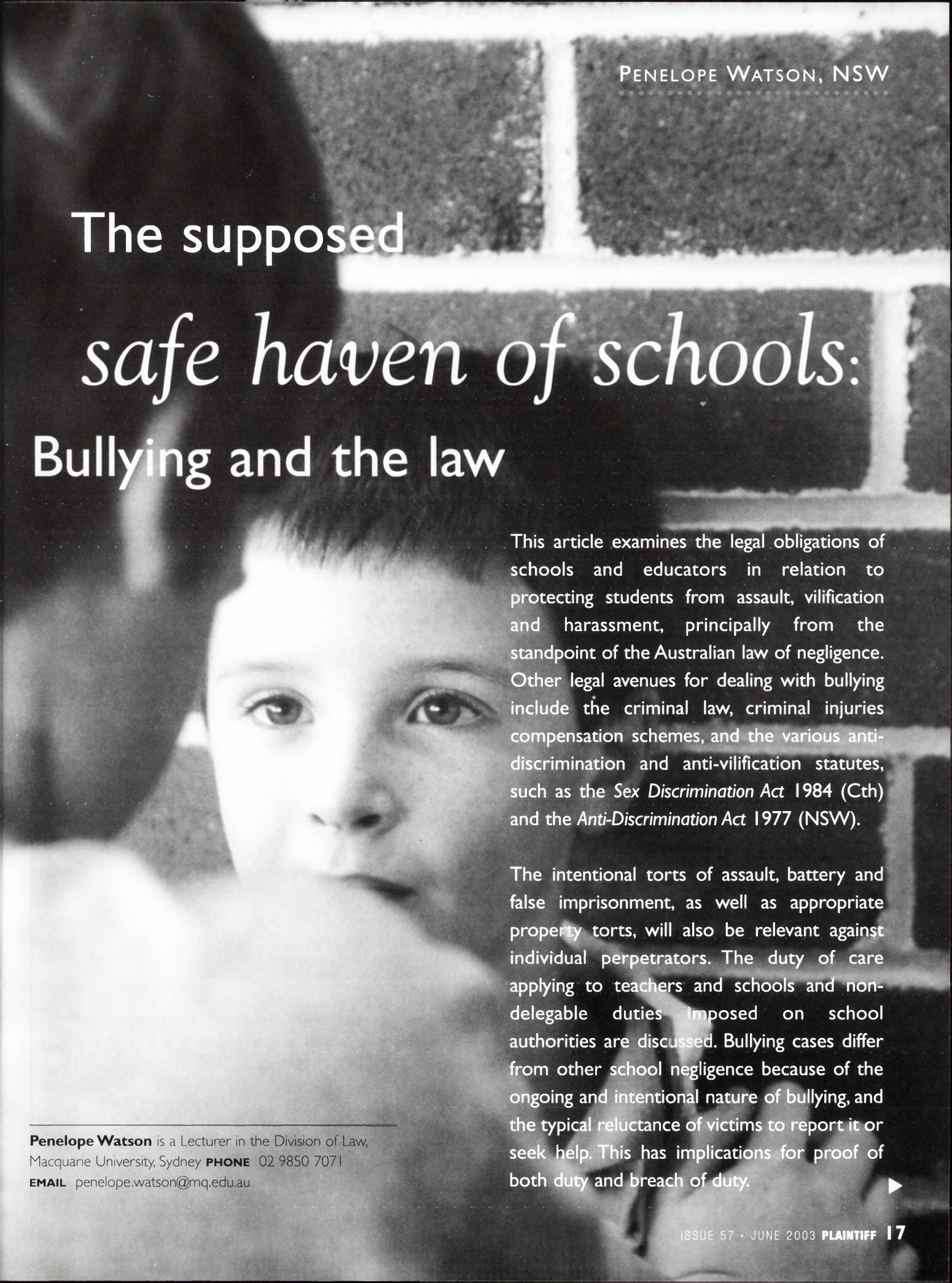
PENELOPE WATSON, NSW

The supposed *safe haven of schools:* Bullying and the law



This article examines the legal obligations of schools and educators in relation to protecting students from assault, vilification and harassment, principally from the standpoint of the Australian law of negligence. Other legal avenues for dealing with bullying include the criminal law, criminal injuries compensation schemes, and the various anti-discrimination and anti-vilification statutes, such as the *Sex Discrimination Act* 1984 (Cth) and the *Anti-Discrimination Act* 1977 (NSW).

The intentional torts of assault, battery and false imprisonment, as well as appropriate property torts, will also be relevant against individual perpetrators. The duty of care applying to teachers and schools and non-delegable duties imposed on school authorities are discussed. Bullying cases differ from other school negligence because of the ongoing and intentional nature of bullying, and the typical reluctance of victims to report it or seek help. This has implications for proof of both duty and breach of duty.

Penelope Watson is a Lecturer in the Division of Law, Macquarie University, Sydney **PHONE** 02 9850 7071
EMAIL penelope.watson@mq.edu.au

INTRODUCTION: *NABOZNY*[1]

Over four years at his high school in Wisconsin, USA, Jamie Nabozny was subjected to violence, abuse and harassment because of his homosexuality. Incidents included forcible mock rape, having objects thrown at him, books knocked out of his hands, his chair pulled out from under him, being spat upon and called names. He stopped using school bathrooms for fear of being attacked. A violent assault in the corridor before school caused internal bleeding.

Each time an incident of abuse took place, Jamie complained to the principal, naming the perpetrators. His parents also complained several times. However, no action was taken, and Jamie attempted suicide twice. Finally he dropped out of school, left his home town, was diagnosed with post-traumatic stress disorder, and commenced legal action.

Scenes like these are played out daily in schools, with varying degrees of seriousness. Little wonder that this 'hateful [and] insidious'[2] practice of bullying is increasingly the subject of litigation.

Bullying takes many forms, including physical assault, taunting and verbal abuse, homosexual vilification, racial, religious or cultural persecution, sexual harassment, and damage to or theft of personal property. More subtle forms include ostracism, rumour spreading and malicious gossip.

Besag[3] defines bullying as: 'The repeated attack, physical, psychological, social or verbal in nature, by those in a position of power which is formally or situationally defined, with the intention of causing distress for their own gain or satisfaction.'

Bothe[4] includes racial and sexual harassment as sub-categories of bullying. The motivation for boys appears to be domination, while for girls it is peer group exclusion.

PREVALENCE OF BULLYING

Many studies demonstrate that about 10% of school children experience bullying, with verbal harassment most prevalent.[5] Up to 30% of boarders in one school reported bullying.[6]

A study[7] involving 25,500 primary and secondary students from Catholic, independent and government schools found that between one in five and one in seven school children reported experiencing bullying several times a week or more.

Australian Kids Helpline data showed that 60% of school-related calls concerned bullying.[8] School homophobia is 'endemic, extensive, and savage' with 'behaviour more like we expect in jails than the supposed safe haven of schools'.[9]

Verbal intimidation and abuse are 'regular experiences' for openly gay students who 'live with the constant spectre of violence, whether they experience it or not'.[10] One gay leader claims 'never [to have] met a gay or lesbian person in my life who cannot recall being bullied or harassed at school'.[11]

Effects on the victims of persistent bullying include deterioriation in self-

esteem, shyness and reduced social confidence, as well as long-term effects on employment opportunities, marriages and parenting skills.

Crisis signs are absenteeism, scholastic under-achievement, childhood depression and suicide. US research suggests gay teenagers are three times more likely than other teenagers to commit suicide.

DUTY OF CARE IN NEGLIGENCE

The duty of care in negligence arises whenever two parties are placed in a relationship of proximity or 'neighbourhood', such that the negligent acts or omissions of one may detrimentally affect the other.[12] In certain situations special duty relationships give rise to more onerous levels of 'special responsibility'.[13] The relationship between teachers/schools and students falls into this category.[14] The basis for the duty was stated by Justice Winneke in *Richards*.

It is 'the need of a child of immature age for protection against the conduct of others, or indeed of himself, which may cause him injury, coupled with the fact that, during school hours the child is beyond the control and protection of his parent and is placed under the control of the schoolmaster who is in a position to exercise authority over him and afford him, in the exercise of reasonable care, protection from injury'.[15]

Similar views have been expressed in *Geyer v Downs*[16] and other cases. It is well established that school authorities are under a common law duty to take reasonable care to protect students from reasonably foreseeable risks of physical injury.[17]

A teacher has a duty to take reasonable steps to maintain the safety of students, although the duty is not so high as to require the teacher to ensure against injury or to keep students under constant supervision. It includes provision of adequate supervision outside the classroom.[18] There is a duty while the students are on school premises and during school hours. But the duty can also apply outside school hours and property.[19]

In *Introvigne*, Justice Murphy noted that, in many respects, the responsibility of the school goes beyond that of the parent, and he drew an analogy with duties of employers. The school, like an employer, must exercise its right to control what occurs during the course of the education of its students.[20]

In *Davis v Monroe County Board of Education*,[21] an American sexual harassment case involving two fifth-grade children, the court reasoned that students should have the same protection in schools as employees have in the workplace. It considered there was greater ability to control behaviour in the classroom than in the workplace.[22]

An Australian workplace sexual harassment case, *Barker v City of Hobart*,[23] was brought against the employer in negligence because there was no relevant anti-discrimination legislation in place. The plaintiff was awarded $150,000 for extreme harassment, including rape.

VICARIOUS LIABILITY AND NON-DELEGABLE DUTY OF SCHOOL AUTHORITIES

The normal rules of vicarious liability apply to education authorities and their employees[24] covering acts performed by staff 'within the scope of the employment'.[25]

In *Introvigne*, the High Court decided that a school authority owes an independent non-delegable duty of care to its students, as well as being vicariously liable for any breaches of duty by its employees. Justice Murphy suggested that the nature and extent of a school's non-delegable duty is:

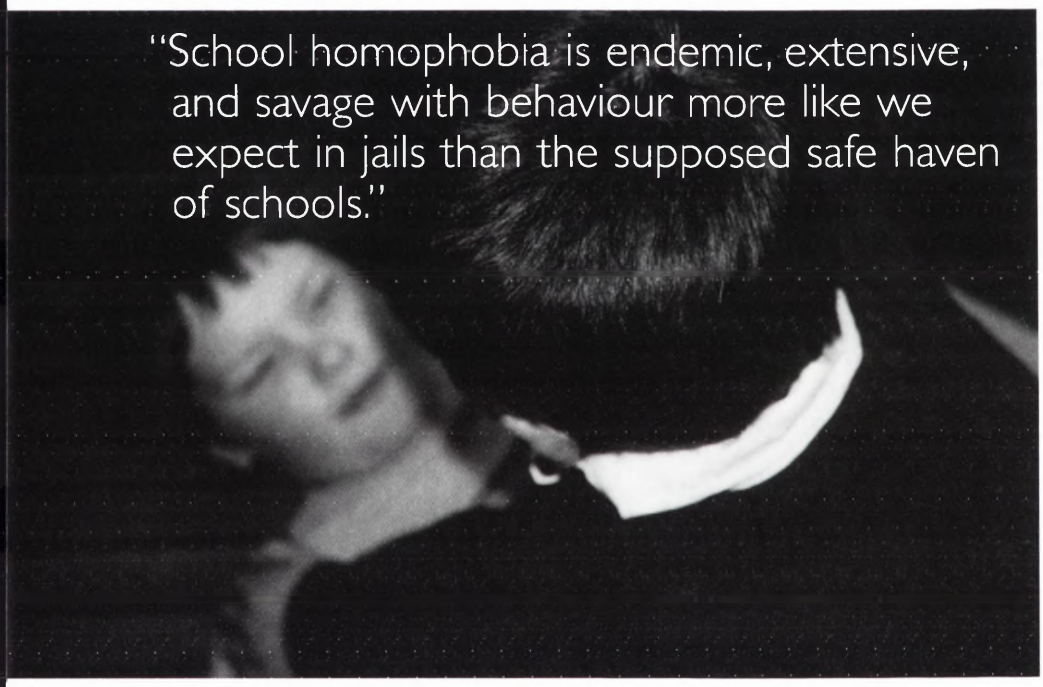
- To take all reasonable care to provide suitable and safe premises.
- To take all reasonable care to provide an adequate system to ensure that no child is exposed to any unnecessary risk of injury.
- To take all reasonable care to see that the system is carried out.

In *Watson v Haines*, Justice Mason emphasised that: 'The duty is not discharged by merely appointing competent teaching staff and leaving it to the ▶

staff to take appropriate steps for the care of the children... [A school authority] has a duty to ensure that reasonable steps are taken for the safety of the children, a duty the performance of which cannot be delegated.'

EXTENT OF THE DUTY OF CARE, AND NATURE OF HARM

All of the cases discussed above concern physical injury to students. Once physical injury is proved, any consequential mental or psychological injury, which is not too remote, is also recoverable. The remoteness requirement has been very broadly interpreted.[26]



To extend the duty of care so that it would afford plaintiffs protection from foreseeable peer vilification and harassment, without physical injury, is far more problematic. Yet in bullying situations, the ongoing persecution and climate of fear, causing major damage to the victim's self- esteem, psychological well-being and future prospects, is generally more significant than any physical injury experienced.

Infliction of emotional distress, in the absence of physical injury, is compensable only in very limited circumstances. And although foreseeable, it is not encompassed by *Donoghue v Stevenson*.[27] Fear by itself has been described as a 'normal human emotion' for which no damages can be awarded.[28] Emotional injury must normally constitute nervous shock, which is unlikely in bullying or harassment situations. An action on the case under *Wilkinson v Downton*[29] is a yet untested possibility.

It seems that in cases of psychological injury, plaintiffs may be expected to demonstrate that they are emotionally and mentally 'normal',[30] despite the eggshell skull rule. However, in the Scottish case of *Scott v Lothian Regional Council*,[31] the pursuer's teacher had noted that she was 'more vulnerable to the boys' attentions because of her own personality/ behaviour/ reaction', and knowledge such as this should be sufficient to raise the standard of care, as in cases like *Paris v Stepney Borough Council*.[32]

Scott concerned a secondary school girl who experienced serious bullying because of her weight. This drove her to attempt suicide, and led to frequent truancy and early termination of schooling. Her complaints to school authorities escalated the bullying because other children blamed her for 'cliping' (dobbing).

In *Scott*, it was accepted that a child who was vulnerable to bullying would be susceptible to further bullying, suggesting that schools may be obliged to take all reasonable steps to monitor continuing bullying and to encourage reporting by victims. The unchallenged existence of a climate hostile to reporting may in itself constitute a breach by the school.

The two guidance teachers in *Scott* ultimately were held not liable, as their actions were not 'such that no guidance teacher of ordinary skill would have taken [them] in the circumstances if acting with ordinary care'.[33]

Loss of opportunity is now well established as compensable harm,[34] and may successfully substitute for emotional harm in harassment cases. The relevant loss would be loss of educational opportunity, leading to reduced employability and so on.

COULD *NABOZNY* HAPPEN IN AUSTRALIA?

Nabozny sued school officials and the Public School District for failing to protect him, and for discriminating against him in breach of the Constitution because of his sexual orientation. On appeal to the Court of Appeals he was awarded a US$1 million settlement. The appeal was argued entirely on Fourteenth Amendment (equal protection) grounds.

Australia, of course, has no constitutional equivalent, and therefore any common law negligence action must necessarily proceed as an examination of the limits of the duty of care, unless a similar right could be implied into Australia's constitution.

There is no doubt that facts similar to *Nabozny* could occur here, as the *Tsakalos*[35] case demonstrated. Clearly, a remedy for harassment is available, pursuant to the anti-discrimination legislation. But it will not achieve the same outcome in terms of damages.

This is also true of remedies available under the criminal law. Tort actions for assault, battery and/or false imprisonment would be available against individual perpetrators, but would not render schools vicariously liable.[36]

In relation to intentional torts of students, the school's liability in negligence, if any, could stem from failures in supervision or in the design and implementation of appropriate systems for identifying and dealing with bullying. This could include disciplining offenders, counselling victims, defects in the physical design of buildings or grounds which render supervision difficult, ignoring or inadequately responding to pleas for help from victims, selective enforcement of safety policies, and so on.

As Justice Stephen said in *Geyer v Downs*: 'It is for schoolmasters and those who employ them, whether government or private institutions, to provide facilities whereby the schoolmasterly duty can adequately be discharged during the period for which it is assumed. A schoolmaster's ability or inability to discharge it will determine neither the existence of the duty nor its temporal ambit but only whether or not the duty has been adequately performed... It will be for the schoolmaster and those standing behind him to cut their coats according to the cloth, not assuming the relationship when unable to perform the duty which goes with it.'

Measured against the three requirements stated by Justice Murphy in *Introvigne*, Jamie's school may have had several deficiencies.

Take all reasonable care to provide suitable and safe premises

Many of the alleged assaults occurred in school toilets, and one in the corridor outside the school library before opening hours. The issues here are supervision, policies concerning students on school premises outside school hours, possibly combined with design factors relating to the premises, such as whether toilet cubicles have lockable doors, or indeed any doors, or if there are blind spots which escape supervision, even when it is provided.

Of course, the fact of a student sustaining injury does not prove that 'all reasonable care was not taken. As Justices Murphy and Aickin observed in *Geyer v Downs*,[37] plaintiffs frequently fail in school negligence cases because they are unable to prove that their injury would have been prevented by adequate supervision. *ACT Schools Authority v El Sheik*[38] is a recent example of this.

Take all reasonable care to provide an adequate system to ensure that no child is exposed to any unnecessary risk of injury, and take all reasonable care to ensure the system is carried out

The school did have in place a system to address sexual harassment. This included provision of school counsellors, a police liaison officer, a discipline officer and a stated policy based on legislation. The problem was not the formal policy, but its selective enforcement. The underlying policy was at odds with the stated policy, probably due to the homophobic attitudes of the relevant staff and students.

CONCLUSION

We live in an era of accountability, with litigation on the rise. Preventative measures in the form of good policies, practices, information and management systems are crucial for schools. In successful bullying cases, financial consequences for schools and insurers can be expected to extend well beyond those relating to physical injuries.

In *Davis v Monroe County Board of Education*,[39] the damage caused by sexual harassment was said to have a greater and longer lasting effect on children than on adults. A sexually abusive environment inhibits, if not prevents, a harassed student from developing full intellectual potential, the court said.[40]

The same could be argued about any abuse, including school bullying. Post- traumatic stress claims are becoming increasingly common, and these, or any similar delayed onset injuries, pose additional problems for schools. Depending on the wording of the relevant limitation provisions, claims could be laid many years after the student has ▶

left school.[41]

Damages awards in cases involving physical and psychological injury of an ongoing or enduring kind, with loss of educational opportunities leading to reduced career prospects, can be expected to be substantial, although in Australia there is no prospect of the very large verdicts achieved in the United States.

In the absence of physical injury, the position at common law is much weaker for plaintiffs, and any finding of liability would necessarily involve extension of the current law relating to psychological harm. PL

Endnotes:

1 *Jamie S Nabozny v Mary Podlesny, William Davies & Thomas Blavert* 92F.3d 446 (1996, US).

2 *Deborah Scott v Lothian regional Council* [1998] ScotCS 14.

3 V E Besag, *Bullies and Victims in Schools*, Open University Press, Milton Keynes, 1989, at 4.

4 P Bothe, 'Bullying in Schools' (1997) *School Law 1997 National Seminar Papers*, LAAMS P/L Publications.

5 Tattum & Lane, 1989; Besag, 1989; Rolande & Munthe, 1989, quoted in Bothe, above; see also K Rigby and P T Slee, 'Dimensions of Interpersonal Relating Among Australian School Children and Implications for Psychological Well-Being' (1992) *Journal of Social Psychology*.

6 Compared to an average rate of 20% for the same school.

7 K Rigby and P T Slee, 'Bullying Among Australian School Children: Reported Behaviours and Attitudes Towards Victims' (1991) 131 *Journal of Social Psychology*, p 615.

8 Bothe, supra 5.

9 Dr David Plummer, Australian National University.

10 NSW school homophobia study, National Centre in HIV Social Research, Macquarie University.

11 Ross Bennett, then coordinator of 2010 Lesbian and Gay Youth Services, quoted in *Sydney Morning Herald*, 2 April 1997, p 11.

12 *Donoghue v Stevenson* (1932) AC 562, All ER Rep 1 (H/L); *Jaensh v Coffey* (1984) 155 CLR 549, 54 ALR 417 (H/C).

13 *Commonwealth v Introvigne* (1982) 150 CLR 258 (H/C).

14 *Warren v Haines* (1986) Aust Torts Reports 80-014; *Richards v State of Victoria* (1969) VR 136 (FC).

15 at 138-39.

16 (1977) 17 ALR 408, Justice Stephen.

17 *Donoghue v Stevenson*, supra 12; *Wyong Shire Council v Shirt* (1980) 146 CLR 40; *Geyer v Downs*, supra 16.

18 *Commonwealth v Introvigne*, supra 13; *Watson v Haines* (1987) Aust Torts Reports 80-094; *Roman Catholic Church (Bathurst) v Koffman*, Supreme Court of NSW - Court of Appeal, no 40753.

19 *Introvigne*, supra 13; *Koffman*, supra 18; *Stokes v Russell*, unreported, Supreme Court of Tasmania, 1983; *Reynolds v Haines*, unreported, Supreme Court of NSW, 1983; *Horne v State of Queensland* (1995) Aust Torts Reports 81-343.

20 See discussion in J O'Brien 'General Legal Principles' (1994) *School Law: A Melting Pot of Developing Legal Issues*. Legal and Accounting Management Seminars P/L, seminar papers.

21 74 F.3d 1186 (11th Circuit) 1996.

22 For a similar case involving a third-grade student, see *Bosley v Kearney R-I School District*, 39 ATLA L. Rep 123, April 1996.

23 Unreported, Supreme Court of Tasmania, 1993.

24 *Ramsay v Larsen* (1964) 111 CLR 16.

25 *Deatons v Flew* (1949) 79 CLR 370 (H/C).

26 eg *Nader v UTA of NSW* (1985) 2 NSWLR 501 (CA NSW); *Stephenson v Waite Tileman* (1973) 1 NZLR 152 (CA NZ).

27 See *Calveley v Chief Constable of the Merseyside Police* (1989) AC 1228 (H/L).

28 *Hicks v Chief Constable of South Yorkshire Police* (1992) 2 All ER 65 (H/L).

29 [1897] 2 QB 57.

30 Justice Windeyer in *Pusey v Mt Isa Mines*.

31 [1998] ScotCS 14.

32 [1951] AC 367.

33 per Lord Maclean

34 eg *Bennett v Minister of Community Welfare* (1992) 176 CLR 408; *Chappel v Hart* (1998) 195 CLR 232.

35 *Tsakalos v Government of NSW*, negligence action Supreme Court of NSW, 1997, settled - similar facts to *Nabozny* in less extreme form.

36 As students are not 'servants' employed to perform work under a contract of service. This is a separate issue from a school's liability.

37 (1977) 138 CLR 91; 17 ALR 408 (H/C).

38 [2000] FCA 931.

39 74 F.3d 1186 (11th Circuit 1996).

40 This case was argued under Title IX of the Education Amendments of 1972 (20 U.S.C. no 1681 *et seq*), the same provisions partially relied on in the *Nabozny* case.

41 eg s 5 (1A), *Limitation of Actions Act* 1958 (Vic) states that 'the cause of action shall be taken to have accrued on the date on which the person first knows that he has suffered those injuries'.