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CYBERBULLYING – WHEN DOES A SCHOOL AUTHORITY’S LIABILITY IN TORT END?

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ABSTRACT

Cyberbullying in schools is increasing on an alarming rate. The development of the Internet and smartphone technology have increased the potential scope of a school authority’s duty of care for its students. A question frequently asked by educators is “Where does a school authority’s duty of care end in the interconnected, 24/7 world of the Internet?” This paper argues that a duty of care will be owed where the school is in a school/student relationship with its students. That relationship can exist outside the school gates and outside of school hours.

There are no decisions of senior appellate courts that deal with a school authority’s liability for cyberbullying. The authors, therefore, analyse the nature of the relationship to identify the key features that must be present to establish the existence of a duty of care. Three features are identified as critical to the existence of the duty of care outside of the normal school hours. They are the extent to which the school authority controls or ought to control a given situation, the extent to which it has encouraged students to participate in a particular activity and the extent to which a school authority is aware or ought to be aware of risks associated with the relevant activity of its students.

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I INTRODUCTION

At 5am on 5 February 2010, 17 year old Allem Halkic ended his life by jumping from Melbourne's West Gate Bridge. He had been receiving threatening text messages from his friend Shane Philip Gerada. Gerada pleaded guilty to stalking and was placed on an 18 month Community Based Order. He reflected on what had happened saying: 'I did not realise the effect of my words'.¹

Welcome to the terrifying reality of cyberbullying. Cyberbullying is the deliberate, repeated and hostile use of information and communication technologies that seeks to intimidate, control, manipulate, put down or humiliate a victim.² It extends from situations of petty nastiness or cruelty through to identity theft, harassment, stalking, and threats of physical harm.³

In practical terms, today's school bullies participate in all the traditional physical and psychological schoolyard bullying that generations of school kids have indulged in or struggled to survive. But the advent of mobile phones and the World Wide Web have increased their arsenal: school bullies create wikis and blogs; circulate emails, post images, message

¹ Selma Milovanovic, 'Man avoids jail in first cyber bullying case', *The Age* (online) 9 April 2010 <<http://www.theage.com.au/victoria/man-avoids-jail-in-first-cyber-bullying-case-20100408-rv3v.html>> and see the report of the report of the Coroner, *Inquest into the Death of Allem Halkic* Court reference COR 2009 0655 dated 27 June 2012.

² Bill Belsey, *Always On? Always Aware!* (17 January 2007) Cyberbullying <<http://www.cyberbullying.ca>>; Youth Affairs Council of Victoria Inc, *Sticks and stones and mobile phones: outcomes on a forum on bullying and young people in Victoria* (November 2009) 12.

³ Kelly Tallon et al, 'New Voices / New Laws : school-age young people in New South Wales speak out about the criminal laws that apply to their online behaviour' (Research Report, National Children's and Youth Law Centre and Legal Aid NSW, November 2012) 14-5.

texts and images, upload, download and network unsociably to harm their victims.⁴ In short, they use all the tools that are their inheritance as internet natives to hurt and humiliate their victims or, simply, to have fun at others' expense. This is the brave new world of cyberbullying where the bully has the advantage of anonymity.⁵ With a few keystrokes the harm is done. From the bully's perspective, it is a bloodless sport. The online bully cannot see the bleeding nose or the despair in the eye of his or her victim.⁶

As with all bullying, there is a perceived or actual power imbalance. The victim's perception is that he or she is less powerful than the bully. In traditional bullying, the imbalance may be caused by the bully's greater strength. In cyberbullying the relative physical strength of those involved is relevant. The imbalance may be caused by the bully's greater technological skills.⁷

Cyberbullying does not recognise geographical boundaries: school gates cannot keep it out and the victim's home is no refuge. Once posted to the internet, cyberbullying is up and running 24/7.⁸ Perhaps, most disturbingly, once on the internet, the hurtful post or the humiliating image has indefinite virtual life and the potential audience is exponential

⁴ Sheri Bauman, 'Cyber bullying: a virtual menace' (Paper presented at National Coalition Against Bullying National Conference, Melbourne, November 2 – 4, 2007) 3.

⁵ Aashish Srivastava and Janice Boey, 'Online Bullying and Harrassment: An Australian Perspective,' (2012) 6 *Masaryk University Journal of Law and Technology* 299, 305.

⁶ Robert Slonje and Peter K Smith, 'Cyberbullying: Another main type of bullying?' (2008) April, 49:2 *Scandinavian Journal of Psychology*, 147 <<http://onlinelibrary.wiley.com/ipacez.nd.edu.au/enhanced/doi/10.1111/j.1467-9450.2007.00611.x/>>.

⁷ Elizabeth Whittaker & Robin M. Kowalski (2015) 'Cyberbullying Via Social Media' (2015) 14(1) *Journal of School Violence*, 11, 12.

⁸ Srivastava and Boey, above n 6, 305.

– especially if the bullying post, video or image goes viral.⁹ It is little wonder cyberbullying is causing school authorities, teachers, parents and guardians increasing concern and despair.

II THE ELEMENTS OF NEGLIGENCE

How are school authorities supposed to react to the continually evolving world of bullying on the internet? Is it possible to draw clear lines of legal responsibility? Where and when, for example, does a school's duty of care to its students start and finish?

A school authority's liability in tort is based on the duty of care it owes to those who have a relationship with it. It is the nature of the relationship that determines the extent and scope of the duty. A school authority, for example, owes a duty of care to its students for situations that can be said to be part of the duty relationship of school and student.¹⁰ However, the following discussion indicates that the existence of that relationship is not necessarily limited to when the student is on school premises during school hours or at a school event.¹¹

Of course, the existence of a duty of care is a necessary but not a sufficient condition of liability in negligence. Having established that a duty of care exists, a court must establish that:

⁹ Marilyn Campbell, Des Butler and Sally Kift, 'School's Duty to Provide a Safe Learning Environment: Does this Include Cyberbullying,' (2008) 13 *Australian and New Zealand Journal of Law and Education* 21, 22.

¹⁰ Phillip T Slee and David C Ford, 'Bullying is a Serious Issue - it is a Crime' (1999) 4 *Australia & New Zealand Journal of Law & Education* 23, 33; *The Commonwealth of Australia v Introvigne* (1981) 150 CLR 258.

¹¹ *Geyer v Downs* (1977) 138 CLR 91; *Commonwealth v Introvigne* (1982) 150 CLR 258; and *Reynolds v Haines* (SC(NSW) Common Law Division, McLaughlin M, 27 October 1993, unreported); Katherine A. Lindsay, 'After the Bell: School Authorities' Duty of Care to Pupils After School Hours Case Note' (1997) 2 *Australia & New Zealand Journal of Law & Education* 101.

1. the school authority breached its duty to the student;
2. the breach caused harm to the student; and
3. the harm was not too remote¹²

to find that a school authority is liable to the student in negligence. A close reading of the cases indicates that the questions of the existence of the duty of care, the breach, causation and remoteness are very closely related and considerations of them by the Courts tend to blur.¹³

However, the precondition of the school authority being legally responsible for the effects of cyberbullying only arise once the existence of a duty of care has been established. Therefore, focus should be placed on understanding the factors that limit a school authority's duty of care in the minefield created by the internet. In particular focus should be placed on the existence and scope of the duty of care owed by a school authority for events that occur outside of school hours and away from school premises. Causation and remoteness are beyond the scope of this article.

There has not yet been a decision by an appellate court in Australia on the duty of school authorities for cyberbullying.¹⁴ Therefore, we have to go back to basic principles to establish the limits of a school authority's liability and apply those principles to cyberbullying. We also draw on analogies from the law of workers' compensation to see where the Courts have found that an employment relationship exists – outside of the work environment and outside of work hours. The use of these analogies is, this paper argues, justified because the rapidly evolving nature of the

¹² RP Balkin and JLR Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) 192.

¹³ Prue Vines, Peter Handford and Carol Harlow, 'Duty of Care' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook, 2011), 151, 152.

¹⁴ Campbell, Butler and Kift, above n 10, 25.

employment relationship has raised very similar issues – albeit in a different context to the school authority/student relationship.

The authors' conclusion is that there is no hard and fast guide to where the duty relationship starts and finishes outside the school gates and outside of school hours. There are, however, factors that increase the risk that a school authority may be held responsible that can be distilled from the cases. The risk that a school authority owes a duty of care will be greater where the school authority:

- has knowledge or ought to have knowledge that a risk of harm to its students exist;
- has control or ought to have control of a particular situation; and
- has induced or encouraged its students to take part in a particular activity.

Critical to the law's thinking in relation to the existence of a duty of care, is the awareness that students are particularly vulnerable; given their age and inexperience, students are prone to mischief. As a result they depend on the school authority to provide a safe environment for the student to work and socialize in when the relationship of student and school exists.

A *Back to basic: The school authority's duty of care*

In this ever-morphing environment, it is not possible to draw absolutely clear lines of legal responsibility. The duty of care relationship, which is the foundation of liability in negligence, arises in situations where the relationship of school and student exist.¹⁵ In particular, that relationship exists in situations where the school has control or ought to be exercising

¹⁵ Slee and Ford, above n 11, 33; *The Commonwealth of Australia v Introvigne* (1981) 150 CLR 258.

control to ensure that its students' learning and social environment are safe.¹⁶ Or, to look at it from the students' or their parents/'guardians' perspective, a duty will arise in situations where it is legitimate for the student or his or her parents/guardians to depend on the school to provide a safe learning and social environment – regardless of whether the relevant activity takes physically place at the school or on the internet. The greater the obligation of the school authority to control a given situation, the more likely it is that a court will find that a duty of care exists.¹⁷

In the older duty of care cases there is often a physical connection between the school and the student: when a school opens its gates to students,¹⁸ takes them on excursions or stages an event for its students,¹⁹ the cases make clear that the school authority owes a duty of care to its students. The internet and mobile phones, however, potentially extend the school/student relationship way beyond the physical boundaries of a school or the location of an excursion and way outside of school hours.

While many cases of cyberbullying lack this physical connection, there are useful principles that can be drawn from the older school negligence cases that shed light on the extent on the limits of liability of school authorities for cyberbullying in negligence. The duty of a school authority to provide a safe environment for its students has been described as a 'personal duty' that cannot be delegated to another person or entity.²⁰ This means that, even if the school authority engages another person or

¹⁶ *Kondis v State Transport Authority* (1984) 154 CLR 672, 684-7 cited with approval in *New South Wales v Lepore* [2003] HCA 4, [35].

¹⁷ *Ibid.*

¹⁸ *Commonwealth v Introvigne* (1982) 150 CLR 258.

¹⁹ *Guigiatti v Servite College Council Inc* (2004) Aus Torts Reports 81-724, [19].

²⁰ Campbell, Butler and Kift, above n 10, 25.

entity to discharge its duties, it is legally responsible for the consequences of that other person or entity's negligence even if it has little, if any, control, over how that other person or entity carries out the work. It still has a duty to ensure that a safe environment is provided to its students.²¹ The non-delegable nature of the duty arises because of the vulnerability of the students and their dependence on the school authority to ensure that a safe environment is provided.²²

A school authority can be directly responsible for its own failure to provide a safe environment for its students.²³ Examples of the potential for direct liability occurs when a school authority employs an unsuitable teacher without carrying out proper reference checking, fails to supervise its staff properly or fails to ensure that its policies on internet use and appropriate behaviour are complied with and a student is harmed as a result.²⁴

In addition to the personal responsibility of a school authority, it can be legally responsible for the negligence of its staff provided that the negligence occurred in the course of the staff member's employment. In *Ramsay v Larsen*,²⁵ Kitto J said that:

...a schoolmaster's power of reasonable chastisement exists, at least under a system of compulsory education, not by virtue of a delegation by the parent at all, but by virtue of the nature of the

²¹ *Commonwealth v Introvigne* (1982) HCA 40, [27]–[29] (Mason J).

²² *New South Wales v Lepore* [2003] HCA 4, [100] (Gaudron J).

²³ *Commonwealth v Introvigne* 150 CLR 258, 269; cited in *Watson v Haines* (1987) ATR ¶80-094, 3; *Carmarthenshire County Council v Lewis* (1985) AC 549, 270.

²⁴ *New South Wales v Lepore* [2003] HCA 4 [2] (Gleeson CJ).

²⁵ *Ramsay v Larsen* [\[1964\] HCA 40](#).

relationship of schoolmaster and pupil and the necessity inherent in that relationship of maintaining order in and about the school.²⁶

His Honour went on to explain that a school authority is liable for the failure of its staff to take due care of a student. This is the notion of vicarious liability.²⁷ Because of this principle, a school authority may be liable for those whom it employs to care for its students.²⁸ His Honour's focus is on the nature of the relationship of schoolmaster and pupil and the school master's obligation to maintain order as the heart of the duty relationship.

Justice Taylor emphasized the importance of the student becoming subject to the 'care and authority of masters'.²⁹

As argued in the rest of this paper, later cases are consistent and that the duty of care arises when the relationship of teacher/school authority and student exists. Authority is based on control. So, it can be said, in situations where a school authority exercises or should exercise control based on their authority – a duty of care will arise.

Students' immaturity and their talent for getting up to no good are key considerations. According to Mason J, children's talent for trouble imposes a 'special responsibility on a school authority to care for their safety, one that goes beyond a mere vicarious liability for the acts and omissions of its servants'.³⁰ The same point was made by Murphy J: 'The standard of care must take into account the well-known mischievous

²⁶ Ibid [7].

²⁷ Martin Davies and Ian Malkin, *Torts* (LexisNexis Butterworths, 6th ed, 2012) 633.

²⁸ *Ramsay v Larsen* [1964] HCA 40, [10].

²⁹ Ibid [38].

³⁰ *Commonwealth v Introvigne* (1982) HCA 40, [30] (Mason J).

propensities of children, especially in relation to attractions and lures with obvious or latent hazards.’³¹

The leading Australian case on the duty of care owed by a school to its students is *Geyer v Downs*.³² It is clear from that decision that the school can create the relationship irrespective of whether or not a particular activity occurred in school hours. Justice Stephen pointed out that the duty owed by a teacher (or a school authority) to a pupil arises from the relationship between them. It is not determined by school hours but by reference to periods when the student is entrusted to the school ‘for the purpose of his education.’³³ His Honour went on to say that:

The temporal ambit of the duty will, therefore, depend not at all upon the schoolmaster's ability, however derived, effectively to perform the duty but, rather, upon whether the particular circumstances of the occasion in question reveal that the relationship of schoolmaster and pupil was or was not then in existence. If it was, the duty will apply. It will be for the schoolmaster and those standing behind him to cut their coats according to the cloth, not assuming the relationship when unable to perform the duty which goes with it.³⁴

What is critical is that the duty goes with the relationship and that is not dependent on the negligence occurring in school hours.

Significantly, Stephen J also emphasised that the duty arises when the student is ‘beyond the control and protection of his parent.’³⁵ His Honour’s warning to schools that they should not extend their duty of

³¹ Ibid [2].

³² *Geyer v Downs* [1977] HCA 64.

³³ Ibid [5]. His Honour cited the decision of Winneke CJ in *Richards v Victoria* (1996) VR 136, 138-9 about the nature of the duty with approval.

³⁴ *Geyer v Downs* [1977] HCA 64, [6].

³⁵ Citing the judgment of Winneke CJ in *Richards v. Victoria* (1969) VR 136, 138-9.

care to relationship to situations where they are unable to provide a safe environment is excellent advice.

The scary reality is that, in the messy world of cyberbullying, students, as internet natives, may be beyond the control of his or her parents and his or her school.

Justices Murphy and Aicken, in their joint judgment, made a vital point that the nature and extent of the duty of care relationship is, in large part, determined by the culture in which the relationship arises:

... What may be a useful guide [from the nineteenth century cases on the nature and extent of the duty of care] applicable to a village or a small country school cannot be of direct assistance in the case of a large city or suburban school with some hundreds of children attending it.³⁶

In other words, the social context in which the schooling is carried out plays a key role in determining the extent and scope of the duty of care. Consequently, the nature of the duty changes as the cultural context changes.

This has obvious relevance to nature and extent of a school authority's potential liability in the internet and smart phone age. The key point being that a school authority's duty or care maybe extended to include maintaining proper supervision, having appropriate policies and training of any website, blog, wiki or other internet wonderland that it created or is responsible for.

³⁶ *Geyer v Downs* [1977] HCA 64, [18].

If the duty is not dependent on the negligence occurring in school hours, it is also clear that the existence of the duty is not dependent on the negligence occurring in school premises or on a school sponsored event.

In 1996, the New South Wales Court of Appeal in *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman and anor* considered the liability of a school authority for injuries sustained by a 12 year old student who, after his school day had finished, walked 300 to 400 meters to the bus stop.³⁷ While waiting for the bus, students from a state high school adjoining the bus stop, harassed and threw objects at the plaintiff injuring him in the eye. Building on *Geyer v Downs*, Mahoney P, dissenting, was prepared to extent the school's duty of care beyond the school boundaries:

... the obligation of the school to do things for the safety of the pupil, will require to be done will depend upon the circumstances. Thus, if it is plain to the school that, immediately outside the school premises, there is a busy and therefore dangerous road, the school will ordinarily have an obligation to shepherd pupils of a young age across the road. But if, in the course of walking from school to home, the student has reason to cross a busy road two kilometres from the school, it does not follow that the obligation of the school to take precautions for the safety of the student will involve that it shepherd the student across the road.³⁸

The fact that the school has the capacity to influence what happens 'immediately outside the school premises.'³⁹ The further the student is from the school and therefore the more outside the school's control, the

³⁷ Lindsay, above n 12; *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman and anor* (1996) Aust Torts Report ¶81-339.

³⁸ *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman and anor* (1996) Aust Torts Report ¶81-339, 63589.

³⁹ Ibid.

less likely it is that a duty of care will arise. However, the distance may not rule out the existence of a duty of care where the school has particular knowledge of risks:

I do not mean by this that a school may not have some obligations in respect of pupil safety even two kilometres from the school. Thus, if the school was made aware that, at that place, the student was habitually molested, it might arguably have an obligation, *inter alia*, to draw that matter to the attention of the parents, the police or others. I have referred to these examples to illustrate that what the obligation to take precautions in respect of a pupil's safety will require the school to do will vary according to the circumstances of time, place and otherwise.⁴⁰

Mahoney P's analysis blends the questions of whether or not a duty of care exists with the question of what that duty requires. Once the school is aware of risk of a particularly dangerous situation immediately outside the school premises, it probably has obligations to supervise students in that unsafe situation. Indeed, according to Justice Mahoney, it is arguable that the school may have obligations that extend beyond the immediate vicinity of the school if it is aware of a particular risk.

Although Mahoney P dissented, in broad terms, his view that a school's duty is not limited by the school gates, was accepted by the rest of the Court of Appeal. Justice Sheller was of the view that the nature and extent of the duty is not dependent on the student being on school grounds:

⁴⁰

Ibid.

I do not think the relationship of teacher and pupil begins each day when the pupil enters the school ground and terminates when the pupil leaves the school ground. Undoubtedly however a particular duty of care arises because of the pre-existing relationship.

In my opinion the extent and nature of the duty of the teacher to the pupil is dictated by the particular circumstances. I do not think its extent is necessarily measured or limited by the circumstance that the final bell for the day has rung and the pupil has walked out the school gate.⁴¹

At its broadest, *Koffman* suggests that, if teachers are aware of a risk to their students, there may be a duty to take preventative steps or warn parents of the risk, even when it arises outside school grounds and outside of school hours.

This has obvious implications for life on the internet where the school may be aware that a particular student has either been at risk of bullying or been a perpetrator of internet bullying. The school may also be aware that inappropriate posts or images are being placed on sites that it is responsible for. The knowledge of the risk in those circumstances is more likely to give rise to the existence of a duty on the school to mitigate or eliminate any risks to its students in those situations.

Priestly JA agreed that a duty of care existed. For his Honour, the existence of a duty of care depends on the particular circumstances of the situation rather than the limit of school hours.⁴²

⁴¹ *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman and anor* (1996) Aust Torts Report ¶81-339, 63597.

⁴² *Ibid* 63593.

However, there are limits to this extended duty. As Justice Shellar pointed out, an employer is not liable to ensure that an employee's bathroom floor is not slippery.⁴³ Similarly, the school's duty is limited in scope and depends on the circumstances. His Honour gave the following example:

The circumstances of a small country high school located beside a quiet street and a primary school located on a busy highway in a big city may be contrasted. In the first case older children leave the environs of the school in comparative safety. In the second small children emerge from the school into a situation of immediate danger.⁴⁴

The consistent emphasis on the importance of the particular circumstances of the school and the student is a consistent theme in these judgments. They echo the stress placed by Murphy and Aicken JJ on cultural context in *Geyer v Downs* to understand the nature of the duty of care relationship.⁴⁵

In 2001, the decision of the New South Wales Court of Appeal in *Graham v The State of New South Wales* demonstrated that there are limits to the duty of care.⁴⁶ The Court considered the case of a young High School student with poor eye sight and balance. This student was severely injured crossing a busy road on her way home from High School.

⁴³ Ibid 63597.

⁴⁴ Ibid.

⁴⁵ *Geyer v Downs* [1977] HCA 64, [30].

⁴⁶ *Graham v The State of New South Wales* [2001] NSWCA 248.

Generally her mother would walk her home. Her mother asked the school to provide the student with transport if she was unavailable. The school declined to do so and notified the mother that it would not provide transport.⁴⁷ On the day of the accident, the plaintiff's mother did not walk home with the plaintiff. The plaintiff was injured crossing the busy road on her way home. She sued the State of New South Wales as the relevant school authority for her loss. She relied on *Koffman* to argue that the school owed a duty to transport her home if her mother was not available to walk her home.

The Court of Appeal dismissed the appeal. According to Meager JA:

No doubt the school had a duty to take reasonable steps to protect the child whilst it was at school, and this it apparently did. There may also have been a duty to inform Miss Graham's parents that neither taxi nor bus was running, and this it certainly did. There is no duty, in my opinion, to go further to take precautions to escort a pupil like Miss Graham to her home. Except in exceptional circumstances the master/pupil relationship ceases to exist at the school boundary.⁴⁸

Relevant factors where the plaintiff's age, she was a twelve year old High School student, the school was aware of her difficulties but had let the parents know that it could not provide transport. Mason P said that:

It doesn't really do anything, on the facts of this case, to assist the plaintiff in showing that the considered decision not to make

⁴⁷ *Graham v NSW* (2001) 34 MVR 198, 198.

⁴⁸ *Ibid* [5].

available this added form of protection was one which was unreasonable in the circumstances.⁴⁹

The important point for schools to take from this case is that they need to be very clear about what they will take responsibility for and what they will not. The Court made clear that it is only in rare cases that the duty of care will extend beyond the school gate.

B *Duty of Care and scope of the duty must be considered together*

It is unreal to isolate the question of the existence of the duty of care from the other elements that must be established in a negligence claim. In *Roads and Traffic Authority of New South Wales v Dederer*,⁵⁰ Gummow J observed that:

...duties of care are not owed in the abstract. Rather, they are obligations of a particular scope, and that scope may be more or less expansive depending on the relationship in question. Secondly, whatever their scope, all duties of care are to be discharged by the exercise of reasonable care. They do not impose a more stringent or onerous burden.

Regarding the first point, a duty of care involves a particular and defined legal obligation arising out of a relationship between an ascertained defendant (or class of defendants) and an ascertained plaintiff (or class of plaintiffs).⁵¹

⁴⁹ Ibid [9].

⁵⁰ *Roads and Traffic Authority of New South Wales v Dederer* [2007] HCA 42.

⁵¹ Ibid [42]–[44].

The existence of the duty of care always has a particular scope that is made up of a number of “particular and defined” legal obligations that are summarised in the obligation to take reasonable care. This is what we saw in *Koffman* where each judge of the Court of Appeal analysed the existence and scope of the duty of care owed by the School authority together.

So, for example, the scope of the duty that is owed to a primary school child will be different from the duty owed to a High School student. As the student gets older, the demands of the duty of care change. Thus in *Camkin v Bishop and another* Goddard LJ held that:

Boys of 14 and 16 at a public school are not to be treated as if they were infants at creches, and no headmaster is obliged to arrange for constant and perpetual watching out of school hours.⁵²

Justice Steytler in the West Australian Supreme Court cited this passage from Goddard LJ in *Gugiatti v Servite College Council Inc*.⁵³ His Honour, giving the Court’s judgment, held that the School authority was not negligent in was not reasonable to expect one of its teachers preventing a sixteen year old on a school leadership camp from jumping over a modest creek and thereby injuring himself.⁵⁴

1 *Employment analogies*

Analogies can be drawn from the law of employment where the law has had a similar struggle to keep abreast of rapid developments in working

⁵² *Camkin v Bishop and another* [1941] 2 All ER 713, 717 cited with approval by Steytler J in *Gugiatti v Servite College Council Inc* [2004] WASC 5, [23] (*Gugiatti*).

⁵³ *Gugiatti v Servite College Council Inc* [2004] WASC 5.

⁵⁴ *Ibid* [24].

relationships. Caution needs to be applied in working with these analogies because the cases we consider involves adults – who are not as vulnerable as children and can, therefore, be expected to be more responsible for their own safety. They are also concerned with the interpretation of the relationship based on construction of relevant statutes as opposed to the common law notion of a duty of care.

Bearing those very important caveats in mind, the legal issues of where does the employment relationship end and, consequently, what are the limits of an employer's liability, are very similar to that posed by the school authority/student relationship. These issues have been considered in the context of workers' compensation cases.

In *Hatzimanolis v ANI Corp Limited*,⁵⁵ the High Court considered whether an injury sustained by a worker on a sightseeing journey on his day off was sustained *in the course of his employment* for the purpose of section 9 of the *Workers Compensation Act 1987* (NSW). According to the joint judgment of Mason CJ, Deane, Dawson, Toohey and McHugh JJ, an activity is within the course of employment even though it is outside a period of actual work if 'the employer, expressly or impliedly, has induced or encouraged the employee to spend the interval or interlude at a particular place or in a particular way.'⁵⁶

Their Honours noted an injury sustained in an interval between periods of actual work (eg, during a lunch break) is more likely to be interpreted as occurring in the course of employment than an injury occurring between two discrete periods of work.⁵⁷

⁵⁵ *Hatzimanolis v ANI Corp Limited* (1992) 173 CLR 473.

⁵⁶ *Ibid* [16].

⁵⁷ *Ibid* [15].

The continued relevance of this test was considered by the High Court in *Comcare v PVYW* (PVYW).⁵⁸ The respondent in that case was an employee of a Commonwealth Government agency. She provided training at a regional office of the agency. She stayed overnight in a hotel and had sexual intercourse with an acquaintance in the hotel room. Whilst making love, either she or her acquaintance, pulled a light fitting from its mount striking the respondent on the head – causing her physical injury and psychological harm. She argued that the injury occurred in the course of her employment under the Commonwealth's *Safety, Rehabilitation and Compensation Act 1988*.⁵⁹

The High Court reiterated the *Hatzimanolis* test so that the employer is liable provided the employee is ‘... doing the very thing that the employer encouraged the employee to do, when the injury occurs.’⁶⁰ Merely requiring an employee to be present at a place is insufficient. Requiring the respondent to be present at a regional centre to conduct training where this necessitated her stay overnight did not attract liability if the employer had not also expressly or impliedly encouraged or induced the employee to engage in the very activity that caused the injury. Consequently, the injury did not occur in the course of the respondent's employment.⁶¹

⁵⁸ *Comcare v PVYW* (PVYW) [2013] HCA 41.

⁵⁹ Section 5A(1)(b).

⁶⁰ PVYW [35]; see Eric L Windholz, ‘Comcare v PVYW: Are Injuries Sustained While Having Sex on a Business Trip Compensable’ (2014) 36(2) *Sydney Law Review* 345.

⁶¹ *Ibid* [46]–[49]. Eric Windholz in a very useful case note points out the significance of the different statutory provisions giving rise to workers' compensation liability in different Australian jurisdictions (see ‘Comcare v PVYW: Are Injuries Sustained While Having Sex on a Business Trip Compensable’ (2014) 36(2) *Sydney Law Review* 345, 347).

Applying this to a school authority, this paper argues that if the school authority has expressly or impliedly encouraged or induced a student to engage in the online activity that caused the injury, this may be taken as an indication of an assumption of legal responsibility by the school. In this context, the school should be confident that the activity it encourages is risk free or, at the very least, it has done what is reasonably required to mitigate that risk by, for example, properly educating its students, having clear policies in place or moderating the activity.

Of course, the question is always one of degree and what is appropriate will be determined by the nature of the activity and the student's involvement in it. If the school is aware of particular risks of the online activity it is encouraging, then it should mitigate those risks or cease encouraging its students to take part in the activity.

C *The duty is to do what is reasonable - breach of the Duty of Care*

Having said that, schools are not required to eliminate risk altogether.⁶² The law does not impose strict liability whereby a school authority may be liable for damage sustained by a plaintiff regardless of whether or not it acted reasonably.

The decision of the High Court in *Roman Catholic Church v Hadba*,⁶³ for example, makes clear that the school authority is not obliged to provide constant supervision in all possible places of risk. According to the joint judgment:

Nor is it reasonable to have a system in which children are observed during particular activities for every single moment of

⁶² *New South Wales v Lepore* (2003) 212 CLR 511, 531.

⁶³ *Roman Catholic Church v Hadba* [2005] HCA 31.

time - it is damaging to teacher-pupil relationships by removing even the slightest element of trust; it is likely to retard the development of responsibility in children, and it is likely to call for a great increase in the number of supervising teachers and in the costs of providing them.⁶⁴

In determining what is reasonable, and thereby concluding whether or not the school authority has breached the duty of care it owes to students, in New South Wales the Court must apply section 5B of the *Civil Liability Act, 2002* (NSW). This section states that:

(1) A person is not negligent in failing to take precautions against a risk of harm unless:

- (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
- (b) the risk was not insignificant, and
- (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

- (a) the probability that the harm would occur if care were not taken,
- (b) the likely seriousness of the harm,
- (c) the burden of taking precautions to avoid the risk of harm,

⁶⁴

Ibid [25]–[26].

(d) the social utility of the activity that creates the risk of harm.⁶⁵

According to Ipp J, the lead designer of the wave of tort reform that hit Australia in 2002,⁶⁶ this section was designed to embody the common law principles that come from Lord Reid in *Wagon Mound No 2* [1967] AC 388:

If a real risk is something that would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involving no disadvantage, and required no expense.⁶⁷

Lord Reid's dicta was picked up by Mason CJ in *Wyong Shire Council v Shirt*:

...when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful.⁶⁸

Having determined that a duty of care exists, Mason CJ explained that:

... it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the

⁶⁵ *Civil Liability Act 2002* (NSW) s 5B.

⁶⁶ Martin Davies and Ian Malkin, *Torts* (LexisNexis Butterworths, 6th ed, 2012) 21.

⁶⁷ *Wagon Mound No 2* [1967] AC 388, 643-4.

⁶⁸ *Wyong Shire Council v Shirt* [1980] HCA 12, [13].

magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.⁶⁹

This has come to be known as the calculus of negligence.⁷⁰ Essentially, school authorities have to carry out a risk assessment – a process with which we are all familiar from work health and safety requirements. The measure against which a school authority's performance is judged is what a reasonable school authority would do in the circumstances.

Therefore, the existence of a duty of care owed by a school authority to a student does not require perfection; it does not require the school authority to prevent injury to its students at all costs but it does require the school to take and enforce steps that are reasonable.

An excellent decision on how section 5B is applied is the decision of the New South Wales Court of Appeal in *State of New South Wales v Mikhael*.⁷¹ The plaintiff in that case was the victim of a serious assault by T, a fellow year 8 student, at a High School operated by the State of New South Wales. The plaintiff sustained brain damage as a result of the assault by T following an argument in a class.

The plaintiff alleged that his injury had been caused by the negligence of the school in failing to warn relevant teachers that T had a propensity for violence. The plaintiff alleged that the failure of the school to implement

⁶⁹ Ibid [14].

⁷⁰ Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 421.

⁷¹ *State of New South Wales v Mikhael* [2012] NSWCA 338.

its own policy of informing all relevant teachers of potential risks had been the cause of this assault and his injuries. Specifically, the plaintiff argued that the school failed to take reasonable care for him in circumstances where early male teenage students are known to be potentially violent and T, in particular, was known to be potentially violent.⁷²

Justice Beazley gave the decision of the Court. She emphasised the importance of foreseeability of risk of injury.⁷³ Applying Mason CJ's test of foreseeability from *Wyong Shire Council*, even a risk that is "quite unlikely" can be foreseeable provided it is not far-fetched or fanciful.⁷⁴ Given that T had carried out a serious assault only some weeks before he assaulted the plaintiff, the risk of injury was clearly foreseeable.⁷⁵ Her Honour found the risk of harm was not insignificant and were such a reasonable person in the school's position would have taken precautions to deal with the risk.

Having satisfied the conditions set out in section 5B(1), her Honour applied the factors set out in sub-section (2). These factors are to be applied to "the extent that they are relevant".⁷⁶ The School had come to the conclusion that there was a low risk of T reoffending. However, if he did reoffend, the potential consequences could be and were very serious – they were certainly not potentially insignificant such that no precautions were necessary.⁷⁷

⁷² *New South Wales v Mikhael* [2012] NSWCA 338, [70].

⁷³ *Ibid* [76].

⁷⁴ *Ibid*.

⁷⁵ *Ibid* [77].

⁷⁶ *Ibid* [80].

⁷⁷ *Ibid* [81].

The Court must then consider the burden of taking precautions. As her Honour points out, the burden is not to be analysed solely in economic terms. In this case, the obvious precaution was proper communication to relevant teachers who might have responsibility for T of his propensity for violence. To calculate the burden, it is legitimate to take into account “factors such as time or distance or communication”.⁷⁸ Weighing the inconvenience of effective communication against T’s right to privacy. Justice Beazley said of this consideration that:

It was the privacy concerns that had dictated that part of the school’s procedures which created the risk of harm. Privacy concerns were appropriate and relevant considerations. However, a different or more sensitively calibrated privacy policy, having regard to particular circumstances, was required, so as to balance the concerns of the physical safety and emotional security of all students at the school.⁷⁹

Given the serious risk of harm, the privacy policy had to be dealt with in a more considered manner. Ultimately, the potential risk was of such seriousness, that it was vital that the school should have ensured that all relevant staff members were informed of the risks created by T’s propensity for violence.

Knowing these risks of injury exist that go beyond far-fetched or fanciful risks, schools must carry out a risk assessment – considering all the factors set out in section 5B. Having carried out that assessment it must do what a reasonable school authority would do in the circumstances. In carrying out that risk assessment, as discussed earlier, schools must be aware of the propensity of their students for mischief and, as *Mikhael*

⁷⁸ Ibid [82].

⁷⁹ Ibid [83].

illustrates, if the school is aware of the potential risks created by particular students, it must manage those risks effectively. So the risk assessment that schools are required to do must be done in full awareness of Murphy's law that what can go wrong probably will go wrong - especially when dealing with students.

III CONCLUSION

In summary, a duty of care will only arise in circumstances where the relationship of school and student or teacher and student arises. This relationship exists pre-eminently on school grounds when the school is open for business. However, as *Koffman* illustrates, the duty can arise outside the school grounds and outside of school hours – especially in situations where the school is on notice of the risks or ought to be on notice.

The duty and this teacher/student relationship arises in situations where the school has control and the students legitimately depend on the school, its delegates, teachers or staff to be looking after the student. The Courts will be reluctant to hold that a duty exists in situations where the school has no control and the student is under the supervision of others. If for example, the student is in his or her home, the expectation will be that the parents or guardians of the student will have responsibility.

The problem is, as discussed earlier, that the internet and smart phones do not respect front doors, or other boundaries. Lines of control and responsibility become blurred.

Where the school clearly exercises control, it is clear there is a duty present. For example, If the school authority is responsible for a website, a blog, wiki or other social networking site, it will be expected to establish proper principles for the use of the internet, to educate its staff

and students as to what is appropriate and what the limits are and to supervise what occurs on those sites.

Similarly, schools will be expected to have clear and effective policies about the use of smart phones, tablets and other internet devices while students are under the control of the school. They will be expected to police those policies effectively.

Where they are on notice that a particular student is vulnerable to bullying, they need to be alert to the needs of that student. Similarly, when a school is aware of the risks created by a particular student, it needs to take steps to mitigate or eliminate that risk if it is anything more than a far-fetched or fanciful one.

The Courts have consistently drawn attention to the need of school authorities to have regard to students' vulnerability and their propensity for mischief. They also need to bear in mind that the young can be ignorant of the effect of what they do on others.

Bearing in mind that children are immature, school authorities should take particular care in relation to any online activities they encourage students to take part. We have seen in the employment cases, that Courts have been inclined to extend an employer's responsibility to include situations that it has encouraged an employee to take part. There is no reason why the same kind of reasoning could not be applied to school authorities and students.

The good news for school authorities is that its duty does not require it to moderate sites 24/7 or to wrap its students in internet free bubble wrap. A school can only do what is reasonable in the circumstances. This does not mean that a school should be content with doing what it has always done or what looks okay. Schools should not be content with drafting internet

policies and allowing them to gather dust on the IT shelves of the library or store them in some musty directory that no one ever refers to.

Because children are immature and therefore vulnerable, school authorities owe a personal duty to their students. This duty arises because the student is dependent on the school to deliver the safe environment. So, while the requirements of the duty do not extend to creating a risk free haven, school authorities are best advised to discharge their duties by looking for and adopting best practice in their supervision of their own online facilities and in what they allow students to get up to using their own devices on school property.

Young people do silly things – a bit like adults really. They have a propensity for mischief. The young man, Shane Gereada, who sent the menacing text messages to his friend, Allem Halkic, did not realise the consequences of his words and was, no doubt, appalled when they led to his friend taking his own life. School authorities need to educate those in their care about good internet citizenship and always be aware and watchful for the risk of harm that exists in this brave new world. With the tragic increase in youth suicides, the need for proper care by school authorities could never have been be greater.