Acta Academica 2008 40(2): 244-274

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Student/learner discipline and bullying: a comparative analysis of legal risk management in schools in Australia and South Africa

First submission: May 2005

This article briefly discusses some legal determinants that influence education in Australia and South Africa, respectively. It is evident that schools whose hierarchy members fail to take the necessary steps to ensure a non-threatening environment may be held liable if negligence can be proven. The focus is therefore on principles and procedures regarding the management of learner discipline, with specific reference to bullying. The article concludes with an analysis of qualitative data from a research project into learner discipline in Australia and South Africa, and a comparison of the respective risk management strategies.

Leerderdissipline en afknouery: 'n vergelykende analise van risikobestuur in Australiese en Suid-Afrikaanse skole

Hierdie artikel ontleed kortliks enkele regsdeterminante wat 'n invloed het op die onderwys in Australië en Suid-Afrika. Dit is duidelik dat skole wat in gebreke bly om 'n veilige omgewing te verseker, aanspreeklik gehou kan word indien nalatigheid bewys kan word. Die fokus is dus beginsels en prosedures ten opsigte van die bestuur van leerderwangedrag, met spesifieke verwysing na afknouery. Die artikel sluit af met kwalitatiewe inligting uit 'n navorsingsprojek in Australië en Suid-Afrika rakende leerderdissipline, en 'n vergelyking van die onderskeie risikobestuursbenaderings.

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In contemporary societies, school policies, practices and procedures are to an increasing extent becoming influenced, if not driven, by legal imperatives. Consequently, it is axiomatic that preventive legal risk management should be an integral component of the school culture. However, considerable complexity surrounds the management and teaching functions in schools. This renders the work of educators increasingly difficult and, to a large extent, specialised.

The law provides one example of where educators are expected to have some specialist knowledge as well as the skills required to manage incidents that arise which have potential legal consequences and which make educators accountable to the school community as well as to the wider community in which the school is located. Above all, however, the paramount concern in dealing with legally related matters in the school is that the best interests of learners[1] have to be considered, as specified in South Africa in section 28 of the Constitution (RSA 1996a). In this regard, school authorities, school principals and classroom teachers internationally have a responsibility for the welfare and well-being of all learners and not only for those who are recognised as well behaved. Nonetheless, it is also important that no learner has to undertake his or her education in a hostile learning environment and that the safety and well-being of the majority must be considered.

Legal risk management has two distinguishable elements that are of equal importance. First, the person or institution carrying the responsibility for the safety of another should do everything that can be reasonably done to reduce the risk of injury. Secondly, the risk of potential lawsuits should be reduced (Spengler *et al* 2006: 2). School authorities should keep both these elements in mind in their risk management strategies in order to minimise all possible threats and dangers in the educational settings.

World-wide, bullying has become a major threat to the safety of learners. Mellor (1995) reports that in Scottish schools, as recently as 1990, "… bullying was a non-issue. Now it is well and truly on

1 In the South African context, the term "learner" is normally used, while the term in Australia is "student".

the agenda". Rassool (2002: 1-3) notes that in the USA an estimated 160 000 children miss school every day for reasons of bullying, while the results of studies conducted at British schools during the course of 1996 demonstrated that on average sixteen schoolchildren per year commit suicide because they were being bullied at school. This situation led to the passing of a law in 1999, in terms of which schools became legally obliged to adopt effective anti-bullying policies, "failure of which was seen as a neglect of care towards children" (Rassool 2002: 1).

Bullying can prevent certain learners from experiencing safety and security and this in turn may hamper effective learning. Ill-discipline and learner misconduct not only affect the security of fellow learners, but also that of educators, with a further adverse effect on the effectiveness of teaching. In a declaration published by the president of the Suid-Afrikaanse Onderwysersunie (SAOU) on 27 May 2007 (Roux 2007: 5), violence and intimidation against educators and an overemphasis of learners' rights were offered as the main reasons for the educators' participation in the national strike on 1 June 2007.

Recent South African studies by Neser *et al* (2004), De Wet (2005) and Du Plessis & Conley (2007) have confirmed substantial evidence of increased peer victimisation in South African schools, resulting in both physical and psychological harm. During the course of 2006, incidents of violent bullying, some of which occurred on the school grounds, were reported in the media. Brutal scenes of bullying were screened on television when Ruan Springorum (18) of Rustenburg became the victim of a vicious attack by a fellow learner, eighteen-year-old Zak Niemann, a school prefect with colours for rugby, and physically much stronger than Ruan (*Carte Blanche*, 23 July 2006).[2] The laughing bystanders in the school toilets did not assist the victim in any way. A helpless friend video recorded the attack on his cell phone camera.

This article starts with a brief discussion of the legal structure and procedures that surround education in Australia and South Africa respectively. The main focus rests on a number of legal aspects

2 <http://carteblanche.mnet.co.za/Display/Display.asp?Id=3127>

related to learner discipline and , more specifically, on the management of serious forms of misconduct, such as bullying. Matters concerned with minor learner infringements, such as the refusal to follow a teacher's instructions or being inattentive in class, occur frequently and do have a significant influence on the teaching and learning process in both Australian and South African schools. However, the more serious offences are the key concern of this article. The article concludes with qualitative data from an on-going research project into learner discipline in Australia and the RSA, and a comparison of their respective policies and procedures.

The Australian educational system was included into this project for several reasons. Well-established relationships with fellow scholars in the field of Education Law in Brisbane has led to an on-going interest in the respective systems. Both countries form part of the Commonwealth, leading to comparable approaches towards education in their legal systems. This comparative research is therefore based on the same common law principle regarding the duty of care at schools with regard to the well-being of learners, with specific reference to the role of schools when serious misconduct such as bullying prevails.

1. Background

1.1 Australia

Australia comprises six states and two territories and by powers granted to them under the Australian Constitution (Commonwealth of Australia Constitution Act 1900)[3] each is responsible for enacting legislation dealing with education, among other matters. Despite the fact that the Commonwealth government or Federal Government, as it is more commonly called, has been given no direct constitutional powers to legislate in respect of matters relating to education, it has become increasingly involved in this field on account of its provision of funding and specific purpose grants to educational institutions, including schools.

3 Hereafter referred to as the Constitution, or Australian Constitution.

Unlike the RSA, Australia has no Bill of Rights and the Australian Constitution is largely silent on the wide range of rights such as privacy, freedom of speech and others that are generally recognised in such a document. Consequently, rights accorded to Australian citizens are to a large extent provided for in legislation such as the anti-discrimination statutes that exist in all jurisdictions. Access to such rights is increasingly tested in various tribunals, including the Human Rights and Equal Opportunity Tribunal and in the courts that exist in each of the jurisdictions. It is important to note that while each state and territory as well as the Commonwealth enacts legislation unique to its specific jurisdiction, there is considerable similarity between the provisions. Nonetheless, each state and territory as well as the Commonwealth, to the extent allowed under the Constitution, has the right to enact legislation different from that in other jurisdictions. On the other hand, principles of law emanating from decisions made in the courts are common across the country and are not restricted to any one jurisdiction.

Briefly, policies and practices relating to student welfare in Australian schools are strongly influenced by a range of parliamentary statutes and by case law in terms of which court decisions define the parameters of best practice school strategies. In the case of statute law, legislation such as that existing in the state of Queensland dealing with learner welfare places a responsibility on schools for students' well-being, particularly with respect to their physical welfare. This legislation includes the Child Protection Act (Australia 1999), the Commission for Children and Young People and Child Guardian Act (Australia 2000), the Anti-Discrimination Act (Australia 1991) and the Workplace Health and Safety Act (Australia 1995). In addition, in Australian and South African courts alike, court decisions have determined that a common law duty of care exists for students while they are under the authority of the school. The Australian case of Lisa Eskinazi *v* State of Victoria[4] and the South African case

4 Lisa Eskinazi *v* State of Victoria. Unreported. County Court of Victoria, Melbourne. No 06471 of 1999. Judgement dated June, 2003.

of Lubbe *v* Jacobs[5] may serve as examples of the way in which courts approach delictual liability of schools, as will be discussed later.

The duty of care extends to periods off the school grounds such as when students are on an excursion and even when — in certain very limited circumstances — students are travelling to or from school. The duty is, however, not an absolute one. Rather it is one of taking care of students' welfare consistent with the common law test of the reasonable person.

1.2 South Africa

In South Africa, the policy regarding learner conduct is mainly determined by specific provisions in the South African Schools Act (SA 1996b) (hereafter SASA). In terms of which section 8 provides that the governing body of the school (SGB) "must adopt a code of conduct for learners after consultation with learners, educators and parents". The aim of these codes of conduct, which should be formulated consistently with the provisions contained in the Constitution, is to establish a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process. In May 1998 the government, in addition to the provisions of section 8, published guidelines for consideration of governing bodies in the adoption of such a code of conduct (RSA 1996c), which became one of the schedules of the SASA.

In the legal risk management strategies of schools in South Africa, specifically in relation to serious offences perpetrated by learners, one provision in this guideline document should be highlighted. Item 6 specifies the responsibilities of parents, stating that the "ultimate responsibility for learners' behaviour rests with their parents or guardians". This implies that the parents should immediately be informed and included in the disciplinary process in cases of alleged serious offences of their children, such as bullying behaviour.

On the other hand, Squelch (2000: 53) stresses the important role of the school in cases of school safety, including bullying:

5 Lubbe *v* Jacobs 2002 (High Court of South Africa: Transvaal).

> Schools cannot be complacent about bullying. The school has a legal duty to provide children with a safe and secure environment, and to protect them from deviant behaviour that [...] infringes their basic rights to security, human dignity, privacy and education.

The author continues by warning school principals and educators who fail to take the necessary steps to ensure a non-threatening environment: "If negligence can be proven, it is certainly possible for schools to be held liable".

In brief, statute law and common law are combined to establish a duty of care where the school staff members know, or ought to know, about situations in which learners have the potential to be harmed in some way. In this regard, the law concerning learner welfare is very mindful of the need to ensure learners achieve their schooling in hostility-free learning environments. As a consequence, this requires schools to have in place systems which will enable their management board members to address the problems of bullying.

In the following paragraphs bullying as a phenomenon will be discussed by means of the provision of definitions, followed by an analysis of the reasons for bullying.

2. Definitions of bullying

A number of definitions of bullying exist in Australia, South Africa and other countries. There is a close relationship between bullying and violence in general. In the USA, for example, Haber (2008)[6] argues that much of what is referred to as violence is in fact bullying — most of it non-physical.

In Australia the Australian Education Union emphasised that such behaviour was not restricted to physical violence. In its submission to the House of Representatives Committee investigating violence and bullying in schools, it defined the behaviour as being

> ... present in any situation where a member of the school community (teacher, student, other education worker, parent, or visitor) is intimidated, abused, threatened, or assaulted or their property

6 <http://www.crime-prevention.org/en/library/publications/international/report3/ rpt3_3.html#8>

> deliberately damaged by another member of that community or the public in circumstances arising out of their activities in a school (HRCS 1994: 1).

In a very important decision, the Committee accepted a view of violence supported by the evidence and submissions presented to it that:

> … it is not only those violent acts which result in physical harm to people and buildings which is school violence. It is also those subtle and invisible acts of bullying which have the greatest detrimental impact on students, their emotions and their educational outcomes (HRCS 1994: 1).

In South Africa, Rassool (2002) defines the phenomenon as follows:

> Bullying is often a direct form of aggression against others, which can assume several forms of behaviour, including teasing, taunting, threatening, hitting and stealing. It also constitutes indirect attacks such as social ostracism, where a student is made to feel marginalised, socially isolated or inferior, which often has more long-term consequences for the victim.

Clifford (2001) says in an editorial article in San Diego, USA that bullying, in its truest form, is

> … a series of repeated, intentionally cruel incidents, involving the same children, in the same bully and victim roles. Bullying can also consist of a single interaction. The intention of bullying is to put the victim in distress in some way. Bullies seek power.

In essence, bullying behaviour involves three main elements: it is violent; it is long term, and it has to do with gaining power over others. The bullying may be verbal, physical, social or psychological. Rigby & Slee (1998: 3) make the point that there are clear distinctions between fighting or quarrelling between learners of equal power and bullying which involves an imbalance of power. Rigby (1996: 12) distinguishes between malign and non-malign forms of bullying behaviour, with malign bullying being perpetrated with the intention to cause harm to another person and non-malign bullying being perpetrated without the intention to harm but being a mindless activity usually carried out by bystanders to support the bully. Whatever the definition, it is generally true that bullying to a large extent exists in cases in which carrying out hostile acts towards,

and intolerance of, others is easier than respecting them or compromising with them.

Internationally, according to Stewart & Knott (1999: 108), there are five commonly accepted forms of bullying:

- Physical bullying involves actions such as hitting, spitting, throwing stones, and using weapons such as knives or guns. This may range from a simple assault to killing.
- Verbal bullying is non-physical and includes name-calling, taunting and teasing. While verbal behaviour is to a large extent thought to be a rather harmless activity, with some victims it can have as severe a consequence as other forms of bullying. In schools it is often manifested in the form of disparaging remarks about the victim's personality, physical appearance, clothes and ability in school activities such as academic and sporting achievements. Increasingly, verbal abuse involves racial and religious abuse.
- Gesture bullying involves non-verbal/non-physical forms of behaviour including threatening and/or obscene gestures. This form of bullying is frequently expressed when a person in authority prevents other forms of bullying from occurring. It is a form of bullying that leaves the victim worrying about what might happen to them at a later time.
- Extortion bullying is the use of stand-over tactics such as demands for the money or property of others.
- Exclusion bullying is a subtle form of bullying that usually takes place among girls and results in the isolation of a student from the peer group.

The "modern" bully in South Africa has recently been described by De Vries (2004: 12) as no longer being typically those learners who are bigger or older than their fellow class members. As stated previously, the modern bully utilises technology such as computers and cell phones. The number of female bullies is on the increase, and bullying of girls as well as boys includes psychological actions such as vicious comments, threatening and exclusion from the group (cf Rassool 2002: 3). This is sometimes done in combination with minor physical abuse such as pushing, shoving or pulling off their victims' hair.

3. What makes a bully?

The major research factors that have been given to explain why bullies act the way they do are generally related to home, school, societal and personality factors. Curwin & Mendler (1997: 3) note that bullying arises out of factors such as economic and social malaise, cynicism concerning political policies, drugs, gangs, the entertainment media, and changes to family structures and relationships. The authors argue that too many children have been overly rewarded and punished and, most important, not taught values. In a finding that indicates the importance of family relationships, they note that some 80% of disruptive and aggressive students come from troubled homes.

Research conducted in Australia by Rigby & Slee (1998) found that the causes of student bullying are to a large extent related to personality factors as well as issues concerned with their home and school. From a wide study of bullies in school settings, the authors were able to conclude that bullying is associated with a low level of empathy for others and that bullies are generally unco-operative. In relation to family factors, it was concluded that bullies "more frequently come from dysfunctional families in which there is relatively little sense of love, support or belonging" (Rigby & Slee 1998: 10). They also note that there is no significant difference between male and female bullies in relation to their family backgrounds. Interestingly, the research of Rigby & Slee (1998) shows that bullies come from family backgrounds where they are frequently criticised and severely controlled by their parents.

While schools are often regarded as places where students can "escape" from the conditions and vicissitudes of their family lives, the reality for bullies is that structures such as class size, school and classroom organisation, style of management and the school culture serve to encourage bullying behaviour (Rigby & Slee 1998: 10). Importantly, the degree of commitment shown by the school community to anti-bullying programmes is central to managing the problem. However, Borg (1998: 438) found that there is

> often widespread scepticism on the part of teachers and school administrators in regard to bullying and its seriousness and their inability or unwillingness to support and protect bully victims.

4. Bullying: the Australian context

Despite the research evidence that bullying occurs in different guises and to different extents in all schools (cf Boethe 1997, Borg 1998, Rigby & Slee 1998, Hay-Mackenzie 2002), there is a lack of national data that would provide a clear indication of just how severe the problem actually is in Australia. Estimates vary as to the size of the problem, with Boethe (1997: 163) maintaining that approximately 10% of students in Australian schools are victims of bullying behaviour, while Rigby & Slee (1998: 5) put the figure much higher and argue, from extensive school-based research data, that some 20% of boys and 15% of girls are bullied and that "one student in six or seven is bullied on a weekly basis or more often".

The seriousness of some forms of bullying is evident from the results of a study carried out in the Australian state of New South Wales. This revealed that from 1990 to 1992, 406 reported incidents of aggravated assault occurred between students in schools in that state and that 95 of the incidents resulted in serious injury, including broken bones, concussion or major wounds (Trimboli & Bonney 1994: 1). In another 177 of the incidents, minor abrasions and cuts were sustained (Trimboli & Bonney 1994: 15).

A Commonwealth report on violence in Australian schools, *Sticks and Stones*, was drawn up by the House of Representatives Standing Committee on Employment, Education and Training (HRSC 1994). In terms of this study, it was found from research conducted across most of the Australian states that "about one in seven students were bullied and that approximately five percent of the student population were bullies" (HRSC 1994: 12). Incidents of bullying noted by the committee included violence based on gender, race and ethnicity as well as violence carried out against teachers. While the data presented to the HRSC does not cover all of Australia and while it is now somewhat dated, it does reveal that different forms of bullying behaviour occur on a regular basis in Australian schools. This is supported by data from the qualitative study on which the article reports in the state of Queensland by these authors which shows that student peer assault as well as abuse and assault against teachers is a perceived as a recognised problem in schools in that state.

As stated, in Australia, as in South Africa, school administrators and classroom teachers owe a common law duty of care for the physical welfare of their students. In relation to bullying there is a legal duty of care that requires schools to have in place policies and practices that inhibit the problem or to manage it in some definite way. This is well illustrated by the court decision in Lisa Eskinazi *v* State of Victoria,[7] where the management of a school was held to have failed to provide the level of care needed to protect a fourteen-year-old female student from violence and bullying by other female students. A brief summary of this case reveals the measures required to be taken at Australian schools to ensure that students are protected from bullying behaviour.

5.1 Lisa Eskinazi *v* State of Victoria

At the secondary school attended by Lisa, there is a behaviour management system in place in terms of which the procedures required of staff and students have been carefully spelt out. There was, however, as evidence from the hearing attests, a failure to ensure that these procedures were followed. Consequently, harassment and bullying did occur.

While Lisa was in primary school, she was considered to be an above average student and she was placed in an accelerated programme for gifted children. During the first half of her first year (1994) at secondary school, Lisa's high level of academic performance continued. There was, however, a serious deterioration evident from the middle of that year when a group of girls, which at times numbered up to five or six, subjected her to verbal abuse and harassment, calling her names such as: "fat bitch", "fat slut", "two dollar hooker", "bitch". More worrying to the plaintiff were the threats that these girls intended to physically harm and "kill her". This frightened Lisa sufficiently not to want to go to school. Indeed by the beginning of 1995 Lisa's parents agreed that she could enrol in an alternative school during the middle of that year.

7 County Court of Victoria, Melbourne No 06471 of 1999; judgement dated June 2003. Lisa Eskinazi *v* State of Victoria. Unreported. County Court of Victoria, Melbourne. No 06471 of 1999. Judgement dated June, 2003.

During the course of 1994, Lisa made several complaints to members of the teaching staff about the way she was being treated by other students. However, the abuse against her aggravated in 1995 when it appears she was verbally abused on a daily basis, graffiti about her appeared on walls and classroom desks around the school, and items such as apple cores were thrown at her. She complained about this behaviour to the Year 8 co-ordinator and the Pupil Welfare Co-ordinator. Lisa's mother also complained and made a request, via the Welfare Co-ordinator, to meet with the principal but no meeting took place.

The worst incidents of physical assault occurred at the school dance in July when Lisa had her hair pulled, was punched and, when she fell to the floor, was again pulled by the hair and then kicked. When she went to the toilet to recover, girls who had just assaulted her, tried to follow her but were prevented by a teacher. Nevertheless, one girl called out to Lisa: "I'm going to get you tomorrow and I'm going to kill you". After the assault, the principal and a number of the teachers present at the dance spoke to Lisa. According to evidence given by the principal at the subsequent trial, he instructed "a" student to come in and see him the following day. He could not remember the identity of the student concerned and took no notes of either the event or the assault that occurred the next day when the group of students attacked Lisa again by kicking her and then smashing her head into a door.

A teacher on playground duty saw the plaintiff pushed up against a post and ordered the girls to stop the abuse and to disperse. The evidence indicates that the principal or staff who had been present at the dance at no time made any attempt to inform the teachers on playground duty of the threats made against Lisa. Moreover, while the second assault took place outside the staff room and would have provided staff with a clear view of events, no one appeared to have observed the incident.

It is important to note that the school had very clear behaviour management and discipline policies and that these were printed in the information handbook of the school. In essence the policies laid down that students must have respect for others as well as for their

property and for that of the school. The policies further contained provisions outlining an expected code of conduct while the disciplinary procedures and penalties in the event of failure to observe the policies were likewise mentioned. In addition, the School Charter contains provisions with regard to teachers' responsibilities in ensuring a safe and orderly environment for all students. one provison affirmed that everyone has a right to be treated with respect and remain free from harassment and intimidation.

Lisa left Sandringham High School and started at Brighton Secondary College in August 1995, although by the middle of Year 10 in 1997 she left school altogether. She sought counselling and medical advice. On at least one occasion she attempted suicide. Because of self-harm tendencies, she was admitted to hospital for two weeks during the course of 1998 and on a number of occasions throughout 1999. While there were signs that she was recovering, Lisa remained on anti-depressants, sleeping tablets, mood stabilisers and anxiety tablets. She commenced a part-time three-year Diploma in Community Development at a College of Technical and Further Education in 2000. As far as her health is concerned, it is important to note that during the court case attempts by the defence to discredit her evidence on grounds that she had a pre-existing medical condition were rejected by the court.

This case clearly demonstrates that it is not enough for schools to have systems in place to protect students from incidents such as those that occurred. Such systems must be appropriately monitored and enforced. Failure to do so in this case had tragic consequences for the victim. The state education authority — under the principle of vicarious liability by which the torts of employees become those of the employer — was required to pay considerable compensation in damages.

Research has shown that many of the issues associated with bullying are vividly present in the case of Eskinazi. The research will be discussed in more detail in the last section of this article.

5. Bullying: the South African context

Until fairly recently, the South African society (as elsewhere in the world) regarded bullying in school as a normal part of school life. As an awareness of the very serious effect of bullying grew, this resulted in an increasing resistance against this phenomenon. School authorities in South Africa and elsewhere began to realise that violence and other forms of aggression are no longer tolerable on the school grounds.

According to De Wet (2005: 2), internationally, a noticeable interest in research on bullying first started to be discerned during the 1990s. Various researchers and institutions (Neser *et al* 2003, De Wet 2005, National Crime Prevention Strategy, Canada 2004) regard Olweus from Norway as the pioneer in this field.

It has been stated that both Australian and South African educators owe their learners a duty of care, the absence of which may constitute negligence. In this regard, numerous court cases have been decided involving educators, educational institutions and the Department of Education, although they focus mainly on forms of injury other than bullying, as was the case in the Eskinazi trial. Examples of the type of cases that involved injuries sustained by learners on the school grounds are Minister of Education and another *v* Peter Wynkwart 2002,[8] Knouwds *v* Administrateur, Kaap 1981,[9] Broom and another *v* The Administrator, Natal,[10] and Lubbe *v* Jacobs 2002.[11] A discussion of the latter case follows.

5.1 Lubbe *v* Jacobs

In the South African law of delict there are five fundamental elements that should be present to prove delictual liability, of which unlawfulness of the act that caused the damage is one. To establish unlawfulness, Neethling *et al* (2001: 47) suggest as one test "the failure or

8 Minister of Education and another *v* Peter Wynkwart 2002 (High Court of SA: Cape of Good Hope; case no 4168/1999).

9 Knouwds *v* Administrateur, Kaap 1981 (1) SA 544 (C) 553.

10 Broom and another *v* The Administrator, Natal, 1966 3 SA 505 (D).

11 Lubbe *v* Jacobs 2002 (High Court of South Africa: Transvaal).

neglect to fulfil a legal duty". A special relationship between the parties concerned must exist, obliging one party to exercise care on behalf of the other. Beloff *et al* (1999: 112) confirm that, in the law of delict, a duty of care has to be established before anyone can be held liable for damage that was suffered on account of his/her negligent behaviour. There is no doubt that the educator-learner relationship embraces this special relationship, and that schools via their educators have a duty of care for the well-being of all learners.

In 2005 much publicity was given to two incidents where bullying on the school grounds had led to severe injuries to a boy in Rustenburg shortly after the death of another boy in Durban. These incidents did not, however, lead to any reported court case. As mentioned, one South African court case that might serve as an example of how courts approach allegations of a breach in the duty of care by educators in cases of injuries to learners is that of Lubbe *v* Jacobs 2002.[12]

Twelve-year-old Nadia, a Grade 7 learner, was injured when a hockey ball was deflected from a stick during the course of a mini hockey tournament. Two games were played simultaneously on one standard hockey field regular, a normal practice in primary school hockey tournaments. Teams of eight players each played crosswise over the field and plastic cones were erected as temporary goal posts. The temporary goal posts had no nets to stop the hockey ball from deflecting onto the bystanders.

After Nadia had finished her game and while her school teacher and hockey coach, Mrs Van Biljon, were refereeing another game, Nadia went to put the teacher's jacket in her bag which was behind one of the temporary goal posts A deflecting hockey ball struck her and she was injured. Lubbe, the father, sued the school and contended that Mrs Van Biljon had been negligent in one or more of the following:

- She did not take proper safety measures.
- She allowed the match to be played on a field without proper goal posts.

12 High Court of South Africa: Transvaal Provincial Division, case no 1225/2001.

- She failed to make arrangements for the students not to be in the vicinity of the temporary goal posts during the matches.
- She failed to take the necessary measures to avoid such an accident.
- She did not execute her duty of care properly.

Lubbe's claim was dismissed with costs by Judge Hartzenberg, who ruled that the teacher had not been negligent and could not be held liable for the incident. The arguments of Judge Hartzenberg were that he contended that twelve- and thirteen-year-old hockey players knew the game. According to the judgment, Nadia was old enough to appreciate the dangers inherent in the game of hockey and Mrs Van Biljon was entitled to accept it.

This approach of a South African court not to hold the educator or school liable is also visible in the cases of respectively Wynkwart and Broom, mentioned previously. How a court will approach a case where a learner is injured during bullying behaviour is still to be seen.

Research findings on school safety and violence released in 1999 in South Africa by the Institute of Criminology of the University of Cape Town reveal that, since 1994, a number of pilot projects have been initiated throughout the country by various organisations in an attempt to promote safer school environments. Security has been improved in many schools and life-skill programmes, psychological empowerment and peer mediation efforts have become common. The results of the research also indicated that a number of new structures aimed at promoting school development and co-ordination of crime prevention efforts have also been established.

5.2 Initiatives against bullying

During the past, decade, a number of projects opposing bullying were initiated in South Africa. Some of these were implemented in a limited area such as a school district or one province, while others are being run on national level.

5.2.1 Catholic Centre for School Quality and Improvement (CSQI)

Rassool (2002: 2) refers to South African Catholic schools, where in 2001 more than 90% of learners at a Gauteng Province school said they had at some point been bullied. The seriousness of the absence of a "hurt-free" environment for all learners necessitated the implementation of a special programme in Gauteng and KwaZulu-Natal. According to the CSQI in Johannesburg, it is proving effective. Some unique forms of bullying exist in South African schools, particularly at the wealthier Catholic independent schools, especially high schools, where character assassinations or "sledging" would be done via cell phone SMS or e-mail messages. This observance has since been confirmed by De Vries (2004: 12) who calls it a "silent epidemic of emotional harassment". The Medical Research Council released statistics indicating that up to 41% of 14 766 learners included in their research indicate that they have been bullied.

5.2.2 Schools, Mediation and Reconciliation Training pro gramme (SMART)

High levels of violence were experienced at urban schools in Kwazulu-Natal, chiefly in the Durban area. These included gang activities by people carrying weapons. Bullying and victimisation of students and teachers occurred in the schools as well as in the local community. In reaction, Margaret Roper, as part of the programmes of the Independent Project Trust, initiated a conflict resolution process.[13] The SMART programme was introduced in the early 1990s. Pupils, teachers and school governing bodies are trained to develop effective dispute and conflict management skills in a democratic way. Learners are trained in peer mediation.

Serious levels of violence made it difficult to use the skills on a regular basis, which in 1997 led to the development of the Community Alliance for Safe Schools (CASS). This task team operates only in Kwazulu-Natal and includes representatives of the major stakeholders. Its purpose is to build a sense of community ownership through

13 <http://www.webpro.co.za/clients/ipt>

partnerships, mobilise communities, protect school children and create safe school environments through effective governing bodies. Similarly, on a national level, the Department of Education initiated the Safe Schools project, in respect of which a manual was distributed to all schools with guidelines on how to cope with offences such as assault, sexual abuse, dangerous weapons and violence in general.

6. Consequences of bullying

The House of Representatives Report on Violence in Australian schools (HRSC 1994: 17) notes that child victims of bullying and violence suffer both physically and psychologically through a generalised fear of others, low self- esteem and depression. Of equal concern is the fact that the harm suffered by a student often continues into adulthood. This is supported by other research (McCarthy *et al* 2001) which indicates that bullies in school tend to become bullies in the workplace while victims at school likewise tend to become victims of workplace bullying. The costs of this anomaly to the community are considerable in terms of welfare, health, policing, insurance and legal expenses, all serving as a drain on community resources.

The HRSC (1994: 17-20) stated that violence and bullying resulted in an inability on the part of the victims to achieve academically and socially; high levels of truancy; illness; stress; tiredness; and disruptive behaviour. Girls were shown to suffer from violence and other forms of controlling behaviour by male students, while girl victims tended to become angry and/or withdrawn, and their feelings of safety, self-confidence and self-worth were severely undermined.

Rigby & Slee (1998: 8) found that specific health problems noted by student victims include a general feeling of not being well, somatic complaints, anxiety, social dysfunction, and depression. The most worrying symptom, as noted in the case of Lisa Eskinazi, is the fact that some victims consider inflicting self-harm and committing suicide. In this regard, 23% of male victims and 32% of female victims compared with 11% of male non-victims and 15% of female non-victims (from samples of 377 boys and 400 girls) reported the recurring idea of taking their own life (Rigby & Slee 1998: 10). While

the causes of suicide among school students are not always evident, it can be argued that bullying is one of the causes. In this regard statistics indicate that the incidence of death from suicide among teenage males trebled during the past four decades while that for females, although not as high, has also increased significantly (Hasan 1995: 13).

As far as teaching is concerned, the HRSC (1994: 18) found that aggressive behaviour in the classroom disrupted effective teaching and learning and that it had become a significant factor in an increasing level of teacher stress. The Committee was informed that many of the teachers who had been assaulted by students failed to receive adequate support from their relevant employing authority, and that many had left teaching never to return.

Several studies have been conducted in South Africa on, among others, learner indiscipline and the effect thereof on educators' security. The adverse effect of a lack of discipline on educator security has been mentioned in various papers by specialists in the field of education law and other education disciplines (cf Lessing & Dreyer 2007: 123, Masitsa 2007: 157, Rossouw 2007: 213, Wolhuter & Van Staden 2007: 396). A survey of South African newspaper reports over the past three years has produced headings such as: cell phone camera case: boy sues teacher (Oellerman 2005); teachers want armed guards at schools (Bolowana 2005); school can't expel dagga pupil (*The Herald* 2007); tensions soar after teachers' murders (Jenkins 2007).

It may be concluded, therefore, that bullying poses a major hindrance to safety and security in any educational setting. As previously argued, a lack of security invariably prevents effective teaching and learning. To counter this situation, effective strategies against bullying should therefore be implemented in schools, as will be discussed in the following section.

7. Qualitative research

In this section of the article, an overview and brief discussion are provided of the results from an international research project which included interviews and surveys of principals' attitudes to learner discipline in Australia and South Africa. In 2002 a team of researchers

from the Faculty of Education Sciences at the Potchefstroom Campus of the North-West University embarked on this project. The basic aim was to determine the major forms of learner misbehaviour in schools, the causes of the misbehaviour and the measures taken to prevent or manage the problem. The project formed part of a wider programme which also involved principals in schools in Britain and Canada. Although qualitative as well as quantitative research methods were utilised, only qualitative data is reported in this article.

In Australia, the research took the form of a sample of convenience with interviews of principals from eight primary schools and two secondary schools in Brisbane, capital city of the State of Queensland. In addition, a questionnaire was mailed to some fifty principals across the state. The interview schedule and the survey questionnaire were designed to determine the nature and extent of learner misbehaviour, its effect on other learners and teachers, and, importantly, the manner in which misbehaviour in schools is treated. Demographic data show that the schools are largely situated in the middle socio-economic inner city suburbs with learner numbers ranging from 75 to 840 grouped in classes ranging from 15 to a maximum of 30 learners. The number of teachers ranged from 4 to 42. The respondents described the academic achievements of their learners as average to above average and misbehaviour problems as being minor in comparison with other schools. The major forms of learner misbehaviour were identified as being "a failure to comply with school rules" or "not following instructions" and these were largely associated with students who failed to attend to their work either appropriately or adequately. In such instances respondents argued that misbehaving students frequently become a source of disruption to others in their class.

Despite the research discussed in this article and the respondent principals' having had learners excluded — suspended and expelled — for certain forms of misbehaviour, it was still claimed by the majority that bullying was not perceived as a problem in their schools. Aggressive behaviour that exists was identified as involving hitting and kicking and other forms of violence, bad or inappropriate language, rough play and some minor forms of body contact. None of

the respondents identified any serious incident of violence involving the use of weapons such as knives or catapults.

In short, as one principal expressed the point, most of the misbehaviour in his school was concerned with "wilful and persistent misbehaviour" such as refusing to follow a teacher's instructions. Only two respondents mentioned bullying as being a learner misbehaviour problem. One of the two principals stated that his primary school:

> … took a really hard line on bullying […] and because bullying we feel is a form of harassment that has to be dealt with. And we do deal with it. We let nothing go by […] We have zero tolerance at this school.

When the question was asked which preventive measures are in place to ensure discipline within the school, only one principal referred to bullying as such:

> We're currently running a school-based Bullying program. We've got quite a few. Things like Peer Support certainly help that. And we've got a Peace Patrol that's run by some of our kids.

The research previously identified in the present study indicates that some form of bullying takes place in every school. It is most likely that the respondent principals did not wish to identify their particular school as having any such problem. In this regard it could well be that despite the researchers' attempts to gain the trust of the respondents, they preferred not to discuss stressful issues such as bullying in a brief one-hour interview. Each school authority in Australia requires its school to implement behaviour management policies and procedures in order to deal with learner misbehaviour. Nonetheless, as the research demonstrates, despite the fact that systems are in place to prevent the problem, various forms of bullying and harassment do occur to a differing extent in each of the nation's schools. As the principal of one of the two secondary schools noted: "I have suspended some students for excessive use of violence. In one case I have gone to an exclusion".

While a single incident of violence does not constitute the existence of learner bullying, this respondent's rejoinder does imply the presence of bullying in some form in his school. It is interesting

to note that in this school during the year there had been some 68 suspensions and it is likely that some of these would be for bullying behaviour. Moreover, only one respondent was adamant that bullying did not occur in her school.

Like the Australians, South African principals, educators and learners showed a marked disinclination to mention bullying specifically during interviews. The qualitative data in South Africa did point out that bullying, in some cases, leads to learner misbehaviour of victims when they play truant for fear of being bullied at, or on their way to school. Others, because of their fear of being bullied after threats in this regard, rather "join forces" with the (often very popular) bully, and become bullies themselves, or at least supporters.

In spite of the scarcity of references on bullying *per se*, the South African data did provide the researchers with a rich variety of proactive as well as reactive or punitive disciplinary methods generally referring to different forms and levels of misconduct. It is clear that it is not the occasional serious incident of misconduct that bothers educators and learners as much as the on-going, persistent occurrence of less serious disruptive behaviour. In some schools a large number of learners per class are guilty of this, but in the majority of schools a reasonable level of order and discipline still exists.

In a suburban Eastern Cape school, some of the learners who took part in a focus group session, openly declared that most disciplinary methods fail to have any positive effect: "The same group of learners sit detention almost every day, but they do not change", one said. "What is more, when serious offenders are suspended for a few days, they see it as a holiday". When these and other learners were asked to suggest more effective methods to combat the misconduct, they said that corporal punishment should be brought back, "because that is all some learners understand".

An educator at a school in a violence-stricken community in the Western Cape admitted that corporal punishment is still administered: "What else is there we can use to save a bit of our dignity and maintain some order with these gangsters?" The more diligent learners in many schools referred to their right to education, and

suggested that serious offenders should be expelled: "Clean up the school!" Most of them are on the verge of adopting a zero tolerance approach. Regarding less serious misbehaviour, a number of educators in schools that have a high level of discipline mentioned that the diligent, positive learners use peer pressure to force offenders to conform to a class climate of order and obedience. Educators in Free State township school are not convinced that suspension or expulsion is the answer. They endeavour to solve the problems in the school, but also mention that many parents are unwilling to become involved.

One effective way of maintaining discipline is described by the principal of a large Western Cape secondary school. He and the staff, in co-operation with the parents, have created a culture of order similar to that of a university, relying on the self-discipline of the learners to be punctual and to attend classes. They are reasonably free to move about the school campus as they see fit, but this freedom is summarily withdrawn in cases of misconduct. Educators confirm that this strategy is effective because the majority of learners take much pride in the confidence shown in them.

8. Strategies for preventing bullying in school settings

It has been argued above that school authorities have a legal duty of care for learners and that this includes providing them with a hostility-free learning environment. While the duty is not an absolute one, it is one in terms of which school managements are required to implement and enforce systems entailing policies and practices which will lead to the provision of a reasonable standard of care for learners' welfare. Throughout Australia, school authorities in both the independent and government sectors require that behaviour management programmes be implemented in order that problems such as bullying may be dealt with in a more effective manner. However, it was demonstrated in the case of Eskinazi that despite the fact that policies and procedures were in place, they were not followed.

Curwin & Mendler (1997) have provided a number of recommendations that have been adapted by Stewart & Knott (1999: 113),

in terms of which it is proposed that an effective school policy to combat student bullying would include the following:

- the existence of practical strategies;
- acceptance by staff that some level of confrontation between students is healthy and normal;
- programmes and policies that are based on core values rather than rewards and punishments;
- expected student behaviour being modelled, taught and believed in by everyone in the school;
- acceptance that both victims and perpetrators of bullying behaviour must be accepted positively in, and by the school community;
- a mix of persons, including student representatives, who create and implement the school anti-aggression programme.

Such a system would need to be school-wide and require commitment on the part of the staff in order to prevent bullying behaviour. The programme would teach students appropriate behaviour expected in a range of situations and would include management of individual aggression. These measures would provide students with models which in turn would enable them to make informed and more appropriate choices regarding their personal behaviour.

In comparison, research in South Africa by Neser *et al* (2003: 3) suggests the following seven steps:

- assess the school's needs and goals;
- develop an anti-bullying policy;
- provide training for teachers, administrators and other school staff;
- involve parents;
- identify resources for bullies, victims and families;
- provide increased supervision in areas where bullying tends to occur;
- integrate anti-bullying themes and activities into the curriculum.

Another strategy in South Africa to cope with this problem is the clustering of schools. As part of the previously mentioned CASS programme, the IPT has facilitated the development of a manual for head teachers, and a series of workshops and training sessions in three pilot schools using a "cluster" approach. The three schools are situated within a 10 km radius from each other, and the relevant individuals work together to collect data and diagnose their school safety

problems. Together they have developed school security plans, and paid attention to problem-solving and negotiation. School safety committees have been established as well as better security, monitoring, counselling, police relations and communication.

By the year 2000, two of the schools were able to report having experienced significant improvements in terms of security. Levels of violence reporting had increased as fear of reprisals diminished. The "cluster" approach was particularly important. Members of the schools' managements expressed their belief that they would have been unable to effect change without the facilitated support of IPT. Clustering had also proved valuable for collective problem-solving — the three schools had successfully lobbied for a change in school bus routes — something they had failed to do independently before.

9. Conclusion

Australian schools are, by and large, safe places to learn and to work in. Moreover, while they may be on the increase, incidents involving weapons are few and incidents of violence by learners in schools are generally speaking not perceived as causing serious challenges to authorities. In comparison with the Australian schools, most of the South African schools that were included as part of the investigation experience similar levels of discipline, the same ratio between serious and less serious offences by learners, and similar approaches to these problems. Although respondents did not specifically name the problem, literature reveals that there exists an increasing occurrence of bullying, ranging from physical threats to emotional and psychological harassment. In South Africa, the more aggressive forms of misbehaviour such as rape, physical assault and drug abuse are more frequent in socio-economically less affluent areas and in townships where violent behaviour and gangsterism have become part of community life.

For the sake of effective teaching and learning in schools as well as of learner safety, it is crucial that effective measures be taken to curb all forms of serious misconduct, including bullying. Educators should realise that their legal duty of care includes the creation of a

safe and secure learning environment for every learner — since it is reiterated that this comprises a crucial element of a successful legal risk management strategy.

It is evident that schools need more than systems or codes of conduct. They need to ensure that these are adequately operationalised and enforced. While the principal and staff at school level should enforce codes of conduct, the governing bodies should assist them by means of properly functioning disciplinary committees which in turn should be ready at short notice to attend to all allegations of serious misconduct, and specifically those forms of misconduct that may lead to suspension or expulsion. By means of prompt reaction and fair procedures, the disciplinary committee can do much to maintain a high level of order at the school, and in so doing prevent more disruptive behaviour and curb the prevalence of specifically bullying behaviour.

The provincial departments of education also play a significant role by objectively paying attention to schools' pleas for assistance in cases of serious misconduct, particularly in cases where expulsion is recommended. Too often it is heard that schools feel helpless when departmental officials seem to protect the wrong-doer, instead of properly caring for those who fall victim to aggressors. The ultimate responsibility for learner safety lies with the Department of Education, which can be held liable for injuries caused by, *inter alia*, incidences of bullying. This responsibility should prompt departments to establish a well-formulated legal risk management strategy, and they should ensure that schools follow suit.

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