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**CYBERBULLYING:  
NEW TECHNOLOGY, NEW CHALLENGES TO LAW**

**DES BUTLER\***

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## **I INTRODUCTION**

Bullying is a common experience in our schools and workplaces. So far as the schoolyard is concerned there was for long an attitude that bullying was merely part of growing up and that indeed a certain amount of bullying was beneficial because it helped the individual develop a resilience necessary for living in modern society. To a certain degree this is still the case: it would not be in the interests of the community for schools to be turned into mini-prison yards with a degree of supervision and regulation that stymies any kind of contact, beneficial or otherwise. It is clear, however, that aggressive behaviour may pass the point where it has any kind of developmental benefit and instead become harmful to the target, in some cases resulting in long term damage whether physical or psychological. A relatively recent phenomenon has been the willingness of targets of bullying to take legal action with respect to such behaviour, if not against the perpetrator himself or herself then against other parties such as school authorities or employers who may have been deficient in their duties of care and who may be perceived in any event to have deeper pockets to meet any compensation award.

While the law has on occasions faced difficult issues in such cases, new challenges are likely to be confronted with the advent of so-called 'cyberbullying' that is bullying which uses technology. This paper examines the difficulties posed to the law by bullying and cyberbullying in a school and work contexts. The starting point, however, is gain a brief insight into bullying behaviour and the technological based forms that it may now take.

## **II BULLYING BEHAVIOUR AND CYBERBULLYING**

One difficulty that besets psychological studies of bullying is that different researchers rely on different definitions of the behaviour they are studying. Despite these inconsistencies, many definitions share common elements such as an intent to harm, provocation, repetition of behaviour, an imbalance of power, and impact on the

victim.<sup>1</sup> It is clear that initial thinking that may have been limited to acts of physical aggression has now been expanded to include verbal aggression, such as name calling, and aggression of a more psychological kind, such as deliberate exclusion and rumour spreading.<sup>2</sup>

Nevertheless, the view that to constitute bullying aggression must be repeated is not universal. For example it has been said that bullying can be a one-off experience,<sup>3</sup> or a form of social interaction not necessarily longstanding, or indeed that one attack or threat may make a person frightened over a considerable length of time, both because of the emotional trauma following the attack but also due to the fear of renewed attacks. Rigby,<sup>4</sup> a leading researcher in the field, points out that common usage permits bullying to be regarded as including single encounters. In support it is noted that a single horrific incident may be traumatising.

Bullies may act individually or in a group, while victims or targets also may be individuals or groups. In a school context, while it might be that bullying behaviour will more frequently arise between students, it is possible to conceive of a power imbalance and misuse of power in the context of a teacher bullying a student or group of students, or a student or group of students bullying a teacher. In a workplace context, bullying may manifest itself, for example, among co-workers,<sup>5</sup> by a superior towards one or more workers he or she supervises<sup>6</sup> or even by workers towards a superior who is perceived to be vulnerable to such behaviour.

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<sup>1</sup> Suzanne Guerin and Eilis Hennessy, 'Pupils' definitions of bullying' (2002) 17 *European Journal of Psychology of Education*, 249

<sup>2</sup> Ken Rigby, *New Perspectives on Bullying* (2002); Dan Olewus, *Bullying at school: What we know and what we can do* (1993).

<sup>3</sup> Peter Randall, *A Community Approach to Bullying* (1996), 5

<sup>4</sup> Rigby, above n 2.

<sup>5</sup> See, eg, *Dickson v Creevey* [2001] QSC 340.

<sup>6</sup> See, eg, *Midwest Radio Ltd v Arnold* (1999) EOC 92-970; *Mannall v State of New South Wales* [2001] NSWCA 327.

Technology has presented new opportunities for bullying. 'Cyberbullying' as dubbed by Canadian Bill Belsey<sup>7</sup> may involve the use of email, SMS text messaging, chat rooms and web sites. Technology, however, has attributes that may increase the impact of the behaviour. This includes:

- Cyberbullies may feel they can hide behind the greater anonymity that technology may afford. This may embolden them further in their behaviour.
- The message may be easily communicated to a very wide audience via the Internet and at great speed.
- Targets may feel an increased sense of powerlessness on the part of the victim, due to the ability of technology to reach the target even when he or she is in a place previously considered safe, including home, at all hours of the day.
- There is an absence of non-verbal cues which ordinarily assist in determining whether behaviour is playful or hurtful.
- The written word, such as an email, text message or posting on the web, may have a greater impact on a target than more fleeting, spoken words.
- As Belsey points out, in the case of child targets they may be reluctant to report cyberbullying for fear that parents may overreact and punish them further by taking away their mobile phones or access to the Internet. The loss of the ability to freely communicate with their peers may lead to increased feelings of isolation.

### **III CYBERBULLYING AND THE LAW**

Cyberbullying lacks the physical aspect of other kinds of bullying, including many instances of bullying in the schoolyard. The psychological effects of cyberbullying may nevertheless attract both criminal and civil liability, if the bully is able to be identified. Identification may not be a hopeless cause, despite perceptions that cyberbullying offers the advantage of anonymity. For example, even freely available

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<sup>7</sup> See <<http://cyberbullying.ca/>> at 21 February 2007. In particular the featured article Bill Belsey 'Cyberbullying: An Emerging Threat to the Always On Generation', 8.

Web-based e-mail services such as MSN hotmail, which allows users to write e-mails using an alias, place particulars in messages which may be used to identify sending computers. There may in addition be other more traditional ways of tracking down wrongdoers, including interviews with suspects and other potential witnesses.

### ***A Criminal Liability***

Cyberbullying may result in the perpetrator incurring criminal liability. For example, stalking is recognised as a criminal offence in all Australian jurisdictions. While there are common elements to the definition of the offence, the laws are not uniform. The anti-stalking law in *Crimes Act 1958* (Vic), s 21A is the one of the most detailed, extending to a person engaging in a course of conduct (ie at least two occasions) which includes following the victim; *telephoning, sending electronic messages or otherwise contacting the victim*; entering or loitering near the victim's residence or workplace or any other place frequented by the victim; interfering with the victim's property; giving offensive material to the victim or leaving it where it will be found by, given to or brought to the attention of the victim; keeping the victim under surveillance; or acting in any other way that could reasonably arouse apprehension or fear in the victim for his or her safety. The conduct must be done with the intention of causing physical or mental harm or arousing apprehension or fear and actually have that result. The Queensland law is also very wide. The Queensland Criminal Code s 359B defines 'unlawful stalking' as the following conduct: *contacting a person in any way, including, for example, by telephone, mail, fax, e-mail or through the use of any technology*, loitering near, leaving offensive material and other types of behaviour that would cause the stalked person fear of violence or property damage or cause detriment to the stalked person or another person. 'Detriment' is defined to include apprehension or fear of violence and serious mental, psychological and emotional harm, as is often the case with cyberbullying. Significantly the section applies to conduct engaged in on 'at least one occasion'.

Legislation in other jurisdictions refers to a person who on at least two occasions stalks another, intending to cause physical or mental harm to that other person or to a third person, or intending to cause apprehension or fear, with 'stalking' including

conduct involving following, loitering outside where the other person is, interfering with property of the other person, keeping the other person under surveillance or acting in any other way that could reasonably be expected to arouse the other person's apprehension or fear.<sup>8</sup> Cyberbullying would constitute 'acting in any other way'. Tasmania, like Queensland, specifically includes 'contacting' the target as an identified form of stalking,<sup>9</sup> which would embrace cyberbullying.

By contrast, in Western Australia the offence is simply expressed in terms of a person who 'pursues another person with intent to intimidate that person or a third person'.<sup>10</sup>

In New South Wales the anti-stalking legislation is limited to cases of 'domestic relationships'.<sup>11</sup> These do not include the kinds of relationships involved in cyberbullying in either a school or work context.

Naturally, there are limits on the age at which an offender is regarded as being criminally responsible. Generally speaking the minimum age of criminal responsibility is 10 years,<sup>12</sup> while some jurisdictions additionally provide either that a child aged between 10 and 14 years can only be criminally responsible if he or she knows that his or her conduct is wrong,<sup>13</sup> or that a child under the age of 14 is only guilty of a crime if he or she has sufficient capacity to know that the act or omission was one which he or she ought not to do or make.<sup>14</sup>

### **B Civil Claims Against Cyberbullies**

A target of bullying may be entitled to bring a civil claim against the perpetrator of the behaviour. Naturally the difficulty for any such claim will be whether the

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<sup>8</sup> See *Crimes Act 1900* (ACT) s 35; *Criminal Code* (NT) s 189; *Criminal Law Consolidation Act 1935* (SA) s 19AA.

<sup>9</sup> *Criminal Code* (Tas) s 192(1).

<sup>10</sup> *Criminal Code* (WA) s 338E.

<sup>11</sup> *Crimes Act 1900* (NSW) s 562AB.

<sup>12</sup> See *See and Children (Criminal Proceedings) Act 1987* (NSW) s 5; *Young Offenders Act 1993* (SA) s 5; *Children and Young Persons Act 1989* (Vic) s 127.

<sup>13</sup> *Criminal Code 2002* (ACT) s 26.

<sup>14</sup> *Criminal Code* (NT) s 38; *Criminal Code* (Qld) s 29; *Criminal Code* (Tas) s 18; *Criminal Code* (WA) s 29.

perpetrator is a person of straw and therefore not worth suing. This will especially be the case where the perpetrator is a child who is bullying a fellow pupil or a teacher or other member of the school staff.

Three potential causes of action may be available against a cyberbully: trespass to the person, and intentional infliction of psychiatric harm and invasion of privacy.

### ***1 Trespass to the person***

Cyberbullying in the form of threats of violence which cause a target to apprehend violence may also give rise to the tort of assault. This form of trespass to person requires an act by the defendant which requires the plaintiff to apprehend immediate contact with his or her person.<sup>15</sup> The plaintiff must believe on reasonable grounds that the person making the threat has the present means of carrying any threat of force into effect. While this may be easy to satisfy where the parties are in close proximity this need not be the case. In *Barton v Armstrong*<sup>16</sup> in the context of threats made over the telephone Taylor J observed that:

To telephone a person in the early hours of the morning, not once but on many occasions, and to threaten him, not in a conversational tone but in an atmosphere of drama and suspense, is a matter that a jury could say was well calculated to not only instil fear into his mind but to constitute threatening acts, as distinct from mere words. If, when threats in this manner are conveyed over the telephone, the recipient has been led to believe that he is being followed, kept under surveillance by persons hired to do in physical harm to the extent of killing him, then why is this not something to put him in fear or apprehension of immediate violence?<sup>17</sup>

It has subsequently been stressed that the relevant query is how immediate the threatened physical violence is to the threat that created the fear.<sup>18</sup> Nevertheless, there may be cases of bullying using means such as SMS, e-mail, discussion forums or

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<sup>15</sup> *Stephens v Myers* (1830) 4 C&P 349, 349-50 (Tindal CJ).

<sup>16</sup> [1969] 2 NSW 451.

<sup>17</sup> [1969] 2 NSW 451, 455.

<sup>18</sup> *Zanker v Vartzokas* (1988) 34 A Crim R 314, 318.

other technology which threatens that the target is going to be killed, bashed or the like in – perhaps during recess or after school or outside work - which should satisfy this requirement.

### ***2 Intentional infliction of psychiatric injury***

A target of cyberbullying might alternatively have a claim based on *Wilkinson v Downton*<sup>19</sup> for the intentional infliction of physical harm. This doctrine was devised at a time when psychiatric injury was believed to be a form of physical harm, and despite its formulation it has been linked to that form of harm rather than physical harm in general.<sup>20</sup> It has not figured largely in Anglo-Australian case law, unlike the comparable cause of action for an intentional infliction of emotional distress in the United States, where a substantial body of jurisprudence has developed. By contrast with the American cause of action, it is clear that to establish a *Wilkinson v Downton*<sup>21</sup> claim it is necessary to show that the plaintiff has suffered harm in the form of a psychiatric condition rather than a more transient emotional response.

Accordingly, while of the intent of a cyberbully will be to cause the target to suffer harm in the form of stress, anxiety or fear it will only be a be a more severe reactions which amount to psychiatric conditions which may form the basis of a claim under the rule in *Wilkinson v Downton*.<sup>22</sup> It is worth noting that in that case a practical joker whose joke went too far and resulted in injury was held liable. This is a salient warning for cyberbullies who engaged in the behaviour because they believe they are ‘having fun’ or playing a joke on the target.

### ***3 Invasion of privacy***

Australia does not as yet recognise a cause of action for invasion of privacy. Instead, an individual who claims that his or her privacy has been invaded must establish another cause of action such as trespass or breach of confidence.

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<sup>19</sup> [1897] 2 QB 57.

<sup>20</sup> *Janvier v Sweeney* [1919] 2 KB 316.

<sup>21</sup> [1897] 2 QB 57.

<sup>22</sup> [1897] 2 QB 57.

Nevertheless, the High Court has not dismissed the idea of a tort for breach of privacy.<sup>23</sup> Moreover, a Queensland district Court Judge was prepared to uphold a claim for invasion of privacy in circumstances involving a man who was alleged to have stalked his former lover. In *Grosse v Purvis*<sup>24</sup> Skoien SDCJ noted that in the case of most crimes against the person there was a corresponding civil cause of action which the victim of the crime was able to pursue against the perpetrator. After finding that a criminal offence of stalking was made out on the facts, his Honour was prepared to recognise a civil claim for the invasion of the privacy for the victim of the stalking. In doing so he drew on the American tort of the invasion of privacy, which has been described as in fact representing four separate torts: unreasonable intrusion upon of the plaintiff's solitude or seclusion, public disclosure of private facts, portraying the plaintiff in a false light to the public, and appropriation of the plaintiff's identity. His Honour envisaged the cause of action for invasion of privacy as having the following elements:

- (a) a willed act by the defendant;
- (b) which intrudes upon the privacy or seclusion of the plaintiff;
- (c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities; and
- (d) which causes the plaintiff detriment in the form of mental physiological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.<sup>25</sup>

Even if the tort did not take these precise elements, an argument may still be made for its recognition.<sup>26</sup> It may be that such a tort can be seen as a on-development of the tort of harassment with which Australian courts have flirted in the past.<sup>27</sup>

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<sup>23</sup> *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

<sup>24</sup> [2003] QDC 151 (16 June 2003).

<sup>25</sup> *Ibid* [444].

<sup>26</sup> Des Butler, 'A Tort of Invasion of Privacy in Australia?' (2005) 29 *University of Melbourne Law Review* 339-89.

<sup>27</sup> See, eg, *Chapman v Conservation Council of South Australia* (2002) 82 SASR 449, [154]. See also *Northern Territory v Mengel* (1995) 185 CLR 307, 342-3. The tort was applied in *Thomas v National Union of Mineworkers* [1986] Ch 20, but rejected in *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721.

If it were the case that such a tort of invasion of privacy were recognised then it would appear well-suited to address claims of cyberbullying. One of the features of cyberbullying is its ability to reach the target at all hours of the day and in previous safe havens such as the target's home. A tort that was designed to safeguard the plaintiff's reasonable expectation of privacy in the form of his or her solitude would therefore directly confront such behaviour.

### ***C Civil Claims Against Schools or Employers***

Any negligence claim against a school authority or employer would be for a breach of its non-delegable duty arising from the school-student relationship or employer-employee relationship respectively. Alternatively, in either case there may be responsibility in the form of vicarious liability for the acts of employees.

#### ***1 Non-delegable duty of care***

As a preliminary point, it is worth noting that any claim for psychiatric injuries resulting from an alleged breach of duty by a school authority or employer will be governed by laws that have recently been the subject of legislative tort reform following the 2002 inquiry into the laws of negligence headed by Justice Ipp.<sup>28</sup> These include the amendment of the definition of 'reasonable foreseeability' to now mean 'not insignificant' and a re-emphasis of breach of standard as reflecting a two tier inquiry: the risk must not only be reasonably foreseeable but also such that a reasonable person would have taken precautions in the circumstances. Mere foreseeability of risk has never been sufficient for liability if a reasonable person would not have taken precautions in the circumstances.<sup>29</sup>

The more specific mental harm provisions in the tort reform legislation will also have significance for any claim for psychiatric injury resulting from cyberbullying. Notwithstanding claims that the legislation only gives effect to the High Court decision

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<sup>28</sup> *Review of the Law of Negligence*, Final Report (2002), 104-5.

<sup>29</sup> See *Civil Law (Wrongs) Act 2002* (ACT) ss 42-3; *Civil Liability Act 2002* (NSW) s 5B; *Civil Liability Act 2003* (Qld) s 9; *Civil Liability Act 1936* (SA) ss 31-2; *Civil Liability Act 2002* (Tas) s 11; *Wrongs Act 1958* (Vic) s 48; *Civil Liability Act 2002* (WA) s 5B.

in *Tame v New South Wales*,<sup>30</sup> in fact the common law in Australia which now only regards a plaintiff's sensitivity as relevant only when it means that the injury is no longer reasonably foreseeable<sup>31</sup> has been replaced by a precondition that it was reasonably foreseeable that a person of normal fortitude would suffer injury in the circumstances. The distinction has importance. This is because it is the notion of a person of normal fortitude lacks any medical validity and must therefore be no more than a matter of intuitive decision, even when it is based on an assessment made by a doctor or psychologist. This is problematic when it is required to be positively proved as a precondition to recovery, rather than being treated as a means to exclude what might in a particular case be regarded as a claim for an extraordinary reaction. For example, exactly what degree of cyberbullying is a school student or worker, as a person of normal fortitude, expected to endure?

The list of guidelines in the legislation to determining the reaction of a normal person – whether there was sudden shock; proximity to the scene; perception with unaided senses; any pre-existing relationship between plaintiff and defendant; and the nature of the relationship between the plaintiff and the victim killed, injured or imperilled – are evidently targeted at so-called 'secondary victim' claims, that is claims by individuals who suffer psychiatric injury as a result of perceiving the death, injury or imperilment of another person. Only two, namely whether there was a sudden shock and the nature of any pre-existing relationship between the plaintiff and the defendant, can have any relevance to a so-called 'primary victim' claim. To say that there was a pre-existing relationship in the form of school authority/student or employer/employee does not seem to assist in the determination of the question. Further, the legitimacy of including sudden shock as a relevant consideration in any claim for psychiatric injury may be open to doubt.<sup>32</sup> It is, in any event, an entirely inappropriate in relation to cumulative stressors that may have no identifiable predominant occurrence, as may be the case

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<sup>30</sup> David Ipp, 'Negligence – Where lies the future?' (2003) 23 *ABR* 158, 163.

<sup>31</sup> (2002) 211 CLR 317, 333 (Gleeson CJ), 343-344 (Gaudron J), 380, 384 (Gummow and Kirby JJ). Only McHugh and Callinan JJ favoured a pre-condition: see Callinan J in *Gifford v Strang Patrick Stevedoring Pty Limited* (2003) 214 CLR 269, 309.

<sup>32</sup> Des Butler, *Damages for Psychiatric Injuries* (2004), 89-90.

when someone is bullied. The list of guidelines therefore offers little assistance in such cases.

In the case of a bullied child, a court will be required to make an intuitive decision concerning the anticipated reaction of a so-called 'normal' child. This will be no easy task. For example, how much and what type – if any – of horseplay should 'normally' be regarded as beneficial character building? At what point does 'horseplay' become unacceptable aggression. In the case of cyberbullying, for example, how many and what type of emails would a 'normal' child be expected to endure without suffering a recognisable psychiatric illness? Yet as a precondition to recovery, this is what must be shown.

The appropriate scope of the duty of care may also present a challenge. In the case of a school authority's duty of care it has been held that the duty only applies while the relationship of schoolmaster and pupil exists.<sup>33</sup> In that case the duty was held to extend to pupils who were arriving as much as 45 minutes before the start of classes each day because of the principal had opened at the school gates and issued instructions concerning the behaviour expected of those pupils. In a later New South Wales case it was held that a school authority owed a duty of care to its pupils who it were using a bus stop 300-400 metres from the school gates, despite the injury occurring 20 minutes after the end of classes.<sup>34</sup> It was significant in that case that the principal was aware that a number of his primary school students were using the bus stop which was located outside of a nearby high school. There was a foreseeable risk that in such a large group of children, particularly from two different schools and involving different ages, combined with the propensity for mischief to be expected of children, such a situation could lead to physical harm being suffered by one of the primary school children.

It has been held by the High Court that an employer's non-delegable duty of care extends to taking all reasonable precautions against injury to the plaintiff in the course

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<sup>33</sup> *Geyer v Downs* (1977) 138 CLR 91.

<sup>34</sup> *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* (1996) Aust Torts Reports ¶81-399.

of her employment. As Kitto J stated in *ACI Metal Stamping and Spinning Pty Ltd v Boczulik*<sup>35</sup> the concept of 'course of employment' is not a narrow one and extends 'beyond the period of work to every situation in which the master sustains the character of master towards the servant'.<sup>36</sup> Such a situation may exist as the employee travels to or from his or her place of work in a manner provided for by an express or implied term of the contract of employment.<sup>37</sup> It would seem that the test proposed by Kitto J would be satisfied in the case of an employee taking work home and perhaps using the employer's tools and facilities such as a computer linked to the employer's computer system via a broadband or dial-up connection.

The relevance of the question of the scope of the duty owed by a school authority or employer is related to the characteristics of cyberbullying. There would seem little doubt that a duty will be owed where an individual, whether a student or employee, is cyberbullied on the premises of the school authority or employer respectively by an individual using its equipment. However, the scope of the duty of care in the case of other possible permutations is perhaps not so clear. For example, the target of cyberbullying may be at his or her home while the perpetrator is on the school authority's or employer's premises and/or using its equipment. Alternatively, the target may be on the school authority's or employer's premises and/or its equipment while the perpetrator is at home or in another place. Similarly, neither the target nor perpetrator may be on the school authority's or employer's premises but nevertheless using its equipment.

The scope of the duty is an issue that is sometimes regarded as an interface between the concept of duty and that of breach. It may be that this notion holds the key for resolution of these more difficult situations. In other words, even accepting that the duty of care and extended to these situations, what precautions would a reasonably prudent school authority or employer take in response to reasonably foreseeable risk of harm? In addressing this question, following the tort reform legislation, the

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<sup>35</sup> (1964) 110 CLR 372, 378-9.

<sup>36</sup> Ibid 378-9. See also John G Fleming, *The Law of Torts* (9<sup>th</sup> ed, 1999) 562.

<sup>37</sup> See, eg, *ACI Metal Stamping and Spinning Pty Ltd v Boczulik* (1964) 110 CLR 372.

responses of a reasonably prudent school authority at least will now be informed by accepted practices in the teaching profession, unless judged unreasonable.

It would be reasonable to expect reasonable 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 or authority to prevent cyberbullying. The expected response in other cases may not be so clear. In all cases it would also be important to have an anti-bullying policy which expressly extended to cyberbullying, 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 or work premises or not. 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 at least have an avenue for the reporting of instances of this misbehaviour.

Naturally, there will be cases where the relationship is not in existence and where there is no connection to the school authority or employer other than the parties involved, such as where one student sends threatening SMS messages to another student from the same school but does so while both are away from school premises and neither are using school equipment. A school authority or employer does not owe a general duty to exercise reasonable care for the safety of students or employees respectively. In such cases any cyberbullying will properly be a police matter.

Following the tort reform legislation in most jurisdictions the defence of contributory negligence now involves a similar two-stage inquiry as that which applies in establishing negligence. In other words, the plaintiff must have a reasonably foreseen the risk of injury and failed to take reasonable precautions taking into account the magnitude of the risk, probability of it occurring, cost and practicality of precautions,

and justifiability of running the risk.<sup>38</sup> There may be greater 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. Practical precautions might include reporting the cyberbullying to the relevant authority and perhaps seeking professional assistance to address psychiatric symptoms. Once again, in the case of children in particular it may be important not to divorce the case from that its context, which may include peer pressure and the belief that the bullying may intensify if there is complaint or may subside if nothing is done.

## ***2 Vicarious liability***

Vicarious liability will be relevant where the failure to prevent cyberbullying is by an individual teacher or employee rather than being more systemic in nature. Vicarious liability may also become an issue where, for example, a student is cyberbullied by a teacher or other school employee. In *New South Wales v Lepore*<sup>39</sup> five of the seven judges in the High Court held that intentional acts by an employee in such a case are not the province of any non-delegable duty of care but instead vicarious liability alone. However, different tests for vicarious liability were proposed. Gummow and Hayne JJ adopted the traditional approach to vicarious liability,<sup>40</sup> namely that an employer is vicariously liable for an authorised act or an unauthorised mode of performance of an authorised act. The conduct must be done in the intended pursuit of the employer's interest or in the intended performance of the contract of employment. It must have been done in the ostensible pursuit of the employer's business or the apparent execution of the authority which the employer held out the employee as having.<sup>41</sup> By contrast, Gleeson CJ and Kirby J held that the traditional 'in the course of the employment' test should be replaced by a wider test which considers whether the acts were 'sufficiently closely connected with the employment'. Gaudron J regarded an employer as vicariously liable as based on ostensible authority, which was a species of estoppel by which a principal was

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<sup>38</sup> *Civil Liability Act 2002* (NSW) s 5R; *Civil Liability Act 2003* (Qld) s 23; *Civil Liability Act 1936* (SA) s 44; *Civil Liability Act 2002* (Tas) s 23; *Wrongs Act 1958* (Vic) s 62; *Civil Liability Act 2002* (WA) s 5K.

<sup>39</sup> (2002) 211 CLR 317.

<sup>40</sup> *Deatons Pty Ltd v Flew* (1949) 79 CLR 370, 381 (Dixon J).

<sup>41</sup> *New South Wales v Lepore* (2003) 212 CLR 511, 590.

precluded from denying his or her agent's authority. This will normally require a close connection between what was done or not done and what the person was engaged to do.<sup>42</sup> Callinan J held that deliberate criminal misconduct lay outside the scope or course of an employed teacher's duty.<sup>43</sup>

While much may depend upon the individual circumstances, it may be that at least some cases of cyberbullying, such as those using the employer's equipment or time, will amount to a wrongful mode of doing an authorised act and therefore satisfy even the narrower traditional formulation of vicarious liability. This will particularly be the case where the cyberbullying is a wrongful exercise of power conferred upon the perpetrator by authority vested in him or her by the employer, such as where the perpetrator is the work superior of the target. In such a case it may also be argued that the clothing of authority could form the basis of an estoppel in terms of that proposed by Gaudron J.

However, the issue is not clear-cut. It will be in the cases where the behaviour of the employee is characterised as being nothing more than a frolic and not even a wrongful mode of doing an authorised act. In this case the differences between the tests now favoured by different members of the court, including whether the cyberbullying can be said to be sufficiently close to the employment, may become significant.

#### **IV CONCLUSION**

Technology adds a new dimension to what is now being recognised as a societal problem in the form of bullying behaviour. The law in both criminal and civil guises can offer only a partial solution of kinds to the problem of bullying. When that bullying is in the form of technology problematic areas including the reach of the criminal law, forms of civil action against perpetrators, and the scope of the duties of care owed by parties such as school authorities and employers and appropriate

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<sup>42</sup> (2003) 212 CLR 511, 561.

<sup>43</sup> Ibid 626.

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precautions to prevent bullying, are accentuated. Cyberbullying is therefore one more area in which the law may struggle to keep up with technology.