

A SCHOOL'S DUTY TO PROVIDE A SAFE LEARNING ENVIRONMENT: DOES THIS INCLUDE CYBERBULLYING?

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Cyberbullying is now recognised as a new form of bullying especially amongst young people. While the consequences of this insidious way of bullying have not been fully explored, it would seem it could be extremely detrimental to both the victims and the perpetrators. Schools in Australia and New Zealand are required to have anti-bullying policies but many have not considered cyberbullying to be in their jurisdiction as cyberspace has no geographical boundaries. This article examines the legal issues of cyberbullying and schools' responsibility under the civil law for cyberbullying and the criminal ramifications of such conduct.

I WHAT IS CYBERBULLYING?

Cyberbullying, a term coined by Canadian Bill Belsey is defined as:

the use of information and communication technologies such as e-mail, cell phone and pager text messages, instant messaging (IM), defamatory personal Web sites, and defamatory online personal polling Web sites, to support deliberate, repeated, and hostile behaviour by an individual or group, that is intended to harm others.¹

Other emerging terms are electronic bullying, e-bullying or technological bullying. There seem to be two main mediums that are involved in cyber bullying, the mobile/cell phone and the computer. While the Internet has been described as transforming society by providing person-to-person communication, the mobile/cell phone has transformed the peer group into a truly networked group.² Adolescents are now using these technologies in ways unintended by their designers to bully their peers.³ Methods include texting derogatory messages on mobile phones and showing these messages to others before sending them to the victim; sending threatening e-mails; forwarding confidential e-mails to all address book contacts, thus publicly humiliating the first sender; ganging up on a victim and bombarding him/her with 'flame' e-mails.⁴ Another way to cyberbully is to set up a derogatory web site dedicated to a targeted student victim and e-mailing others the address, inviting their comments. In addition, web sites can be set up for others to vote on the 'biggest geek', or 'sluttiest girl' in the school.⁵ One widely reported incident occurred in the United States when a self-made film of a 15 year-old Quebec boy emulating a Star Wars fight was posted on the Internet by three of his classmates which millions downloaded and which prompted the media to dub him 'the Star Wars Kid'.⁶ In another incident, an overweight boy was photographed by a mobile phone camera in the school change room and the picture

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posted on the Internet.⁷ Cyberbullying can also be carried out in chat rooms, with the participants 'slagging' a targeted student or continually excluding someone.⁸

II INCIDENCE OF CYBERBULLYING

The incidence of cyberbullying is difficult to determine at this time, as there is scant published research in this area and the existing research seems to vary, from country to country and also at different points of time. In Britain the reported incidence of cyberbullying has ranged from 25 per cent of the sample⁹ to 16 per cent.¹⁰ In the United States some studies have found from 35 percent of cybervictims¹¹ to just 7 percent.¹² In Canada the percentage has been reported as 25 percent¹³; in Australia 14 percent¹⁴ and in Sweden 12 per cent.¹⁵ In the year 2007 alone Beran and Li¹⁶ found 58 per cent of young people reported being cyberbullied; Raskauskas and Stoltz¹⁷, 48 per cent and Campbell¹⁸, 14 percent. Cyberbullies have been identified as comprising 34 per cent of the sample,¹⁹ or 17 per cent,²⁰ or 15 per cent²¹ or 11 percent.²² Many of these studies are limited by small sample sizes and often different definitions of bullying. In both the United Kingdom and Australian studies, most targets of cyberbullying seem to be bullied by texting, followed by chat rooms then by e-mail.²³ Overall this research would seem to indicate that the incidence of cyberbullying would seem to be about 20 per cent of victims (Smith et al., MSN).²⁴

There have also been conflicting results in relation to gender differences in cyberbullying. Stys found no gender differences in those who bullied,²⁵ Li found that males were more likely to cyberbully than females²⁶ and the MSN cyberbullying report found that girls were more likely to be the victims of cyberbullying.²⁷ However two recent studies found no gender differences in either cybervictims or cyberbullies.²⁸

III CONSEQUENCES OF CYBERBULLYING

The only documented consequence of cyberbullying has been media reported suicides.²⁹ In 2006, a 12-year-old New Zealand girl killed herself at the end of the summer holidays reportedly because she had been cyberbullied and could not face returning to school³⁰ and in 2005 a 15-year Florida adolescent who was cyberbullied took his own life.³¹ However, it would seem that cyberbullying would have similar consequences to face-to-face bullying. These consequences have been reported increased levels of depression, anxiety and psychosomatic symptoms in victims.³² Bullied students also feel more socially ineffective; have greater interpersonal difficulties³³ together with higher absenteeism from school and lower academic competence with consequent implications for future careers.³⁴ However, it is still unclear if these symptoms are antecedents or consequences of bullying.³⁵ Thus, the direction of causality may be both ways.³⁶

While there is scant research on the consequences of cyberbullying, it is hypothesised that it could have even more serious consequences than face-to-face bullying. Cyberbullying has a variety of attributes which may accentuate the impact of the bullying behaviour: for example, the potential to include a wider audience; anonymity; the more enduring nature of the written word; and the ability to reach the target at any time and in any place including previously considered safe havens such as the target's home. Because of the far reaching nature of cyberbullying, changing schools is not a viable option. Additionally, cyberbullies may be more emboldened because they cannot see their victims and believe that their anonymity protects them from detection. It has also been postulated that, because cyberbullies do not see the immediate reaction of their victim, they may increase the intensity of the attacks and continue for longer than they would face-to-face.³⁷ Although bullying by physical violence can only be threatened, not conducted, by technology,

research has shown that verbal and psychological bullying may have more negative long term effects³⁸ and thus cyberbullying could have serious consequences.

IV LEGAL IMPLICATIONS FOR SCHOOLS

To date there has been little detailed examination of the legal issues associated with bullying,³⁹ let alone cyberbullying. Additionally schools' responsibility under the civil law for cyberbullying and the criminal ramifications of such conduct are not well understood.

A Criminal Law

In Australian and New Zealand law, bullying and therefore cyberbullying, is not a criminal offence per se. The law names criminal offences most associated with bullying as assault, threats, extortion, stalking or harassment. However, bullying by students is usually seen more as a disciplinary matter in schools and not a crime. The police are rarely involved and prosecutions are uncommon. As one Canadian Judge said in 2002,

When do school yard taunts cross over the line to become a criminal offence of threatening death or bodily harm? When does a teenager's annoying behaviour towards a fellow student amount to an offence of criminal [stalking]?⁴⁰

Whilst criminal sanctions might seem an extreme response, it is not inappropriate for all stakeholders – young persons, parents, schools, education authorities and psychologists – to be aware of the potential for criminal liability, especially when the consequences of the cyberbullying conduct are serious for the target student and/or where there is simply no other basis on which the conduct might be dealt with, occurring as it frequently does beyond temporal and physical school boundaries. In many instances, cyberbullying can constitute criminal conduct, especially when the behaviour is seriously threatening, harassing or intimidating. While there may be a natural tendency to seek to avoid the criminalisation of young people in this context, criminal sanctions are appropriate to more cases than are generally appreciated, while very few young people seem to appreciate their potential for attracting criminal liability. Media reports and other accounts, however, have recently highlighted that schools themselves, if not teachers and parents also, are increasingly inclined to resort to the criminal law; often out of fear, frustration or in the interests of community safety. For example, in the U.S., Meadows et al.,⁴¹ reported that six Grade 8 children were charged with harassment, while four were also charged with making terrorist threats. The children had 'derided classmates about their weight and threatened students online, telling one, "You'll be needing an intraocular lens when I stab a skewer through your head."'. They were found guilty and sentenced to community service and probation.

Under what circumstances might the school-aged cyberbully be held criminally responsible for their conduct? It is a fundamental proposition of the criminal law that a perpetrator must commit the proscribed conduct concomitant with having the requisite guilty mind or intent. The latter focus on guilty intent is commonly referred to as 'criminal responsibility'. A person may avoid criminal responsibility by reason of their 'immature age'. While young offenders might generically suffer from a degree of immaturity in the sense of underdeveloped empathy skills, lack of appreciation of the gravity of their conduct, and reduced ability to control their impulses, the criminal law is generally not concerned with those aspects of (im)maturity but, rather, focuses strictly on an age threshold to impose liability.

At common law, the age of criminal responsibility is 7 years. This has been raised by statute in all Australian jurisdictions and in New Zealand to 10 years, meaning a cyberbully under 10 will never be liable, while those aged between 10- and 14-years may be criminally responsible if the prosecution can prove beyond reasonable doubt that the child knew they ought not to have committed the offence; that is, they knew that it was a wrong act of some seriousness, as distinct from an act of mere 'naughtiness or childish mischief'.⁴²

Children aged 14 and over are deemed to have the requisite capacity. In practice today, most children aged 10-13 are found criminally responsible and the question of criminal responsibility as an impediment to prosecution will rarely arise.

In Australia and New Zealand, with the exception of Division 8B *Crimes Act 1900* (N.S.W.), there has been no dedicated legislative response to bullying or cyberbullying, unlike the situation in the U.S.⁴³ Despite the absence of targeted responses, the conduct involved in cyberbullying is no more or less than a further manifestation of personal violence or harassment that causes psychological and/or physical harm, albeit in the context where the offline world of violence (or threats of such to person or property) has moved online and into cyber space. Many of the crimes that may be committed correlate with the civil remedies available (eg, assault, defamation, harassment, see below), though obviously the criminal standard of legal proof is higher (beyond reasonable doubt) than for civil actions (the balance of probabilities). The definitional essence of bullying conduct⁴⁴ — the power imbalance, the intentional and repetitive nature of the harassment, victim blame and exclusion as justifications, the implicit support of the bully by bystanders and that victims are unable to defend themselves — lends itself easily to a criminal analysis.

While the criminal law, like the civil law, is still playing catch up in the area of criminal cyber activity, it does not require any great stretch of the prosecutorial imagination to reconceptualise types of cyberbullying as the well known criminal offences of assault, threats, extortion, stalking, harassment, indecent conduct and the like, while an increasing array of new offences, such as torture, voyeurism, cyberstalking, and the telecommunications offences, expand the reach of the criminal law to capture young and older offenders alike.

B *Civil Law*

Increasingly, targets who may feel powerless in the face of bullying behaviour are turning to the courts to exact some measure of reparation from those responsible. When the cyberbullying takes place in a school context, the target of the behaviour (the 'plaintiff' in any legal action) may seek to obtain compensation against either the perpetrator or the school authorities who failed to take steps to prevent it (the 'defendants' in any action). In the case of the perpetrator, depending on circumstances, such an action might be framed as action for the tort of 'assault', an intentional infliction of psychiatric harm, defamation or the embryonic tort protecting privacy. Unlike criminal law, age is no barrier to a civil liability to pay compensation for cyberbullying. The only question is whether the perpetrator 'was old enough to know that his [or her] conduct was wrongful — that is to say if, in the common phrase, he [or she] was old enough to know better'.⁴⁵ The decision whether to bring an action against a child perpetrator is therefore more likely to involve more practical considerations such as whether he or she has sufficient financial resources to make him or her worth suing. Whatever the position in other countries, under Australian law parents are generally not legally liable for the acts of their children.⁴⁶

By contrast, the school authority — which in case of a public school will usually be a State or Territory government and in the case of a private school will normally be an organisation such as an incorporated company, a church diocese or trust — may be perceived to be a more attractive target for litigation since it will likely have greater resources to meet any compensation award, whether through insurance or the backing of government finances. Practically speaking, therefore, a negligence action against the relevant school authority for an alleged failure to prevent the cyberbullying may be the most likely civil cause of action pursued by the target of such bullying.

1 *Duty of Care*

It is well established that at common law a school authority owes a duty of care towards its students.⁴⁷ The duty is described as being ‘non-delegable’. This means that even where, as is usually the case, the practical responsibility for ensuring that the school is a safe environment is delegated to the principal of the school, the *legal* responsibility at all times remains with the school authority. Consequently, it will be the school authority that will bear any legal liability in the event that the duty is breached.

This duty has been recognised as extending to protecting the student from the conduct of other students.⁴⁸ The duty covers not only physical injuries but also recognisable psychiatric illness, which as noted, is a potential consequence of cyberbullying. While the existence of the duty may be without doubt, more problematic may be the *scope* of the duty in terms of geography and time. In Australia it has been held that the existence of the duty depends upon whether in the particular circumstances ‘the relationship of schoolmaster and pupil was or was not then in existence’.⁴⁹ The test therefore does not depend upon whether the student is on school premises or whether any accident occurs during school hours. There have been cases which have held that the duty has been owed despite the incident resulting in injury occurring outside school hours and beyond school premises. In *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman*,⁵⁰ a 12-year-old school boy injured in an incident involving older students successfully sued his school for breach of duty despite the incident occurring 20 minutes after the end of the school day and 400 metres from school grounds. Shellar JA went so far as to say that, depending on the circumstances, the duty could extend to pupils bullied on the journey on the bus or while they were walking to or from school.

Such principles will be of relevance in the as yet untested case of liability for cyberbullying. There will be no doubt that the scope of a school’s duty will embrace bullying via a website, blog or wiki hosted on a school server during school hours using school computers. However, the duty is likely to extend further. It is also likely to catch contributions to a school-hosted website, blog, or wiki which is accessed remotely by a student, perhaps from home or some other location away from school premises. This extension would be based on factors such as the school’s control over the hosting server and its grant of remote access to a student user under instructions or conditions of use, which may be regarded indicia that the relationship of teacher and pupil is in existence in the circumstances, notwithstanding the time or place the website, blog, or wiki is being accessed. Arguably the duty should also be seen as extending to students using school computers on school premises, whether during school hours or not, to access sites hosted on third party servers (such as a MySpace profile or the like) since again there will presumably be rules or instructions relating to use of these computers which may be sufficient to establish that in the circumstances the necessary relationship of teacher and pupil existed at that time. However, instances of cyberbullying occurring at a time when the relationship of teacher and pupil is not in

existence must necessarily be the concern of parents or, if need be, the police. The mere fact that the bully and his or her target attend the same school will not be sufficient to bring such a case within the purview of the school authority's duty of care.

2 *Standard of Care*

In the past, the duty of a school teacher has been expressed as 'such care ... as a careful father would take of his boys'.⁵¹ However, this has been criticised as unrealistic for a principal in charge of a large number of students⁵² and in a time of teachers having tertiary qualifications. Today the duty is expressed as being the care that would be exercised by a reasonable teacher or school. This in turn involves two questions: (1) was the risk of injury reasonably foreseeable in the circumstances, in the sense that the risk was 'not insignificant' and (2) what precautions (if any) would a reasonable person have taken to avoid that risk in the circumstances — taking into account the probability that harm would occur absent care, the likely seriousness of that harm, the burden of taking precautions, and the social utility of the risk-creating activity.⁵³ Further, in many jurisdictions when deciding what would be a reasonable response to a risk, the court is to defer to a 'responsible body' of expert opinion 'unless no reasonable court would do so'.⁵⁴

3 *Contributory Negligence*

If a school is to have any defence it will lie in contributory negligence. In six Australian states a plaintiff's contributory negligence is now to be based on the same approach to a defendant's negligence, that is reasonable foreseeability of risk and the precautions a reasonable person would take (if any) to that risk, taking into account the same kinds of factors that determine a defendant's standard of care.⁵⁵ Once again, this will require a determination of what the reaction of a 'reasonable child' would have been in the circumstances, including what precautions such a mythical child would have taken for his or her own safety. Superficially, practical precautions by a plaintiff to prevent being injured by cyberbullying normally might include reporting the cyberbullying to the relevant authority and perhaps seeking professional assistance to address psychiatric symptoms. However, there may be some difficulty establishing contributory negligence in the case of a student who had been cyberbullied inasmuch as children will normally have a reduced capacity to appreciate risk. Further, it may be important not to divorce the case from its context, which may include peer pressure and the belief that the cyberbullying may intensify if there is complaint or may subside if nothing is done.⁵⁶ There may be an additional fear that parents or teachers who do not properly understand but who mean well might react by removing the target's own cherished access to the technology, in effect punishing the target himself or herself for being bullied!

V RECOMMENDATIONS

How can a school harness the power of both the criminal and civil law to help prevent and combat cyberbullying amongst its students and also protect its staff?

A *Policies*

Most obviously, schools need to have educational, ethical and legally defensible policies in place to deal with cyberbullying. Most schools are now aware of their responsibility under the Safe Schools Framework to have an anti-bullying policy. However, some schools have not updated their policies to take cyberbullying into account.

The problem with school policies is that sometimes they do not define bullying or even include cyberbullying with sufficient precision. The nuances of words are important for the purposes of effective prevention and deterrence, while policy enforcement requires clarity and precision in language. School policies may be practically and legally ineffectual if the language used is too vague and/or does not address the foreseeable risks. Bullying is not a legal term as mentioned previously; rather, the terminology associated with bullying is that of assault, threat, extortion, stalking and harassment. There are studies that show schools with bullying policies are effective in reducing the incidence of bullying.⁵⁷ However, there are other studies which suggest that there are no differences in the incidence of bullying whether the school has an anti-bullying policy or not.⁵⁸ This is perhaps because of the lack of implementation of the policy. If a bullying policy exists, then it needs to be practical, well-publicised, enforceable and enforced. A good policy should aim to educate about, deter and prevent bullying and will therefore require a clear and inclusive definition of what constitutes the proscribed bullying conduct, a description of expected behaviour, what consequences will apply for breaches of the stated standards of behaviour, procedures for reporting, provisions to protect reporters, ways to increase reporting and processes for investigating complaints. It is axiomatic that anti-bullying policies need to be supported and operationalised by robust implementation strategies and procedures.

B Procedures

Even the best anti-bullying policy will be ineffectual unless clear procedures exist to enable the reporting of cyberbullying and an explicit process for investigating complaints is articulated that all staff, students and parents are aware of and can be confident will be followed. One of the most important ways to decrease cyberbullying is for students to report its occurrence. While supervision in the playground can prevent and quickly deal with instances of overt bullying, covert bullying, such as relational aggression and cyberbullying, are harder for adults to detect. Victims often do not tell adults because they are ashamed, fear retaliation from the bullies, are caught in a culture of 'don't do' and think that adults will not and cannot help.

C Recognising Barriers to Reporting

One of the difficulties is the fact that many victims will not report bullying to adults, with less than a quarter of bullied students ever telling a teacher.⁵⁹ It is known that there are many reasons why young people do not tell adults:⁶⁰ frequently, they feel too humiliated and embarrassed to do so. In addition, many young people think that their complaint will not be believed, that the incident will be trivialised by adults, or that they will be made feel that they are responsible for being bullied. They also do not have much faith that adults will be able to solve the problem and fear that adults might make it worse.⁶¹ In the Brisbane study,⁶² young people said that adults did not appreciate that they had an online life so they wouldn't understand. One student even said that teachers are so old they wouldn't even have a mobile phone. Particularly, cyberbullied students fear that adults will take their technology away from them: that they will either lose their mobile phone or not be allowed on the Internet. In the NCH study nearly 30 per cent of cyberbullied students told no-one.⁶³

There are many things that schools and parents can do to increase the likelihood of reporting. The first is to believe the reporter and not to trivialise any complaint, but to treat it seriously and respectfully. Confidentiality in reporting (as much as possible) needs to be assured and solving the problem should be conceptualised as a joint affair, with adults resisting the urge to take a

punishing role immediately. Setting out clear roles and responsibilities in this way, together with a statement of intent as to how complaints will be sought to be resolved, will further support the efficacy of school policies and should increase reporting rates. Another strategy is to educate about the potential for criminal liability for this type of anti-social conduct.

D Educate about Criminal Liability

All stakeholders have a duty both to understand the frequency, nature and reach of cyberbullying among young people and the extreme seriousness of its potential consequences. The challenge, of course, is to educate school communities and young people around the qualitative difference between annoying or impolite interactions on the one hand and dangerous and offensive cyberbullying conduct on the other.

The position taken by the criminal law is salutary on these matters and, it is suggested, should prove helpful to school authorities, psychologists and parents in their understanding and assessment of the gravity of any impugned conduct. The factors on which the criminal law focuses – the kind of threats, their nature and frequency, the potential involvement of third parties, the escalation in magnitude, menace and intimidation, the physical and psychological effect on the target, and the intention of the bully in perpetrating the behaviour – are all useful indicia to which school authorities and psychologists may have regard when conducting cyber bullying assessments, for example, in the interview and information gathering phase. The evidence trail often left in the wake of the misuse of technology, which can be gathered, saved, and used in subsequent proceedings and disciplinary actions, is also a potent tool in the deterrence armoury.

The notion of ‘reintegrative shaming’ of lawbreakers as a mechanism for crime control – whereby the existence of criminal sanctions can be harnessed to support a culture of judicious shaming coupled with restorative justice principles that then seek to reintegrate the bully/offender into the community by having them acknowledge the shame of the wrongdoing and offering ways to expiate that shame – could be usefully adapted in this context.⁶⁴ A policy and program commitment to such a process sends an unequivocal message to bullies that their significant others (peers, parents, teachers, and counsellors), as one with the general community, deem cyberbullying to be inappropriate by any standard (especially to the more serious criminal standard) and reinforces that such behaviour will not be condoned or tolerated.

An approach of this type may provide an entrée into other systematic, therapeutic responses. If underpinned and supported by a robust and integrated policy environment, a range of psychosocial interventions might be usefully embraced: for example, including –

- dedicated skill building programs around core values, anger management, enhanced empathic awareness, peer intervention skills, problem solving skills, and self-esteem enhancement;
- police/legal briefings and training for students, staff and the broader school community;
- staff development opportunities for school staff; and
- educational responses to empower targets and bystanders alike about how to prevent, protect and respond appropriately to cyberbullying; and to alert would-be bullies to the serious potential consequences both they and their targets face as a result of their anti-social conduct.

E *School Practices to Guard Against Civil Liability*

When assessing whether schools have discharged their duty of care, in many jurisdictions the accepted practices in the teaching profession will, unless judged unreasonable, be the best guide to what should have been the response of a reasonable school authority or teacher. For example, it might be reasonable to expect supervision and monitoring of the use of computer equipment for those cases where the target and perpetrator are both on the premises of the school authority. An additional precaution that may be expected could be for the school to monitor and exercise prudent editorial control over any web sites, blogs, wikis or the like that are hosted on the school's server. Whether schools should go so far as banning the use of mobile phones on school property may not yet be regarded as an 'accepted practice'. This may be a matter that, if not already accepted, may be recognised in due time. Its recognition as a matter informing the relevant standard of care in the circumstances will therefore depend upon whether there is evidence that a sufficient number of schools are pursuing such a policy so as to make it an 'accepted practice'.

In all cases it would also be important to have an anti-bullying policy that expressly extended to cyber bullying, and for that policy to be put into practice including repeated reminders. Such policies could extend to the time the relevant relationship is in existence, whether on school premises or not. School-hosted sites may need to be routinely monitored for potentially deleterious content, although this cannot be expected to be a complete panacea since there may be content, such as obscure terminology or abbreviated communications, which may not be reasonably understood to constitute cyberbullying without a full understanding of context. Alternatively, the cyberbullying may take subtle forms such as deliberate exclusion from the community manifested by, for example, a refusal to acknowledge contributions to a discussion forum, blog or wiki. Such bullying may be impossible to detect without a proper understanding of the context. In addition, it is important complaints about bullying be taken seriously and investigated properly by those charged with that responsibility, normally principals or deputy principals.⁶⁵ If remedial action is required then it must be taken and applied in a consistent fashion so that potential bullies do not think that such a policy might be the zero tolerance in name only. It is also important to encourage a culture in which bystanders do not stand idly by whilst bullying, including cyberbullying, takes place and that bystanders also should at least have an avenue for the reporting of instances of this misbehaviour.

VI CONCLUSION

When cyberbullying by young people causes serious physical and/or psychological harm, the gravity of its construction as criminal conduct or civil liability, in addition to acting as a potent deterrent, has implications for many professionals. It is our responsibility to work together more constructively to ensure that immature youths, who may be held criminally accountable for their anti-social conduct, or their schools held civilly liable, are educated about cyberbullying as unacceptable harassment and are protected from it.

Keywords: cyberbullying; criminal law; civil law; internet.

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