

Just a Harmless Pat on the Bottom? - When may a School be held Liable in Respect of Peer to Peer or Teacher to Student Sexual Harassment?

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'A student should feel safe and comfortable walking down the halls of his or her school. School is a place for learning and growing. Sexual harassment stops that process'.¹

Abstract

A school is a microcosm of society and as such reflects the rights and responsibilities, which exist in society generally. There are two additional factors, which impact significantly on any consideration of rights and responsibilities within the school environment. The first is that a child is compelled to attend school. Though the ability of a child to choose which school to attend is a feature of New Zealand's education system, in reality within the public school sector that choice exists in theory only.

Secondly, there is an imbalance of power in relationships within the school environment. The student is in a weaker position to those in authority - teachers, principals and administrators. These factors, it is suggested, necessitate an even greater emphasis on the rights of the student and corresponding responsibilities of those in authority.

There is an increasing public awareness of the incidence of sexual harassment and abuse within schools. This is accompanied by the understanding that bullying and harassment in any form is unacceptable and that, at the very least, a child is entitled to expect a safe and non-threatening educational environment. This article considers the potential for liability of a school which fails to ensure that safety by neglecting to address factors such as sexual harassment which threaten it. First, it considers the possible impact on New Zealand courts of recent U.S. decisions where damages have been awarded under anti-discrimination provisions. Secondly, it considers whether an action in the tort of negligence may be maintained against a school.

Introduction

Picture two scenarios.

In the first, girls attending a public high school in a small community are subjected to frequent incidents of improper touching and sexual advances by a senior teacher and hockey coach. He enters bathrooms where they are showering after hockey games, initiates discussions relating to sexuality and engages them in massaging rituals. He is a teacher of long standing and a highly respected member of the local community. The girls frequently discuss his conduct with

their parents, who in turn voice their concerns to the school. Their perception is that their complaints have little effect and in frustration the girls resort to various less direct methods of bringing his conduct to the attention of other teachers and the school principal, including circulating notes and writing on the chalkboard. One student responsible for the latter is allegedly told there is no place in the school for people like her and she leaves without completing her schooling. In 1996, 17 years after the school first heard complaints about the teacher's behaviour, he pleads guilty to 28 charges of rape, sexual violation and indecent assault involving students and ex-students at the school.

In the second scenario, a fifteen year old girl, attending a public high school is allegedly subjected to severe and repeated harassment by a male student. This includes inappropriate touching and sexually suggestive comments. The conduct continues for an eight month period during which time the girl and her parents frequently complain to the teacher and school principal. Her request to a teacher to move her seat away from the boy is refused for three months. The principal remarks that he cannot understand why she is the only one complaining. Her grades drop and she considers suicide. Following her complaint to the local sheriff the boy is arrested and pleads guilty to sexual battery.

Our parents felt secure in their belief that while at school we were in as safe and protected an environment as when at home. The home is no longer seen as the safe place we once imagined and schools are following. Once, harassing behaviour in schools was looked upon as an unfortunate by product of having large numbers of diverse young people together for long periods of time. It was also seen as part of the 'toughening up' process of growing up. However, society has now been forced to recognise that such behaviour damages the victims, emotionally and educationally. While obviously not on the same scale as the tragedies of the mass slaughter of school children by their peers such as in Littleton, Colorado, it is now seen that the safety of children in the school environment is threatened in a number of different ways less public and less sensational.

In considering the question of whether public schools owe an affirmative duty to protect their students, the U.S. courts have canvassed three theories of liability.² The first is that the 'special relationship' between the state and its citizens gives rise to such a duty.³ The second is the 'state-created danger' or 'custom, policy and practice' theory whereby the Plaintiff must show that the school acted affirmatively in such a way that created the risk of harm.⁴ Closely related is the view that a school may be liable when it shows deliberate indifference. This means that it fails to take remedial action when it has actual knowledge of the behaviour.

This article examines whether a student may maintain an action for damages against a New Zealand school in respect of student to student and teacher to student sexual harassment and abuse (called 'peer harassment' and 'teacher harassment' respectively). Though there have been complaints to the Human Rights Commission, there have as yet been no actions for damages in respect of peer harassment. There is one action in respect of teacher harassment, the Mahurangi case⁵ which currently awaits hearing. In the United States there is a developing jurisprudence in this area and, while anecdotal only, there are indications that New Zealand could follow.

What is Sexual Harassment?

Sexual harassment and abuse cover a wide spectrum of behaviour. At one end is the type of behaviour which seems at first glance to be annoying and hurtful intimidation based on the victim's gender or sexual orientation. At the other is sexual violation and rape. Wherever the behaviour sits the common factor is that it is damaging, often severely. Most importantly is that, at whatever the level, it detrimentally effects the educational opportunity of the victim.

It may take many different forms. It may be verbal harassment such as being called names like 'slag' or 'bitch,' or loud public comment on physical characteristics. It may be physical ranging from unnecessary brushing up against or inappropriate touching to sexual contact or violation. One of the difficulties is that often (hopefully in the past) any such behaviour may have been dismissed as 'normal male behaviour'. The definition adopted by the New Zealand Human Rights Commission focuses on the effect on the victim: 'Sexual harassment is unwelcome and offensive sexual behaviour that is repeated or significant enough to have a harmful effect on you'. The stereotypical picture of sexual harassment in the educational context is one that involves the use of power. An example, may be where the male professor or teacher harasses a female student by demanding sexual favours in return for passing an exam or receiving a higher grade. However, studies in the United States have revealed that peer harassment is far more common than teacher harassment. They also show that young women are far more likely to be the victims of sexual harassment than young men.⁶ There are indications that gay students are also being subjected to harassment, as shown by newspaper articles relating to an Australian schoolboy Christopher Tsakalos who in 1997 initiated proceedings against Cranebrook High School in Sydney. He alleges he was subjected to frequent homophobic attacks while a student at the school. One article appearing in the Dominion newspaper in Wellington stated that hundreds of gays were considering pursuing actions against their schools on the same basis.⁷

Importantly any such harassment prevents the victim from participating equally in the educational process. It causes students to fail to join in class discussion if they feel they will be laughed at as a result, to skip classes where they feel uncomfortable or to fail to attend school at all. If allowed to continue it creates a hostile learning environment which impacts on all students. The bottom line is that it interferes with a child's right to education.

A New Zealand Child's Right to Education in General

Every child is entitled to a safe educational environment. Universally, this was declared in the United Nations Convention on the Rights of the Child. By its ratification in March 1993 New Zealand agreed to abide by its principles. State institutions such as public schools are therefore under an obligation to take the principles of the convention into account in making decisions about their students.

Articles 28 and 29 recognise the right of the child to education on the basis of equal opportunity. Such education shall be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential, and the development of respect for human rights and fundamental freedoms. Article 29(d) provides that the States Parties agree that education shall be directed towards preparing a child for responsible life in the spirit of

understanding, peace, tolerance and equality of the sexes. Of particular importance in the context of this discussion are Articles 3 and 19.

Article 3:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be of primary consideration.

.....

3. States Parties shall ensure that the institutions, services and facilities responsible for the care and protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff as well as competent supervision.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child.

In New Zealand every child and young person, between the ages of 6 and 16, is entitled to a free education.⁸ Each public school in New Zealand is administered by a community elected Board of Trustees. This body has, subject to any enactment and the general law of New Zealand, complete discretion to control the management of a school as it thinks fit.⁹ The school principal has, subject to existing law, complete discretion to manage the day to day administration of the school as he or she thinks fit.¹⁰ Each school is required to formulate a charter which has the effect of an undertaking by the Board of Trustees to the Minister of Education.¹¹ Each charter has a compulsory or core content which is specified by the Minister of Education in the National Educational Guidelines.¹² These include the ‘Guiding Principles’ as follows:

‘The Board of Trustees accepts that all students in any school or schools under its control are given an education which enhances their learning, builds on their needs and respects their dignity.

This education shall challenge them to achieve personal standards of excellence and to reach their full potential. All school activities will be designed to advance these purposes’

The effect of a school’s formulating a charter with its specified mandatory content as above is that in return for receiving state funding for education the school undertakes to fulfill the charter objectives. This is met in two ways. First, there must be adherence to charter principles in

the manner in which the board governs and the principal manages. Secondly, it imposes upon them an obligation to put in place policies to achieve the charter objectives.

The pastoral duty of the school principal is reinforced by Section 77 of the Education Act 1977 which provides that he or she shall take all reasonable steps to ensure that in the case of individual students there is not only guidance and counselling but also that the student's parents are told of any factors which are impeding that student's educational progress. This clearly goes further than purely educational factors to include any factors which may serve as a barrier to that child's learning. Arguably it gives rise to a duty of care on the part of a school in respect of factors occurring within the school environment which may be detrimentally effecting a child's ability to learn.

The Workplace Analogy

The subject of sexual harassment has traditionally attracted a considerable amount of understatement. This is true even in the employment environment. There is still the view that there should be applied some objective test of a minimum threshold of behaviour which assumes priority over the effect on the victim. Recently much media attention was given to the remarks of a judge in the New Zealand High Court in an action against an employer for sexual harassment in the workplace. Wild J. had said: 'For example, a single, casual touching of the buttocks I do not think would suffice', and 'Whilst the insidious, bothersome and often abhorrent nature of sexual harassment is not to be depreciated, there is a need in this area to be realistic and not to be prissy'.¹³ This highlights the problem of from whose perspective the behaviour should be viewed. Though there will always be the odd exception, in general terms, it is to be hoped that a person would not be driven to complaint unless the behaviour is seriously effecting them. A more correct approach would be to ask the question whether the effect of the behaviour on the victim was such as to prevent their equal participation.

Recognition of this emphasis is contained in Sections 62 and 68 of the Human Rights Act 1993, which impose a statutory responsibility on employers to maintain a workplace which is free from harassment. Under s.68 which employees are potentially liable for the actions of their employees. Recognition is also contained in ss 27, 29 and 36 of the Employment Contracts Act 1991 by which sexual harassment may amount to a personal grievance. In 1993, Chief Judge Goddard of the Employment Court stated strongly:

It has been aptly if colourfully said in the North American Courts that sexual harassment poisons the atmosphere in the workplace. It is wholly unacceptable and entirely devoid of any redeeming features. It follows that its occurrence can never be met with matters of justification, excuse or mitigation. It is an attack on the basic human right that all persons must be supposed to have to pursue their economic well being in conditions of freedom and dignity. Its victims are almost invariably women. It is insidious and deceptive in character.¹⁴

If sexual harassment is behaviour unacceptable among adults, there is little justification for acceptance of a lesser standard of behaviour from school children. The fear was voiced recently in the U.S. Supreme Court that to impose workplace standards on schools would allow

‘sexual teasing’ to become the subject of a federal lawsuit.¹⁵ The response of the Plaintiff’s Attorney¹⁶ was that as with workplace harassment, the behaviour would need to be severe and pervasive to become ‘lawsuit fodder’.

The idea that in the education context it is all ‘much ado about nothing’ was assisted by earlier high profile cases which led to a media frenzy in the United States. There were two incidents. One, where a school in Lexington North Carolina suspended, a six year old for a day for kissing his female classmate on the cheek. Another was when a school in New York suspended a seven year old for 5 days for a similar act of impulsiveness. Both children were suspended on the basis that their actions had violated their schools’ policy on sexual harassment. These incidents give the impression that a school is responsible for the behaviour of one student to another. They neglect the key point that relates more to the behaviour of the school. The question is not whether schools should be under a duty to prevent sexual harassment occurring within their confines, but rather whether a school has a duty to provide a positive response when they know of matters which affect the well-being and safety of their students. Commonsense should prevail.

Sexual harassment has the effect of preventing equal access to educational opportunity. For this reason action has been taken in the United States under the anti-discrimination provisions of the Constitution. An action may also be taken in negligence for breach of a common law duty of care and this is dealt with later in this article.

The Basis of Actions in the USA - Anti-Discrimination Provisions

These are contained in Title IX of the Educational Amendments of 1972.¹⁷ This provides that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be *subjected* to discrimination under any education program or activity receiving Federal financial assistance.¹⁸ The right to sue for damages is contained in 42 U.S. Constitution, s.1983 which permits individuals to sue state officials in federal Courts for damages when a person acting under colour of state law ‘*subjects, or causes to be subjected*, any citizen of the United States or other person within the jurisdiction thereof to deprivation of any rights, privileges, or immunities secured by the Constitution or federal laws’.

Anti-Discrimination Legislation in New Zealand – The Human Rights Act 1993

Rights

Section 57 prohibits discrimination in all educational establishments. It states:

- 57. Educational establishments -
 - (1) It shall be unlawful for an educational establishment, or the authority responsible for the control of an educational establishment, or any person concerned in the management of an educational establishment or in teaching at an educational establishment, -
 - (a) to refuse or fail to admit a person as a pupil or student; or

- (b) to admit a person as a pupil or a student on less favourable terms and conditions than would otherwise be made available; or
 - (c) to deny or restrict access to any benefits or services provided by the establishment; or
 - (d) to exclude a person as a pupil or *a student or subject him* or her to any other detriment, - by reason of any of the prohibited grounds of discrimination.
- (2) In this section ‘educational establishment’ includes an establishment offering any form of training or instruction and an education establishment under the control of an organisation or association referred to in section 40 of this Act.¹⁹

In addition, Section 62 deals specifically with sexual harassment and applies to education.²⁰ It provides:

62. Sexual harassment-

(1)

(2) It shall be unlawful for any person (in the course of that person’s involvement in any of the areas to which this subsection is applied by subsection (3) of this section) by the use of language (whether written or spoken) of a sexual nature, or of visual material of a sexual nature, or by physical behaviour of a sexual nature, to subject any other person to behaviour that -

- (a) Is unwelcome or offensive to that person (whether or not that is conveyed to the first-mentioned person); and
- (b) Is either repeated, or of such a significant nature, that it has a detrimental effect on that person in respect of any other areas to which this subsection is applied by subsection (3) of this section.

In order for there to be sexual harassment for the purposes of s.62, a person must show:

1. That they were *subjected* to acts which were
2. unwelcome or offensive to them (whether or not the harasser knew this); and
3. repeated or significant so as to have a detrimental effect on them.

Remedies

Part III of the Act deals with complaints which are made in the first instance to the Complaints Division. After investigating a complaint the Division may assist the parties in reaching a settlement. The Proceedings Commissioner may decide whether to institute proceedings in the Complaints Review Tribunal against the body or person the complaint was made, or the

complainant may institute proceedings under their own volition. The Complaints Review Tribunal has jurisdiction to make a variety of orders including damages.²¹ Damages awarded may be in respect of pecuniary loss, loss of any benefit whether of a monetary kind or not which the complainant may reasonably have expected to obtain but for the breach.²² This could, in the education context, specifically include loss of educational opportunity though it would be difficult to establish quantum. Damages may also be awarded for humiliation, loss of dignity, and injury to feelings.²³

While it must be remembered that the New Zealand legislation does not have the entrenched status of the U.S. Constitution, it is of value to consider the approach taken by their cases in this area. This is because the basis of liability in all the provisions, the U.S. Constitution's Title IX and s.1983, and the New Zealand Human Rights Act 1993 ss.57 and 62 is to cause a person to be 'subjected' to the behaviour in question. The U.S. courts provide us with a clear indication of the factors which it may be argued could give rise to liability in New Zealand.

The U.S. Claims for Damages

In the case of *DeShaney v Winnebago County Department of Social Services*²⁴ the Supreme Court was required to consider whether the state could be held liable for the failure of a social services agency to act on complaints of abuse of a child. In that case the child's mother had complained repeatedly about the care her son was receiving in the custody of her former husband. The majority opinion, delivered by Chief Justice Rehnquist held that section 1983 of the Civil Rights Act²⁵ was not intended to protect citizens from each other, but rather to impose a liability where a person or agency has knowledge of a situation in which safety is threatened and fails to act or shows 'deliberate indifference'. This is relevant here. It is generally accepted that, in the absence of additional factors, there is no custodial relationship in the school context. The imposition of liability on a school authority must therefore be dependent upon knowledge, together with a failure to act on the part of school officials. This is the view that has been adopted by many subsequent cases which involve the liability of school authorities under s.1983. The first such case which concerned teacher harassment was *Doe v Taylor Independent School District*.²⁶ There Jane Doe, a first year student at Taylor High School had been sexually molested by her biology teacher. The Fifth Circuit stated:

You would think it obvious that sexual molestation when visited upon one of our schoolchildren by her public school teacher, would undoubtedly violate her constitutional right to be free from intrusions into bodily integrity. You would also think it indisputable that a school superintendent and a school principal, once aware that such reprehensible conduct was taking place on their campus, would have not only a moral duty, but also a legal duty, to stop it - that the Constitution would not tolerate their looking the other way or taking only meagre measures to protect a 14-year-old school girl from being sexually abused by one of their subordinates.²⁷

Following this case to the Supreme Court were the actions of *Franklin v Gwinnet County Public Schools*,²⁸ and *Gebser v Lago Vista Independent School District*.²⁹ The former was the first

case relating to sexual harassment to be taken under Title IX, the anti-discrimination provision. A female high school student sought an award of damages under Title IX from her school authorities. She alleged that her teacher, who was also her sports coach, had submitted her to continual sexual harassment and abuse including 'coercive sexual intercourse'.³⁰ She argued that school officers who had actual knowledge of the teacher's conduct failed to intervene to protect her. The opinion of the Supreme Court was that Title IX prohibits sexual harassment in public schools, and that an award of compensatory damages was an appropriate remedy for those bringing an action to enforce Title IX. The justices defined sexual harassment as involving unwelcome sexual advances, requests for sexual favours and other unwelcome verbal or physical conduct of a sexual nature. They had no difficulty in applying the same principles as Title VII (employment) to Title IX (education). In so doing, they stated the view: 'Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of that subordinate's sex, that supervisor 'discriminates' on the basis of sex'. We believe that the same rule should apply when a teacher sexually harasses and abuses a student'.³¹ The same could be said in relation to s.57 of the Human Rights Act 1993, and there is no reason to believe that a New Zealand court would not apply similar reasoning. The standard applied there was uplifted from the employment case of *Meritor Savings Bank v Vinson*³² has ready application. Essentially it is that to establish a hostile or abusive school environment the plaintiff must prove: that they are member of a protected class; that they experienced unwelcome sexual conduct toward them; that they would not have experienced such conduct but for their gender; that it had the effect of creating a hostile school environment; and that the school authorities knew and failed to take remedial action. This same standard was later adopted in *Gebser v Lago Vista Independent School District*.³³

In the U.S. the spotlight has now turned on peer harassment. The question is whether the same principles could be applied to a school's failure to act on complaints. Three cases have been filed in the Supreme Court. The first two, *The University of Illinois Board of Trustees v Doe*³⁴ and *McCaffrey v Oona R.S.*³⁵ (in which the allegations relate to harassment by a student teacher as well as other students), await hearing. In the third of these cases, *Davis v Monroe County Board of Education*³⁶ (*The Davis Case*) the Supreme Court delivered its opinion on 24 May 1999. Once again, though specifically related to U.S. constitutional provisions, the majority's opinion is significant here as it clearly indicates important key factors.

The allegations were that while LaShonda Davis was a fifth grade student at Hubbard Elementary School in Forsyth, Georgia she was continually harassed by a fellow student over a 6 month period and the school principal and three teachers failed to take action to prevent this happening.³⁷ This inaction was despite frequent complaints by LaShonda, her mother and other students. The question before the court was whether the liability of school authorities for teacher harassment as in *Quinn* could be extended to liability in the event of sexual harassment by one student to another. While there are other considerations which may at common law influence liability for teacher harassment, vicarious liability and liability for agents, in this context the principles are the same. The importance is in recognising that in applying anti-discrimination provisions the action is not seeking to make schools liable for the misdeeds of others, but rather in accepting that schools have a duty to respond to complaints of harassment and failure to do so may

result in liability. The Court was told that LaShonda was subjected to unwelcome sexual harassment by the male student that was sufficiently severe and pervasive so as to alter the conditions of her education and to create an abusive educational environment. The harassment to which La Shonda was subjected over a considerable period of time was not only physically threatening and humiliating,³⁸ but it severely affected her emotional and mental well being. Importantly, the school was aware of it. The Supreme Court, in a 5 to 4 majority opinion, ruled that the school district be liable in damages and sent the case back to the lower court for substantive hearing.³⁹

The significant factors were:

1) In order for a school to ‘subject’ a student to discrimination it must show ‘deliberate indifference’

The Justices looked closely at the interpretation of the words ‘to subject’. In so doing they took definitions of ‘subject’ from the Random House Dictionary of the English Language 1415 (1966) as ‘to cause to undergo the action of something specified; expose’; or ‘to make liable or vulnerable; lay open; expose’ and from Webster’s Third New International Dictionary of the English Language 2275 (1961) as ‘to cause to undergo or submit to; make submit to a particular action or effect; expose’.

A school, by turning its back on complaints of sexual harassment, subjects or exposes a student to discrimination or harassment. The same applies under s.57 of the New Zealand Human Rights Act 1993, in that it denies or restricts access to any benefits or services provided by the school, or subjects a student to a detriment by reason of their gender. This also applies to s.62. There the test is whether the complainant is detrimentally effected by having been ‘subject’ to acts which are unwelcome or offensive and repeated or significant so as to have a detrimental effect on that person.

The majority in *Davis* stressed that circumstances in which damages may be awarded must be limited to those where the school must have been in a position to do something about it and failed to act. O’Connor J. said: ‘These factors combine to limit a recipient’s⁴⁰ damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. Only then can the recipient be said to ‘expose’ its students to harassment ...’⁴¹

2) The harassment must have been so ‘severe, pervasive, and objectively offensive so as to deprive the student of educational opportunities’.⁴²

In considering the level of discrimination the court was of the view that it was not necessary to show an overt deprivation of access to educational facilities within the school. The test is whether the harassment is shown to have been at such a level that it effectively detracted from the student’s educational experience. The key point is that where a person is constantly subjected to pervasive harassment they are effectively denied equal access to the school’s resources and opportunities.

Under s.68 of the New Zealand Human Rights Act 1993 the situation may be more clear in the case of teacher harassment. This provides where an employee is the perpetrator of such acts it is as if the acts were done by the employer whether or not they were aware or approved of such

acts. However, subsection (3) of this section provides that it shall be a defence for an employer to show that they took such steps as were reasonably practicable to prevent the acts occurring. In this case, the question becomes whether a school would be able to rely on the fact that it had sexual harassment policy and procedures in place in absence of any direct evidence of preventative action.

Thus far this article has considered only liability under the Human Rights Act 1993. A further action may be taken against a school in the tort of negligence for breach of a common law duty of care.

New Zealand: The Mahurangi College Case

In this action there are seven women plaintiffs (whose names are suppressed).⁴³ The Plaintiffs are seeking to establish the liability of the school authorities for their failure to act on complaints of sexual abuse over a period from 1978 to 1995. The abuser was Thomas Leigh, a teacher and sports coach at the school.

Thomas Leigh was a paedophile who was sexually attracted to adolescent female students. From 1983 onwards a large number of concerns were expressed to various teachers and others at the school relating to Thomas Leigh's behaviour towards female students. The school allegedly responded in a manner that was at best half-hearted, and at worst dismissive of their complaints. One student was suspended from the school for writing on the chalkboard that Thomas Leigh was having an affair with a student. In 1984 a parent who raised concerns with a teacher about comments Mr Leigh had made about her daughter was contacted by a past principal of the school and thanked for not going public. The School Board, as early as 1987, was aware that students at the school warned visiting American students to be careful of Mr Leigh. Finally, in 1995 a formal complaint laid by a student led the School Board of Trustees to instigate disciplinary procedures against Mr Leigh. At the hearing students were involved as witnesses. One student approached the Commissioner for Children with serious misgivings about the way in which the hearing was conducted. She said that she felt that it was she who was 'on trial' and not Mr Leigh and that her complaints were disbelieved. In 1996 Thomas Leigh was charged with 28 charges involving sexual violation and indecent assault. He pleaded guilty and was sentenced to 17 years imprisonment.

Subsequently, the Commissioner for Children was approached by the college to inquire into the matter with a view to introducing practices which would ensure the safety of their students in the future. In New Zealand the Commissioner for Children, under section 411(1)(e) of the Children, Young Persons and Their Families Act 1989 has the power: 'to inquire generally into, and report on, any matter, including any enactment or law, or any practice or procedure, relating to the welfare of children and young persons'. An inquiry was carried out by the Commissioner under this jurisdiction.

In his report, it was made clear by the late Commissioner for Children, Laurie O'Reilly, that a school must, in such situations, be clearly able to distinguish between its responsibility as a good employer and its duty towards its students under the Human Rights Act 1993. In that report he said:

Perhaps one of the most important structural impediments to the Board of Trustees in dealing with Mr Leigh's abuse was due to a confusion between taking due care as an employer and the responsibility to provide a safe learning environment for the pupils. Sexual harassment and sexual abuse of pupils by staff exemplifies this dual role.

It is my opinion however that the Principal and the Board exercised their responsibility as an employer to the detriment of the victim(s) of the abuse.

The Principal of a school and the Board of Trustees have two separate areas of responsibility which may sometimes come into conflict. The Principal has to work closely with the teaching staff and deal with day to day problems that arise and the Board of Trustees has a responsibility to be a good employer. The Principal and the Board have separate responsibilities towards the students and are required to provide a safe learning environment for all students.⁴⁴

Two students who alleged abuse complained to the Human Rights Commission for breach of the Human Rights Act 1993 and a settlement was negotiated with the college. Seven ex-students have issued proceedings in the High Court in the tort of negligence. They are claiming exemplary (or punitive) damages from the school principal, the School Board of Trustees and the Attorney General. The latter is on the basis of vicarious liability as employers. Damages for emotional trauma and distress are also being sought, as well as those for loss of educational opportunities. The action is yet to be heard.

An Action in the Tort of Negligence

The U.S. Supreme Court in the *Davis* case declined to consider liability in negligence, the action being founded solely upon Title IX. There appears to be no obvious reason, however, why a negligence action could not be sustained against a school authority on the basis that they have, with knowledge, failed in their duty to deal with matters which effect a student's safety. Support for this view may be taken from remarks made by the court in the U.K. case of *Walker v Derbyshire County Council*.⁴⁵ Becky Walker, a student disabled by cerebral palsy, sued her local education authority for damages for negligence on the basis that her school had failed to protect her from bullying by other students. The court declined her claim on the facts, deciding that the alleged incidents of bullying were not sufficiently intense and long-standing so that a teacher could have anticipated damage. The court said however, that there is no reason why as a matter of law a student could not recover damages where it was found that the school failed to take reasonable care. During 1996, Californian courts awarded plaintiffs substantial amounts of damages against school boards in negligence actions relating to sexual harassment.⁴⁶

Liability in negligence is based on the simple principle of 'neighbourhood' stated by Lord Atkin in *Donoghue v Stevenson*.⁴⁷ This is that a person should be liable for harm, caused by his or her carelessness, suffered by those who they could reasonably have foreseen.

For a case in negligence to be established four elements must be proved:

- That the Defendant owed the Plaintiff a duty of care;

- That the Defendant was careless in the discharge of that duty in that they failed to exercise a standard of care which would be expected in those circumstances;
- The plaintiff suffered an injury which was compensatable at law;
- There was a link of causation between the breach of the duty owed by the Defendant and the loss or injury suffered by the Plaintiff.

The Defendant owed the Plaintiff a duty of care

The test of reasonably foreseeability based on the ‘neighbourhood’ principle enunciated by Lord Atkin was refined as a two stage test by Lord Wilberforce in the House of Lords in *Anns v Merton London Borough Council*.⁴⁸ The effect of this test is that having found that a relationship of proximity exists so that the Defendant could reasonably have foreseen that the Plaintiff may suffer harm from their carelessness, it then falls to be considered whether there are any policy reasons which may serve to limit or negate the scope of a duty of care. In the raft of actions in the U.S. in the 1970s⁴⁹ in educational negligence or ‘malpractice’ as it was termed, policy considerations assumed a priority which resulted in the courts failing to allow a duty of care on the part of school authorities. One argument was that to allow a duty would open the courts to a flood of litigation, and this would lead to the diversion of school finances from buying educational resources to payment of insurance premiums and awards of damages. This concern was voiced recently in the dissenting opinion of the court in *Davis* when Kennedy J. said:

The only certainty following from the majority’s decision is that scarce resources will be diverted from educating our children and that many school districts, desperate to avoid Title IX peer harassment suits, will adopt whatever federal code of student conduct and discipline the Department of Education sees fit to impose upon them.

Policy considerations have not assumed the same importance in actions for personal injury in the U.S. and Australia. The reason for this may be that in education malpractice cases many ‘policy’ issues were more correctly problems relating to establishing causation. In personal injury cases the line of causation is more easily recognisable. In Great Britain, the House of Lords did not let policy considerations lead to dismissal of actions for negligence in education.⁵⁰ Lord Browne-Wilkinson who delivered the majority decision there, said later:

It is quite important where what has gone wrong is due not to the individual shortcomings of the doctor, the teacher or the psychologist but to the system within which he is asked to operate. The liability should be that of the employer or the organiser for permitting such a system to be operating. What has been breached is the duty of care owed directly from the education authority or the proprietor of the school to the child who has been taken in.⁵¹

The considerable number of Australian negligence cases which relate to students’ suffering physical injury due to lack of appropriate supervision, have taken the view that school teachers, being in a position of authority, owe a duty to protect a student from injury.⁵² That

schools have a duty to ensure the welfare of their students is evident from the Education Act 1989, and the United Nations Convention on the Rights of the Child.

Breach of a duty of care

It must be shown that a school breached that duty. The test used in *Davis* has application here. A school acts carelessly where it demonstrates deliberate indifference while having actual knowledge of events which had the potential to cause emotional harm to a student. O'Connor J. referred to this in *Davis* when she said: 'The common law, too, has put schools on notice that they may be held responsible under state law for their failure to protect students from the tortious acts of their peers. In fact, state courts routinely uphold claims alleging that schools have been negligent in failing to protect their students from the torts of their peers'.⁵³

Damages

Since 1974 New Zealand has had a system of compensation for personal injury known as the Accident Compensation Scheme.⁵⁴ This is a 'no fault' scheme and prohibits court actions for damages for personal injury. New Zealand schools have, therefore, been immune from actions of negligence in respect of personal injury of students at school or while under the school's control. This does not mean, however, that courts may not, where appropriate, award exemplary damages. There are two recent New Zealand decisions which are relevant in that they relate to the availability in principal of exemplary damages in light of the accident compensation regime. In *McLaren Transport Ltd v Somerville*⁵⁵ the court held that exemplary damages may be available in appropriate cases arising out of circumstances falling within the accident compensation scheme irrespective of whether the tort was intentional or unintentional. They will however be awarded only if the Defendant's conduct is bad enough. In deciding whether to award exemplary damages it is the manner in which the Defendant conducted themselves which is at issue, rather than the loss sustained by their actions. In the words of Tipping J.: 'Exemplary damages for negligence causing personal injury may be awarded if, but only if the level of negligence is so high that it amounts to an outrageous and flagrant disregard for the Plaintiff's safety, meriting condemnation and punishment'.⁵⁶

This view was supported by the Court of Appeal in *Ellison v L*.⁵⁷ A situation where school authorities show deliberate indifference with knowledge of harassment may be a situation such as contemplated where exemplary damages are appropriate.

Furthermore, damages may be awarded at common law, as well as under the Human Rights Act 1993 for emotional distress and trauma. In New Zealand there have recently been a number of actions taken by persons seeking this type of damages against public authorities for the effect on their lives of sexual and other forms of abuse suffered as a child. Such a case is that of *W v Attorney-General*.⁵⁸ This action was taken by Mrs W. who was sexually abused by a foster parent in whose care she had been placed having been taken from her parents by the Department of Social Welfare. Despite her telling an officer of the Department that her foster father was being 'rude' to her, they took no action. The allegations were that as a result of such abuse she had serious and lasting psychological and emotional impairment resulting in criminal offending and a

general inability to function and cope with the demands of everyday life. The argument of the Crown was that the objective 'reasonable person' test should be applied to the Plaintiff's discovery of the link between her sexual abuse as a child and her psychological problems. Thomas J. in delivering the majority judgment, denounced that argument. He showed a new understanding of the effect of sexual abuse on a victim emphasising the need for courts to move forward from adherence to essentially male-dominated approaches in this area. He said:

It must also be said in this context that the courts have not established a commendable record for determining what is or is not reasonable in the case of women who have been subject to sexual violation. Critics point to a judiciary that has for centuries been dominated by males and a law which is constrained by male dominated thinking.⁵⁹

Conclusion

Historically, there were two factors inhibiting complaint from young women students and others who may suffer from sexual harassment and abuse. One was the lack of understanding as to its definition. One commentator quotes Catharine MacKinnon, a law professor and expert in the area of sexual harassment as saying: 'It is not surprising ...that women would not complain of an experience for which there has been no name. Until 1976, lacking a term to express it, sexual harassment was virtually unspeakable, which made a generalised, shared, social definition of it inaccessible'.⁶⁰

Another, was a fear of not being taken seriously. As seen in the above cases, that fear was not unfounded.

Looking at the number of actions, particularly in the U.S. it would be easy to adopt the view that there is a particularly new breed of lecherous schoolboy and master. The increase in attention paid to the seriousness of the problem may, it is suggested, be due to a number of factors:

1. There is a much increased intolerance of such behaviour in the workplace which has spawned a similar attitude in schools. Historically young women felt they had no choice but to tolerate or to find their own ways of dealing with behaviour now recognised as sexual harassment - touching, offensive remarks and gestures, catcalls and skirt lifting.⁶¹
2. Society is seeing many changes relating to the role and status of women. Young women may have been pressured into sexual encounters with teachers by offers of better grades or preferential treatment. Certainly many believed they had no choice but to succumb. Each successive generation sees the emergence of more young women who are assertive and have a greater feeling of self-worth.
3. Through more research and publicity there is a greater public awareness of the catastrophic effect on a person's life caused by sexual abuse.
4. Society shows there is a greater recognition that not only teacher but also peer harassment have the potential to seriously effect a person's educational experience. Victims risk being denied the equal benefits of education guaranteed by law. Also, when it is present in a school, it detrimentally effects not only the victim but also the welfare of the whole school community.

The object of this article is not to suggest that litigation is desirable. The best result is not that achieved through litigation but it is in greater efforts being made in terms of education of the harmful effects of harassment. This involves the implementation of anti-harassment policies and appropriate and readily accessible avenues of complaint. Hopefully New Zealand educators will have learnt from the lesson of liability in the United States and we will see sexual harassment complaints being satisfactorily resolved without going to court. In the words of one commentator: 'One of the biggest challenges to eliminating sexual harassment in the schools is to get educators, parents and students to recognise the behaviour is sexist and indefensible'.⁶²

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Endnotes

1. (1997) Sexual Harassment: It's not Academic, Office of Civil Rights, U.S. Department of Education, quoting N. Stein and L. Sjostram, *Flirting or Hurting? A Teacher's Guide on Student to Student Sexual Harassment in Schools*, 66 (1994).
2. See DA Colson (1996) *Safe Enough to Learn - Affirmative Duty of Protection by Public Schools*, National Victims Centre <http://www.nvc.org/idr/nettex32.htm>.
3. As recognised in *DeShaney v Winnebago County Department of Social Services* 489 U.S. 189 (1989).
4. *Stoneking v Bradford Area School District* 882 F.2d 720 (3rd Cir. 1989).
5. Referred to in the first scenario of this article's introduction and later discussed at p. 45.

6. Louis Harris & Assoc. Inc.(1993) Hostile Hallways, AAUW Survey on Sexual Harassment in America's Schools.
7. *The Dominion*, Wellington, New Zealand, 3 March 1997, p.5.
8. s.3 Education Act 1989.
9. s.75 Education Act 1989.
10. s.76 Education Act 1989.
11. s.64. Education Act 1989.
12. Dated 19 December 1989, and gazetted at 1990 New Zealand Gazette No.1.11 January 1990, p.6-9
13. *Sahay v Onepoto Service Station (1992) Limited & The Proceedings Commissioner* Unreported Judgment, 23 December 1998, AP277/96, High Court, Wellington Registry, per Wild J. at p.9.
14. *Z v A* [1993] 2 ERNZ 469, per Goddard J.
15. *Davis v Monroe County Board of Education* 120 F.3d 1390 [120 Educ. L. Rep. 390] (11th Cir. 1997) while hearing oral argument in the U.S. Supreme Court, January 12, 1999.
16. Vice President to the National Women's Law Centre, representing the student Plaintiff.
17. The equivalent in employment is Title VII.
18. 20 U.S.C. Section 1681
19. This gives the provision wider application than Title IX which is limited to: 'any education programme or training receiving federal financial assistance'. The New Zealand provision includes private education providers also.
20. s. 62(3)(j).
21. s.86 Human Rights Act 1993.
22. s.88(1)(b).
23. s.88 (1)(c).
24. 489 U.S. 189,103 L.Ed 249, 109 S.Ct.
25. 42 U.S.C. s.1983.
26. 975 F.2d 137 (5th Cir,1992), 122 L.Ed.2d 371, 113 S.Ct 1066 (1993).
27. 975 F.2d at p.138.
28. 911 F.2d 617 (11th Cir.1990) rev'd 503 U.S. 60, 112 S. Ct 1028, 117 L.Ed 2d 208 (1993).
29. 118 S. Ct 1989 (1998).
30. 503 U.S. 60, at p.63.
31. 503 U.S. 60, at p.75 (They quoted from the case of *Meritor Savings Bank v Vinson* 477 U.S. 57, at p.64 (1986)).
32. 477 U.S. 57 (1986).

33. 118 S.Ct 1989 (1998).
34. 138 F. 3d 653 [124 Educ. L. Rep.812] (7th Cir.1998).
35. 143 F. 3d 473 [126 Educ.L. Rep 589] (9th Cir.1998).
36. 120 F. 3d 1390 [120 Educ L. Rep. 390] (11th Cir.1997).
37. The facts are largely set out in the second scenario which introduced this paper.
38. The boy allegedly tried to touch her breasts and vaginal area, made sexual suggestions and rubbed himself against her in a sexually suggestive manner.
39. O'Connor J. delivered the opinion of the Court in which Stevens, Souter, Ginsburg and Breyer JJ joined. Kennedy J. filed a dissenting opinion, in which Rehnquist CJ, and Scalia and Thomas JJ joined.
40. ie. a recipient of federal funds, a public school in this instance.
41. unreported judgment, p.19.
42. unreported judgment p.7-22.
43. It is important to note that for this reason the files are not available and details in this article are largely from the Report of the Commissioner for Children, referred to below, and newspaper reports.
44. (1998) Report of an Inquiry by the Commissioner for Children on Mahurangi College, p.10.
45. (1994) Nottingham County Court July 13, reported in Childright Bulletin 108, p.3 and 109, p.6.
46. These were the Los Angeles Unified School District and the Antioch Unified School District. See (1996) The American School Board Journal, Vol. 183, p.12.
47. [1932] All ER Rep I (HL), [1932] A.C.562.
48. [1978] AC 728 (HL).
49. Of which three of the most notable were *Peter W. v San Francisco Unified School District* 60 Cal.App.3d.814, 131 Cal.Reptr.854 (1976); *Hoffman v Board of Education of the City of New York* 64 App. Div.2d.369; N.Y.S.2d.99 (1978); and *Donohue v Copiague Union Free School District* 95 Misc.2d 1, 408 N.Y.S. 2d 584 (1977).
50. *X (Minors) v Bedfordshire County Council* [1995] AC 633.
51. (1996) The Cavendish Conference Centre, 14 November, quoted in J Robinson 'Damages for academic under-performance: pupils as plaintiffs' (1997) 9, 2 *Education and the Law* 93.
52. *Ramsay v Larsen* (1964) 111 CLR 16; *Richards v State of Victoria* [1969] VR 16; and *Introvigne v The Commonwealth* (1981) 32 ALR 251.
53. She referred to cases such as *Rupp v Bryant* 417 So.2d 658 (Fla.1982) and *Brahatcek v Millard School District* 202 Neb. 86, 99-100, 273 N.W. 2d 680,688 (1979).

54. Introduced by the Accident Compensation Act 1973, now in its present form under the Accident Insurance Act 1998.
55. [1996] 3 NZLR 424.
56. [1996] 3 NZLR 424, at p.434.
57. [1998] 1 NZLR 416.
58. [1998] Court of Appeal of New Zealand, CA239/98, 6 May 1999.
59. n.2, per Thomas J. at pp 27 & 28.
60. CA MacKinnon (1979) Sexual Harassment of Working Women 27.
61. One commentator talks about 'Friday flip-up day' which was a long standing tradition at a Montana elementary school which was essentially a competition among boys to see how many skirts they could lift on a particular day. Shere, M. (1994) No Longer Just Child's Play: School Liability under Title IX for Peer Sexual Harassment' *University of Pennsylvania Law Review* 141, p.2119 at p.2121 discussing Adler, J. and Rosenberg, D. (1992) 'Must Boys Always be Boys!' *Newsweek*, 19 October 1992,p.77.
62. C Richard (1996) Surviving student to student sexual harassment: legal remedies and prevention programmes, *Dalhousie Law Journal*, Vol. 19, 169.