

LEGAL RESPONSES TO CYBERBULLYING BY CHILDREN: OLD LAW OR NEW?

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Cyberbullying presents an old problem in a new form. Advances in technology have often presented new challenges for the law to solve; as Windeyer J observed in 1970, the law marches with other disciplines ‘but in the rear and limping a little’.¹ One recent challenge has arrived as a result of the expansion of the internet and the ubiquity of social media use among young people and children. Cyberbullying by schoolchildren poses significant problems for lawyers and school authorities, as the primary article by Peta Spyrou demonstrates. One of the questions that arises is the adequacy of the law’s responses to these technology powered wrongs. Are existing legal responses sufficient, or do we need to respond more creatively by introducing new legislative remedies? This comment will consider whether the two established legal regimes of tort law and the criminal law can offer a satisfactory response to the problem of cyberbullying, before moving on to outline some innovative legislation introduced recently by the governments

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¹ *Mt Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 395 (commenting on advances in medicine).

of Australia and New Zealand. It suggests that the law of torts is not currently equipped to deal directly with many of the problems caused by cyberbullying and argues that using the weight of the criminal law is not always an appropriate response to wrongs committed by school children. It concludes that the recent legislative initiatives can offer a more efficient, effective and restorative response.

I CAN TORT LAW PROVIDE AN ADEQUATE CIVIL REMEDY?

There are two features of tort law that make it difficult for victims of cyberbullying to obtain a civil remedy. The first is tort law's traditional attitude to the harm known as 'mere emotional distress' and its insistence that a plaintiff must suffer a recognised (or recognisable) psychiatric illness before liability in negligence will be imposed. The second is the fact that civil justice is costly both in terms of time and money, which means that pursuing a remedy through the courts is often neither practicable, nor effective.

A *The Tort of Negligence*

Tort law has traditionally been sceptical about the harm that it has labelled 'mere' emotional distress and in the past judges have treated claims for 'nervous shock' with extreme caution, if not outright suspicion.² Pure emotional distress, sorrow, grief or 'lacerated feelings' on their own do not amount to sufficient 'harm' to attract a remedy in negligence.³ This means that plaintiffs in any case of cyberbullying would have to prove that they suffered from a recognised form of psychiatric injury before they could be successful in a claim in negligence against a school authority that failed to take reasonable precautions to prevent the harm from occurring. This poses a problem because, in many cases of cyberbullying, the harm suffered by a victim in the form of feelings of humiliation, fear and ongoing anxiety etc, may not be enough to reach the required legal threshold — or may not emerge until after a lengthy period of bullying occurs. The law of negligence may, therefore, not directly cover the vast majority of cases, and consequently it can be seen as falling short of offering an appropriate response to the problem of cyberbullying.

² Ibid 402-5 (Windeyer J).

³ *Tame v New South Wales* (2012) 211 CLR 317, 381 [192] (Gummow and Kirby JJ); see also Hayne J, 399-400 [243]-[246].

This apparent failure of the law of negligence, however, does not reveal the full effect of the law. Although negligence would not directly offer a remedy in all cases of cyberbullying, it does have an indirect beneficial effect. If schools develop effective policies to deal with serious forms of cyberbullying, these policies will also serve to protect other students who do not go on to suffer more serious psychiatric consequences. By aiming their protection against the worst case, the policies will also bring relief for the less serious cases. So, while the *remedial* function of tort law may not provide direct benefits to all cyber victims, the *deterrent* effect of the tort of negligence and its insistence that a school must do all that a reasonable school would do to protect students from the foreseeable harm caused by cyberbullying by other students, may provide an indirect benefit for all potential victims. This means that while the tort of negligence may not provide a remedy to all victims, the fact that it exists as a potential cause of action does have a protective effect that extends beyond its primary remedial function.

B *The Intentional Infliction of 'Nervous Shock' Injury*

Although the law does not recognise 'mere emotional distress' as a sufficient harm to found an action in negligence, there is another cause of action that could provide victims of bullying with an alternative in the form of a suit taken directly against the perpetrator of the conduct. The action on the case for the intentional infliction of 'nervous shock' or psychiatric injury, commonly known as the tort in *Wilkinson v Downton*,⁴ protects us against intentional, worthless, antisocial conduct that threatens our mental and psychological integrity. The elements of this tort require that:

1. There must be a positive act or deliberate statement made by the defendant.
2. The defendant's act must indirectly cause nervous shock (psychiatric injury) to the plaintiff.
3. The defendant must have wilfully intended to shock, upset or terrify the plaintiff (or been reckless about causing such shock or upset).
4. The defendant's conduct must be 'calculated' or objectively likely to cause nervous shock (psychiatric injury).⁵

The current status of this tort is uncertain,⁶ but some cases of cyberbullying could fit within its elements, provided the victim developed a psychiatric

⁴ *Wilkinson v Downton* [1897] 2 QB 57.

⁵ See Julia Davis, *Connecting with Tort Law* (Oxford University Press, 2012) 150-7.

injury. The recent case of *Nationwide News v Naidoo*⁷ provides an example where this tort was used in the NSW Court of Appeal to justify an award of damages to a plaintiff who suffered from sustained workplace bullying and harassment.

In the case of *Khorasandjian v Bush* an 18 year old woman, who was subjected to a campaign of harassment by a former boyfriend, was granted an injunction forbidding him from ‘using violence, harassing, pestering or communicating with the plaintiff in any way’.⁸ The majority in the English Court of Appeal decided the case on the grounds that the harassment, including abusive telephone calls, amounted to a private nuisance, but they also cited the *Wilkinson* line of cases, noting that while the law does expect the ordinary person to ‘bear the mishaps of life with fortitude’ it does not expect an ordinary young person ‘to bear indefinitely such a campaign of persecution’.⁹ Given that there was ‘an obvious risk that the cumulative effect of continued and unrestrained further harassment’ would be likely to cause a psychiatric illness, the Court granted the injunction on a *quia timet* basis.¹⁰ The dissenting judge, who rejected the nuisance argument, did accept, however, that the tort in *Wilkinson v Downton* ‘amply justified’ granting an injunction to restrain conduct that if continued, would impair the health of the victim, provided the injunction was limited by the words ‘calculated to cause the respondent harm’.¹¹ This case illustrates the point that an injunction can be sought to prevent an ongoing campaign of harassment, without the need for victims of cyberbullying to wait until they develop a full blown psychiatric illness, provided they can show that the conduct is ‘calculated’ or ‘objectively likely in the circumstances’ to cause illness.¹² The issue remains, however, whether requiring school students to go to court to ask for relief is an appropriate response to cyberbullying.

⁶ The High Court of Australia recognised the existence in of this tort in *Bunyan v Jordan* (1937) 57 CLR 1, but in *Magill v Magill* (2006) 226 CLR 551, [117] Gummow, Kirby and Crennan JJ suggested that the tort derived from *Wilkinson v Downton* [1897] 2 QB 57 has been ‘subsumed under the unintentional tort of negligence’.

⁷ *Nationwide News v Naidu* (2007) 71 NSWLR 471.

⁸ [1993] QB 727, 728.

⁹ *Ibid*, 736 (Dillon LJ, with whom Rose LJ agreed). The majority judges cited the Canadian nuisance case of *Motherwell v Motherwell* (1976) 73 DLR (3d) 62, where the Appellate Division of the Alberta Supreme Court issued an injunction to restrain the defendant from persistent harassment by telephone calls: 734-5. (Note that the private nuisance aspect of the decision in *Khorasandjian v Bush* was overruled by the House of Lords in *Hunter v Canary Wharf Ltd and London Docklands Development Corporation* [1997] 2 AC 655.)

¹⁰ *Ibid* 736.

¹¹ *Ibid* 746 (Peter Gibson J).

¹² See *Carrier v Bonham* [2002] 1 Qd R 474.

C *The Intentional Infliction of Severe Emotional Distress*

The courts in the United States have extended the *Wilkinson* tort to allow claims for the intentional or reckless infliction of severe emotional distress. As Maxwell P pointed out in *Giller v Procopets*,¹³ the American *Restatement of the Law (Second) Torts* describes ‘intentional infliction of emotional distress’ in these terms:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.¹⁴

No case in Australia has extended the tort to cover mental distress falling short of psychiatric injury. However, in the Victorian case of *Giller v Procopets*, Maxwell P argued that: ‘the requirement to show physical harm as a signifier of psychological harm is anachronistic’; the assumption that a clear line separates ‘psychiatric illness’ from mental distress is ‘unsustainable’; and that the focus should simply be on ‘the nature and extent of the mental distress actually suffered by the plaintiff’.¹⁵ Maxwell P would have awarded damages for the intentional infliction of emotional distress and humiliation in this case where an estranged de facto partner had shown or threatened to show to others videotapes of sexual activity between the defendant and plaintiff, but neither Ashley JA nor Neave JA agreed on this point. Given the position taken by the majority judges in this case, any victim of cyberbullying who had not suffered a psychiatric injury but who wanted to extend the law by taking a case to the High Court would face a dauntingly difficult, lengthy and uncertain legal battle.

D *The Tort of Defamation*

The tort of defamation may also cover some varieties of cyberbullying. Defamation is the unjustified conduct by the defendant that communicates to a third party some matter that has the capacity to diminish the plaintiff’s reputation or to lower their standing in the community and the esteem in which they are held by others.¹⁶ Recent reports suggest that social media platforms like Facebook, for example, have led to a notable increase in the number of defamation inquiries received by law firms and a sharp rise in the

¹³ *Giller v Procopets* (2008) 24 VR 1.

¹⁴ *Ibid* 14 [37].

¹⁵ *Ibid* 13 [31].

¹⁶ Davis, above n 5, 273.

number of social media cases coming before the courts.¹⁷ So, where one student spreads false and malicious rumours about another student to a third party, liability in defamation may apply and injunctive relief as well as compensatory damages may be awarded. The benefits of using the tort of defamation is that, unlike negligence, it does not require proof of a recognised psychiatric illness as a threshold test before liability is imposed, nor does it require proof of any particular intention to harm the plaintiff. However, while some, but not all, bullying conduct may be covered by the tort, defamation is a highly technical and complicated tort with intricate rules of procedure and pleading, and it may be beyond the means of many victims.

E *The Cost and Problems Associated with Taking Civil Action*

Civil remedies are not only costly to pursue, but also time consuming to maintain. This means that they will almost always be beyond the means of the families whose children are victims of bullies, and even if a case is brought successfully, it may be years before a court imposes a remedy. Traditional remedies in the law of torts are focused on compensatory damages, but it can be argued that compensation many years after the event is not really what children who are being harassed or bullied need; rather, their need is for immediate support and quick action to stop the harassment. Furthermore, if the wrongdoer is also a child, there may be very little hope that any award of damages would actually be paid. Without means, a child would be unable to pay damages, and the law does not impose liability on the parents for the torts of their children unless it can be proved that they are personally at fault.¹⁸ This suggests that pursuing a remedy through the law of torts may not suit the immediate needs of most child victims — nor would it operate as an effective deterrent to many child tortfeasors.

Because the cost of pursuing a legal remedy in terms of time, money and effort is so high, it appears that the law of torts offers at best, only indirect protection to the vast majority of victims of cyberbullying in schools. The remedies it offers will often be too late, too hard to pursue, and possibly pointless.

¹⁷ Mariann Papdakakis, 'Facebook Defamation Surge Challenges Courts', *Financial Review* (online) 25 August 2015, < <http://www.afr.com/business/legal/facebook-defamation-surge-challenges-courts-20150825-gj74hv>> notes that the number of NSW District Court action concerning social media doubled from 31 in 2013 to 61 in 2014.

¹⁸ *Smith v Leurs* (1945) 70 CLR 256, 262 (Dixon J).

II CRIMINAL LAW: DO WE WANT TO CRIMINALISE SCHOOL CHILDREN?

Chris Berg and Simon Breheny have argued that the criminal law offers substantial protection for those who are victims of cyberbullying, citing both Commonwealth and state crimes that forbid and punish conduct including stalking, making threats, and using a carriage service to menace, harass, or cause offence.¹⁹ While it is true that some examples of cyberbullying may in fact be covered by criminal offences, the issue is whether we want to use the blunt force of the criminal law to deal with children who bully others. The criminal sanction carries serious consequences for those convicted of crimes and the mere fact of conviction can have serious implications for a child's future life. We should be wary of imposing the stigma of a criminal conviction on children, and indeed the criminal justice system has always treated children and juvenile offenders as a special case warranting extra leniency and an increased emphasis on rehabilitation. As Newman J of the South Australian Children's Court explained in 1983:

Juveniles are less mature – less able to form moral judgments, less capable of controlling impulses, less aware of consequences of acts, in short they are less responsible and less blameworthy than adults.²⁰

This understanding of the special position of children suggests that restorative rather than punitive responses may be a better way of dealing with the problem of cyberbullies.²¹ Indeed, given some estimates of the prevalence and scale of this type of bullying behaviour, (which suggest that between 6 to over 40 per cent of young people have experienced cyberbullying and indicate that children in both primary and secondary school can be perpetrators),²² we should question whether as a community, we are prepared to criminalise such a significant and youthful section of the school population. The full weight of the criminal law should be reserved for the most egregious examples of cyberbullying and we need to consider whether,

¹⁹ Chris Berg and Simon Breheny, 'A Social Problem, Not a Technical Problem: Bullying, Cyberbullying and Public Policy' (Institute of Public Affairs, 2014) 17-21.

²⁰ South Australia, Children's Court Advisory Committee, *Annual Report*, (1983) 6-7, cited by Richard G Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2nd ed, 1999) 827.

²¹ See, eg Susan Hanley Duncan, 'Restorative Justice and Anti-Bullying Laws' (2011) 37 *New England Journal on Criminal and Civil Confinement* 267.

²² Ian Katz et al, *Research on youth exposure to, and management of, cyberbullying incidents in Australia: Synthesis report* (SPRC Report 16/2014). Sydney: Social Policy Research Centre, UNSW Australia, 2. For a recent comprehensive survey on both perpetrators and victims of covert bullying, see also Donna Cross et al, *Australian Covert Bullying Prevalence Study*, Research Report for Department of Education, Employment and Workplace Relations (2009).

in the majority of cases, community and police resources would be better directed down a different path.

III TWO LEGISLATIVE RESPONSES

This comment has argued that neither the civil nor the criminal law provides an adequate response to cyberbullying involving school children: tort remedies may not satisfy the needs of the victims, and the harsh sanctions of the criminal law may not be the best way to deal with the perpetrators. In recognition of these deficiencies in the current legal regime, parliaments in both Australia and New Zealand have crafted a new approach to the problem of cyberbullying that is designed to give better support to victims and their families and to respond in new ways to those who bully others via the internet. The Australian *Enhancing Online Safety for Children Act 2015* (Cth) and the New Zealand *Harmful Digital Communications Act 2015* (NZ) both entered into force this year.²³ While there are several important differences between the two pieces of legislation (most notably, the fact that the Australian statute is limited to assisting only children who suffer from online bullying, whereas the New Zealand law applies to adults and children alike),²⁴ both statutes have been designed to provide victims with a speedy, government funded alternative to seeking expensive legal advice or going to the police. So, child victims of cyberbullying in Australia (or their parents) are able to complain to the Australian eSafety Commissioner and any person who is targeted by harmful digital communications in New Zealand has access to an Approved Agency. Both the NZ Agency and the Australian eSafety Commissioner have powers to investigate complaints and assist in securing the removal of the harmful digital or online material that breaches the relevant standards.

The Australian policy focuses on three outcomes:

- the rapid removal of cyber-bullying material from large social media services;

²³ The *Enhancing Online Safety for Children Act 2015* (Cth) received Royal Assent on 24 March 2015 and the *Harmful Digital Communications Act 2015* (NZ) received Royal Assent on 2 July 2015.

²⁴ The New Zealand statute also introduces new offences of 'causing harm by posting digital communication' in s 22. Another important innovation in the New Zealand legislation is the statutory recognition of ten 'communication principles' in s 6 that guide decisions made under the Act.

- a more effective response to cyber-bullying complaints that cannot be managed at the school level but may not warrant a criminal justice response; and
- quality assurance of online safety programmes offered in schools.²⁵

The New Zealand legislation is designed to:

- deter, prevent, and mitigate harm caused to individuals by digital communications; and
- provide victims of harmful digital communications with a quick and efficient means of redress.²⁶

If the initial approach by the government representative to resolve the complaint is unsuccessful, both statutes allow more serious legal actions to be taken against a person who has posted cyber-bullying material targeted at an Australian child (under Part 5 of the Australian statute) or against a person who is responsible for a harmful digital communication (under s 19 of the New Zealand statute).

It is beyond the scope of this brief comment to explore the two statutes in detail, but two key points suggest that the legislative response is a superior alternative to simply leaving the victims of cyberbullying to pursue traditional avenues of redress on their own. The first aspect is symbolic; the strength of the government stands behind the victims and this sends a powerful message to the bullies and offers powerful support to the victims who no longer need to feel so alone and vulnerable. This symbolism extends to the two-step process envisioned by both statutes, which mandate a more restorative approach to doing justice that involves advice, negotiation, mediation and persuasion as a first line response, before any of the more coercive aspects of the justice system are brought to bear against wrongdoers.²⁷ This staged approach is particularly well suited to dealing with young children who engage in cyberbullying.

The second aspect relates to the practical and procedural matters: establishing a single government agency in each country to deal with victims and wrongdoers and to maintain relationships with online service providers will lead to a less fragmented, more efficient and consistent national approach to cyberbullying. The new orders available under the legislative regimes are

²⁵ Explanatory Memorandum, *Enhancing Online Safety for Children Bill 2014* (Cth), 22.

²⁶ *Harmful Digital Communications Act 2015* (NZ) s 3.

²⁷ See eg, *Harmful Digital Communications Act 2015* (NZ) s 8(1)(c).

more flexible than those offered by the traditional legal system and include take down orders, correction orders and orders for apologies. Furthermore, neither of these statutes require proof of psychiatric illness as a threshold for protection and consequently, the protection they offer is much wider than the current coverage given by the law of torts.²⁸ Finally, these two statutes will facilitate much faster responses to events than the traditionally slow responses offered by the civil justice system, and in this context, where children are in danger of suffering from the harmful effects of cyberbullying, speed is a virtue.

Of course, any legislative initiatives like these will inevitably cause some restrictions on existing freedoms, as Chris Berg and Simon Breheny point out.²⁹ The expansion of legal protection for victims of cyberbullying must have the corresponding effect of cutting down upon existing protections for freedom of speech enjoyed by those who use social media to publish material about others. Although the right to freedom of speech is not absolute and is already subject to a number of limitations, it is, along with the other fundamental rights to liberty, bodily and mental integrity and autonomy, an important and valued right. For this reason, the *Enhancing Online Safety for Children Act* has made provision not only for regular Annual Reports in s 66, but also requires in s 107 that the Minister must conduct a special Review of the entire operation of the Act within three years after its commencement. If the Review reveals that the new statute has pushed the balance between these fundamental rights too far in the wrong direction, and shows that the law is still 'limping a little', then further improvements can be made. But, as Windeyer J pointed out in *Mt Isa Mines Ltd v Pusey*,³⁰ new technologies sometimes require new legal responses, and these attempts to offer a faster, more appropriate method of dealing with the problem of cyberbullying are to be welcomed.

²⁸ The Australian statute applies to material that is perceived by an ordinary reasonable person to be 'seriously threatening, seriously intimidating, seriously harassing or seriously humiliating': s 5(1)(b)(ii) of the *Enhancing Online Safety for Children Act 2015* (Cth). The New Zealand statute defines harm in s 4 as 'serious emotional distress'.

²⁹ Berg and Breheny, above n 19.

³⁰ (1970) 125 CLR 383, 395.