

⁶ Convention Article 28 (1) (f)

⁷ See the following articles:

Fiona Buffini, 'Policing e-commerce', *The Australian Financial Review* (Sydney), 5 July 2001, 53

Kingshuk Nag, 'And now a Net dispute redressal system', *Times of India* (Delhi, India), 25 June 2001

'Regulating the internet: Tied up in knots', *The Economist* (London, UK), 7 June 2001

Patrick Thibodeau, 'Pending deal alarms E-commerce experts', *Computerworld* (Framingham, United States), 28 May 2001

Christopher Stern, 'Copyright holders vs. Telecoms – interests clash in debate on regulating global commerce', *Washington Post* (Washington, United States), 16 May 2001, E4

⁸ 'Regulating the internet: Tied up in knots', *The Economist* (London, UK), 7 June 2001

A school's duty of care to its students in cyberspace

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1. Introduction

Each week millions of school students catch a bus to cyberspace in the form of a browser, some for a few hours, some for total immersion.¹ Unlike their atom-world school, cyberspace is a "total interconnectedness of human beings through computers and telecommunication without regard to physical geography."² In cyberspace they do not deal with atoms, be they books, bubblers or bullying boys. They deal with "informational products"³ reduced to one single medium, a 'world of bits'.⁴

Justice Penfield Jackson found ninety-five per cent⁵ of internet users utilise the browser of one company. Consequently, the bulk of students board a bus called Microsoft Internet Explorer. Unlike travel to traditional schools, students remain on this bus, as they learn in cyberspace. Its architecture determines their modes of learning.

The authentication mode is "unauthenticated pseudonymity"⁶ - student gender, and, more particularly their age, is unknown. So the student who logs onto the Revs "Dealer Network" system to simulate buying a car in a cyberspatial lesson⁷ is advantaged by anonymity and treated as seriously as the query of any adult. Paradoxically the sense of liberty in such anonymity is tempered by

internet surveillance methods such as I.P. addresses⁸ and cookies.⁹ In contrast, the student entering a sex shop of the atom-world does not have the advantage of anonymity and therefore has self-authenticating difficulty getting around the norms and laws that regulate access to such products.

Yet to cyberspace we take our atom-world personalities, laws and values. Schools have a duty of care to their students in the atom-world. This paper examines this duty in cyberspace.

2. The Legal definition of a 'school'

Atom-world definitions of a school are steeped in notions of physicality and see them as command-driven places of unidirectional instruction. Knowledge is "imparted...instruction is given..."¹⁰ On the other hand, schooling in cyberspace is interactive and promotes the exchange of ideas beyond the walls of the school. This clash was tested in *Ford and Net Grammar School Pty Ltd v Board of Studies*.¹¹

In this decision, Net Grammar School applied to NSW Administrative Tribunal to review the decision of the Board of Studies ('the Board') to reject its application for initial registration of a proposed school and

allow it to represent candidates for the Higher School Certificate ('HSC'). Net Grammar sought to educate via the internet¹² enabling qualification to anyone anywhere in the world¹³, through interactivity that includes "group discussions through Microsoft NetMeeting and a dedicated chat room, talking to his or her tutor using ICQ E-mail service, and self-managed learning..."¹⁴

The Board of Studies argued that they were not competent to deal with the application because it proposed a 'school' that did not fall within the meaning of the *Education Act 1990* (NSW) ('the Act')¹⁵, expressing monitoring and control concerns.¹⁶ The Board relied on several sections of the Act which states registrants must have satisfactory premises¹⁷, mandates compulsory attendance¹⁸ and states alternatives such as home schooling be in a defined physical setting.¹⁹

The term 'school' is not defined by the Act but both parties accepted that it was to have its natural meaning. However Net Grammar argued for a wider interpretation than that put forward by the board to encompass "a modern interpretation reflective of changes in the wider social environment of learning" in the meaning of the term 'school'.²⁰ The school also argued that a school is not only "a fixed educational location"²¹

requiring attendance and that the school's aim in seeking to provide educational services for children living in remote areas of Australia or countries outside Australia should be considered. In its application, when asked to state the school's buildings they boldly asserted: "As the Net Grammar School is a virtual classroom this section does not apply."²²

The tribunal found for the school stating that they "favour a meaning of the kind that appears first in the *Australian Concise Oxford Dictionary* – 'an institution for educating children or giving instruction', which avoids undue emphasis in referring to the term 'school' as a place where students physically assemble for education."²³ Hence the application for registration by Net Grammar was a proposal for a 'school' in the broad sense of the term. That is, it proposed an institution for the provision of education and instruction. The Board was ordered to reconsider the application on that basis.

It would appear that the Board's preferred definition is a result of 'Is-Is-ism'²⁴ – because that is the way things are, that is the way we suppose they must be.

Before we can consider a school's duty of care in such a cyberspace, let us first examine their duty in the atom-world.

3. A School's 'Atom-World' Duty

To establish liability one has to prove there is a duty of care, the duty has been breached and that the breach was a cause of the injury or loss.

The duty of school authorities to students is neither a duty of care, nor a vicarious liability for the negligent acts of its employees. It is more onerous. It is a duty "not to take reasonable care but...to ensure that reasonable care was taken with respect to the Plaintiff's safety."²⁵ The duty can not be delegated to another school authority,²⁶ a sub-contractor,²⁷ or another student acting as a volunteer.²⁸ This duty is also owed to parent volunteers on school camps²⁹ though

the standard of care required will be lower. Nor can schools easily argue contributory negligence. The standard of care students owe for their own safety and that of fellow students is only at the level of those of the same age, intelligence and experience.³⁰

Due to the nature of students, the standard of such care is very high. They have a "propensity to meddle with anything"³¹ and are driven by the "foreseeable folly of youthful exuberance."³² Initially the scope of duty was that of a "careful father"³³ but it is now accepted that a school's legal responsibility goes beyond that of a parent. As Murphy J pointed out in *Introvigne*, unlike a home, students have no choice of their classmates, injury can occur through sometimes malicious behaviour and a school has the right to control what occurs.³⁴

Consequently, unlike most other areas of tort where there is no duty for non-feasance, schools have a duty that is one of "affirmative action to take reasonable steps to protect [students] against risks of injury which reasonably ought to be foreseen."³⁵ Schools are replete with non-feasance possibilities in negligence – a failure to supervise,³⁶ a failure to break up a fight,³⁷ a failure to supervise a bus queue.³⁸ In measuring standard of care, *Romeo* considerations³⁹ such as the cost of preventing the particular accident, or the cost incurred in measures to avoid all accidents of like kind in the future are irrelevant when the duty is to ensure reasonable care is taken.

Nor it is adequate to think once a student has left the grounds the duty is null and void. The scope of duty was extensively widened in *Koffman*. The nature and extent of duty "is dictated by the particular circumstances of the relationship", and not limited by "the fact that the final bell has rung and the pupil has left the school. The relationship does not begin and end at definite times each school day."⁴⁰

Does this mean that the duty is 'res ipsa loquitur' - negligence on the part of a school authority can be inferred from the mere fact there was an accident and injury?⁴¹ If this were the case, would it not make school

authorities liable for "an indeterminate amount for an indeterminate time to an indeterminate class."⁴² While courts differ little over the imposition of a duty or the standard and scope of that duty, there is considerable difference over what constitutes "reasonable foreseeability" in a breach and whether, if there was a breach, the injury would have occurred but for the breach. Teachers supervising a regular cricket game for weeks were not found liable for a boy hurt by the jagged end of a bat made from a broken bench slat.⁴³

Recently a decision of the Supreme Court of the ACT was overturned by the FCA due to varying opinions on causation. The lower court found the school authority liable and granted \$770,000 in damages even though it held the Principal and the teacher had not been negligent.⁴⁴ A boy with a pre-condition (unknown to the school) of severe internal bleeding resulting from the slightest knock, was kicked during play-lunch 'horseplay'. The FCA could find no causal link between lack of supervision and the resultant injury. Arguing the nature of boys "would require an army of supervisors"⁴⁵ to prevent such accidents the court lowered the bar for the standard of care. Wilcox J held that educational authorities have a "duty to take reasonable steps to protect students from significantly violent behaviour, or from prolonged unwelcome physical attention, I do not think it can realistically be said that the duty extends to protecting an apparently normal 15 year old boy from receiving, over a short period of time, playfight kicks from his friend,"⁴⁶ So while a duty existed, this duty was not breached as it was successfully argued that the lack of supervision was not a cause of the injury. Application for leave to appeal this decision on the basis of causation was recently denied.⁴⁷

4. The Duty in Cyberspace

Let us now apply these atom-world laws to two cyberspatial scenarios.

Scenario 1 – Physical injury

A boy aged 15 works at home and logs onto the school web site hosted on the server of an internet Service

Provider (ISP). From the school's Science Page, he hyperlinks to a scientific site about bombs. This site has a link to another that gives detailed instructions on making a bomb.⁴⁸ The school was aware of this and the IT director had emailed the ISP a list of sites to be added to the filtering software to block it. The ISP had not done so. The boy proceeds to make the bomb. It explodes causing permanent injury.

Under *Koffman*, there is little doubt that the school would have a duty to this boy engaging in school activities. A central aim of cyberspatial education is to make school work available from "anywhere" at "a time of their choosing".⁴⁹ Cyberspace will increase the scope of duty. The negligence in not updating the filter software could mean the school has breached one of its non-delegable duties. This liability is complicated further, by the fact recent, narrow-sighted legislation renders ISPs liable in preventing "exposure to Internet content that is unsuitable for children,"⁵⁰ and the site could be subject of a 'take-down notice'. This extends the scope of possible complainants to whom the school is accountable. It places the school in a position of reliance on another for carrying out non-delegable duties. Disregarding ISP liability as a co-defendant, persuasive evidence in the USA outlines other factors in considering a school's duty. Filtering software creates a 'false sense of security and complacency' and is beyond the budget and technical capacity of many schools.⁵¹ It is important to examine a school's acceptable use policy ('AUP') and establish whether internet access is regarded as a right or a privilege. If a right, the onus is on the school to have a higher standard of care.

In a cyberspatial setting, teachers are primarily responsible for content selection and creation, not text book companies – so they have a higher legal responsibility.⁵² It has been argued the further a breach of duty (ie accident) is from the school, the less control a school has over the standard of care necessary.⁵³ Yet in cyberspace everyone is equidistant – simply a login away – and while a school has

granted access and has control, they can not take disciplinary actions at the point of the breach – only after the event.

Clearly, there are significant causation problems for any attempt to recover on behalf of the boy. It can hardly be argued that, but for the failure to remove a Web link, the boy would not have been injured. In the author's opinion, his actions in proceeding with the bomb presents sufficient 'new intervening acts' to break the chain of causation.

Scenario 2 - Mental harm

It will always be difficult to prove causation for a breach of duty in cyberspace that results in a physical injury. But what if the injury is one of mental harm?

Consider the following scenario. As part of a Civics course, students in a girls' school use a link from a Social Science Web page to a site enabling users to create online polling. During lunch-time, from a supervised school computer lab, a girl designs a poll: *Who is the biggest slut in Year 7?* The site lists a set of possible candidates. Students at the school and other students with Web access at other schools vote in this e-poll. Results are updated and presented in real-time.⁵⁴

Whether the school could have reasonably foreseen the act and whether the teacher who supervised the computer lab could supervise the content of the 'private' work of up to 30 students on their own laptops is a question no court has yet considered. However, but for the teaching of the e-polling system and the students access to it promoted by the school, it is reasonable to assert that the unfortunate candidates in this e-poll would not have suffered 'nervous shock' that could foreseeably arise at having been publicly branded a slut by their peers. Even though the duty and causation are well established laws of the atom-world, they will still rescue the school authority from liability. In Australia the girls must show a sudden jolt that results in a "psychiatric illness" attested by expert evidence rather than mere 'mental distress'.⁵⁵ Even if such nervous shock is suffered, its application is limited to

set categories for a duty of care to arise in its prevention. These duties are tied to shock from fear of damage to one's property⁵⁶ or to one's physical person.⁵⁷

Nevertheless, in order to make a political or moral example, it is not unforeseeable that angry parents may at least try to gain nominal damages (because an injury cannot be made out) against a school that enables access to unacceptable sites due to inadequate supervision. In the USA one parent has sued a school authority for denying him access to computer files that would allow him to check the validity of district filtering policies by viewing sites visited by students.⁵⁸

5. Conclusions

In short, the 'slow-wing'd turtle'⁵⁹ of common law tort protects injury to body or property, not injuries to the mind resulting in mental anguish. However cyberspace and information society involve matters of the mind and intangible wrongs. Unless the tort is so grievous that it results in nervous shock resulting in physical harm to the person concerned, it is unlikely a tort can be made out.

Schools should not be overly cautious in regulating access to cyberspace that brings forth enormous and well documented educational benefits. Internal access procedures such as providing students with user names linked to the school domain name and use of internal audit trails would regulate the scenario for mental harm outlined above. Much school misfeasance is brought about by students using anonymous user names promoted by Hotmail and other such groups. It is the author's view that sites that allow creation of anonymous identity should be filtered. But neither tort law nor efficient internal procedures can adequately regulate the coded architecture of "unauthenticated pseudonymity" inherent in the current dominant browser.

Lawrence Lessig argues governments should take a more direct role in framing how code defines and regulates cyberspace.⁶⁰ This form of regulation does not rely on common law tort duty of care which is limited by its concern with remedies after a

breach has occurred. Regulation in cyberspace can be more proactive and avoid a breach rather than be reactive to a breach. Rather than let code writers at institutions such as Microsoft impose the architecture of "unauthenticated pseudonymity", browsers could be re-coded to make them self-authenticating. Hence a child browser could be made the default setting with a simple change of code mandated by Government and unsavory sites could be required to install code at their end denying access when hyperhit by a child browser. The end users maintain control. Regulation is transparent if a warning message to children is contained in the code of the access denial message. A particularly inquisitive child might engage teachers in debate over such sites. The child would learn, not be hindered in an unknowing way.

Torts avoided **before** the breach limit fears of indeterminacy. We need to mindfully apply atom-world laws to a cyberspatial paradigm. Judges are reluctant in referring to evidence given about the convergence of communications media on the internet Sheppard J declared, "There has been so much development in the technology which affects this area in recent times and the progress has been at such a rate that it is impossible to deny that quite revolutionary changes may be upon us all quite soon. But I have to be cautious. I cannot decide a case which is largely based upon what has happened up to now upon what might happen in the future."⁶¹ Yet this paper has indicated significant areas of law that limit tortious liability of schools for physical and mental harm resulting from internet misuse by students. Considering the enormous educational benefits of cyberspace, schools should heed the aphorism of Roosevelt. Apart from budgetary constraints, what they have most to fear is fear itself as they navigate their students through the digital millennium.

¹ Net Grammar was the first school to seek accreditation from the NSW Board of Studies for providing the HSC via the internet in 1999
² William Gibson, *Neuromancer*, Ace Science Fiction, 1984

³ Brian Fitzgerald and Leif Gamertsfelder, "Protecting Informational Products (including Databases) through Unjust Enrichment Law: An Australian Perspective", *E.I.P.R.*, July 1998, Volume 20, Issue 7 at 244
⁴ Negroponte Nicholas, *Being Digital*, Vintage Books, New York, 1996
⁵ *United States of America v Microsoft Corporation* (USA v Microsoft), Findings of Fact, November 1999, per Justice Thomas Penfield Jackson at 35
⁶ Graham Greenleaf, "An Endnote on Regulating Cyberspace: Architecture vs Law", *University of NSW Law Journal* Vol 21, 2
⁷ Chris Durante and Phillip Bain, "Bits, Bytes and Automobiles", Loreto College, Kirribilli, <<http://www.loreto.nsw.edu.au/Curriculum/SocialScience/BUYACARP.HTM>>, accessed 5 December 2001.
⁸ The unique number "address" of each computer that logs onto the Net. Quantitative measures on the type of access would be useful, particularly numbers relating to those who have internet access on networks that randomly assign IP addresses. Such access does not identify the user easily suggesting identification and consequent privacy issues are overrated.
⁹ Small programs usually resident on a users hard disk that enable tracking of browsing activities by a user
¹⁰ *The Megalex Macquarie Concise Dictionary*, Eurofield Information Systems, Version 1.2, January 1998
¹¹ *Ford and Net Grammar School Pty Ltd v Board of Studies* [1999] NSWADT 47
¹² *Ibid.* at 12
¹³ *Ibid.* at 13
¹⁴ *Ibid.* at 17
¹⁵ *Ibid.* at 27
¹⁶ *Ibid.* at 23
¹⁷ *Education Act* 1990 (NSW) s47 (e)
¹⁸ *Ibid.* at s22
¹⁹ *Ibid.* at s70
²⁰ Note 11 at 47
²¹ Note 11 at 53
²² *Ibid.* at 21
²³ *Ibid.* at 49
²⁴ Lessig Lawrence, *Code and Other Laws of Cyberspace*, Basic Books, New York, 1999 at 25
²⁵ *Romel El-Sheik v Australian Capital Territory Schools* [1999] ACTSC 90 at 91
²⁶ *Commonwealth v Introvigne* (1982) 150 CLR 258 at 26
²⁷ *Ibid.* at 34
²⁸ *Lee-Anne Duncan by her next friend Noel Duncan v Trustees of the Roman Catholic Church for The Archdiocese of Canberra and Goulburn* [1998] ACTSC 109
²⁹ *Toutounji v Waldorf School & Girl Guides* [1998] SADC 3765
³⁰ *Copping v State of South Australia & Lightbody* [1997] SADC 3632
³¹ *Williams v Eady* (1893) 10 TLR 41

³² Note 26 per Brennan J at 10
³³ Note 31
³⁴ Note 26 per Murphy J at 8
³⁵ Note 32
³⁶ Note 26
³⁷ **Note 25**
³⁸ *Austlii: The Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman & Anor*, Supreme Court of NSW Court of Appeal
³⁹ *Romeo v Conservation Commission (NT)* (1998) 151 ALR 263 at 129
⁴⁰ Note 38
⁴¹ Peter E Nygh and Peter Butt, *Concise Australian Legal Dictionary*, Butterworths, Sydney, 1998 at 378
⁴² *Ultramares Corporation v Touche* (1931) 74 ALR 1139, per Cardozo C.J. at 1145
⁴³ *Vandescheur v State of NSW* [1999] NSWCA 212
⁴⁴ Note 25 at 77
⁴⁵ *Australian Capital Territory Schools Authority v El Sheik* [2000] FCA 931 (11 July 2000) at 25
⁴⁶ *Ibid.* at 26
⁴⁷ *El-Sheik v Australian Capital Territory Schools Authority & Anor* C18/2000 (14 September 2001) HCA
⁴⁸ *Australian Capital Territory v Tawanda David Noble bhmf Jan Noble* [1998] ACTSC 140. An injured boy bought a plan to make a bomb from a schoolmate who found it on the internet.
⁴⁹ Graham Bassett, "Digitising the Past to Transform Learning", *The Australian History Teacher*, 24, 1997 p. 14
⁵⁰ *Broadcasting Services Amendment (Online Services) Bill* 1999 s3 (m) and Schedule 5 – Online Services.
⁵¹ Nancy Willard, "Legal and Ethical Issues Related to the Use of the internet in K-12 Schools", *Brigham Young University Education and Law Journal*, 2000 at 225
⁵² *Ibid.* at 262
⁵³ Stanley Yeo, "A School's Liability to Pupils Journeying to and from School", *Torts Law Journal*, (1997), 5 at 282 282
⁵⁴ This is an actual event that took place in a number of private schools in Sydney during 1999
⁵⁵ *Swan v Williams (Demolition) Pty Ltd* (1987) 9 NSWLR 172
⁵⁶ *Campbelltown City Council v McKay* (1989) 15 NSWLR 501
⁵⁷ *Mt Isa Mines v Pusey* (1970) 125 CLR 383
⁵⁸ Carl S Kaplan, "Suit Considers Computer Files", *Cyber Law Journal*, September 29, 2000, <www.nytimes.com/2000/09/29/technology/29CYBERLAW.html>, 12 October 2000
⁵⁹ William Shakespeare, *Taming of the Shrew*, Act i. Scene 1
⁶⁰ Note 24
⁶¹ *Austlii: Audio-Visual Copyright Society Ltd v NSW Department of School Education & Ors* [1997] AcopyT 1