

## CASE NOTES

# **A School's Duty to Ensure a Hostility-Free Learning Environment: Violence Among Girls in a Melbourne School**

*Lisa Eskinazi v State of Victoria*

*County Court of Victoria, Melbourne. No 06471 of 1999  
(unreported)*

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Traditionally, bullying among school girls has been associated with non-physical, and not so serious, forms of abuse including among other forms, verbal abuse and exclusion with occasional incidents of hair pulling. More recent research, mainly from countries outside of Australia suggest however, that during the past two decades there have been significant increases in the number of serious physical violence incidents taking place among girls in school settings. Hay-Mackenzie, in a thoroughly researched paper published in ANZJLE (Vol 7 No 2, 2002; pp. 87-140), although writing about data from the United Kingdom, notes the increase in that country of incidents involving stabbings, head kicking, stoning, slapping, and broken bones many of which have necessitated hospitalisation.

Schools in Australia, while generally safe places to learn and work in, have to confront the reality that serious incidents of bullying among girls is a problem that has the potential to be as serious as the physical violence that occurs among boys. As the case discussed here illustrates, in order to prevent or reduce incidents of physical abuse among girls, just as with boys, it is necessary for schools to have in place policies and practices to manage the problem effectively. This requirement was well emphasised in *S and The Corporation of the Synod of the Diocese of Brisbane* [2001] QSC 473 by Wilson J when in her summing up to the jury she stated 'as a matter of law, the defendant was obliged to have in place proper systems to ensure that reasonable care was taken ...'

It is not however, sufficient merely to have such systems in place. Rather schools have to ensure that these systems are policed, enforced and frequently reviewed so as to ensure students are adequately protected and staff kept legally safe. This point was recognised by Wilson J in *S* '... as a matter of law it [the school] was obliged to implement those systems and to police compliance with them'. Similarly in the English Court of Appeal case of *R v London Borough of Newham ex parte X* [1995] ELR 303 it was stated:

The problem (bullying) is now well enough recognised for it to be reasonable to expect all schools to have policies and practices in place to meet it ... We agree such policies are of little value unless they are put into practice.

The duty is however only one to take reasonable care for students' welfare and while a school or school authority has a duty to ensure reasonable steps are taken (*Commonwealth v Introvigne* (1981) 150 CLR per Mason J at 270) schools are not seen as absolutely liable for injuries incurred by students when under the school's care (*Eskinazi v State of Victoria* at 4). Schools are not insurers of student welfare (*The Trustees of the Roman Catholic Church for the Diocese of Sydney v Kondrajian* [2001] NSWCA 308)

In *Eskinazi* the school had policies in place to manage the problem of bullying but, as the following discussion clearly indicates, compliance with them was not enforced and, as a consequence, the plaintiff suffered physical and psychological harm. It is significant to note that *Eskinazi* is an illustrative case decided by the Victorian County Court. It does not establish a new precedent.

## **The School Bullying Policy**

At the time of the incidents complained of the school discipline policy was contained in the Information Handbooks given to each student. Provision was made for the discipline policy, together with the school code of conduct, to be developed in consultation with students, staff and parents. The policy was to be reviewed at regular intervals and contained a major objective of 'maintaining an orderly learning environment through respect of the rights ... of all'. The Information Handbook made it quite clear that serious or repeated offences could lead to suspension. A provision dealing with school rules required students to read the rules which were contained in the school diary. These rules included three of particular importance to the allegations by the plaintiff namely that it was against the school rules: to 'provoke, bully or fight with other students'; to 'throw objects'; or to 'use abusive language'. It was also against the school rules to 'write on or damage school furniture, equipment or buildings'.

There was also a code of classroom conduct that, in essence, sought to provide for a hostility free learning environment through 'respecting the rights of those in the class not to be verbally harassed or physically assaulted ...' In addition the School Charter required teachers to take responsibility for ensuring 'a safe, orderly and stimulating environment for learning' and noted that 'students have a right' and parents can expect them 'to work in a secure environment' Above all the Charter adds the provision that students may be expected to 'be free from harassment and intimidation' and 'to be treated with courtesy and respect'.

## **The Background**

The plaintiff (Lisa)<sup>1</sup> was born in 1981 and, after attending Sandringham Primary School, where she was placed in an accelerated program for gifted children, started her secondary education at Sandringham Secondary College in 1994. During the first half of 1994 Lisa continued to attain sound academic standards achieving 'A's in most subjects although she was not as strong in Mathematics and Science. Her class reports were highly positive and reflect a hard working, polite and cooperative student.

Early in the second half of 1994 a number of girls – at times up to five – began to 'gang up' on the plaintiff and harassed her by calling her names including 'fat bitch', 'fat slut', 'two dollar

hooker’, ‘bitch’ on a daily basis. In addition she was threatened with physical violence and death threats. While the reasons for the harassment are not readily discernible, it appears the bullies believed Lisa had spread a rumour about them smoking marijuana. As a consequence of the harassment the plaintiff was scared and did not want to go to school.

The evidence in this case reveals that throughout the latter part of Year 7, Lisa had not revealed her concerns to her mother. Although the defence argued this was evidence that the bullying did not take place, or at least not to the extent alleged, the court refused to accept this and, as Lewitan J stated ‘there a number of reasons including fear or shame why the plaintiff, then almost 13 years old, would not confide in her mother’. It was only at the end of 1994 or the beginning of 1995 that Lisa’s parents were acquainted with the seriousness of the problem and arranged for her to sit an entrance examination for another school with the intention of transferring her there at the end of her second year at Sandringham Secondary College. Even then, however, Lisa requested her parents not to intervene as she believed it would only make matters worse for her at school.

Other students had heard Lisa being harassed by the name calling and threats and stated that the plaintiff did not retaliate in like fashion. Other evidence, accepted by the court showed that the plaintiff, in addition to having to suffer verbal abuse, was frequently pushed in locker rooms and corridors and that as a result she was often seen crying and upset. The transcript of the proceedings provides a very clear picture of a student who, during the early part of her Year 7 at school, was constantly bullied and harassed. While research has revealed that bullying is a problem to a greater or lesser extent in all schools, the court transcript of this case provides an example of where a promising young student is bullied and harassed to such an extent that serious physical and psychological harm were almost inevitable.

The deterioration in Lisa’s academic work was evident from the end of second semester, 1994, when she achieved lower grades than those in the first half of the year. It was during the latter part of that year graffiti about Lisa began to be written on classroom desks, on the walls and the door of the classroom and in the sports changing room. This included such expressions as ‘Lisa is a fat bitch and a slut and a two-dollar hooker’. More serious forms of bullying started to occur from the beginning of 1995 when, in addition to name calling, Lisa had death threats made against her, she was kicked in the back and had rotten fruit thrown at her. It is also a concern that at this time more girls became involved as bullies against Lisa and against other students in the school as well.

At the beginning of 1995, ‘on about five occasions’ Lisa reported the harassment to the Year 8 Coordinator, who was responsible for dealing with bullying for students in that year cohort. She was, however, merely told that if she ignored it the problem would go away! Another teacher to whom Lisa reported the bullying – the welfare coordinator – also merely told Lisa to ignore the problem. Lisa’s health also began to deteriorate from around this time and she lost 10 kilograms while in Year 8.

In March, 1995 Lisa’s mother met with the Year 8 coordinator, and she too, was merely told that the problem would ‘blow over’. At a subsequent meeting Mrs Eskinazi suggested a meeting might take place with all of the parents of the girls harassing Lisa but this suggestion was rejected on the grounds that ‘some of the parents were violent and it would not be good to get in the same room with them’. She was also told that Lisa should deal with the problem by staying away from the bullies. No advice was proffered about how in a confined space, such as a school, Lisa could keep away from these students particularly in the face of their continued determination to bully and harass others. Mrs Eskinazi’s request to have a meeting with the principal was also rejected by the co-ordinator on the grounds that the problem could be managed.

In July of 1995 the plaintiff suffered the first of two assaults when, while at the school dance, she had her hair pulled, was punched in the stomach and, when she fell to the floor, she was dragged along by her hair. This incident was followed by the assailant and other girls threatening her further and one added 'I'm going to get you tomorrow and I'm going to kill you'. The Year 8 Coordinator, Student Welfare Coordinator and the School Principal were all at the dance but none of them saw the incident. Although the principal spoke to Lisa after the assault he failed to take notes of the incident and he and the teachers also failed to follow up on the events the next day or to take any precautionary measures to ensure Lisa would not be threatened or harmed further.

The plaintiff was again assaulted on the day following the dance when a group of girls started kicking her while she was sitting on a ledge in front of the staffroom during the lunch break. She then had her head smashed several times against a door. There were only two teachers on ground duty at the time and they had not been advised to watch out for incidents involving Lisa. While no member of staff appeared to witness the assault from the staffroom, one of the teachers on ground duty did notice Lisa pushed up against the door and ordered the students to stop their behaviour.

## **Consequences**

After this incident Lisa was taken to the sick bay but was not allowed to ring her parents and it was only at 3.30pm that she was picked up and taken home. As a result of these assaults two of the students were suspended from the school for a period of three days while a third received an in-school suspension.

The plaintiff did not return to Sandringham Secondary College after these incidents but started at Brighton Secondary College in early August 1995. However, finding she was unable to concentrate on her work, she left that school by the middle of 1997. She subsequently completed Year 11 as a part time student at a Technical and Further Education College in 1999 and has since commenced a three year part-time Diploma in Community Health.

Lisa suffered considerable psychological harm as a result of the harassment, bullying and violence and was admitted to hospital on a number of occasions over the period 1997-1999 because of a drug overdose and suicidal depression. She remains on medication but appears to be gradually getting better.

## **Pre-Existing Psychiatric Illness**

The Judge added further that she accepted expert evidence to the effect the plaintiff would have overcome any 'depressive disposition' had she not met adverse conditions and, moreover, 'would have gone on to be relatively untroubled and would certainly not have experienced the sorts of distress she has been experiencing ...'

## **Liability: Breach of Duty of Care**

Given the importance of the decision for schools the grounds for deciding are provided here in some detail. Lewitan J held that the Year 8 Coordinator, the Student Welfare Coordinator and the school Principal had breached their duty of care by failing to ensure reasonable care was taken of the plaintiff for the following reasons:

The Year 8 Coordinator failed to:

- prevent the bullying, harassment and threatening;
- discipline the bullies;

- discipline the bullies for breaching school rules;
- arrange meetings between parents and staff;
- foresee the seriousness of the bullying;
- brief other staff over the problem; and
- appreciate the seriousness of the first assault and thus failed to take precautionary measures to prevent another assault.

The Student Welfare Coordinator failed to:

- follow up on the plaintiff's complaints;
- take care of the plaintiff's welfare;
- discharge the duty owed the plaintiff by delegating her responsibility to the Year 8 Coordinator;
- report the matter to the principal;
- to refer the plaintiff or the bullies to an independent counsellor; and
- see the seriousness of the situation or that the plaintiff might be physically bullied.

The School Principal failed to take:

- appropriate measures to stop the bullying when the plaintiff complained to him or when the Year 8 Coordinator reported the incidents to him;
- notes of the first assault;
- disciplinary action against the bullies after the first assault at the dance; and
- reasonable measures to prevent the second assault on the following day.

The principal was also held to have breached his duty of care on the day after the school dance by delegating the responsibility for Lisa's welfare to the coordinators. As Lewitan J stated:

The delegation of that duty was not reasonable in the circumstances of this case because [the principal] knew or should have known that the plaintiff had been assaulted by a group of girls who continuously bullied and harassed the plaintiff during that year and that one of the group of girls had threatened the plaintiff with violence at the school the next day.

The court noted that the principal did not follow up on the assault after the dance and made no inquiries to determine whether any investigation of the assault was in place.

Moreover, on the day after the school dance, the principal was held to have breached the duty of care owed to the plaintiff by failing to brief teachers who were on supervisory duty in the school grounds, about the events of the previous night so as to ensure they would be responsive to any situation involving the girls that might arise. In essence, he failed to ensure that there was an appropriate standard of supervision of students on the school grounds.

The State of Victoria was held to be vicariously liable for the negligence of the Year 8 Coordinator, the Student Welfare Coordinator and the School Principal for having failed 'to ensure that reasonable care was taken of the plaintiff whilst she was on school premises during hours when the school was open for attendance'.

## **Liability: Causation**

Conflicting evidence was given concerning whether the plaintiff suffered from a pre-existing medical condition amounting to psychiatric illness. The court held, however, that while Lisa might have had periods of sadness even as far back as her primary school days, she ‘was never clinically diagnosed with major depression or had treatment for depression prior to the commencement of the bullying’. Lewitan J held:

I accept the plaintiff’s submission that to the extent, if any, that prior to the bullying the plaintiff suffered from underlying conditions such as depression or bipolar affective disorder, those conditions were then largely asymptomatic. It was the effect of the school bullying on the plaintiff that rendered those conditions symptomatic.

It was held that the failure to prevent the violence, to discipline the bullies, or to contact their parents was such as to leave the bullies with the knowledge that they would not be prevented from carrying out their threats of violence against the plaintiff. As a consequence of these failures the plaintiff suffered physical and psychiatric harm. Further, as noted previously, the court held that the defendant had not ‘established the plaintiff’s pre-existing condition and its future probable effects with a reasonable measure of precision’. Lewitan J added she accepted evidence that ‘the plaintiff may not have developed a depressive illness later in life at all if she had been able to be navigated through her adolescence relatively successfully’.

## **Implications for Practice**

There are many causes for concern that can be noted from the incidents emanating from this case. Above all the failure of the teachers and the principal to take seriously the complaints of the plaintiff or her mother must be seen as a warning that systems put in place for student welfare must be complied with. There are also some concerns over the possibility that teachers appeared unwilling to take action against the group of bullies because of potential violence by their parents. Of concern also is an apparent failure of the plaintiff’s parents to insist on an appropriate level of action being taken to prevent the harassment, bullying and violence that were taking place. They must have been aware from the latter part of Lisa’s Year 7 that she was facing problems at school and that this was affecting her health and academic standards.

The incidents discussed in this case note demonstrate well the need for the promotion and development of school cultures not only of compliance, but of professional engagement. As has been noted in an increasing number of court cases and publications, no student should have to tolerate a hostile learning environment. Schools’ failure to prevent events such as those depicted in *Eskinazi* have been part and parcel of the reality of school life since mass education began. Given the tragic consequences that can result, change is long overdue.

## **Endnotes**

1. The plaintiff’s name will be used throughout this discussion in order to respect and acknowledge Lisa’s individual identity.