Cyber Bullying In Schools and the Law: Is There an Effective Means of Addressing the Power Imbalance?

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Cyber bullying – or bullying through the use of technology – is a growing phenomenon which is currently most commonly experienced by young people and the consequences manifested in schools. Cyber bullying shares many of the same attributes as face-to-face bullying such as a power imbalance and a sense of helplessness on the part of the target. Not surprisingly, targets of face-to-face bullying are increasingly turning to the law, and it is likely that targets of cyber bullying may also do so in an appropriate case. This article examines the various criminal, civil and vilification laws that may apply to cases of cyber bullying and assesses the likely effectiveness of these laws as a means of redressing that power imbalance between perpetrator and target.

1. Introduction

The ubiquity of modern telecommunications in the modern world has brought with it great benefits to society. However, it also has its darker side. This has included the phenomenon of 'cyber bullying' – a term coined by Canadian Bill Belsey to describe 'the use of information and communication technologies to support deliberate, repeated, and hostile behaviour by an individual or group, that is intended to harm others'.[1] Cyber bullying is being experienced across different walks of life, although it is perhaps currently most prevalent amongst school students. Indeed, for so-called 'Net-Gen' – those who have been born since 1982 – electronic socialising and interactive communications are an integral part of their daily lives.[2] Indeed, one 2005 Canadian study found that 94% of children accessed the Internet from home, with some aged as young as Grade 4 being reliant on the Internet to network with their friends. So is perhaps not surprising that what little research that has been done on cyber bullying to date has been focused primarily on these 'digital natives'.[3] However, as technology continues to permeate all society and as the digital natives pass from adolescence to adulthood, there is reason to expect that cyber bullying may become more common in older age groups.

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[1] Bill Belsey, 'Always on? Always aware!' <www.cyberbullying.org> at 7 September 2009.

[2] D Oblinger and J Oblinger, 'Is it Age or IT: First Steps Towards Understanding the Net Generation' in D Oblinger and J Oblinger (eds), *Educating the net generation*. EDUCAUSE. <http://www.educause.edu/educatingthenetgen/> at 7 September 2009.

[3] As author Marc Prensky has described this generation: see, eg, Marc Prensky, 'Digital Natives, Digital Immigrants' (2001) 9(5) *On the Horizon* 1.

The potential is clear for technologies such as on-line social network sites like MySpace and Facebook, discussion boards, on-line forums, blogs, wikis and e-mail as well as the now ubiquitous mobile phone to be used as a means of mala fides against other users. The potential for the misuse of the Internet by deviant adult predators has been widely publicised and well understood. However, there is only growing realisation that hostile behaviour utilising technology can also have serious and long lasting effects on its targets. Victims of bullying of any kind typically feel powerless to repel or fight back against their aggressors. Cyber bullying adds a new dimension to this powerlessness with its ability to reach the target 24 hours a day, 7 days a week. Now a target cannot even rely on his or her home as a safe haven from bullying behaviour.

Increasingly victims of bullying are turning to law, both civil and criminal, as a means of addressing the power imbalance between them and their bullies, or at least of obtaining some form of vindication. While this might seem an extreme response to conduct that might be considered by some to be trivial or 'just a joke', the potential harm that victims may suffer makes the effectiveness of the various laws that may be called into play worthy of scrutiny.

2. Cyber Bullying and its Effects

2.1 Concepts of Cyber Bullying

Cyber bullying may be defined by examples of how technology is used in bullying. An associated question is whether concepts applicable to traditional face-to-face bullying apply equally to cyber bullying, or whether the use of technology to bully requires fresh thinking. This question is not helped by the fact that sociological researchers do not even agree on the definition of face-to-face bullying. Nevertheless, most researchers agree that bullying per se is a form of aggression which has at least four underlying features. On examination, these concepts at least would seem to be capable of extending to cyber bullying.

First, the perpetrator intends to hurt the target, whether emotionally or physically. Bullying cannot be accidental. An intention to hurt would seem to be the present also in cyber bullying. Secondly, traditional concepts of bullying include the notion of an imbalance of power. Usually in face-to-face bullying, the bully has a power differential because of size, age or position. By contrast, in the case of cyber bullying the bully often chooses to remain anonymous. This might be thought to negate any sense of power imbalance, since the target cannot perceive that he or she is less powerful if he or she does not know the identity and attributes of the other person. However, it can be argued that the very act of bullying, creates an imbalance of power. Moreover, the bully's anonymity in itself places the target at a disadvantage and invests the bully with a measure of power over the target.

The third underlying concept of face-to-face bullying is the repetition or continued threat of further aggression. Both perpetrator and target believe the aggression will be

sustained, thereby causing the target continuing agitation or fear. This notion would seem to be readily transferable to cyber bullying. Technology provides easy means to rain a seemingly ceaseless barrage of hostility upon the target. Finally, targets of face-to-face bullying are typically unable to defend themselves, or unable to fight back as they feel helplessness, hurt and shame. Due to the global reach of technology and supported by the usual anonymity of the aggressor, targets of cyber bullying are no less powerless to respond to intimidation than, for example, a physically weaker target is at a disadvantage and powerless to respond to the physical blows of a face-to-face bully.

2.2 Incidence of Cyber Bullying

There is as yet scant published research on the incidence of cyber bullying. Much of the research that has been done concerns the cyber bullying of adolescents. This is perhaps understandable since this is the first generation born which only knows of a world linked by digital technology. One Canadian study in 2006 found that 24.9% of adolescents reported they have been cyber bullied.[4] This compares to a 2005 study in Australia that placed the incidence at only 14%[5] and a 2004 North American study[6] that found only 7% reported to have been victimised. Other research shows an apparent increase from 25% of young people reporting being targets of cyber bullying in 2002[7] to a figure of 35% in 2005.[8] A factor hampering any meaningful comparison between these studies is the tendency of researchers to use varying definitions of cyber bullying which often include all forms of aggression and which do not conform to commonly understood concepts of bullying. Perhaps the best that can be said is that the current incidence of cyber bullying seems to be about 10% of adolescents.[9]

An open question is whether boys or girls are cyber bullied more, although one study found no differences.[10] It also is not known whether someone who cyber bullies also engages in face-to-face bullying. The same study found that 64% of cyber bullies admitted to also bullying face-to-face.

[4] Qing Li, 'Cyber Bullying in Schools: A Research of Gender Differences' (2006) 27(2) *School Psychology International* 157.
[5] Marilyn Campbell, 'Cyber Bullying: An Old Problem in a New Guise?' (2005) 15 *Australian Journal of Guidance and Counselling* 68.
[6] Michele Ybarra and Kimberly Mitchell, 'Youth Engaging in Online Harassment: Associations with Caregiver-child Relationships, Internet Use, and Personal Characteristics' (2004) 27 *Journal of Adolescence* 319.
[7] NCH, '1 in 4 children are the victims of "on-line bullying"' <http://www.nch.org.uk/information/index.php?i=237> at 7 September 2009. This was one of the first studies of cyber bullying.
[8] Justin Patchin and Sameer Hinduja, 'Bullies Move Beyond the Schoolyard: A Preliminary Look at Cyber Bullying' (2006) 4(2) *Youth Violence and Justice* 148.
[9] Peter Smith, Jess Mahdavi, Manuel Carvalho and Neil Tippett, 'An Investigation into Cyberbullying, Its Forms, Awareness and Impact, and the Relationship between Age and Gender in Cyber Bullying' <http://anti-bullyingalliance.org.uk/downloads/pdf/cyberbullyingreportfinal230106_000.pdf> at 23 7 September 2009; Donna Cross et al, *Australian covert bullying prevalence study* (Perth: Edith Cowan University, 2009), xxiii.
[10] Tanya Beran and Qing Li, 'Cyber-harassment: A Study of a New Method for an Old Behaviour' (2005) 32 *Journal of Educational Computing Research* 265.

2.3 Consequences of Cyber Bullying

Little is yet known for sure about the consequences of cyber bullying. There have been several media reports that have linked suicides with the decedents being identified as targets of cyber bullying.[11] However, research into the effect of face-to-face bullying on adolescents has shown that it can lead to increased levels of depression, anxiety and psychosomatic symptoms in victims.[12] Research has also shown victims may suffer even more serious consequences including severe physical harm, self-harm attempts[13] as well as the reported suicides.[14] Students who are the targets of bullying may have greater interpersonal difficulties and feel socially ineffective,[15] and have higher levels of absenteeism from school and lower academic competence, with ramifications for future careers.[16]

While there is little research on the consequences of cyber bullying specifically, it may be that it could have even more serious consequences than face-to-face bullying due to the variety of attributes that may accentuate the impact of the behaviour. Depending on the particular circumstances, this may include a wider audience, anonymity of the bully, the more enduring nature of the written word and the ability to reach the target at any time and in any place, including the target's home. Further, cyber bullies may feel emboldened because they cannot see their targets or their immediate responses, and believe that, because of their anonymity, they will not be detected. It has been suggested that this anonymity may increase the intensity of the attacks and encourage them to continue for longer than they would otherwise do face-to-face.[17] While it is true that cyber bullying can only threaten physical violence rather than inflict it, research has shown that verbal and psychological bullying may have more negative long term effects.[18]

3. The Law's Response

In many respects the law has struggled to keep apace with advances in technology. The problem of cyber bullying is no different. While there is yet to be a case of cyber bullying reach an Australian court, such an eventuality is readily conceivable. It is

[11] Kacy Marshall, 'The "always on" generation: School liability and Preventative Measures for Cyber-bullying.' *Education Labor Letter* <www.laborlawyers.com/CM/Education%20Labor20%Letters/EducationLaborLetter498.asp> at 7 September 2009.

[12] Riittakerttu Kaltiala-Heino, Matti Rimpela, Päivi Rantanen, and Arja Rimpela, 'Bullying at School – An Indicator of Adolescents at Risk for Mental Disorders' (2000) 23 *Journal of Adolescence* 661; Riittakerttu Kumpulainen et al, 'Bullying and Psychiatric Symptoms Among Elementary School Children' (1998) 22 *Child Abuse and Neglect* 705.

[13] C Coggan, S Bennett, R Hooper and P Dickinson, 'Association between Bullying and Mental Health Status in New Zealand Adolescents' (2003) 5 *International Journal of Mental Health Promotion* 16.

[14] Riittakerttu Kumpulainen et al, n 12; Ken Rigby and Phillip Slee, 'Suicidal ideation among adolescent schoolchildren, involvement in bully/victim problems and perceived low social support. (1999) 29 *Suicide and Life-Threatening Behaviour* 119.

[15] WM Craig, 'The Relationship Among Bullying, Victimisation, Depression, Anxiety, and Aggression in Elementary School Children' (1998) 24 *Personality and Individual Differences* 123.

[16] Ken Rigby, 'What Children Tell Us About Bullying in Schools.' (1997) 22(2) *Children Australia* 28.

[17] Kathleen Conn *Bullying and harassment: A legal guide for educators* (Alexandria: ASCD, 2004).

[18] Philippa Reid, Jeremy Monsen, and Ian Rivers, 'Psychology's contribution to understanding and managing bullying within schools' (2004) 20(3) *Educational Psychology in Practice* 241.

not difficult to reconceptualise cyber bullying in terms of criminal, tortious or vilifying behaviour.

3.1 Cyber Bullying as a Criminal Offence

It may seem to some that a criminal prosecution would be an extreme response to bullying behaviour. In the first place, the Director of Public Prosecutions may be dubious in a given instance that a case can be established beyond reasonable doubt, particularly with respect to the necessary intention to commit the relevant crime. Nevertheless, even where there is such reticence on the part of the prosecuting authority, targets of cyber bullying may find that the very involvement of a police investigation helps them to regain a sense of control and power otherwise lost to the bully. Examination of the range of criminal offences that may be relevant is therefore warranted.

3.1.1 Criminal Responsibility

A threshold question when considering the criminality of behaviour is whether the offender is deemed by law to be responsible for his or her actions. In the case of young perpetrators it might be thought that they lack the same ability to appreciate the consequences of their behaviour, empathy for others and ability to control their impulses that might be reasonably expected of adults. Irrespective of such considerations, criminal responsibility is determined solely on the basis of age.

At common law, the age of criminal responsibility is 7 years. This age has been raised by statute in all Australian jurisdictions to 10 years, meaning a cyber bully under 10 will never be criminally 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 he or she ought not to have committed the offence. In other words, it must be shown that the child knew that it was a wrong act of some seriousness, as distinct from an act of mere 'naughtiness or childish mischief'.[19] By contrast, anyone aged 14 and over is deemed to have the requisite capacity and is thus criminally liable for his or her conduct.

3.1.2 Offences

New South Wales is the only Australian jurisdiction to enact legislation specifically directed at bullying in schools (which would in its terms include cyber bullying),[20] unlike, for example, the United States where sixteen states including New York, California and Illinois have statutory responses.[21] Nevertheless, cyber bullying may

[19] *C v DPP* [1996] 1 AC 1 and see *Criminal Code Act 1995* (Cth) s 7(1),(2); *Crimes Act 1914* (Cth) ss 4M, 4N; *Criminal Code Act 2002* (ACT) ss 25-26; *Children (Criminal Proceedings) Act 1987* (NSW) s 5; *Criminal Code* (NT) ss 38(1),(2); *Criminal Code 1899* (QLD) s 29(1),(2); *Criminal Code Act 1924* (Tas) s 18(1),(2); *Children and Young Persons Act 1989* (VIC) s 127; *Criminal Code Act Compilation Act 1913* (WA) s 29.

[20] *Crimes Act 1900* (NSW), Div 8B.

[21] The relevant states are Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Louisiana, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Rhode Island, Vermont, Washington, and West Virginia: see the discussion in Fred Hartmeister and Vickie Fix-Turkowski, '*Getting Even*

easily be conceived in terms of well know criminal offences such as assault, threats, extortion, stalking, harassment, and indecent conduct. In addition, an increasing array of new offences, such as torture, voyeurism, cyber stalking, and telecommunications offences may be relevant. The New South Wales provisions and some of these other offences as they apply to cyber bullying are worth closer examination.

(a) Assaults, Intimidation and Harassment at School (New South Wales)

The *Crimes Act 1900* (NSW) was amended by the *Crimes Amendment (School Protection) Act 2002* (NSW) (commenced February 2003) to make it an offence in s 60E where a person 'assaults, stalks, harasses or intimidates' any school staff or student while attending the school. None of the terms 'assault', 'stalk', 'harass' or 'intimidate' are specifically defined, but on their natural meaning would include cyber bullying.

This section is unique in the Australian criminal law, but is limited in its reach to staff and students while 'attending the school', which is defined in s 60D(2) as follows:

> (a) while the student or member of staff is on school premises for the purposes of school work or duty (even if not engaged in school work or duty at the time), or
>
> (b) while the student or member of staff is on school premises for the purposes of before school or after school child care, or
>
> (c) while entering or leaving school premises in connection with school work or duty or before school or after school care.

This limitation is significant. Even in the case of face-to-face bullying, it does not cover hostile behaviour directed against student or staff members while they are on the way to, or home from, school (as opposed to actually entering or leaving school premises). Much less does it cover cyber bullying occurring while the target is away from school premises. It does not even cover cyber bullying performed by a bully who is on school premises, perhaps even using school computer equipment, against a target who is not on school premises. Such a position is made even more absurd in a case in which the target is not on school premises because, for example, he or she is at home trying to recuperate from bullying behaviour directed at him or her while on school premises.

(b) Assault

A common assault may be committed by the threat of force which puts the target in fear of imminent violence.[22] Actual direct or indirect application of force is not

with Schoolyard Bullies: Legislative Responses to Campus Provocateurs' (2005) 195 *Educ L Rep* 1, 5-6.

[22] *Stephens v Myers* (1830) 4 C&P 349 at 349-350.

necessary.[23] This offence exists in all States and Territories.[24] There are minor differences in the elements of the offence between jurisdictions but, generally it is required that:

- the offender attempt or threaten to apply force,
- the threat must be evidenced in some way and
- the threat creates an apprehension in the victim of present or immediate harm by reason of the offender apparent ability to carrying out the threat.

These elements might easily be satisfied in a cyber bullying case such as where, for example, a child receives an SMS message threatening that a gang is coming to kill him or her. However, under the Queensland, Tasmania and Western Australia statutes words or images online are *insufficient* evidence of a threat.[25]

All jurisdictions also provide criminal sanctions where an assault causes some form of criminal harm, although this is variously described in the various statutes as 'grievous', 'bodily', 'actual bodily' or 'serious'. A relevant question in this connection is whether 'harm' includes psychological harm, as cyber bullying is apt to produce. In England the House of Lords has held that 'bodily harm' for the purposes of common law criminal law included mental harm or psychiatric injury provided the latter amounted to a 'recognisable psychiatric illness' such as clinical anxiety or prolonged depression.[26] Taking a lead from the law concerning civil liability for psychiatric injury caused by negligence, it was held that the term 'bodily harm', as used in the *Offences Against the Person Act 1861* (UK), 'must be interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury'.[27] Australian courts have similarly been prepared to recognise psychiatric injury as a form of damage warranting compensation, and it would not be surprising to see a similar interpretation applied to criminal statutes in this country.

[23] The modern day criminal offence of assault, as now legislated in all Australian states and territories, is essentially a merger of the common law offences of 'assault' (the offer or threat of force coupled with the apparent present ability to carry out that threat) and 'battery' (the intentional application of force on another). See *Crimes Act 1900* (ACT) ss 26, 26A; *Crimes Act 1900* (NSW) s 61; *Criminal Code 1983* (NT) ss 187(b), 188; *Criminal Code 1899* (Qld) ss 245, 335; *Criminal Law Consolidation Act 1935* (SA) s 20; *Criminal Code Act 1924* (Tas) ss 182(1), 184; *Crimes Act 1958* (Vic) s 31; *Criminal Code 1913* (WA) ss 222, 313.

[24] *Crimes Act 1900* (ACT) ss 26, 26A; *Crimes Act 1900* (NSW) s 61; *Criminal Code 1983* (NT) ss 187(b), 188; *Criminal Code 1899* (Qld) ss 245, 335; *Criminal Law Consolidation Act 1935* (SA) s 20; *Criminal Code Act 1924* (Tas) ss 182(1), 184; *Crimes Act 1958* (Vic) s 31; *Criminal Code 1913* (WA) ss 222, 313.

[25] *Criminal Code Act 1924* (Tas) s 182(2) provides that words alone cannot constitute an assault. *Criminal Code 1899* (Qld) s 245 and *Criminal Code 1913* (WA) s 222 both refer to 'threatening by physical gestures', which would seem to preclude online words or images being sufficient. Cf *Criminal Law Consolidation Act 1935* (SA) s 20(1)(c) which specifically includes 'threatens by words or conduct'; *Criminal Code 1983* (NT) ss 187(b) providing that the threat may be 'evidenced by bodily movement or threatening words'. At common law words are sufficient (see *R v Ireland; R v Burstow* [1998] AC147 where it was held that a series of silent telephone calls could amount to common law assault; see also *Barton v Armstrong* [1969] 2 NSWLR 451; *Marchioro v Miller* [1962] SASR 233).

[26] *R v Ireland; R v Burstow* [1998] AC 147, 159; see also *R v Chan-Fook* [1994] 2 All ER 552, 559.

[27] *R v Ireland; R v Burstow* [1998] AC 147, 159, per Lord Steyn.

This would mean that a criminal offence may be committed where cyber bullying causes its target to suffer a recognisable psychiatric illness.

(c) Misuse of Telecommunications Services

The Commonwealth *Criminal Code Act 1995* contains a number of offences which may be effective means of redress against a cyber bully who misuses telecommunication services to menace, threaten or hoax other persons. Section 474.17 makes it an offence to use telecommunication services to menace, harass or cause offence (punishable by 3 years). It does not matter whether the menace or threat is caused by the type of use (such as multiple postings on a website) or by the content of the communication or both, provided reasonable persons would regard the use as being menacing, harassing or offensive in all the circumstances.

Where the threat goes further and contains a threat to kill or cause harm, an offence under s 474.15 may be committed. This section provides that it is an offence for a person to use telecommunication services, including the Internet, to threaten to kill (punishable by 10 years imprisonment) or to cause serious harm (punishable by 7 years) to another person (such as the target) or to a third person, if the bully intends the target to fear that the threat will be carried out. 'Fear' is defined broadly in the Act to include apprehension, while 'threat' is defined as including 'a threat made by any conduct, whether express or implied and whether conditional or unconditional.' It is not necessary for the target to *actually* fear that the threat will be carried out, just that it be *intended* to be so.[28] This is a significant point since most bullies intend that their targets are fearful, and there have been numerous reported cases of death threats and threats of serious harm being made in the cyber bullying context (most commonly by email or text message).[29]

Additional offences in the *Criminal Code Act 1995* (Cth) that may be relevant to cyber bullying include s 474.16, which makes it an offence for a person to send a hoax communication intending to induce a false belief that an explosive has been left somewhere (punishable by 10 years imprisonment) and s 474.22, which prohibits using a carriage service for child abuse material. The latter section may catch posting video of sexual assault and other abuse like the incongruously-named 'happy slapping', in which an unsuspecting victim is assaulted while an accomplice films the attack, often with a mobile phone, and distributes the video via a website.[30]

(d) Other Threat Offences

All Australian States and Territories have their own threat offences which mirror the Commonwealth threat provisions. These may apply where the cyber bullying does not result in physical injury but puts the target in fear of personal violence against him

[28] See s 474.15(3)
[29] *MSN Cyberbullying Report: Blogging, instant messaging and email bullying amongst today's teens* <http://www.warwickshire.gov.uk/Web/corporate/pages.nsf/Links/1301BDA3D993CD7D8025707D002A3372/$file/44+MSN+cyberbullying+research.pdf > at 7 September 2009..
[30] Michael Shaw, 'Bullies Film Fights by Phone', *The Times: Educational Supplement* 21 January 2005, 3.

or her. For example, *Crimes Act 1900 (NSW)* s 31 makes it an offence to maliciously send or deliver, or cause to be received, any document threatening to kill or inflict bodily harm.[31] Less serious threat offences are also provided for in all Australian jurisdictions, variously prohibiting a cyber bully from threatening to harm, injure or endanger a target to varying levels of gravity.[32]

British Columbia provides an example of the successful prosecution of bullies uttering threats to cause death or serious bodily harm. In the associated cases *R v DW and KPD*[33] and *R v DH*[34] the bullying, which including telephone calls, involved threats like 'I am going to beat you up' and 'You're dead' directed at a girl called Dawn Wesley by her Grade 9 classmates. She later committed suicide, leaving a note attributing her actions to the relentless bullying. In *R v DW and KPD*, Rounthwaite CJ held that 'bodily harm' included 'psychological hurt or injury, as well as physical' and found that conditional or future threats were included in the ambit of the relevant offence.[35]

(e) Stalking and Harassment

The last decade has seen a proliferation of anti-stalking, intimidation and harassment legislation both in Australia and overseas. All Australian jurisdictions now have stalking legislation proscribing behaviour calculated to harass, threaten or intimidate.[36] Stalking has been described as the 'pursuit by one person of what appears to be a campaign of harassment or molestation of another.'[37] Common examples include following the target, sending articles to the target, waiting outside or driving past the target's home or place of work, and repeated contact by phone, email or text. These offences have proven extremely valuable as part of a larger strategy to contain domestic violence and like behaviours where an imbalance of power is exploited in quite unimaginable and bizarre, but extremely frightening, ways. They are therefore of particular relevance to cyber bullying where, like all cases of bullying, there is a similar exploitation of power imbalance.

Each of the State and Territory sections contains lengthy, inclusive lists of the types of conduct caught, although there are minor differences in these lists. The anti-

[31] See *Criminal Code 1899* (Qld) s 308, *Criminal Code Act 1924* (Tas) s 163 (threats to kill in writing); *Criminal Code 1913* (WA) ss 338A-338B; *Crimes Act 1900* (ACT) s 30; *Crimes Act 1958* (Vic) s 20; *Criminal Law Consolidation Act 1935* (SA) ss 19(1), 19(3); *Criminal Code 1983* (NT) s 166 (threats constituted by words or conduct).

[32] For example, *Crimes Act 1900* (NSW) ss 31, 199; *Crimes Act 1900* (ACT) s 31; *Criminal Code 1913* (WA) ss 338(a),(b),(d), 338B; *Criminal Code 1983* (NT) s 200; *Criminal Code 1899* (Qld) s 359; *Crimes Act 1958* (Vic) s 21; *Criminal Law Consolidation Act* 1935 (SA) s 19(2).

[33] [2002] BCPC 0096.

[34] [2002] BCPC 0464.

[35] [2002] BCPC 0096 at [13].

[36] *Criminal Code 1899* (Qld) s 359A; *Criminal Code 1913* (WA) ss 338D, 338E; *Crimes Act 1900* (NSW) s 545B (intimidation or annoyance by violence or otherwise); *Crimes Act 1958* (Vic) s 21A; *Criminal Law Consolidation Act 1935* (SA) s 19AA; *Criminal Code Act 1924* (Tas) ss 192, 192A; *Criminal Code 1983* (NT) s 189; *Crimes Act 1900* (ACT) s 35; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 8, 13.

[37] Celia Wells, 'Stalking: The Criminal Law Response' [1997] *Criminal Law Review* 463, 466; Sally Kift, 'Stalking in Queensland: From the Nineties to Y2K' (1999) *Bond Law Review*, 11(1), 144.

stalking law in *Crimes Act 1958* (Vic), s 21A is the one of the most detailed, covering a person who engages in a course of conduct (i.e. at least two occasions) which includes, amongst several other forms of conduct, telephoning, sending electronic messages or otherwise contacting the victim; 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 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. Under the Queensland Criminal Code s 359B 'unlawful stalking' means *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 (emphasis added). 'Detriment' is defined to include apprehension or fear of violence and serious mental, psychological and emotional harm,[38] as is often the case with cyber bullying. It is significant that the section applies to conduct engaged in on 'any 1 occasion' if the conduct is protracted.

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 (emphasis added).[39] Cyberbullying would constitute 'acting in any other way'. Tasmania, like Queensland, specifically includes 'contacting' the target as an identified form of stalking,[40] which would embrace cyber bullying. 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'.[41]

By contrast, the New South Wales legislation now proscribes 'stalking or intimidation with intent to cause fear of physical or mental harm' very broadly in the newly enacted *Crimes (Domestic and Personal Violence) Act 2007*[42] while also retaining an offence of 'intimidation of annoyance' in the *Crimes Act 1900* (NSW) s 545B. The latter provision makes it an offence to use violence or intimidation to or toward another person, or that person's spouse, child, or dependant. 'Intimidation' is further defined as causing a reasonable apprehension of injury, which may be in respect of that person's property, business, occupation, employment, or other source of income. 'Injury' is also said to include 'any actionable wrong of any nature'. Arguably, therefore, it might also cover damage to reputation (which might otherwise found an action for defamation) or disclosure of personal information (which might otherwise

[38] *Criminal Code 1899* (Qld), s 359A
[39] See *Crimes Act 1900* (ACT) s 35; *Criminal Code* (NT) s 189; *Criminal Law Consolidation Act 1935* (SA) s 19AA.
[40] *Criminal Code* (Tas) s 192(1).
[41] *Criminal Code* (WA) s 338E.
[42] *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 8, 13..

found an action for breach of confidentiality, or perhaps invasion of privacy)[43] which are potential consequences of some forms of cyber bullying.

The anti-stalking legislation has a number of advantages as a means of addressing cyber bullying. First, a wide range of hostile behaviour falls within its ambit which in itself need not be criminal.[44] For example, a threat which is merely implicit rather than explicit would still be caught. Secondly, while there are differences between jurisdictions in relation to the offender's requisite intent and the required state of mind (if any) of the victim, it is usually sufficient that the offender, by means of repeated conduct (other than in Queensland, which refers to 'at least one occasion'), intends to induce in the target an apprehension or fear of violence or harm (which in most Australian jurisdictions includes the intention to cause the target *either* physical *or* mental harm). Accordingly this offence is well suited to cases of cyber bullying, where the purpose is normally to cause emotional, rather than physical, harm and distress.

(f) Torture

Queensland and the ACT have both enacted law prohibiting torture.[45] These offences are primarily designed to outlaw the infliction of pain for coercion, punishment, obtaining information or perhaps deviant pleasure.[46] However, the wording of the Queensland section may be wide enough to catch bullying, including cyber bullying. It defines 'torture' as the 'intentional infliction of severe pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion', and 'pain or suffering' as including physical, mental, psychological or emotional pain or suffering, whether temporary or permanent. As bullying (and by extension cyber bullying), on any sociological conception includes the intent to cause the target emotional or psychological harm and a repetition of the behaviour,[47] it therefore meets the definition of torture. Naturally, whether the prosecuting authorities would be prepared to view a case of cyber bullying in such a light is another question. However, the possibility cannot be discounted if appropriate circumstances presented themselves.

(g) Visual Recording, 'Upskirting' and Breach of Privacy

Some jurisdictions have responded to voyeuristic behaviour involving the surreptitious use of mobile phone camera and other miniature cameras to photograph unsuspecting people involved in private activities or of their private parts (for example, the practice known as 'upskirting' where an image is taken covertly looking under a woman's skirt). These jurisdictions have prohibited non-consensual visual recordings of a target when the latter is engaged in a private act or in a private place

[43] See section 3.2.1(c) below.
[44] *R v Clarke* Unreported Queensland District Court, Ipswich, 27/2/95 (Robertson DCJ).
[45] *Criminal Code 1899* (Qld), s 320A; *Crimes Act 1900* (ACT) s 36.
[46] The ACT provision is expressly limited to public employees or their accomplices using torture for the purposes of obtaining information, punishment, intimidation or coercion, or discrimination: see s 36.
[47] Peter Smith et al, 'Cyberbullying: Its nature and impact in secondary school pupils' (2008) 49(4) *Journal of Child Psychology and Psychiatry* 376.

(such as showering or toileting at work or school) and the distribution of those recordings (for example, by posting on a web site).[48] When it is considered that such behaviour may result in severe emotional and psychological harm to the target, the application of these provisions in the context of cyber bullying is readily apparent.

(h) Criminal Defamation

Derogatory or denigrating material that is published to others, perhaps by way of a web site, may constitute civil defamation of the target.[49] It might also constitute a criminal defamation. In Australia the common law offence of criminal libel subsists in Victoria, but has been abolished elsewhere and replaced by a statutory offence, generally called 'criminal defamation'.[50] Even in Victoria there is a statutory offence of publishing false 'defamatory libel' that complements the common law.[51]

The statutory offences in New South Wales, Queensland, South Australia, Tasmania, Western Australia and the ACT introduced a requirement of mens rea as an element of the offence. In other words, the prosecution must show both knowledge of falsity and an intention to cause serious harm or reckless indifference.[52] In the absence of admissions by the accused, each fact must be proved by inference.[53] In the Northern Territory the element of mens rea was introduced by setting out a requisite intention for which the defamatory matter was published, namely:

> (a) with intent to cause or that causes or is likely to cause a breach of the peace;
> (b) with intent to cause loss;
> (c) with intent to interfere with the free and informed exercise of a political right;
> (d) with intent to prevent or deter a person from performing any duty imposed on him by law;
> (e) with intent to prevent or deter any person from doing any act that he is lawfully entitled to do or to compel him to do any act that he is lawfully entitled to abstain from doing;
> (f) with intent to prevent any lawful investigation or inquiry; or
> (g) with intent to interfere with or to influence any judicial proceeding.[54]

Moreover, intent need not be shown in the Northern Territory where a publication actually causes or is likely to cause a breach of the peace. In Victoria there are two offences following the enactment of an offence of publication of defamatory matter knowing it to be false, which stands alongside the continued operation of the common law criminal libel which does not require an intention to defame or knowledge of falsity.[55]

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[48] *Summary Offences Act 1988* (NSW) ss 21G, 21H; *Criminal Code 1899* (Qld) ss 227A, 227B; see also *Criminal Code* (Canada) s 162; *Sexual Offences Act 2003* (UK) s 67; *Crimes Act 1961* (NZ) ss 216H, 216J; *Video Voyeurism Act* 18 USC §1801(a) (2004).

[49] See section 3.2.1(d) below.

[50] *Crimes Act 1900* (ACT) s 439; *Crimes Act 1900* (NSW) s 529; *Criminal Code 1983* (NT) s 204; *Criminal Code 1899* (Qld) s 365; *Criminal Law Consolidation Act 1935* (SA) s 257; *Criminal Code Act 1924* (Tas) s 196; *Criminal Code 1913* (WA) s 345.

[51] *Wrongs Act 1958* (Vic) s 10.

[52] *Crimes Act* (ACT), s 439(1); *Crimes Act 1900* (NSW), s 529(3); *Criminal Code 1899* (Qld), s 365 (1) (knowledge and either intention or 'without having regard'); *Criminal Law Consolidation Act 1935* (SA) s 257(1) (knowledge or reckless as to whether true or false, and intention to cause serious harm or reckless indifference); *Criminal Code 1924* (Tas), s 196(1) (knowledge and either intention or 'without having regard'); *Criminal Code 1913* (WA), s 345(1) (knowledge or without having regard as to true or false, and intention to cause serious harm or 'without having regard').

[53] *Waterhouse v Gilmore* (1988) 12 NSWLR 270 at 290.

[54] *Criminal Code 1983* (NT), s 204.

[55] *Wrongs Act 1958* (Vic), s 10(1); see the analysis in *King v R* (1876) 2 VLR 17 at 20.

Otherwise, most jurisdictions import the meaning of elements like 'publish' and 'defamatory matter' from law of tort for the purposes of the criminal offence.[56]

Prosecutions for criminal defamation are rare, prosecuting authorities usually taking the attitude that vindication of reputation is best left a matter to be determined civilly between the parties. Nevertheless, they are possible.[57] It is conceivable, then, that cyber bullying may involve a degree of denigration that reaches such a level of criminality that it warrants prosecution by the State.

(i) Accessorial Liability

All jurisdictions prohibit a person from being a party to an offence, for example, by aiding, counselling or procuring a criminal offence.[58] There are numerous ways that such provisions may be involved in a case of cyber bullying. One situation in particular where the provisions may prove useful would be a case of 'happy slapping', where the assault on the unsuspecting victim is filmed by an accomplice before being uploaded to the Internet. Thus, while the initial assault may be thought of in terms of face-to-face bullying, the accomplice, in recording and then distributing the footage with the intent of causing greater emotional harm to the target, also engages in cyber bullying.

3.1.3 Criminal Injuries Compensation

Where a bullying target suffers an injury or injuries as a result of a criminal offence against the person, it is possible for that person, as a 'victim of crime', to seek criminal injuries compensation for the injury suffered as a result of the act(s) of violence committed against them. Each state and territory has its own legislative scheme for compensating victims of crime,[59] though eligibility, the amount payable, the procedural requirements (including time limits), and the precise legislative scheme applicable will depend on the date of the crime committed and the type of injury inflicted. While the legislative responses in Australia are far from uniform, at a very broad level of generalisation it may be said that they provide compensation for personal injury (both physical and mental injury), but not for property loss or damage. Thus, there is the possibility that a target victim might recover criminal compensation for the bullying injury suffered, to a modest, prescribed monetary level. While the

[56] See *Crimes Act 1900* (ACT) s 439(8); *Crimes Act 1900* (NSW) s 529(11); *Criminal Code 1983* (NT) s 203; *Criminal Code 1899* (Qld) s 365(8); *Criminal Code Act 1924* (Tas) s 196(7); *Criminal Code 1913* (WA) s 345(7). The South Australian statute does not define 'publish.'

[57] See, eg, *Spautz v Williams* [1983] 2 NSWLR 506; *Gypsy Fire v Truth Newspapers Pty Ltd* (1987) 9 NSWLR 382; *Waterhouse v Gilmore* (1988) 12 NSWLR 270; *Grassby v R* (1992) 62 A Crim R 351.

[58] *Criminal Code 2002* (ACT) ss 45-47; *Crimes Act 1900* (NSW) ss 345-351B; *Crimes Act 1958* (Vic) ss 323-325; *Criminal Code 1983* (NT) ss 8-10, 12-13, 43BG; *Criminal Code 1899* (Qld) ss 7-9; *Criminal Law Consolidation Act 1935* (SA) s 276; *Criminal Code Act 1924* (Tas) ss 3-5; *Criminal Code 1913* (WA) ss 7-9; *Criminal Code 1995* (Cth) ss 11.2, 11.4.

[59] *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 1976* (Tas); *Criminal Offence Victims Act 1995* (Qld); *Victims of Crime Assistance Act 1996* (Vic); *Victims Support and Rehabilitation Act* 1996 (NSW); *Victims of Crime Assistance Act* (NT); *Criminal Injuries Compensation Act 2003* (WA); *Victims of Crime (Financial Assistance) Act 1983* (ACT).

Queensland scheme requires the offender's conviction on indictment, with the possibility of a further application to the state for an 'ex gratia' payment should the offender be unable to pay,[60] most states now have statutory compensation schemes under which payments may be made from a government fund in acknowledgment of the pain and suffering a victim of crime has suffered.[61] Some jurisdictions also provide for a compensation or restitution order to be made against the offender at the time of sentencing, which may cover property damage.[62]

An alternate course of action, should the offender have assets, is to pursue a civil action and recover damages. This will now be discussed.

3.2 Cyber Bullying as a Ground for Civil Liability

A target of cyber bullying may also seek compensation for the harm suffered from either the perpetrator or a third party deemed responsible for failing to take steps to prevent the hostile behaviour, such as the perpetrator's school.[63] Civil proceedings have the advantage that a case need only be proved on the balance of probabilities rather than on the criminal standard of proof beyond a reasonable doubt. The disadvantage of civil action is the need for the target to have the financial resources to pursue an action. In those cases where both a criminal offence has been committed and civil liability incurred, the target may seek to delay commencing civil proceedings until such time as criminal responsibility has been determined. A finding of guilt on the higher criminal standard will mean that the circumstances should easily establish civil liability on the lesser civil standard, and in turn make pursuit of the civil claim easier.

3.2.1 Perpetrator Liability

Consideration of a cyber bully's civil liability, like his or her criminal liability, also involves threshold questions. Unlike criminal law, age is no barrier to a civil liability to pay compensation for cyber bullying. As Windeyer J decided in *McHale v* Watson, 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.'[64] As long as this question can be answered in the affirmative, the perpetrator may be sued for reparation. A different threshold question is perhaps more relevant: is the perpetrator worth suing? There is little point in spending time and money obtaining a judgment against a perpetrator who has little in the way of resources to meet any damages award.

[60] *Criminal Offence Victims Act 1995* (Qld) ss 24, 32.
[61] *Victims of Crime Act 2001* (SA) ss 17, 20; *Victims of Crime Assistance Act 1976* (Tas) s 5; *Victims of Crime Assistance Act 1996* (Vic) ss 1, 25, and see also *Sentencing Act 1991* (Vic) s 74; *Victims Support and Rehabilitation Act 1996* (NSW) ss 6, 42, 46; *Victims of Crime Assistance Act* (NT) s 30; *Criminal Injuries Compensation Act 2003* (WA) ss 12-13; *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 27.
[62] For example, *Penalties and Sentences Act 1992* (Qld) s 35.
[63] See, eg, *Cox v State of New South Wales* (2007) 71 NSWLR 225.
[64] (1964) 111 CLR 384 at 386.

A natural question in the case of young perpetrator is whether an action may also be brought against his or her parents, and against whom there may be greater prospects of recovering a judgment debt. In *McHale v Watson* Windeyer J also observed that:

> A parent is, generally speaking, not legally liable for the wrongdoing of his child. This is the rule of the common law. In other systems a different view is taken and parents are required by law to make good the harm that their children do. In our law that is so if the parent has in some way participated in, directed or ratified the wrongdoing of his child, or if the child were in fact employed as his servant and the wrongful act was done in the course of his employment. A parent may also be liable for the consequence of his child's wrongdoing if his own negligence caused or provided the occasion for it. In that case the parent is not vicariously liable: he is liable because of his own negligence. Such negligence may arise from his failure to exercise a reasonable control of the activities of his child. It may in some cases arise from his arming the child with an instrument which it could reasonably be thought might be used by the child in a manner that would be dangerous to other persons. Whatever acts or omissions of the parent be relied upon, they must amount to a breach of a duty of care created by the reasonably foreseeable risk of an injury arising as a consequence of those acts or omissions. Although I have spoken of the parent as 'he', a mother may of course be liable in the same way as a father.[65]

It would be difficult to argue that the simple act by a parent of giving a child a mobile phone or a computer with access to the Internet constituted 'arming the child with an instrument which it could reasonably be thought might be used by the child in a manner that would be dangerous to other persons'. Any liability on the part of the parent would need to be on the basis of a 'failure to exercise a reasonable control of the activities' of the child which would 'amount to a breach of a duty of care created by the reasonably foreseeable risk of injury arising as a consequence of those acts or omissions' of the parent. A plaintiff would need to argue, for example, that in the case of cyber bullying conducted on the perpetrator's home computer, a parent should exercise reasonable control by supervising the child's Internet usage. The practicality of such a proposition, however, might be open to doubt. Even if a parent locates the computer with access to the Internet in such a place in the home that permits supervision of Internet usage, it can be difficult, if not impossible, for even the most prudent parent to be completely sure of what the child is doing at all times. Without an understanding of the full context, such a parent is not to know that a seemingly innocent message has a sinister connotation. Further, the use of abbreviations, code words or slang can hide the true meaning of a message.

A number of intention-based causes of action may be relevant in a cyber bullying context. Some of these causes of action are the tortious counterparts to criminal offences.

(a) Assault

Cyber bullying in the form of threats of violence communicated by telephone or SMS message, or posted on a website, and which cause a target to apprehend violence may not only constitute a crime but also give rise to the tort of assault giving rise to a right to compensation. Like the crime, this form of trespass to person requires an act by the

[65] *McHale v Watson* (1964) 111 CLR 384 at 386-387; See also *Smith v Leurs* (1945) 70 CLR 256.

defendant which requires the plaintiff to apprehend immediate contact with his or her person.[66] 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. This may be easy to satisfy where the parties are in close proximity. However, it has also been recognised that a plaintiff may be made to apprehend immediate physical violence in the case of threats made over the telephone.[67] If, for example, a phone call, text message or entry on a website, blog or wiki threatened that the target was going to be killed, bashed or the like in the very near future – perhaps during a recess break or after school – it may be that this requirement has been satisfied. However, the more generalised any threat of violence, or the more remote the threat of violence from any likely infliction, the more difficult it may be to argue that the defendant has committed an assault.

(b) Intentional Infliction of Mental Harm

It has been noted that bullying entails the perpetrator intending to cause the target to suffer harm. Consequently, a target of cyber bullying may have a claim based on the rule in *Wilkinson v Downton* ('*Wilkinson*')[68] for the intentional infliction of physical harm. It is salient warning for bullies of any type who believe they are 'having fun' or playing a joke on the target that this case involved a practical joke gone wrong. The defendant, by way of a practical joke, told the plaintiff that her husband had been involved in an accident and that she should hurry and take pillows to him. The plaintiff suffered psychological harm as a consequence, and the defendant was held legally responsible for this harm. Similarly, in *Janvier v Sweeney*[69] a defendant was held liable for threats against a woman and her fiancé which were uttered with the knowledge that they were likely to cause her injury due to her personality and which resulted in her suffering a psychiatric condition and a long period of illness. This doctrine was formulated in an age when psychiatric injury was believed to be a form of physical harm. It has been subsequently interpreted as being linked to psychiatric injury rather than harm in general, including physical harm per se.[70]

The *Wilkinson* decision spawned a substantial body of jurisprudence in the United States concerning claims for 'extreme and outrageous conduct intentionally or recklessly causing severe emotional distress to another'.[71] In Australia, Latham CJ in *Bunyan v Jordan*[72] recognised that if a person 'deliberately does an act of a kind calculated to cause physical injury ... and in fact causes physical injury to that other person, he is liable in damages.'[73] It was held that 'calculated' meant objectively likely to happen. Latham CJ said of the words uttered in *Wilkinson* that 'it was naturally to be expected that they might cause a very severe nervous shock.'[74] More

[66] See section 3.1.2(b).
[67] *Barton v Armstrong* [1969] 2 NSWR 451; *Zanker v Vartzokas* (1988) 34 A Crim R 314 at 318.
[68] [1897] 2 QB 57.
[69] [1919] 2 KB 316.
[70] See, eg, *Janvier v Sweeney* [1919] 2 KB 316; *Carrier v Bonham* [2002] 1 Qd R 474.
[71] See *Restatement (Second) of Torts* §46. Indeed, the facts of both *Wilkinson v Downton* and *Janvier v Sweeney* are used by the Restatement as illustrations of the application of the section.
[72] (1937) 57 CLR 1.
[73] *Bunyan v Jordan* (1937) 57 CLR 1at 10.
[74] *Bunyan v Jordan* (1937) 57 CLR 1at 11. See also Dixon J at 17.

recently, in *Northern Territory v Mengel*[75] it was said that *Wilkinson* illustrated 'acts which are calculated in the ordinary course to cause harm ... or which are done with reckless indifference to the harm that is likely to ensue.'[76]

However, in contrast to the American experience, the doctrine has not figured largely in Anglo-Australian case law. The case was decided at a time when the Privy Council in *Victorian Railway Commissioners v Coultas*[77] was authority for the view that nervous shock was too remote a consequence of a negligent act to be a recoverable head of damage. It was clearly evident that the decision in *Wilkinson*, by being based on intention, was an attempt to evade *Coultas* although its reliance on intention was dubious since Mr Downton in fact only intended to cause Mrs Wilkinson to suffer a fright, not any resulting illness. An unanswered question, therefore, was whether the intention had to be actual or imputed. With *Coultas* no longer good authority, *Wilkinson* itself is able to be comfortably accommodated by the law concerning nervous shock caused by negligence. Lord Hoffmann remarked in *Wainwright v Home Office*[78] that in cases of psychiatric injury there is no point in seeking to rely on intention when negligence will do just as well, meaning that *Wilkinson* has been left with 'no leading role in the modern law.'[79]

Accordingly, it may be the case that a practical joke which is honestly well-intentioned, although perhaps misguided, and which results in unintentional injury will now be treated as a case of negligence in appropriate circumstances. However, a distinguishing feature of bullying, no less of cyber bullying, is the specific intent to cause emotional harm. If that emotional harm is of such a level that it amounts to a recognisable psychiatric illness then an action based on the rule in *Wilkinson* would seem well-suited as a means of reparation. [80] Targets of bullying seeking to use the law as a means of fighting back against their aggressors may yet breathe life into a doctrine thought past its usefulness.

(c) Invasion of Privacy

Cyber bullying may invade the privacy of the target of that bullying in one of two ways: it may contain threatening material or it may give widespread publicity to private information concerning the target. In either case the contributions may result in the target suffering harm in the form of distress, embarrassment and/or humiliation.

[75] (1995) 185 CLR 307.
[76] *Northern Territory v Mengel* (1995) 185 CLR 307 at 347.
[77] (1888) 13 App Cas 222.
[78] [2004] 2 AC 406.
[79] *Wainwright v Home Office* [2004] 2 AC 406 at [41]. A similar sentiment has been expressed in Australia: see, eg, *Carrier v Bonham* [2002] 1 Qd R 474 at 484 (McPherson JA, with whom McMurdo P and Moynihan J agreed)
[80] Maxwell P in *Giller v Procopets* (2008) 40 Fam LR 378 at [35] suggested that it should be sufficient to show an intention to cause mental distress without the need to show that it amounted to a psychiatric illness. In that case his Honour thought that the defendant's deliberate course of action of showing or threatening to show a video tape of his former de facto partner engaging in sexual relations with him, in order to humiliate, embarrass and distress her, 'fitted comfortably' within the definition of intentional infliction of emotional distress (at [38]).

Whether the target has a cause of action for invasion of privacy per se is still a vexed question in Australia.

For long Australian courts thought that dicta in the High Court case *Victoria Park Racing and Recreation Grounds Co v Taylor*[81] meant that the common law in this country did not recognise a right to privacy.[82] Instead any action for breach of privacy would need to be framed in terms of some other recognised cause of action such as trespass to land or breach of confidence. The protection of privacy in this way is piecemeal, being dependent on the limitations of these other causes of action. For example, since the necessary title to sue for trespass is possession of the land, it would be of little use to adolescents who were cyber bullied at school or in their parents' home. However, the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[83] has now not dismissed the idea of a tort for breach of privacy. While most of the judges were content to express the view that *Victoria Park* did not stand in the way of development of a common law protection of personal privacy,[84] Callinan J was prepared to suggest that the time was ripe for Australian law to recognise such a cause of action.[85]

This challenge has been taken up by two lower courts. In the Queensland District Court case *Grosse v Purvis*[86] a man was alleged to have stalked his former lover. 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 taking this 'bold step' 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.[87] 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.[88]

[81] (1937) 58 CLR 479;
[82] See, eg, *Cruise and Kidman v Southdown Press* (1993) IPR 125 at 125.
[83] (2001) 208 CLR 199.
[84] See Gummow and Hayne JJ (with whom Gaudron J agreed) at 248, Kirby J at 277.
[85] (2001) 208 CLR 199 at 338.
[86] [2003] Aust Torts Reports ¶81-706.
[87] See W Prosser, 'Privacy' (1960) 48 *Cal LR* 383 and *Restatement (Second) of Torts* §652A.
[88] *Grosse v Purvis* [2003] Aust Torts Reports ¶81-706 at 64,187.

It may be argued that element (d) in this formulation is misguided, since as a direct and intentional act such an unreasonable intrusion would be a tort akin to trespass and therefore should be actionable per se.[89] Nevertheless, such a tort would be well suited to cyber bullying behaviour.[90] Indeed for targets who, by reason of technology, have been able to be bullied even in their homes and at any time of day, a tort designed to redress intrusions on a person's seclusion or solitude would seem to be a cause of action par excellence.

The challenge was also taken up with respect to the other form of invasion, disclosure of private facts, in the Victorian County Court in *Jane Doe v Australian Broadcasting Corporation.*[91] The case involved three ABC Radio news reports which contravened the statutory prohibition against publication of particulars identifying the victim of a sexual offence. The victim, who had been raped twice by her husband, had suffered post traumatic stress disorder as a consequence but had made substantial progress toward dealing with the condition. The broadcasts had a devastating impact on her, causing her to be re-traumatised and severely aggravating her condition. Hampel J upheld the plaintiff's claim on four bases: breach of statutory duty, a negligent infliction of psychiatric injury, breach of confidence and invasion of privacy.

Hampel J ventured, after reference to Gleeson CJ's suggestion in *ABC v Lenah Game Meats*[92] that Australia might follow the English approach to breach of confidence as the appropriate cause of action for breach of privacy, to hold that the English approach as also representing the common law development of breach of confidence in Australia.[93] This approach essentially involves fusing the traditional elements of the confidentiality action (information with a quality of confidentiality, obtained subject to an obligation of confidence, and actual or threatened use) into determining whether there was a reasonable expectation of privacy in the circumstances, and whether it is outweighed by the public interest in free speech.[94] However, this approach has also been strongly influenced by the requirement under the *Human Rights Act 1988* (UK), s 6(1) for English courts to take into account, so far as possible, *The European Convention on Human Rights*. This convention recognises both a right to privacy and a right to free speech. Australian law does not operate in such a context. Australian courts have a strong history recognising that the basis of the action for breach of confidence is the obligation of conscience which binds the confidant,[95] not the nature of the information. Further, the orthodox Australian view is that while the administration of common law and equity has become fused, they are nevertheless based upon different systems of justice.[96] There is significant doctrinal angst,

[89] See Des Butler, 'A Tort of Invasion of Privacy in Australia?' (2005) 29 *Melbourne University Law Review* 339, 360.
[90] Such a tort may be seen as a development of the tort of harassment with which Australian courts have flirted in the past: see, eg, *Chapman v Conservation Council of South Australia* (2002) 82 SASR 449, [154]; cf *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721)
[91] [2007] VCC 281.
[92] (2001) 208 CLR 199.
[93] (2001) 208 CLR 199 at [110].
[94] *Campbell v MGN* [2004] 2 AC 247; *Douglas v Hello! Ltd* [2008] 1 AC 1.
[95] See, eg, *Moorgate Tobacco Ltd v Philip Morris Limited (No 2)* (1984) 156 CLR 414 at 438; *Johns v Australian Securities Commission* (1993) 178 CLR 408.
[96] See, eg, *Felton v Mulligan* (1971) 124 CLR 367 at 392.

therefore, in seeking to grant common law compensatory damages for an equitable cause of action.

Hampel J used the same considerations for finding a breach of confidence to find that the plaintiff had established a claim for breach of privacy. Her Honour found that an action could lie where there was an unjustified publication of personal information which the plaintiff had a reasonable expectation would remain private. While such a finding represented, like *Grosse v Purvis*, a 'bold step' in development of the common law, it has the virtue of avoiding the doctrinal difficulties posed by trying to utilise an equitable doctrine to resolve a problem for which it was not designed. It reflects the development of the common law by the New Zealand Court of Appeal in *Hosking v Runting*.[97] In the process of recognising a common law claim for public disclosure of private facts, the majority judgments[98] noted that the absence of a broad right of privacy in the Bill of Rights did not prevent the courts from the incremental development of protection of aspects of privacy in appropriate circumstances.[99] The leading majority judgment of Gault P and Blanchard J drew on American jurisprudence and endorsed two 'fundamental requirements' for a successful claim of interference with privacy:

> (1) the existence of facts in respect of which there is a reasonable expectation of privacy; and
>
> (2) publicity given to those private facts that would be considered highly offensive to an objective reasonable person.[100]

In so doing they thought that the New Zealand cases were in effect very close to the position in the United Kingdom, except that in that country the matter had been dealt with by way of a modification of the action for breach of confidence, rather than as a separate head of liability.[101]

Hampel J's judgment in *Jane Doe v Australian Broadcasting Commission* might be seen as the first tentative step towards a similar development of the common law in this country.[102] A tort designed to protect against public disclosure of private facts would seem ideally suited as a means of redressing information disseminated widely by a bully using technology in order to intimidate or humiliate, particularly in light of the ease with which information may be uploaded to the Internet.

However, the Victorian Court of Appeal in the recent case *Giller v Procopets*[103] showed greater reluctance to recognising a tort of privacy, at least where an existing

[97] [2004] NZCA 34.
[98] Gault P and Blanchard J (joint judgment) and Tipping J
[99] [2004] NZCA 34 at [96].
[100] *Hosking v Runting* [2004] NZCA 34 at [117]. This was therefore akin to the formulation of the tort in the *Second Restatement*.
[101] *Hosking v Runting* [2004] NZCA 34 at [7]. See also Tipping J at [247].
[102] The defendant appealed the trial judge decision but the action was subsequently settled.
[103] (2008) 40 Fam LR 378.

cause of action was available. So far as is relevant, the case concerned a claim by a plaintiff against her former de facto partner for damages for breach of confidence, intentional infliction of mental harm and invasion of privacy, relating to a video depicting sexual activity between them, which he was alleged to have shown, or threatened to show, to others. The case is significant in that was the first Australian appellate decision to recognise that an award for mental distress damages may be made for a breach of confidence.[104] That finding meant that it was unnecessary for the court to consider whether a generalised tort of invasion of privacy should be recognised.[105] Thus, while not excluding the possibility that such a tort could develop, the case shows that it will have no room to operate where an existing cause of action may be extended to cover the circumstances in question.[106]

Targets of cyber bullying would be beneficiaries of a development of the common law to recognise that personal privacy may be protected by, depending on the circumstances, a cause of action for either unreasonable intrusion upon seclusion, public disclosure of private facts or breach of confidence . A separate tort or torts for invasion of privacy would not require the imminence of violence necessary for a tortious action for assault, or the long lasting diagnosable psychiatric illness that may be required for a *Wilkinson* action.

However, the incremental development of the law would inevitably leave pockets of uncertainty. For this reason, and accepting that personal privacy should be protected, the Australian Law Reform Commission has now recommended a statutory cause of action for breach of privacy be enacted.[107] Such a cause of action should be drawn generally, and apply where there was a 'reasonable expectation of privacy' and an invasion by 'act or conduct [which] is highly offensive to a reasonable person of ordinary sensibilities.'[108] Such a statutory cause of action would embrace most, if not all, forms of cyber bullying.

(d) Defamation

Where the cyber bullying consists of uploading words or images onto internet web sites, chat rooms, bulletin boards, blogs or wikis which humiliate, embarrass or otherwise cause distress to the target, the target may have an action for defamation. Under the uniform regime of defamation legislation recently enacted by all jurisdictions in Australia, the common law is now to be applied when determining whether the cause of action has been established.[109] The cyber bully would need to have communicated to at least one person other than the target defamatory material

[104] *Giller v Procopets*(2008) 40 Fam LR 378 at [418].
[105] *Giller v Procopets*(2008) 40 Fam LR 378 at [168], [452].
[106] *Giller v Procopets*(2008) 40 Fam LR 378 at [168].
[107] Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) [74.112]-[74.198]; See also the discussion in New South Wales Law Reform Commission, *Invasion of Privacy*, Consultation Paper 1 (2007) Chap 7.
[108] Australian Law Reform Commission, above n 107, [74.117], Recommendations 74-1 and 74-2; New South Wales Law Reform Comission , above n 107, [7.5].
[109] *Civil Laws (Wrongs) Act 2002* (ACT), Chap 9; *Defamation Act 2005* (NSW); *Defamation Act* (NT); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA).

that is reasonably referable to the target. The publication need not refer to the target expressly by name but may consist of a photograph, drawing or other image or otherwise which may be reasonably understood as identifying him or her. To be adjudged defamatory the publication needs to either: (1) expose the plaintiff to hatred, contempt or ridicule;[110] (2) induce others to shun or avoid the plaintiff;[111] or (3) lower the plaintiff in the estimation of others[112] whilst disparaging the plaintiff in the sense of attributing moral blame to the plaintiff for some disagreeable conduct or attribute.[113] It is the interpretation of ordinary, fair-minded members of society that is taken into account.[114]

Importantly, the motive or actual intention of the defendant is irrelevant. Merely because matter is published in jest does not necessarily prevent cartoons, caricatures, jokes or satire from being subject to the laws of defamation. If ordinary, fair-minded members of society would regard the publication as trivial ridicule or good natured humour, there is no cause of action.[115] However, if it the publication is judged to have gone further and derided the target, it will constitute ridicule amounting to defamatory material.[116] Similarly, if the attempted humour suggests an underlying assumption of alleged truth which may be considered defamatory, then the cyber bully cannot claim that the publication was no more than comic nonsense.[117]

A cyber bully who defames his or her target will rarely if ever have a defence. Even where the target has consented to good natured humour, this will not be regarded as a voluntary assumption of risk that the publication will convey an imputation which was not anticipated or will exceed that consent and amount to derision.[118]

3.2.2 Third Party Liability

Not infrequently, the perpetrator will not have sufficient resources to meet any compensation order made against him or her. Notwithstanding any psychological benefit that might be produced by a successful claim against such a person, there would normally be little to be gained, and much to lose in terms of time and money, by pursuing such an action. It is natural, therefore, for an aggrieved person to seek reparation from a third party who may be held responsible for allowing the cyber bullying to take place, such as the school authority in the case of cyber bullying at

[110] *Parmiter v Coupland* (1840) 6 M&W 105 at 108; 151 ER 340 at 342; *Brander v Ryan* (2000) 78 SASR 234 at 245.
[111] *Henry v TVW Enterprises* [1990] WAR 475 (publication saying plaintiff had a contagious disease).
[112] *Sim v Stretch* (1936) 52 TLR 669 at 671.
[113] *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1.
[114] *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 506.
[115] *Donoghue v Hayes* (1831) Exch 265 at 266.
[116] *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449; *Ettingshausen v Australian Consolidated Press* (1991) 23 NSWLR 443 at 448-449. An example of a plaintiff alleging that defamation by a cartoon, see: *Harry Seidler & Associates Pty Ltd v John Fairfax & Sons Ltd* (1986) Aust Torts Reps 80-002.
[117] *Donoghue v Hayes* (1831) Exch 265 at 266; *Entienne Pty Ltd v Festival City Broadcasters Pty Ltd* (2001) 79 SASR 19 at 28-29 (FC).
[118] *Ettingshausen v Australian Consolidated Press Ltd* (Unreported, New South Wales Supreme Court, Hunt CJ in CL, 11 March 1993); (1993) A Def R 51-065'.

school. Such a third party may be perceived as having 'deep pockets' capable of satisfying any judgment debt by virtue of insurance or the resources of the State.

School authorities may have personal liability sheeted home to them either for negligence in failing to take reasonable care to prevent the cyber bullying taking place or for defamation by facilitating the continued publication of the defamatory material.

(a) Negligence

A negligence claim for cyber bullying may be problematic in a number of respects, relating to the various elements of the negligence equation. Some of the difficulties are associated with the damage being of a pure psychological nature.

Duty of care

It is well established that school authorities owe non-delegable duties of care to their students. [119] These duties extend to taking reasonable precautions against not only physical but also psychiatric injury.[120] Moreover, the duty of a school authority has been recognised as extending to protecting the student from the conduct of other students.[121] However, the duty of care issue becomes more challenging in the context of any normal fortitude requirement and in relation to the temporal and or geographical scope of the duty.

It is a common understanding in the community that different people have different resilience to stressors that may trigger psychological damage.[122] Concerns that a defendant could be held responsible for the psychiatric injury suffered by a plaintiff who was seen as being overly sensitive led to the suggestion by a succession of judges that, absent specific knowledge on the part of the defendant of the plaintiff's excessive susceptibility, the plaintiff should be required to conform to a standard of normality before being entitled to compensation.[123] Since those times the law has shown greater faith in the advances in knowledge and understanding of psychiatric conditions, reflected in Australia in the High Court decision *Tame v New South Wales*[124] in which a majority the judges rejected the notion of a normal fortitude precondition. Nevertheless, the 2002 *Review of the Law of Negligence Report*, which followed an inquiry headed by Justice Ipp, recommended prescribing 'recognised psychiatric illness' as the relevant damage, and a requirement that such injury to a person of normal fortitude be foreseeable (Recommendation 34). The second part of this

[119] *Commonwealth v Introvigne* (1982) 150 CLR 258.
[120] See, eg, *Cox v New South Wales* [2007] NSWSC 471.
[121] *New South Wales v Lepore* (2003) 212 CLR 511 at 565.
[122] *Chadwick v British Railways Board* [1967] 1 WLR 912 at 922.
[123] See, eg, *Bunyan v Jordan* (1937) 57 CLR 1 at 14, 18; *Bourhill v Young* [1943] AC 92 at 110, 117; *Jaensch v Coffey* (1984) 155 CLR 549 at 568; *Wodrow v The Commonwealth* (1993) 45 FCR 52 at 72-3. In the United States see, eg, *Rodrigues v State of Hawaii*, 472 P 2d 509 at 520 (Haw, 1970); *Culbert v Sampson's Supermarkets Inc*, 444 A 2d 433 at 437 (Me, 1982); *Bass v Nooney Company*, 646 SW 2d 765 at 773 (Miss, 1983); *Thing v La Chusa*, 771 P 2d 814 at 830 (Cal, 1989); *Portee v Jaffee*, 417 A 2d 521 at 528 (NJ, 1980); *Gammon v Osteopathic Hospital of Maine Inc*, 534 A 2d 1282 at 1285 (Me, 1987); *Payton v Abbott Labs*, 437 NE 2d 171 at 181 (Mass, 1982).
[124] (2002) 211 CLR 317 at 333 (Gleeson CJ), 343-344 (Gaudron J), 380, 384 (Gummow and Kirby JJ).

recommendation was intended to give effect to the decision in *Tame v New South Wales*[125] but in fact only reflected the views of two members of the bench.[126] Nevertheless, this recommendation was enacted in all but two jurisdictions, Queensland and the Northern Territory.[127]

As a result a plaintiff student who suffers psychiatric harm resulting from cyber bullying in an Australian jurisdiction other than Queensland or the Northern Territory must prove, as a positive element of his or her case, that he or she is a child of 'normal fortitude'. The difficulty with this requirement lies in the fact that every person has his or her own breaking point to external stressors, which depends upon *inter alia* individual factors such as age, health, personality type and previous experiences. There is no medical legitimacy to the concept of 'normality' in the general community.[128] It is not surprising, then, that where a court considers the matter it cannot venture beyond psychiatrists giving evidence in the nature of ex cathedra assertions without any attempt at justification or explication,[129] or to 'normal fortitude' being a matter of judicial notice[130], or now, in McHugh J's terms, an application of a community standard.[131] Rather than leave the foreseeability of normal fortitude as a matter of such unguided intuition, the legislation follows a further recommendation emanating from the Ipp inquiry: that a court should take into account factors such as whether there was sudden shock; whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril; any pre-existing relationship between plaintiff and defendant; and the nature of the relationship between the plaintiff and the victim killed, injured or imperilled. These factors have previously been considered by some courts as prerequisites for recovery for psychiatric injury,[132] a view rejected by the majority of the judges in the High Court of Australia who decided in *Tame v New South Wales* and later *Gifford v Strang Stevedoring Ltd*[133] that they should be considered to be merely factors informing the reasonable foreseeability test.

Application of these factors to an action against a school for failure to take reasonable care to prevent cyber bullying illustrates their shortcomings as guidelines to normal fortitude. In such a case there is no 'scene' and 'no victim.'[134] The existence of a pre-existing relationship between the school and the student who has been cyber

[125] David Ipp, 'Negligence – Where Lies the Future?' (2003) 23 *Australian Bar Review* 158, 163.
[126] Only McHugh and Callinan JJ favoured a pre-condition: see Callinan J in *Gifford v Strang Patrick Stevedoring Pty Limited* (2003) 214 CLR 269 at 309.
[127] *Civil Law (Wrongs) Act 2002* (ACT), s 34; *Civil Liability Act 2002* (NSW), s 32; *Civil Liability Act 1936* (SA), s 33; *Civil Liability Act 2002* (Tas), s 34; *Wrongs Act 1958* (Vic), s 72; *Civil Liability Act 2002* (WA), s 5S.
[128] See, eg, Judith Herman, *Trauma and Recovery* (1992), 58; Jay Shurley 'Types of Psychiatric Disabilities Following Trauma' (1967) 3 *Lawyers' Med J* 257; David Tomb, 'The Phenomenology of Post Traumatic Stress Disorder' (1994) 17 *Psychiatric Clinics of North America* 237, 246-7.
[129] *Morgan v Tame* (2000) 49 NSWLR 21.
[130] *Page v Smith* [1994] 4 All ER 522, 549-50 per Hoffman LJ.
[131] (2002) 211 CLR 317 at 359. McHugh J stated that normal fortitude was 'not a matter for expert evidence.'
[132] Des Butler, *Damages for Psychiatric Injuries* (Annandale, NSW: Federation Press, 2004), ch 5.
[133] (2003) 214 CLR 269.
[134] Unless the plaintiff is another student who claims to have been traumatised by the cyber bullying of a fellow student. Such a claim is outside the scope of this article.

bullied adds nothing to the issue, while trying to pinpoint a single 'shocking event' is inappropriate and unhelpful in a case like cyber bullying which typically involves an accumulation of instances of objectionable behaviour. The guidelines, therefore, offer little assistance, meaning that a court would be left to rely on assertion and intuition. Moreover, when the task is reframed in terms of a 'normal child,' it becomes an even greater challenge. The same question arises as in the case of face-to-face bullying: what degree of resilience might be expected of a child when school years are the main formative time of a young person's life and some forms of aggressive interaction are beneficial to the healthy development of a person who is able to cope with the pressures and demands of living in a modern society.

By contrast, Queensland and the Northern Territory continue to apply the common law approach supported by the majority of the judges in *Tame v New South Wales.* Under this approach, the defendant will owe a duty of care unless the plaintiff's reaction to the bullying is beyond the bounds of reasonable foreseeability. This is likely to only be in an extreme case, of a kind on which most would agree.

The other difficulty posed by cases of cyber bullying is in relation to be temporal and geographical scope of the non-delegable duty. In Australia it was been held in *Geyer v Downs* that the existence of the duty depends upon 'whether in the particular circumstances the relationship of school teacher and pupil was or was not been in existence.'[135] This test was developed in the context of a school principal who, for the safety of students arriving at the school gate prior to school hours, allowed students to enter school grounds but directed that those arriving before 9:00am were not permitted to play games or run about and instead were to occupy themselves in sitting down and reading or talking quietly. The principal's appreciation of the risk of injury and his direction concerning permissible behaviour were held to give rise to the relevant relationship. There is little doubt, therefore, that the existence of the relationship does not depend upon the student being on school premises or whether the injury occurs during school hours. For example, it was held by the New South Wales Court of Appeal in *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* that a duty of care arose in a case where a 12 year old school boy was injured in an incident involving older students despite the incident occurring 20 minutes after the end of the school day and 400 metres from school grounds.[136] Indeed, in the same case 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. Thus, if the school authority 'were aware … that on a particular journey older children habitually and violently bullied younger children, the duty may well extend so far as to require the school to take preventative steps or to warn parents. This duty would be founded in the relationship of teacher and pupil.'[137]

There will be no doubt that the scope of a school's duty will embrace cyber bullying by students using mobile phones while they are at school, or via a website, blog or

[135] (1977) 138 CLR 91 at 94.
[136] (1996) Aust Torts Reports 81-399, 63,597.
[137] (1996) Aust Torts Reports 81-399, 63,597.

wiki hosted on a school server during school hours using school computers. However, the duty is likely to extend further. It may embrace cyber bullying which involves 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. Such an extension would be justified by factors such as the school's control over the hosting sever and its grant of remote access to a student user under instructions or conditions of use as being indicia that the relationship of teacher and pupil was in existence in the circumstances, irrespective of the time or place the website, blog, or wiki is being accessed. For the same reasons the relationship may also exist where students use school computers on school premises, whether during school hours or not, to access sites hosted on third party servers (such as a Myspace or Facebook profile or the like).

There may be more borderline cases, such as where a cyber bully uses his or her mobile phone while on school premises to bully a fellow student who is not on the premises, or while the target is on school premises but the cyber bully is not. In the former, but not the latter, it might be possible to argue that if there are rules concerning the use of mobile phones while on school premises then those directions as to conduct are indicative of a relationship of school teacher and pupil being in existence. If the school were aware of habitual cyber bullying taking place in such a manner, it might be that such cases have features similar to the extension suggested by Shellar JA in the *Koffman* case.

By contrast, other instances of cyber bullying may be seen as occurring outside the ambit of the relationship. For example, a student who is bullied by a fellow student using a mobile phone or on-line where both are at home occurs at a time when the relationship of teacher and pupil is not in existence and must necessarily be the concern of parents or, if need be, the police. The mere fact that the cyber bully and his or her target attend the same school will not be sufficient to bring such a case within the ambit of the school authority's duty of care.

Standard of care

Cyber bullying poses further challenges in relation to the required standard of care, and determining breach. Once the duty was thought of in terms of 'such care … as a careful father would take of his boys,'[138] but such a standard is unrealistic for a principal in charge of a large number of students.[139] It also does not reflect the fact that teachers today normally have tertiary qualifications, which may mean that in a given situations the degree of care that may be reasonably expected may be greater or less than the care of a 'careful parent'. Today the duty is recognised as being the care that would be exercised by a reasonable teacher or school. Legislation now reflects the common law position that this involves two questions: (1) was the risk of injury was 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

[138] *Williams v Eady* (1893) 10 TLR 41 at 42.
[139] *Geyer v Downs* (1977) 138 CLR 91at 102.

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.[140]

In addition, many jurisdictions have provided that 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.'[141] As a consequence, in these jurisdictions the accepted practices in the teaching profession will, unless deemed to be unreasonable, be the best guide to the standard of care that may be expected from a reasonable teacher or school authority. This may prove to be significant in the case of cyber bullying. Thus, for example, accepted practice among the teaching profession would undoubtedly include having a policy governing the use of school ICT equipment and an anti-bullying policy which specifically refers to cyber bullying and is zero tolerance. Such policies should extend to the time the relevant relationship is in existence, whether the perpetrator is physically located on school premises or not. Further, merely having such a policy would be insufficient if students are not repeatedly reminded of its existence. Moreover, complaints would need to be taken seriously and investigated properly by those charged with that responsibility, normally principals or deputy principals.[142] If remedial action is required then it must be taken and applied in a consistent fashion so that potential cyber bullies do not think that such a policy is zero tolerance in name only. 'Accepted practice' would also likely include supervision and monitoring of the use of computer equipment on school premises, as well as monitoring and exercising prudent editorial control over any website, blogs, wikis or similar forum that the school is hosting. On the other hand, while it is not uncommon for schools today to ban the use of mobile phones during school hours on school property, there may be a question whether this precaution is so widespread that it can be said to presently reflect 'accepted practice' in the teaching profession.

Even if a school authority takes such precautions as may be deemed to form part of the accepted practice of the teaching profession in response to cyber bullying, and thereby satisfy its duty of care, there is no certainty that such bullying behaviour will be eradicated. For example, there may be content, such as nicknames, abbreviated communications or other obscure references which may constitute cyber bullying but not be recognisable as such without a proper understanding of the full context of the communication. Further, subtle forms of cyber bullying may be near impossible to detect such as an electronic 'sending to Coventry' by deliberately refusing to acknowledge a particular person's contributions to a discussion forum, blog or wiki.

Causation

[140] *Civil Law (Wrongs) Act 2002* (ACT), s 42-43; *Civil Liability Act 2002* (NSW), s 5B; *Civil Liability Act 2003* (Qld), s 9; *Civil Liability Act 1936* (SA), ss 31-32; *Civil Liability Act 2002* (Tas), s 11; *Wrongs Act 1958* (Vic), s 48; *Civil Liability Act 2002* (WA), s 5B.
[141] *Civil Liability Act 2002* (NSW), s 5O; *Civil Liability Act 2003* (Qld), s 22; *Civil Liability Act 1936* (SA), s 41; *Civil Liability Act 2002* (Tas), s 22; *Wrongs Act 1958* (Vic), s 59. Cf *Civil Liability Act 2002* (WA), s 5PB which only applies to medical professionals
[142] Cf *Cox v New South Wales* [2007] NSWSC 471.

The State/Territory civil liability legislation has enacted the common law position that the plaintiff must show that his or her injury would not have occurred but for the specific breach of duty by the defendant.[143] Accordingly, it would be insufficient to merely identify a breach of duty by the school such as a failure to supervise school computer equipment if that failure to supervise did not materially contribute to the plaintiff's injury.

A further difficulty may be that many of the symptoms of the types of psychiatric injury that may be caused by cyber bullying, such as mood swings, depression, anxiety and poor academic results might in a given case be experienced by an adolescent as a result of a variety of causes, including simply those associated with growing up or as the result of unrelated upheaval in the family situation like parents divorcing, and not as the consequence of bullying behaviour. There can sometimes be a tendency, conscious or subconscious, for a child plaintiff or his or her family to attribute all ailments of a psychological or psychosomatic nature to the cyber bullying. This will include cases where the child is situated within a family which is otherwise beset by depression, such that he or she may even be genetically predisposed to depression or other psychological disorders[144] or where the child's family consciously or subconsciously encourages him or her to adopt a 'sick role' in the hope of attracting monetary compensation.[145]

A court will therefore be faced with the threshold task distinguishing between psychological or psychosomatic injuries linked to the breach of duty and those resulting from other causes.[146] It will be sufficient, however, if the plaintiff is able to show that the school's failure to prevent the cyber bullying in breach of its duty of care was one of the material causes of the resulting psychological harm rather than, for example, the sole or dominant cause.

Defences

Clearly, the mere use of ICT equipment by a school student will not amount to a student being *volens* to the risk of being cyber bullied. Thus, if the school is to have any defence it will rest with contributory negligence. The six States have now prescribed that contributory negligence is to be determined using a similar approach as that used to determine a defendant's negligence. In other words, it calls for a determination of whether the risk was reasonable foreseeable and what precautions a reasonable person would take (if any) to that risk, 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.[147] In the Territories the common law

[143] *Civil Law (Wrongs) Act 2002* (ACT), s 45; *Civil Liability Act 2002* (NSW), s 5D; *Civil Liability Act 2003* (Qld), s 11; *Civil Liability Act 1936* (SA), s 34; *Civil Liability Act 2002* (Tas), s 13; *Wrongs Act 1958* (Vic), s 51; *Civil Liability Act 2002* (WA), s 5C.
[144] *Cox v New South Wales* [2007] NSWSC 471.
[145] *Nader v Urban Transit Authority of New South Wales* (1985) 2 NSWLR 501.
[146] *Bradford-Smart v West Sussex County Council* [2002] ELR 139 (CA).
[147] *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.

prevails, so that contributory negligence is a question of whether the plaintiff took sufficient precautions for his or her own safety.[148]

Like the question of normal fortitude, contributory negligence involves a determination of the reaction of a 'reasonable child' and the precautions that such a mythical creature would take in response to a foreseeable risk.

At first glance, it might be suggested that a reasonable person who is being subjected to bullying using technology might be expected to take practical precautions in response to the risk of injury including the cessation of his or her own use of the technology, reporting the cyber bullying to the relevant authority and perhaps seeking professional assistance to address any psychiatric symptoms. However, the question takes on added difficulty when considered in the context of the cyber bullying of a school student. In the first place, children will normally have a reduced capacity to appreciate the risk of injury, or the measures to take to minimise such injury should it occur.[149] In addition, it is important to not divorce the case from its context. In *New South Wales v Griffin*,[150] a case in which the child plaintiff was injured in a schoolyard brawl, it was argued on behalf of the defendant that, even as a 13 year old, the plaintiff ought to have appreciated that the fight was against school rules and that there was a real risk of being hurt. However, the New South Wales Court of Appeal declared such thinking to be divorced from the reality of the situation and what should be expected of a 13 year old boy. In particular, it was held that the particular pressures and influences that may affect such a child's judgment should not be discounted. In this case there had been an excited expectation that the fight would take place which had permeated throughout the school (including a general invitation being written on one of the class blackboards). Peer pressure on the plaintiff had been very strong. Accordingly, to suggest that in such circumstances he would not turn up for the fight was 'quite unreasonable' because he would have become notorious throughout the school and would have had to face the charge of cowardice.[151] Instead, the plaintiff's behaviour fell within 'the foreseeable folly of youthful exuberance.'[152]

It may be unrealistic, therefore, to regard a student who has been cyber bullied has been contributory negligent if, for example, he or she fails to report the matter to his or her parents or some other authority figure such as a school teacher or police officer. In its context, the target may consider that complaining would be likely to invite further, possibly more intense, hostility from the perpetrator. 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 a second time. In the eyes of an adolescent who has the misfortune of being targeted by a cyber bully, the best course of action in the circumstances might instead be to do nothing and say nothing and endure the hostility in the hope that it will eventually subside. Taken in its context,

[148] *Commissioner of Railway v Ruprecht* (1979) 142 CLR 563 at 570.
[149] *McHale v Watson* (1966) 115 CLR 199 at 214-15 ('deficiencies of foresight and prudence that are normal during childhood').
[150] [2004] NSWCA 17.
[151] *New South Wales v Griffin* [2004] NSWCA 17 at [9]-[10].
[152] *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 280.

such a response should not be held to amount to contributory negligence on the part of the target.[153]

(b) Defamation

In *Byrne v Deane*[154] it was held that anyone who, whilst not the original statement maker, becomes aware of a defamatory statement posted on his or her property and, while having the authority and capacity to terminate the publication, fails to do so is regarded as having republished the defamatory material and will incur personal liability for that publication. This doctrine has been extended to computer sites where the host of the site has editorial control.[155] Accordingly, school authorities who exercise editorial control over the computer sites they host must act promptly, upon becoming aware of potentially defamatory material having been posted on the site in order, to ensure that the offending material is taken down. [156]

4. Cyber bullying as vilification

If the cyber bullying behaviour takes the form a widespread attack on the target on the basis of his or her race, ethnic group or religion, it may be possible for the target to have recourse to anti-vilification legislation in order to obtain a remedy. Most Australian jurisdictions also prohibit racial vilification, although there are differences in the formulations. The Commonwealth *Racial Discrimination Act 1975*, s 18C prohibits any act, other than a private act, which is reasonably likely in all the circumstances to offend, incite, humiliate, or intimidate another because of the other person's race, colour or national or ethnic origin. The corresponding prohibition in State/Territory legislation is against vilification in the form of a public act which incites hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race (as broadly defined).[157] Breach of these provisions may be pursued as a civil claim. There is also a criminal offence at the State/Territory level of serious racial vilification, which involves threats, or incitement of threats, or physical harm towards the person or property of another.[158] In addition, New South Wales, Queensland and Tasmania have outlawed the public incitement of hatred, contempt or ridicule on the grounds of a person's sexual orientation, sexuality or transgender identity.[159]

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[153] Cf *Copping v The State of South Australia* (1997) 192 LSJS 109 (9 year old's failure to leave the vicinity of where senior students were throwing stones at younger students held to amount to a failure to take reasonable care for his own safety).

[154] [1937] 1 KB 818 at 829.

[155] *Stratton Oakmont Inc v Prodigy Services Inc*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct., 1995); cf *Cubby Inc v CompuServe Inc*, 776 F Supp 135 (SDNY, 1991).

[156] Cf *Bishop v New South Wales* [2000] NSWSC 1042.

[157] *Discrimination Act 1991* (ACT), s 66; *Anti-Discrimination Act 1977* (NSW), s 20C; *Anti-Discrimination Act 1991* (Qld), s 124A; *Anti-Discrimination Act 1998* (Tas), s 19(a). See also *Racial Vilification Act 1996* (SA), s 4; *Racial and Religious Tolerance Act 2001* (Vic), s 7. Cf *Criminal Code* (WA), ss 77-78.

[158] *Discrimination Act 1991* (ACT), s 67; *Anti-Discrimination Act 1977* (NSW), s 20D; *Anti-Discrimination Act 1991* (Qld), s 131A; *Racial Vilification Act 1996* (SA), s 4; *Anti-Discrimination Act 1998* (Tas), s 19(a); *Racial and Religious Tolerance Act 2001* (Vic), s 24.

[159] *Anti-Discrimination Act 1977* (NSW), ss 38R-T, 49ZS-TA; *Anti-Discrimination Act 1991* (Qld), ss 124A, 131A; *Anti-Discrimination Act 1998* (Tas), s 19(c).

The requirement of an 'act other than a private act' or 'public act' means that the legislation will not apply to hostile behaviour directed solely at the target, such as an SMS message on the target's mobile phone. It would, however, embrace messages uploaded onto the Internet. Further, the word 'incite' in the State statutes is given its dictionary meaning of urging or stimulating action. It has been held in a different context that screaming of abuse, even of vile abuse, is insufficient to constitute an incitement of hatred, contempt or ridicule for the purposes of the Act.[160] Accordingly, for example, depending on the language and context, aggressive behaviour in the form of homophobic name-calling may not be sufficient to amount to vilification even in these three jurisdictions. These limitations aside, whether there has been a breach of any of these prohibitions is determined objectively, and is not reliant on the subjective feelings or sensitivities of an aggrieved person.[161] Further, the context in which the act occurs is an important consideration.[162]

5. Conclusion

Cyber bullying is a growing phenomenon, particularly among 'Generation Y' – the natives of the digital age. Cyber bullying shares many attributes with face-to-face bullying, including the power imbalance and the target's feelings of helplessness and inability to defend himself or herself, but introduces further dimensions such as the ability to reach the target had any time and anywhere and the perceived anonymity of the perpetrator.

Despite a variety of strategies, face-to-face bullying remains prevalent in our schools. Cyber bullying has now emerged as a further challenge confronting today's young people. The invocation of the law may seem an extreme response to behaviour which the perpetrator may view as merely having fun. However, the serious harm that may result from cyber bullying may mean that the intervention of criminal, civil and/or vilification laws is appropriate. However, the extra dimensions that technology offers for a bully, combined with the psychological nature of the harm that it produces, can have an adverse impact upon the effectiveness of the law as a means of redress for the targets of cyber bullying.

[160] *Burns v Dye* [2002] NSWADT 32, [87]. Cf however *Peters v Constance* [2005] QADT 9 where in a short judgment it was held that yelling 'paedophile' at a homosexual amounted to vilification.
[161] See, eg, *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615.
[162] See, eg, *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615.