 28(1) of the Criminal Justice Act 1985, where a party is convicted of an offence arising out of any act or omission that occasions physical or mental harm to any other person and a court imposes a fine, it must consider whether it should award, by way of compensation to the victim, the whole or any part of any fine as it thinks fit. This is another means by which the courts can compensate a victim of a personal injury over and above the allowances payable under the Accident Compensation Scheme.

A leading case under the current Health and Safety legislation is *Department of Labour v De Spa & Co Ltd & Ors*[75]. This involved three appeals by the Department of Labour in regard to the level of fines imposed for offences under section 50 of the HSEA. The *De Spa* case indicates the relevant criteria to be considered in determining the level of fines to be imposed under the HSEA, (albeit in relation to the current maximum fine under the section ($50,000)). In one case, an employee was killed when trapped in a wool bale elevator and his neck was crushed. The District Court imposed a fine of $6,500. Another employer was fined $2,000 where an employee suffered an amputation to part of a finger and lacerations to a thumb. In the third case, an employer was

fined $5,000 where the employee had died as a result of a workplace accident. In each case the Department's appeal to increase the level of fines failed.

The Court set out the following criteria to be considered in determining the level of fine to be imposed:

- the degree of culpability;
- the degree of harm resulting;
- the offender's financial circumstances;
- the offender's attitude, including remorse, co-operation and taking remedial action;
- any guilty plea;
- the need for deterrence;
- compensation for the victim under section 28 of the Criminal Justice Act 1985;
- the employer's safety record;
- the facts of the particular case.

Two years ago, a 10 year old boy suffered concussion, neck injuries, chipped teeth and a bitten tongue when he struck a chain placed at the bottom of a waterslide to prevent trespassers using the slide, while on a school trip. The child had used the slide before adult supervisors had removed the chain in accordance with the camp operator's instructions. The organisation which operated the slide pleaded guilty to a charge under the HSEA of failing to ensure the boy's safety while he was at the camp. A District Court Judge fined the camp $30,000 for a breach of section 16 of the HSEA[76] and, pursuant to section 28 (1) of the Criminal Justice Act, awarded the entire amount of the fine to the boy. The Judge's sentencing notes said that the boy's school could have been made a second defendant.[77] On appeal to the High Court, the amount of the fine was reduced to $6,500.[78] Justice Morris considered that the fine imposed by the District Court Judge was $5,000 more than the maximum awarded under section 16 of the HSEA where death resulted.[79] His Honour ruled that this accident did not cause death or significant injury, nor did it involve a dangerous work environment.

While average fines may well increase commensurately with the increase in the maximum fines, it is reasonable to assume that the financial circumstances of offenders, both employer and employee, will continue to be taken into account in determining the level of fine to be imposed, along with the other factors referred to above. Having said that, the Explanatory note to the Amendment Bill makes it clear that the amendments reinforce the seriousness with which human life and well-being should be treated in the workplace, and that the Bill is intended to strengthen penalties against poor injury prevention practice and outcomes.

Indemnity For Schools

Under the proposed amendments to the HSEA employers will not be able to insure/be indemnified against fines (although insurance to cover costs will be allowed to continue).

Presently, the Ministry of Education provides an indemnity to all state and integrated school boards for costs arising from any prosecution, conviction, and any fines under the HSEA, or its regulations, if requirements to qualify for the indemnity are met. These include;

- reporting to the Ministry, in the case of state schools, and to the proprietor, in the case of integrated schools:
- any Improvement Notice or Prohibition Notice received;
- any health and safety incident that could give rise to an offence under the HSEA or its regulations,
- any prosecution under either of the above; **and**
- ensuring that all reasonable steps have been taken to mitigate any risk of danger or hazard in the place of work.

This means that if the amendment preventing insurance against fines/indemnification comes into effect, boards could find that they are responsible for paying any fines resulting from prosecution under the HSEA from their own funds. Given that under the proposed legislation trained Health and Safety representatives (for example, teacher representatives) will be able to issue Hazard Notices where an employer has refused to take steps or the parties do not agree or the employer has not acted in a timely fashion, the current indemnity is likely to need overhauling, in any event, to take account of that eventuality, and other effects of the proposed amendments.

The package of amendments to the HSEA, including the expansion of the objects of the HSEA, the introduction of trained Health and Safety representatives, the removal of the OSH monopoly on prosecutions, the significant increases in penalties, the extended definition of '*harm*' and '*hazard*', suggest that in future schools are more likely to find themselves held accountable under the HSEA than in the past, in relation to student safety, for example, for failing to take all practicable steps to protect students from bullying.

What Can Schools Do To Manage, Reduce And Prevent Bullying?

Marr and Field[80] contend that there are few legal avenues for dealing with bullying and that in any event, law is not a solution. Bullying is sustained by the attitudes of society and it is those attitudes that have to be changed. In the authors' view, bullying can only be successfully tackled when both staff and students are genuinely committed to a whole school anti-bullying ethos where:

- everyone knows and understands what bullying is and discusses openly why they think bullies bully;
- everyone knows and understands that bullying is unacceptable;
- incidents of bullying are nipped in the bud;

- the bully is called to account in a firm but supportive manner without physical punishment; (If the bully was subjected to physical punishment then it would reaffirm in his mind the acceptability of violence to achieve objectives.)
- the bully is subsequently supervised and supported in learning more appropriate ways of interacting with other children;
- all children are taught how to be assertive;
- all children are taught how to spot bullying and intercede or report it;
- all children are empowered to help both target and bully.[81]

To properly discharge their duty to provide a safe learning environment, every school should have an anti-bullying policy with clear guidelines on how to report, manage and reduce bullying. Policies should be reinforced in school assemblies and newsletters and be seen to have the active and visible support of all staff. Marr and Field[82] suggest that every anti-bullying policy should include:

- encouraging anyone who has been bullied or sees bullying to report it;
- having bully boxes where students can place anonymous reports of what is happening;
- having student meetings where problems like bullying are discussed and dealt with;
- ensuring there are specially trained students to help others, or teachers assigned to help with bullying problems.

There are a number of other things that school boards/school governors can do to raise awareness for staff, parents and students and reduce the risks of bullying at school, including:

- implementing a school-wide Code of Conduct, specifying what is and is not appropriate behaviour in the classroom and around the school;
- providing clear guidelines for teachers to help them maintain a safe classroom environment. The responsibilities of teaching staff when dealing with a case of bullying should be clear;
- ensuring that target areas and activities where bullies dominate, are adequately supervised;
- having staff monitor students' arrival and departure from school, movement around the school between classes and lunchtime activities;
- developing prevention programmes and support-systems so that students can report bulling without fear of repercussions;
- achieving consistency when dealing with student misbehaviour;
- organising meetings with parents and students to discuss the nature and consequences of bullying behaviour, its impact on all participants, and the school's anti-bullying policy.

Prevention Programmes

Schools should ensure that programmes designed to prevent bullying are school-wide, pro-active, and aim to show attitudes and behaviours, rather than focus on punishments and rewards.

Peer mediation programmes, where senior students are trained as mediators to help assist in resolving conflict between students, have been successful in encouraging students to seek help when they are in a conflict situation. Mediation can help the bully understand the hurt he/she is causing.

Cool Schools

Over half of all New Zealand schools are involved in the Cool Schools peer mediation programme which is a whole school model that teaches students skills to resolve conflicts peacefully. The programme is promoted and supported by the Peace Foundation, Aotearoa New Zealand. The underlying aim is to provide a better class and school learning environment by pro-actively teaching students communication, conflict resolution and leadership skills which reduce bullying and other distractive behaviour. Specially trained students mediate conflicts among their peers. Research has shown that conflicts are greatly reduced and students learn life skills which will help them in their own relationships and are also valuable job skills. There is also a Cool Schools parents' programme which invites parents to learn mediation skills to reinforce the school's programme and give them some parenting skills as well. [83]

Generally, school mediators have to apply for the job. They rotate on a roster system and assist children to find realistic solutions to their problems. The mediators usually work in pairs. One is the support person and is trained to listen without judgment, keeping information confidential. Together they run mediations to help people sort problems out. However, mediators have an ethical obligation to seek support from the guidance counsellor or school management if there is an issue of safety, for example, self harm.[84] Similar programmes operate successfully overseas.

Summary

School boards/ governing bodies have a legal duty to provide a safe physical and emotional environment for students. This includes taking all reasonable steps to prevent bullying. Tackling bullies needs to be a collaborative effort involving the school, families, students and sometimes outside agencies. Everyone needs to accept that a school must be a safe, supportive environment where bad behaviour is not tolerated, and where bullying is recognised, publicly condemned and dealt with. If bullies are allowed to get away with it at school, they are likely to think they can get away with it at work.

The first step for schools is to explain to students what bullying is, and to publicly condemn it. Schools should have policies and procedures in place for dealing with bullying, and reinforce the message in newsletters and at assemblies that bullying is unacceptable behaviour and will not be tolerated. Staff and parents need to be seen to actively and visibly support the school's initiatives to stop bullying. Students need to know that reporting bullying is the right thing to do, and that if they come forward, they will be protected from retaliation and further harm.

If a school breaches its duty of care to keep students safe at school, and a student suffers an injury or recognised mental trauma as a result of persistent psychological bullying, a student and their parents may be able to successfully sue the school for damages if they can establish that the harm suffered was caused by the school's negligence or failure to prevent the bullying from occurring. In New Zealand, however, The Accident Compensation legislation prevents a student suing for compensatory damages for personal injury caused by physical bullying or mental harm suffered as a result of physical injury caused by bullying. Exemplary damages (damages to punish the perpetrator, rather than compensate the victim) may be available if a school has flagrantly disregarded its obligations and showed outrageous disregard for its students' safety. A school also has obligations, and may be liable for prosecution, under Health and Safety legislation.

Most parents and schools want students to excel at school and in life. A school's reputation for offering a supportive, safe environment where students are taught to treat one another with kindness, dignity, and respect, should be as prized as outstanding sporting and academic achievements. As a society, we may need to re-evaluate our priorities.

Can Teachers Be Victims Too?

In their book, *Bullycide, Death at Playtime*[85] Marr and Field report that since its inception in 1996, teachers have consistently formed the largest group of callers to the United Kingdom's National Workplace Bullying Advice Line. They report being bullied by colleagues, heads of department, deputy heads, and most often by head teachers. The authors report anecdotal evidence which suggests that if bullying is rife in the staffroom, then bullying is also rife in the playground, given that children learn most by example.

According to Marr and Field, the most common scenario in around 800 cases from the education sector, involves a popular competent teacher who has control of discipline. The bully, on the other hand, be they a fellow teacher, manager or head teacher, does not have control of discipline, despite protestations to the contrary. To hide their shortcomings the bully makes unsubstantiated but superficially convincing allegations of under performance as a pretext for imposing a competency procedure leading to dismissal. The bully then goes out of his or her way to make life difficult for the targeted teacher. For example, allocating the most disruptive pupils, the worst classes, the most difficult timetable, the most inconvenient locations and so on. Faults are found in everything the teacher says and does although criticisms cannot be authenticated. Requests for substantiation are met with charges of insubordination. After months of being set up to fail and with health severely damaged, a mistake inevitably occurs and the bully activates dismissal proceedings[86].

What Is Workplace Bullying?

Although workplace bullying may include physical assault, very often in the context of the workplace, bullying by managers or colleagues is more likely to be in the realms of verbal abuse, intimidation, sarcasm, threats, ridicule, isolation, exclusion, victimisation, humiliation, assigning people to unpleasant tasks and other sorts of undermining behaviour. Like all forms of bullying, workplace bullying is often a secret, subversive phenomenon. It can cause far reaching and serious consequences for the victims, threats to, and loss of, physical and mental health, alcohol and drug

abuse, loss of jobs and job opportunities. For employers, workplace bullying can lead to poor morale, absenteeism, high staff turnover, loss of productivity, mistakes and poor performance by victims, and the cost of compensation claims.

Definitions

Ireland

The Taskforce on the Prevention of Workplace Bullying established by the Irish Minister for Labour Trade & Consumer Affairs in September 1999, published its report in April 2001: *'Dignity at Work – The Challenge of Workplace Bullying'*.[87] The Report recommended the publication of codes of practice on bullying and harassment by three state agencies, and the following definition of workplace bullying:

> Workplace bullying is repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual's rights to dignity at work. An isolated incident of the behaviour described in this definition may be an affront to dignity at work but, as a once-off incident, is not considered to be bullying.[88]

This definition is set out in both the *Code of Practice Detailing Procedures for Addressing Bullying in the Workplace* (declared to be a code of practice for the purposes of the Industrial Relations Act 1990 on 25 January 2002) and in the *Code of Practice on the Prevention of Workplace Bullying*, issued under the Safety, Health and Welfare at Work Act 1989 (which came into effect on 1 March 2002). A code of practice introduced under the Employment Equality Act 1998 does not incorporate the general definition of bullying, as it deals primarily with harassment and sexual harassment defined in the Employment Equality Act 1998, both of which can constitute bullying in light of the general definition of bullying in the Taskforce's Report. The three codes may be admissible in evidence in relation to any proceedings commenced under the legislation giving effect to each code of practice.

Queensland

Recently, the State Government of Queensland released Australia's first comprehensive strategy to address bullying in the workplace. Key recommendations include introducing an Advisory Standard under the Workplace, Health and Safety Act on the prevention and management of workplace harassment at the workplace level, and outlining employees' rights and obligations; strengthening the powers of the Queensland Industrial Relations Commission to enable it to mediate serious disputes with a model grievance procedure which would help prevent frivolous and vexatious claims; and developing a comprehensive education and awareness strategy for employers, employees and the broader community.[89]

The Advisory Standard is to include a clear definition of *workplace harassment*, the term adopted by the Workplace Bullying Taskforce to refer to workplace bullying.

The Report of the Queensland Government Workplace Bullying Taskforce, released in March 2002,[90] proposed the following definition:

> Workplace harassment is repeated behaviour, other than behaviour that is sexual harassment, that:
>
> (1) is directed at an individual worker or group of workers; and
>
> (2) is offensive, intimidating, humiliating or threatening; and
>
> (3) is unwelcome and unsolicited; and
>
> (4) a reasonable person would consider to be offensive, intimidating, humiliating or threatening for the individual worker or group of workers.[91]

In announcing the recommendations, Premier, Peter Beattie, said that:

> They represent the most significant step forward anywhere in Australia in tackling a growing problem that is costing this country an estimated $13 billion a year.[92]

The steps taken in the jurisdictions referred to above reflect growing international awareness about the problem of workplace bullying, and the urgent need to address it.

The Nature And Extent Of Workplace Bullying

Incidence and Dynamics

In her article entitled '*The Incidence of Workplace Bullying*'[93] Charlotte Rayner reports on a survey into workplace bullying carried out at Staffordshire University in 1994. Of the 1,137 respondents, approximately half reported that they had been bullied during their working lives (the respondents were part time students). At that point, Rayner indicates that there had been little academic study regarding adult bullying at work, most having been conducted in Sweden. The findings indicated that a very large proportion of workplace bullies are in management positions (71%), which supported anecdotal evidence, although contrasted with Scandinavian data where only 40% of bullying was identified as perpetrated by managers.

In Scandinavia, however, there is apparently not only more peer bullying, but also a phenomomen not identified in the British study, where groups of peers pick on one person, translated as '*mobbing*'. Scandinavian research indicates that this also happens in schools. This trend is reflected in school bullying research in Japan where *'mobbing'* is referred to as '*shikato*' and accounts for 25% of school bullying. Rayner indicates that most commentators consider Scandinavia and Japan to be unusual in these respects.[94]

Statistics emerging from the British study, revealed a somewhat surprising pattern of bullying (only 19% of victims were bullied on their own) and that people appear to react differently when bullied in groups. Individual victims reported leaving their job at a fairly consistent (approximately 30%) rate, regardless of the length of time of bullying. The data for the larger groups (over five bullied) showed a smaller proportion (12%) leaving their jobs when the duration

of the bullying was less than six months, with momentum appearing after a year of bullying (35%). Victims who were bullied in groups of over five appeared more likely to have a longer staying on rate than any other. Rayner suggests that cognitive dissonance could be a reason for this, where, if others are observed to be putting up with the bullying, then an individual may attempt to change his or her own perception. The high incidence of bullying of groups also revealed that very few people sought help from colleagues, indicating to the researchers how effective a bully can be at shutting down his or her targets even when the latter knows others are being subjected to the same behaviour. Interestingly too, non-bullied people anticipated a far more pro-active response than the bullied person actually took. Rayner suggests that this indicates the difficulty of communicating the experience to others who have not been bullied. [95]

This study was the first attempt in the United Kingdom to establish the incidence of workplace bullying, showing that at least 77% of people studied, observed bullying, and approximately half the population studied, experienced it. Bullies were identified as generally being managers and older than the targets who were usually in staff positions when bullied. There was a surprising amount of bullying of groups whose targets exhibited different dynamics than those who were singularly victimised. 27% of the bullied left their jobs because of it, indicating both the direct cost to organisations and a potential litigious topic.[96]

Aggression

Crawford[97] identifies aggression as an important factor in workplace bullying. He describes bullying as 'sub-violent behaviour just a stone's throw from acts which this society deems criminal; the expression of aggression without physical violence - psychological aggression (Fromm, 1974; Storr, 1972). … Workplace bullying is in the middle of a continuum. On one end of the continuum is workplace homicide, murdering a colleague. … Physical violence at work is the next level along, and in the middle sexual harassment and bullying'.[98]

Crawford reports that violence at work resulted in the US Justice Department in 1993 proclaiming the workplace the most dangerous place to be (Labar, 1994). At the other end of the spectrum according to Crawford, is aggression in the service of the task and essential for the development of organisations. Crawford suggests that:

> Bullying is so endemic in our lives that I will go as far as to say it is interwoven to the fabric of our work. Day in day out people in positions of authority abuse their staff. Yet to be publicly branded a bully is to be likened to a yob. It is derisory, the antithesis of professionalism, the bully-boy and bully-girl pushing their weight around, the power to intimidate, sadism protected by positions of power. Many roles in organisations have bullying built into their structure – eg. the hatchet man, a feature of current organisational life.[99]

Organisational Dysfunction

In a nutshell, for Crawford, bullying is a symptom of organisational dysfunction. He writes:

> It should draw your attention to an organisational issue manifested in bullying. It is evidence of internal organisational conflicts which have bubbled to the surface. For me bullying is an example of seepage and spillage: the conflict is either seeping to the surface or suddenly spills out.[100]

Crawford also suggests that the study of bullying *'is the examination of line drawing'*. Where does firm management and decisive leadership end and bullying begin? Where does teasing end and bullying begin? Why are certain individuals bullied? These are difficult questions beyond the scope of this article which is primarily intended to raise awareness, highlight some of the complexities and provide a context in which to consider legal obligations.

Crawford examines some of the complex dynamics of bullying by considering the bullying and violence in the kitchens of restaurants and the verbal and physical abuse between senior chefs, their juniors and kitchen porters.[101] He suggests that certain organisations with rigid hierarchical structures are more likely to have a culture where bullying can flourish, where the power differential is handled without humanity, and indicates that there is a wide range of organisations where workplace bullying occurs: banks, insurance companies, the civil service, the defence industry, the European Parliament, the legal profession, university departments, the Health Service and education, privatised utility companies, the emergency services and the church[102].

The Report of the Queensland Government Workplace Bullying Taskforce, referred to above, indicates that reports of workplace bullying or harassment are commonly made in the fields of health and community services, education, and public administration. Similarly, in Queensland, statistics show that 43% of workers' compensation claims that are related to workplace bullying/harassment originate from those industries. The Report notes that a British study has found that teachers are the most likely group to be harassed at work by a person in authority, followed by health service employees, and those in the higher education sector. A significant number of submissions also perceived workplace harassment to be endemic to teaching, the health services, and higher education.[103]

Examples Of Intimidating/Bullying Behaviour

In *'Bullying at Work'* after Andrea Adams[104] the authors[105] identify a host of examples of bullying/intimidating behaviour: being repeatedly told off or criticised in front of colleagues; using offensive language (typically shouting or screeching); constantly nitpicking over trivia; over monitoring; withholding information to ensure an individual fails to achieve a given task; persistently attacking a person's personal and professional performance often developing into a campaign of vindictiveness; intercepting or listening to telephone calls; interfering with mail; altering desk and office arrangements; refusing requests for leave or training without any explanation; excluding from meetings previously attended; removing responsibilities designed to humiliate and undermine; reducing a person's input to a trivial and unrewarding level; constantly moving the goal posts so people become disoriented and start to make mistakes; setting victims up to fail by asking them to complete impossible tasks in impossible time scales.

Thomas-Peter[106] identifies additional, perhaps more subversive, abusive actions designed to dominate, humiliate or undermine others. These include:

- openness as a weapon (e.g. raising issues, questioning a project's continued viability or usefulness, in a team meeting where the employee has had no chance of preparation, meaning a defence of the project is awkward, and easily put down, and the employee is revealed as being emotionally driven and over committed).
- changing cogs (e.g. requiring someone to change the area in which they work without recognising that the relationship between the individual and workplace is complex and sophisticated).
- entrapment (e.g. inviting an employee to commit themselves to a statement, course of action or policy that is already known by the bully to be flawed).
- furtive alliances (e.g. several individuals form an alliance without the recognition or knowledge of the organisation with the intention of undermining individuals or policies for the purpose of advancing the ideas or interests of one or more of the alliance members).
- arguing from position (e.g. arguing from what the bully would consider to be high moral ground or a position of principle, with the result that frequent conflict or battle fatigue amounts to a situation where issues will be avoided to prevent another confrontation).
- Laying mines (e.g. creating an embargo on certain subjects by virtue of their reaction to anyone raising it, i.e. the bully feels at liberty to confront and challenge others but cannot be challenged themselves in a similar way, with the result that discussion is paralysed, prohibiting responsiveness to changing demands and allowing attitudes or practices to be above question).

The Power Of The Bully

Adams (Rayner/Beasley) make the point[107] that with families to support and mortgages to pay, often victims have no option but to endure the abuse. Confronting the bully often results in people getting the sack. The power of the bully lies in people remaining silent through fear. The insidious and persistent wearing down process is difficult to describe in a formal complaint. Incidents may sound quite trivial to the untrained ear. Other employees generally remain silent for fear of becoming victims.

A particular person may be seen as a threat to the bully's position. The victim is made to look professionally incompetent as a way to get rid of him or her, and to remove potential opposition. Similarly, someone whom the bully perceives to be too big for his or her boots or too timid or too loud or even just too inquisitive may unwittingly provoke repeated attacks. As Adams (Rayner/Beasley) point out, unfortunately, given that most people have never had their professional competence challenged or called into question, they begin to blame themselves, their self confidence seeps away, and their performance suffers.[108]

A bully is likely to have a Jekyl & Hyde component to his or her character, according to Adams (Rayner/Beasley), and is also likely to be very bad at delegating for fear of losing control. Bullying usually filters from the top down and is often seen as an acceptable way to manage which gets people promoted. A dictatorial style of management does not allow people to have the responsibility to do things themselves. Bullying often reflects a controlled culture. Where it is

allowed to happen it threatens the ability of an organisation to function to its full potential. If victims pluck up courage to confront issues they may be accused of being insubordinate, or complaints about a bullying boss can seem to imply criticism of those who placed this person in a position of trust or responsibility over others.[109]

Costs Of Workplace Bullying

For any organisation the costs of dealing with complaints of workplace bullying can be substantial. The Report of the Queensland Government Workplace Bullying Taskforce provides some interesting data in terms of costs. It indicates that in the United Kingdom alone the cost of lost working time and legal fees associated with workplace bullying is £4 billion per annum. The estimated costs of trying to overcome the problem is US$30 to US$100,000 for each person subjected to workplace harassment/bullying behaviour. An Australian model developed for assessing the impacts and costs of workplace bullying in Australian workplaces was used to cost the direct, hidden and intra-sector lost opportunity costs of workplace bullying. The costs examined were those associated with absenteeism, staff turnover, legal and workers' compensation, management time lost in addressing cases of workplace harassment, and decreased productivity. Using this model, the Report indicates that workplace harassment/bullying is estimated to cost the Australian economy between $6 billion and $13 billion per annum, representing between 0.9% and 2% of the gross domestic product where the prevalence rate is estimated at 3.5%. The research also estimated that the average cost of a case of serious workplace harassment (for example, where it persists for at least six months) is between $17,000 and $24,000.[110]

In addition, the Report indicates that the costs of workplace bullying also flow beyond the workplace into public health and medical services (including prescription and counselling services), income support and related government benefits for unemployed victims, and the public sector costs of administrative and legal action to address formal complaints. Other impacts mentioned include foregone profits, reduced discretionary spending among victims and families, which may arise because of reduced income, either because overall income levels have declined, for example, through unemployment or because counselling, medical, legal or other costs reduce income normally available to spend on other goods and services.[111]

The Report suggests that 75% of victims of long term workplace bullying display symptoms indicative of post traumatic stress disorder, including 65% for whom workplace bullying had ceased five years previously. Exposure to workplace bullying causes social isolation, stigmatising, social maladjustment, psychosomatic illnesses, depressions, compulsions, helplessness, anger, anxiety and despair. An American study identified three forms of impact on victims, including physical symptoms such as loss of strength and chronic fatigue; depression and related symptoms, such as sleeplessness; and psychological symptoms, including nervousness, hostility and avoidance of social contact.[112]

The Report indicates that Governments face costs relating to the increasing pressure placed on agencies to handle complaints of workplace bullying, and that this is evident in the steady increase of psychological/psychiatric claims documented by Workcover authorities in all States and Territories in Australia as well as by an increase in the number of complaints of workplace bullying

to workplace health and safety inspectors, industrial relations inspectors, and the Anti-discrimination Commission of Queensland[113].

Violence Towards Teachers – The Extreme End Of The Bullying Continuum

Shock waves reverberated around the world earlier this year when a former high school student in Germany, gunned down 11 teachers. Tragically, this example of extreme violence is no longer a new phenomenon. Although the examples from the United States, noted below, are one-off incidents and on that basis do not constitute bullying *per se*, it seems appropriate to include them, as they demonstrate violent behaviour taken to extremes, and to that extent are indicative of what may happen, if inappropriate aggression is tolerated, permitted to escalate, and is then taken to its logical conclusion.

United States

The incident recalled several multiple killings in the United States in recent years.

- March 1998, Jonesborough, Arkansaw: two children, 11 and 13, fired at schoolmates and teachers killing five and wounding 15.
- April 1999 the mostly widely-publicised incident: Columbine High School, Colorado. Two students gunned down twelve students and one teacher and then turned the guns on themselves.
- July 2001, Florida: Nathaniel Brazill ,14, was sentenced to 28 years in prison for killing by shooting a 30 year old, 7th grade teacher at a middle school in Lakewest, Florida on the last day on school in May 2000. Brazill, suspended earlier that day for throwing water balloons in the school cafeteria, had returned to school and asked the language arts teacher if he could enter the teacher's classroom to speak with two students. When the teacher said no, Brazill pointed the gun at him and it went off killing the teacher with one bullet to the head.[114]
- January 2002, Virginia: a failing student shot to death three people at the Appellation School of Law in Grundy. The student had failed his first year but was given another chance. When he received a notice of dismissal after failing again in 2001, he became increasingly distraught. He arrived at the campus to protest his dismissal and demanded to see his grades. After discussion about his academic standing with one of the professors he walked down the hall to the dean's office, opened fire at close range with a semi-automatic hand gun and killed the dean. He then shot another professor before killing another student in the school lounge who died later at the hospital.[115]

Following the Brazill shooting, and in the wake of a growing number of violent attacks on school staff, teachers in American schools were advised that they would be offered a special insurance deal to compensate their families if they were killed on the job. The National Education Association (NEA) the country's largest teachers' union with 2.6 million members announced it would offer an 'unlawful homicide' benefit worth $150,000 to the families of those killed at work. In the last 10 years at least 29 teachers and school staff have died violently at school. Another

leading teachers union, the American Federation of Teachers was expected to consider a similar move.[116]

A United States Government study of school violence, reported in *The New Zealand Herald* in December 2001, indicated that although the number of deadly school attacks had declined the incidents were more lethal and the attackers often suicidal or the victims of bullying. Researchers found attacks were more likely at large or urban schools and three quarters of the time a firearm was used. The attackers were much more likely than their victims to have been suicidal, have criminal records, to have been a gang member, to have been associated with high risk peers, to have a reputation as a loner, the study found. They were also twice as likely than their victims to have been bullied. Another pattern was that most attacks occurred during transition periods, the start of the school day, during lunch or at the end of a school day. The report recommended that efforts to reduce crowding, increase supervision and institute plans for handling disputes during these intervals may reduce the likelihood that conflicts would occur and that injuries would result when they do.[117]

Bullying By Students/Parents?

New Zealand

An article in *The New Zealand Herald* in August 1999[118] revealed that two out of three secondary school teachers are abused or threatened by their students each year, 16% seriously, according to the secondary teachers' union, the New Zealand Post Primary Teachers Association. 80% said that their classrooms were getting harder to control. One teacher's week was reported to include:

> arguing with teacher, yelling over teacher, threatening to break windows in my house, spitting on door handles, graffiti on desks, going through teacher's desk.

One female teacher reportedly received a letter saying she needed '*a bullet in the ----ing head*'. The article reported that the previous year 289 students had been suspended for assaulting teachers, and 1,490 suspended for verbal abuse, an increase on the previous year. The article suggested that many attacks go unreported especially if teachers consider their school is inept at dealing with the incidents or they will be seen to be incompetent.

A teacher quoted in *The New Zealand Herald* in late 1999 described her '*third form class from hell*'. The teacher experienced problems with a boy with a bad history of home violence, who brought a knife to school. *'… I said "D, I want that knife now". And he put the knife at my face and said "You take the knife and I'll cut your face", or something like that. He was very menacing and a lot taller and bigger than me, and very aggressive in the way he spoke. … He threatened if I took the knife off him he would do something to my car. I knew I wasn't going to win and I was very afraid he was actually going to do it because I didn't trust him at all … I went home that night and I had chest pains and I suppose I had lost my confidence, and I just didn't want to face the class again. I went the next morning to the doctor's surgery and I sat in the surgery and I just cried and cried. When the doctor eventually saw me, he said I had all the classic symptoms of stress and he suggested I didn't go back to that class. Day after day I had been victimised, bullied by these kids which was so horrible'.*[119] The teacher left her teaching position at the school.

An article in the same newspaper on 24 August 1999 reported another teaching career which had started with high hopes ending more than 20 years later in violence and intimidation. Before the teacher even entered the classroom at an Auckland secondary school several years ago, a sixth former reportedly asked *'If we are bad will you leave?'*. The teacher indicated that this comment haunted her for the next two and a half years. She reported being assaulted by a fourth form girl a few weeks later, and shortly afterwards a fifth form boy began trying his hardest to undermine her authority and create problems in her classroom. The teacher reported feeling intimidated for two more years and that the school discipline procedures were cumbersome and did not work. Eventually, she left the teaching profession *'because I had to encounter behaviour and attitudes no teacher should have to encounter'*[120].

Another story in the same edition of *The New Zealand Herald* on 24 August 1999,[121] which highlighted violence towards teachers, revealed that some principals had installed panic buttons in their offices to call for help, and had stopped teachers conducting parent teacher interviews alone in the classroom. At a school in Fielding in June that year the police had to be called after a parent threatened staff because his child had not arrived home. The parent had reportedly said that *'he was going to kill someone in the staffroom if he didn't get what he wanted'*.

Britain

Marr and Field[122] report that a secondary teacher in the West Midlands, Jean Evans, allegedly hanged herself in the garage of her home, rather than face another day of classroom torment, and the lack of understanding of her boss. They contend that after teaching for 19 years, in her final weeks, she '*fell prey to the blackboard jungle predators*'. The deputy headmaster at the same school committed suicide shortly after Jean. The 'Bullycide' authors also report that a Scottish hotline set up for bullied school children has been inundated by calls from teachers. Of every 500 calls, 120 are apparently from staff claiming victimisation by students. They quote Anti-Bullying Network Manager Andrew Mellor: *'The teachers are concerned about workplace bullying from pupils, parents, and managements'*.[123]

In April 2000, the BBC reported that two thirds of head teachers said their schools had been disrupted by violence and abusive parents. A survey of heads found that aggression from parents was one of the biggest difficulties in running a school.[124]

A report in *The Times* on 26 July 2002[125] reported that a parent received a nine month jail sentence for attacking a head teacher. The aggrieved parent apparently struck the head teacher in the jaw with his elbow before punching him several times more at a meeting to discuss the suspension of his teenage son. The article also reported a survey published the previous week that showed that serious assaults on teachers by pupils had risen from 34 in 1998 to 130 last year. A rise of 280% was identified in a survey of teachers across England by The Association of Teachers and Lecturers (ATL). The survey also revealed that 82% of teachers had been threatened by pupils, 53% had experienced bullying on a regular basis, and a third had found offensive weapons on pupils[126].

Reports in *The Independent* on 11 and 12 July 2002[127] reported an incident where a Mr Gladding of Norwich was so concerned by his son Lewis' reports of bullying in the playground that he went into the school, found the head teacher, pinned him against the wall, and as screaming

children ran for cover, set about inflicting what the school secretary described as the most abusive and violent attack she had witnessed in 14 years. The newspaper article reports that every day in the year a parent will walk into a school and express his or her concern in the most direct way available. 58,000 instances of parental aggression have been recorded by the Teachers Support Network over the past two years. Mr Gladding told the Court that he was angry because the school had not done enough to tackle the alleged bullies of his 9 year old son. According to the prosecution counsel, the father used *'foul and abusive language'* and *'was spitting with rage'*. He pushed the head teacher, Mr Holman against the wall and tried to butt him, but Mr Holman managed to move his head. Mr Gladding's face was less than a centimetre away.

In July 2002, *The Herald Express*, Torquay,[128] reported that as part of its anti-bullying campaign, violent, aggressive or threatening behaviour to any staff or children in its Torquay schools would be totally unacceptable. The National Union of Teachers in the South West indicated that their research showed that a small but growing number of pupils and parents believe it acceptable to harangue and harass teachers, sometimes turning into physical assaults.

What About Bullying By Colleagues?

New Zealand

The most recent, high profile case in New Zealand, which was eventually settled out of court, involved Virginia Woolf, an English teacher, at Kelston Girls High School in West Auckland, for 14 years. She resigned in January of 2000 and sought $350,000 in a personal grievance case against the school's board of trustees. The teacher claimed that she was a victim of oppression, dominance and bullying by the English Faculty Head, and had to take extended sick leave after collapsing at school through stress and anxiety. She sought compensation for humiliation, medical costs, sick pay, and loss of future earnings[129].

The UK Experience

A report in the *Sunday Mercury* newspaper in June 2002[130] reported that a new school bullying support group had been launched in the Midlands for teachers. The group has been founded by former teachers who all left their teaching jobs after suffering harassment. Their new pressure group is called Dignity at Work Now (DAWN) to help teachers and others who suffer workplace bullying. As well as offering support and advice, the group intends to lobby parliament. One of the founding members of the group reported being harassed by another member of staff. She indicated that she became so unwell that her hair began to fall out and she suffered depression and had panic attacks. The article quoted another founding member:

> Where I worked there was a history of bullying and a lot of people were off for stress related illnesses. The school was run in a way which created an atmosphere of fear and mistrust among colleagues where everyone was set up against each other. As teachers, we often had to deal with school bullies in the playground and yet the irony was that a lot of staff were being bullied themselves.

In 1998, a former deputy principal in Britain won more than £100,000 in damages after claiming he was bullied at work by colleagues.[131] His experiences reportedly caused two mental breakdowns and forced him to give up teaching. He claimed he was isolated, ignored, subject to a series of humiliating practical jokes, denied the normal responsibilities of a deputy principal, and was refused a set of keys to the school. He maintained:

> The bullying led to my breakdown and it got to the point where I couldn't teach any more.

The bullying went on for more than a year. This was reportedly the first case where a teacher had settled a claim based on allegations of bullying for a six figure sum, and echoed 600 or so other cases of teachers being bullied out of their job by aggressive colleagues or heads. Some examples:

- In June 1999, Teacher Fiona Turner claimed constructive dismissal after two years of bullying by her head teacher which had made her life intolerable.[132] It was estimated that the bullying scenario which lasted for two years would have cost taxpayers in excess of £100,000, possibly much more, given the time devoted to bullying, the impairment of performance caused by bullying, the number of people involved in the investigation, unwarranted disciplinary action, legal action, preparation for tribunal, solicitors fees, barristers fees etc. In the end, the head teacher and the chair of the Board of Governors conceded the case. Ms Turner was awarded £2,880.50 in compensation.
- In May 2000, deputy principal Jeff Hetherington won a unanimous verdict that he was unfairly dismissed.[133] The former deputy principal alleged that the arrival of a new head teacher led to a period of constant criticism, excessive monitoring and a tirade of unsubstantiated allegations of under-performance which brought an expected end to a successful 25 year career.
- In May 2000, a 45 year old Shropshire teacher accepted £300,000 compensation for a career wrecked by the bullying of a new female head teacher.[134] The teacher who specialised in working with emotionally and behaviourally disturbed children experienced a stress breakdown following a year of confrontations with the head teacher whose methods were questioned. The National Union of Teachers who supported the teacher said the problems began in January 1995 when a new head was appointed: '*Previously the school had run on team lines, but the new head would not listen to suggestions from experienced staff. She failed to demonstrate consistency and disciplinary policies, ignored the concerns of staff and rejected criticism from experienced teachers*'.
- In October 2001, primary school teacher Christine Browel obtained £100,000 in an out of court settlement against Northumberland County Council after they failed to deal with claims of bullying by the former principal and former head teacher of Mowbray First School.[135] The Council refused to admit liability claiming the teacher did not use formal grievance procedures to make a complaint.

These examples clearly demonstrate the need for school boards/school governors to be alive to the potential scenario of workplace bullying occurring in their schools.

Work-Related Stress

A 24 hour counselling help line called TeacherLine was set up in October 1999 for stressed teachers in England and Wales. TeacherLine reports that teachers are four times more likely to experience stress at work than employees in other professions. Research carried out for the Teachers Benevolent Fund revealed that 200,000 teachers had complained of stress over the past two years. 85,000 teachers had reported pupil aggression and 58,000 recorded aggression from other teachers. As at 27 October 2000, the counselling service revealed that 1000 teachers a month called the helpline. Of the 12,000 calls lodged in the helpline's first year, 27% were about stress, anxiety and depression, 14% reported conflict with managers, 9% were about workload, 9% had suffered loss of confidence, while 7% reported severe problems comprising risk of suicide, major depression or substance dependency.[136]

Work-related stress is a hot topic in New Zealand at the moment. The proposed amendments to The Health & Safety in Employment Act 1992 ('HSEA'), and one or two high profile court cases have had considerable exposure in the media.

Work-Related Stress Caused By Bullying

There is no doubt that there is the potential for teachers whose schools ignore their complaints about workplace bullying, whether by other staff, students, parents or other members of the school community, to bring a successful work-related stress claim against the school's governing body, if the teacher can establish that he or she has suffered work- related stress, mental harm, and fatigue, as a result of a breach by the school of its obligation to provide a safe, physical and emotional working environment. Before considering the available remedies, it may be useful to outline the facts of one English case which lead to a scenario that most schools would not wish to find themselves facing, a substantial out of court settlement in favour of a teacher who suffered a stress related illness brought about by workplace bullying.

Mr A v Shropshire County Council

As mentioned above, Mr A received a £300,000 settlement, as a result of being forced to retire early due to a stress induced illness. At the time the case was reported in the news media[137] the teacher was receiving counselling weekly and had been on medication for three years. He complained of feeling fearful and haunted and was constantly looking over his shoulder. He had not slept properly for two years and could not cope with strangers. He rarely left home despite having previously been active in sport.

After the arrival of a new head teacher, who promoted a divide and rule management style, failed to demonstrate consistency in disciplinary matters, ignored the concerns of staff, and rejected criticism from experienced teachers, Mr A began suffering stress related symptoms including physical exhaustion, short temper and loss of weight. He also began to suffer from insomnia and was reluctant to leave home. He became obsessive about work, lost concern for his appearance and indicated that the head teacher drew pupils' attention to his deteriorating appearance. Previously a non smoker, he became a chain smoker. He reported becoming completely disorientated.

The new head teacher reportedly put an end to joint staff meetings between teaching and ancillary staff, reprimanded ancillary staff in front of pupils, and created an atmosphere of them and us with both pupils and staff. Communication between the head and staff broke down. The head imposed a new disciplinary policy on the school which Mr A believed was inconsistent and incoherent. This included imposing inappropriate sanctions for minor misdemeanours and leaving no disciplinary sanctions for serious breaches. Mr A found the way the school was managed day to day and the lack of structure to maintain discipline and enable good teaching practice very stressful. Ill health became rife with numerous absences as a result of bad working conditions.

Mr A reported the situation to the responsible officer in Shropshire County Council explaining that the school was a disaster, that staff were demoralised and stressed, and that the children were very much out of control. He reported that he believed the staff were being bullied by the head teacher and told to look for alternative employment if they did not like decisions she made. When he said he was at breaking point and began to cry, asking whether he should seek counselling, he was told that was not necessary and that the Authority was aware of the problems and would get back to him. He heard nothing from the Authority after the meeting despite calling several times to follow up.

Mr A was subsequently involved in breaking up two physical attacks by pupils on each other and was himself pushed down the stairs by a pupil. He became irrational and suffered from delusions. He reported being unable to distinguish his dreams, which were solely about work, from reality. Four days after being pushed down the stairs, he was diagnosed as having suffered a complete nervous breakdown and has been unable to work since. The National Union of Teachers' General Secretary said at the time *'this is an appalling case of lack of care and concern for the health and well being of the teacher shown by both the school governors and Shropshire County Council. This teacher had suffered dreadful stress which could have been dealt with if the authorities intervened as soon as it became aware of the problems. Instead a committed caring teacher is now too ill to continue his chosen career'.*

Potential Prosecution Under HSEA

As mentioned above, in New Zealand, under the HSEA, boards, like all employers and other persons in control of a work place have an obligation to take all practicable steps to ensure the safety of their employees while at work. This includes making sure that machinery and equipment are safe and that employees are not exposed to any *hazard*. As previously mentioned, a *hazard* includes any circumstance, activity, phenomenon, arrangement, or situation that is an actual or potential cause of harm. Where a *hazard* is significant (an actual or potential cause or source of *serious* harm) an employer must take all practicable steps to eliminate the hazard or, if that is not possible, to isolate it, or at the very least to minimise it.

Under the proposed amendments to the HSEA, the definitions of *harm* and *hazard* have been extended. If the amendments are passed, *harm*, previously defined as *illness, injury or both*, will expressly include *physical or mental harm caused by work-related stress*. *Hazard* will expressly include *a situation, where, for example, because of physical or mental fatigue a person may be an actual or potential cause or source of harm.* These amendments reinforce existing case

law, where the Courts have indicated that the HSEA already applies in situations where an employee suffers harm arising from both physical and mental injury.

Nevertheless, in terms of workplace bullying, the amendments mean that boards will soon have an express statutory obligation to protect not only the victim's interests, by taking all practicable steps to prevent employees suffering unreasonable levels of stress and fatigue, for example, as a consequence of bullying (by students, parents and colleagues), so that they do not become a hazard themselves, but also to take all practicable steps to identify workplace bullying, to manage and reduce the risk of it occurring, and if at all possible to eliminate it from the workplace.

As also noted above, the proposed legislation increases the level of fines and allows for private prosecutions, thereby providing greater incentives for compliance. The Minister of Labour, Margaret Wilson has indicated, however, that employees will have to provide medical or other evidence of stress before an employer will be found liable under the planned Health and Safety amendments. OSH expects to release revised stress and fatigue guidelines.

In an article in *The New Zealand Herald,* on 11 February 2002, Dr Chris Walls, OSH Departmental Medical Practitioner, said employers would be, and are, expected to identify stresses or fatigous hazards.[138] They will also be expected to institute controls either by eliminating the hazard, if possible, or by isolating and minimising it. Employers must communicate measures to staff, train them and monitor the control measures. Stress factors can be identified, and the effects measured, for example, in suicide rates in young doctors and nurses, sick leave from burnout, productivity, sickness and absenteeism. Dr Walls said it is unlikely that OSH will pursue legal action in anything other than clear-cut cases.

Civil Claims For Damages

The potential for civil liability also exists. In New Zealand, given that occupational stress is excluded from our accident compensation regime, damages claims for mental injury/ work related stress are possible.

Attorney General v Gilbert[139]

The most notable case involving work-related stress in New Zealand was brought by Mr Gilbert, a former probation officer, who sued his former employer, the Department of Corrections, claiming that he was forced to retire on medical grounds 14 years earlier than expected, due to ill health (cardiac disease and vital exhaustion) caused by work-related stress, fatigue and burnout. The Employment Court and the Court of Appeal upheld Mr Gilbert's claims that the Department breached Mr Gilbert's employment contract by failing to take reasonable precautions against unnecessary stress. Mr Gilbert was awarded compensation for lost earnings until the date of his expected retirement, $75,000 general damages for humiliation, anxiety and distress, as well as medical expenses amounting to approximately $14,000, and costs. In light of the preceding discussion on exemplary damages it should be noted that the Court of Appeal quashed an award of $50,000 exemplary damages previously awarded in favour of Mr Gilbert by the Employment Court.

Mr Gilbert had raised his concerns with the Department but it did nothing. Mr Gilbert took sick leave, underwent operations and on his return to work the pressure of work increased. The Court of Appeal found that the Department :

- permitted inadequate staffing levels and excessive workloads;
- breached their own guidelines;
- provided grossly deficient management;
- failed to provide support, resources, and supervision;
- exposed Mr Gilbert to an excessive and stressful work load and environment; and
- failed to monitor Mr Gilbert's health in relation to that hazard.

Brickell v Commissioner of Police[140]

Another high profile case involved Mr Brickell, who had been employed in the Police video unit. His job required him to video horrific crime scenes. Continual exposure to gruesome material was a major factor in the psychological problems Mr Brickell encountered over an eight year period. He was diagnosed with stress and depression, and eventually retired due to ill health. The High Court found that the Police had been negligent, and acted in breach of their statutory duty under the HSEA, by failing to provide a safe work environment for Mr Brickell, and that as a result of those breaches Mr Brickell developed post-traumatic stress disorder.

Mr Brickell was awarded $293,915.01 compensation for loss of future earnings, $75,000 for pain, suffering and loss of amenity, and $4,035.35 for psychiatric treatment costs. However, the Court reduced the award by 35% to reflect Mr Brickell's own contribution to the disorder he developed. This is a significant point, and in terms of developing policies and procedures in regard to work-related stress, boards/schools will find it useful to consider how Mr Brickell contributed to the situation in which he found himself:

- he failed to advise his employer that the nature of the work was causing him stress and affecting his health;
- he undertook significantly more exposure to stress than necessary;
- he failed to communicate effectively with his supervisors;
- he failed to seek a re-arrangement of workload.

Personal Grievance Claims

Under the personal grievance provisions of the Employment Relations Act 2000 ('ERA') an employee may bring a personal grievance for being disadvantaged by some unjustifiable action by an employer, and/or for unjustified dismissal. There is no reason why workplace bullying resulting in work-related stress could not be dealt with as an unjustified disadvantage. This type of claim is

generally brought while the employee is still employed by the employer. If an employee felt obliged or forced to resign because their working conditions were no longer tenable due to excessive and unnecessary work-related stress, the employee could well have a claim for constructive dismissal. The onus is on the employee to establish that such a dismissal took place, in which case the onus of justifying the dismissal passes to the employer in accordance with normal principles.[141]

To establish constructive dismissal under the personal grievance regime, an employee would not need to meet the same threshold of illness required to bring a successful claim for stress-related damages based on negligence, where the claimant must demonstrate a recognised psychiatric illness or psychological injury/disorder. Given the exclusive jurisdiction under the ERA of the Employment Relations Authority and Employment Court to make determinations about employment relationship problems, including matters relating to a breach of employment agreement and personal grievances, it is likely that most stress related claims by employees in New Zealand will be brought within the employment dispute regime established under the ERA.

A stress related claim based on negligence on the other hand would need to be brought in New Zealand in the High Court. To be successful, the claimant would need to prove the necessary elements to establish negligence reviewed above. Relevant factors in determining which jurisdiction to employ could well include not only the nature and level of stress related illness or consequences suffered, but also the available timeframe for lodging a claim within each jurisdiction, and/or which jurisdiction in the circumstances offered a more favourable basis for assessing compensation.

Damages available for stress related claims generally include:

- loss of career earnings; only awarded where the employee is in a position to show a psychiatric or psychological injury to their health with prevents them from working again; damages for loss of career earnings have the potential to be significant.
- lost remuneration; payment of wages as compensation for dismissal (usually three to six months); if damages for loss of career are not warranted, lost remuneration damages may be awarded instead.
- stress damages; for stress, humiliation and distress that flows from an employer's breach of employment agreement. In workplace stress claims awards tend to be significantly higher ($15,000-$50,000) than stress damages usually awarded for routine employment cases ($4,000-$5,000).
- special damages; to cover medical expenses and other specific costs.
- exemplary damages; as explained above, exemplary damages are awarded where an employee's conduct is so outrageous that it requires condemnation and punishment.

How Can Boards/Schools Fulfil Their Obligations To Staff In Relation To Work-Related Stress Caused By Bullying?

The *Gilbert* and *Brickell* cases provide some useful insights for employers. In both cases, employers refused to investigate and assess work situations, despite repeated complaints from affected staff and obvious staffing problems. Recent case law from Britain also provides some helpful guidelines for employers in handling occupational stress issues.

Sutherland v Hatton[142]

Earlier this year, the United Kingdom Court of Appeal issued a judgment, where four separate employers appealed against findings of negligence at first instance, resulting in liability for damages for employees' psychiatric illness caused by stress at work. Two of the cases involved secondary school teachers, Penelope Hatton and Alan Barber, who in the lower court had been awarded substantial damages of £90,000 and £101,000, respectively.

Mrs Hatton

Mrs Hatton was a French teacher. She taught at the same school for 15 years and then had a breakdown in health, retiring on health grounds in August 1996. She claimed that the school authorities failed to take reasonable steps to protect her from suffering a stress related psychiatric illness. Mrs Hatton had two months off work suffering from depression in 1989 following the break-up of her marriage. She was again off work for a considerable part of 1993/94 but did not tell anyone at the school that she attributed her absences to overwork, and she had not complained to anyone at the school about her workload.

The Court of Appeal found that Mrs Hatton's pattern of absences and illness was on the face of it readily attributable to causes other than stress at work. In January 1994 she was off work for a month following an attack in the street. In April 1994 one of her sons had to go into hospital for a considerable period. She was sent home and remained away for the rest of the term certified with depression and debility. Although she saw a stress counsellor in August 1994 she did not tell the school about this. When she returned in September 1994 she attributed her absence to her son's illness. During the school year 1994-95 Mrs Hatton had no absences due to depression or debility, although she did have a number of absences for minor physical ailments.

The Court found that her workload and pattern of absence taken together could not amount to a sufficiently clear indication that Mrs Hatton was likely to suffer from psychiatric injury as a result of stress at work, such as to trigger a duty to do more than in fact was done. The school could not reasonably be expected to probe further into the causes of her absence in the 1994 summer term, when she herself had attributed it to problems at home, which the school knew to be real. The Court of Appeal found that the claim must fail at the first threshold of forseeability.[143]

Mr Barber

Mr Barber, a Maths teacher, suffered depression following brusque, autocratic and bullying behaviour by his head teacher. A restructuring exercise meant that Mr Barber's workload increased but resources were withdrawn. Although Mr Barber developed depressive symptoms during the Autumn 1995 term, he told no-one at school about these. Even though he felt worse during the

Spring 1996 term, he again told no-one at school. In May 1996, he had three weeks off work with depression. He was surprised to be told the diagnosis as he had never thought of himself in that way.

On this return, he had an informal meeting with the head teacher and raised his concerns that he was finding things difficult. In July 1996, he saw one of the deputy heads and told her that he could not cope and that the situation was becoming detrimental to his health. She referred him to Mr Gill, the other deputy head, who was more symphatetic. However, Mr Barber did not tell either of them about the symptoms of weight loss, lack of sleep and out-of-body experiences that he described in his evidence. On the unexpected retirement of the head teacher at the end of the term, Mr Gill became acting headmaster. He was concerned about Mr Barber and asked a colleague to keep an eye on him. In November 1996, Mr Barber lost control in the classroom and was advised to stop work immediately.

The Court of Appeal found this was a classic case in which it is essential to consider at what point the school's duty to take some action was triggered, what that action should have been and whether it would have done some good. Although the Court of Appeal said that there was evidence entitling the Judge at first instance to hold that stress at work had made a material contribution to Mr Barber's illness, that in itself was not enough to lead to the conclusion that the school was in breach of duty or that its breach caused the harm.

The first the school knew of any possible adverse effects upon Mr Barber's health of the difficulties at work was after his return in 1996. However, he simply told the head teacher that he was not coping very well. Although he made a more explicit reference to his health to the deputy head teachers, he did not explain the symptoms from which he was suffering. Upon his return from the summer holidays he told no-one at school of any problems during that term. The Court of Appeal found that in the circumstances it was difficult to identify a point at which the school had a duty to take the positive steps identified by the Judge at first instance.

The Court found that it might have been different if Mr Barber had gone to Mr Gill at the beginning of the Autumn term and told him that things had not improved over the holidays, but it was expecting far too much to expect the school authorities to pick up the fact that the problems were continuing without some such indication. In the Court of Appeal's view the evidence taken at its highest did not sustain a finding that the school was in breach of its duty of care towards Mr Barber. [144]

For the reasons outlined above, the Court of Appeal found that neither teacher had established sufficient grounds for a successful negligence claim against their respective employers in terms of the propositions outlined below, and in fact allowed three of the four appeals before it. The Court acknowledged that occupational stress claims require particular care in determination because they often give rise to difficult issues of foreseeability and causation, and identifying a relevant breach of duty.

The propositions outlined by the Court of Appeal may provide useful guidelines for schools/their governing bodies, specifically in relation to claims based on negligence, but also more generally, in terms of both the nature and extent of an employer's duty to take reasonable steps to provide a safe and healthy work environment, and an employee's own responsibilities.

Useful Guidelines *(Sutherland v Hatton)*[145]

- The ordinary principles of employer's liability apply.
- The threshold question is whether the harm suffered by the particular employee was reasonably foreseeable. That has two components:
- an injury to health, as distinct from emotional stress; which is
- attributable to stress at work as distinct from other factors.
- Foreseeability depends on what the employer knew or ought reasonably to have known about the individual employee. Because of the nature of mental disorder it is harder to foresee than physical injury but might be easier to foresee in a known individual than in the population at large. An employer is usually entitled to assume that the employee can withstand the normal pressure of the job, unless the employer knows of some particular problem or vulnerability.
- The test is the same whatever the employment. There are no occupations which should be regarded as intrinsically dangerous to mental health.
- Factors likely to be relevant in answering the threshold question include:
    - the nature and extent of the work done by the employee;
    - signs from the employee of impending harm to health.
- The employer is generally entitled to take what the employer is told by an employee at face value, unless the employer has good reason to think to the contrary.
- To trigger a duty to take steps, the indications of impending harm to health arising from stress at work have to be plain enough for any reasonable employer to realise that the employer should do something about it.
- The employer is in breach of duty **only** if the employer fails to take reasonable steps, bearing in mind the magnitude of the risk, the gravity of any harm, the costs and practicability of preventing it, and justification for running the risk.
- The size and scope of the employer's operation is relevant including, for example, re-distribution of duties to other employees and the need to treat them fairly.
- An employer can reasonably be expected only to take steps which are likely to do some good.
- An employer who offers a confidential counselling or treatment service is unlikely to be in breach of duty. (Commentators in New Zealand have suggested that there could be circumstances where employers offer confidential counselling that may still be liable.)
- If the only reasonable step is to demote or dismiss the employee, the employer will not be in breach, in allowing a willing employee to continue working.

- It is therefore necessary to identify the steps the employer should have taken before finding the employer in breach.
- The claimant must show the employer's breach of duty has caused the harm. Occupational stress is not enough.
- Where the harm has more than one cause, the employer is liable for only the employer's contribution.
- The assessment of damages will take account of any pre-existing disorder or vulnerability.

At the time of writing it is unclear whether the judgment will be appealed. In the meantime, however, the case will provide some comfort to school boards/governors. The propositions that emerge from the case demonstrate that claims along the lines brought by Mrs Hatton and Mr Barber will not succeed merely upon the establishment of work-related stress. A claimant must establish that the school has breached its duty to the teacher and that the resulting breach has caused the harm suffered.

What Strategies Can Schools Employ To Manage, Reduce, And Prevent Bullying Of Teachers?

This article reviews the main legal obligations of schools towards teachers and remedies available to teachers, who claim to have suffered mental harm or work-related stress as a consequence of workplace bullying, whether at the hands of students, parents or colleagues. In most cases, however, strict legal remedies seldom provide a positive, satisfying solution in an educational context.

What clearly emerges in the literature on workplace bullying is that if there is to be a real shift in organisational culture, with a view to freeing workplaces from bullying behaviour, there needs to be a genuine commitment to changing attitudes.

Thomas-Peter[146] suggests that the first step in the war against workplace bullying is to identify strategies and behaviours designed to dominate, humiliate or undermine others, on the basis that it is only by identifying types or categories of reprehensible behaviour that progress can be made in limiting interpersonal harassment. Second, Thomas-Peter recommends establishing standards of interpersonal behaviour against which an individual's conduct may be considered, and third, requiring a personal commitment to maintain those standards.

The implementation of an anti-bullying policy appears to be a crucial element in the effective management and reduction of workplace bullying, aligned with clear procedures for investigating and dealing with complaints. A clear policy needs to be seen to be implemented effectively so that victims feel confident to seek redress and the benefit/cost balance is reduced for those tempted to bully others. Once the policy is implemented it should be kept on the agenda.[147]

Andrea Adams[148] stresses that risk assessment is essential, and suggests the following strategies that employers can adopt for their staff and for themselves:

- implement a clear policy on bullying which sets out the disciplinary action which offenders will face;
- communicate the policy to staff through leaflets and posters on notice boards;
- identify in the policy forms of bullying and let staff know how they can help and have their complaint dealt with in confidence;
- watch out for signs of stress;
- take complaints seriously and deal with them swiftly;
- provide training for aggressive managers in stress and anger management.

Assertiveness training may also be useful for victims of bullying given that a common problem in dealing with bullying is how to encourage the majority who dislike bullying to take a stance and not be passive bystanders condoning bullying behaviour. Conflict mediation and peer counselling are other possible approaches.[149]

For school boards/governors who wish to take positive, pro-active steps to address the issue of workplace bullying (even if they do no perceive it to be a significant problem or issue in their school or place of work), there are many helpful resources available. For example, the Workplace Bullying Employers Guide (produced by the Queensland Council of Unions, Commerce Queensland, Queensland Working Women's Service and Queensland Government Department of Industrial Relations)[150] provides employers with useful information about workplace bullying and how to address it (under the headings: W*hat is workplace bullying?; Why prevent workplace bullying?; Doing something about workplace bullying; Finding out if workplace bullying exists at your workplace; Developing a plan; Reviewing the strategy implemented; Legal obligations; A sample workplace bullying policy; Where to find information).* There is also an accompanying Workplace Bullying Workers Guide.

In terms of work-related stress which is likely to be a consequence for victims of sustained bullying behaviour, school boards/governors should take their employees' concerns seriously:

- listen to employees' concerns about work-related stress;
- put in place a clear process for handling complaints about stress;
- identify tasks that could cause stress and be considered significant hazards;
- Introduce policies and procedures to identify, manage, and reduce stress levels and related symptoms;
- communicate measures to staff, train them, and monitor control measures;
- provide counselling for employees working in particularly stressful situations;
- be pro-active, flexible, and responsive in terms of providing constructive solutions.

Summary

In the same way that student bullying is unacceptable and needs to be publicly condemned, so too, the bullying of teachers must not be tolerated or condoned, whether the perpetrators are students, parents or faculty.

School boards/governors owe a duty to their employees to provide a safe and healthy working environment, free from physical harm and psychological abuse, intimidation, and all forms of offensive, humiliating, and unwelcome behaviour. If school boards breach the duties they owe to staff, with the result that a teacher suffers harm as a result of the school's breach, the teacher may be able to bring a successful personal grievance against the board based on their employment relationship with the board, or a civil claim for damages, for example, based on negligence, subject, in New Zealand, to the restrictions imposed by our Accident Compensation Scheme on claims for personal injury. The board may also be liable to prosecution under Health and Safety legislation.

Conclusion

Bullying is an issue for all schools. Whatever its manifestation, bullying needs to be recognised for what it is, harmful, hurtful, and totally unacceptable behaviour. A clear message should be communicated to all members of the school community, students, staff, and parents, that bullying in any form by anyone, student, teacher or parent, will not be tolerated. It is in nobody's interest to allow bullying to go unchecked. The patterns of bullying and abusive behaviour identified in the examples outlined in this article, demonstrate that bullying can have extremely harmful, long term consequences for the individual and for the school community, sometimes resulting in tragedy.

Schools are a powerful influence in shaping the values and attitudes of young people. Young people generally respond well to strong, positive role models. Where schools are tackling bullies effectively in the classroom and in the staffroom, school boards/governors and senior management will be leading by example and modelling behaviour that promotes a culture of decency throughout the school, with a view to ensuring that every member of the school community is treated with dignity, kindness, and respect, from the youngest student to the most senior teacher.

Endnotes

1. Definition adopted by Slee, PT and Ford, DC "Bullying is a Serious Issue – It is a crime!" (1999) 4(I) Australia and New Zealand Journal of Law and Education, pp 23 at 25
2. The Christchurch Press, 1 May 2002, "Complaint laid against Taradale school staff", p 5.
3. High Court of New Zealand, Napier, T14/01 Queen v Castles, Sentence of Gendall J, at p 3.
4. Gendall J, supra, p3
5. Gendall J, supra, p5
6. The Dominion, 25 April 2002, p9 "Driven out by the bullies; I was known as the local geek".
7. The Christchurch Press, 4 May 2002, "Reining in the bullies".
8. The Dominion, 6 May 2002, p1, "30 kids a day complain of bullying".
9. The Dominion, 6 May, 2002,supra, p1.
10. The New Zealand Herald, 25/1/2002.

11. www.bullying.co.uk provides a life line for parents and children who are being bullied and need assistance.
12. www.bullying.co.uk/the_site/statistics.htm
13. Marr, N & Field, T Bullycide, Death at Playtime, (Success Unlimited, Didcot, Oxfordshire, Great Britain 2001) p256.
14. Bullycide, supra, p133.
15. See http://www.successunlimited.co.uk/books/bullcid.htm.
16. Bullycide, supra, a call away, pp128-149
17. Bullycide, supra, chap 10, a call away, p149
18. Scottish Daily Record, 4/7/2002, p4.
19. "Bullying is a Serious Issue- It is a Crime!" supra, pg 25
20. National Administration Guideline Number 5. The National Administration Guidelines are given effect by sections 60A and 61 of the Education Act 1989.
21. David Ford, Emil Ford & Co – Lawyers, ANZELA Annual Conference 2001.
22. David Ford, Emil, Ford & Co, supra, p11.
23. *Attorney-General v Prince* [1998] 1 NZLR 262, at 286.
24. *Phelps v Hillingdon London Borough Council* [2002] AC 619
25. *Williams v Eady* (1893) 10 TLR 41, CA.
26. [1982] 41 ALR 577, Murphy J at 591.
27. (1964) 111 CLR 16, Kitto J at 28.
28. [1982] 41 ALR 577.
29. [1982] 41 ALR 577 Mason J at 586.
30. [1955] AC 549. A school authority was held liable for the death of lorry driver when a child wandered onto the road through an unlocked gate at the school and the driver in swerving to avoid the child hit a pole. Their Lordships found that the injury was caused by the failure of the authority to take reasonable steps to prevent the escape of the child.
31. [1982] 41 ALR 577 Mason J at 586.
32. [1982] 41 ALR 577 Mason J at 588.
33. [1982] 41 ALR 577, Murphy J at 591.
34. *Richards v Victoria* (1969) VR 136, Winneke CJ at 138.
35. (1969) VR 136.
36. (1969) VR 136, Winneke CJ at 141.
37. 123 DLR (3d) 1; (1981) 2 SCR 21.
38. (1893) 10 TRL 41.
39. 123 DLR (3d) 1, McIntyre J at 10.
40. (1969) VR 136.
41. *Richards v Victoria* (1969) VR 136 Winneke CJ at 139.
42. (1893) 10 TRL 41.
43. (unreported) C.38/1967, Western Australia.

44. *Overseas Tankship (UK) Limited v Morts Dock & Engineering Co Limited (The Wagonmound No.1)* [1961] AC388 (PC).
45. (1980) 29 ALR.
46. [1951] AC850 (HL).
47. [2000] 3 NZLR 499.
48. 8 November 2000 TLR (QB).
49. *Phelps v Hillingdon London Borough Council* [2000] 3WLR 776 approving *Gower v London Borough of Bromley* [1999] ELR 356, at 359.
50. *Bradford-Smart v West Sussex County Council* [2002] EWCA CIV 7 (23 January 2002)
51. *Bradford-Smart v Wessex County Council*, supra, p8.
52. The Birmingham Post, 6 July 2002, p6.
53. Bullycide, supra, p161.
54. 'Bully Online' website of UK National Workplace Bullying Advice Line. Case Law and out-of-Court settlements.
55. Bullycide, supra, pp160-161.
56. [1982] 1 NZLR 97 (CA).
57. [1982] 1 NZLR 97 (CA) Cooke J at 107.
58. Section 3(2)(a).
59. [1989]1 NZLR 325 (CA).
60. Section 396 Accident Insurance Act 1998
61. [1995] NZAR 33 Master Thompson, at 43.
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