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**Sticks and Stones Can Break Your Bones
But Names Can Really Hurt You:**

**School Board Liability for Bullying and
Harassment**

**C. Kirk Boggs
and
Andra L. Maxwell-Baker**

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LERNERS



Suite 2400, 130 Adelaide Street W.
Toronto, ON M5H 3P5

Tel: (416) 867-3076
Fax: (416) 601-9192

Sticks and Stones Can Break Your Bones But Names Can Really Hurt You: School Board Liability for Bullying and Harassment¹

In recent years there has been growing awareness of bullying and violence in our schools. School boards, teachers and administrators have been under increased pressure from the media and the public to prevent bullying in its myriad forms, including the emerging phenomenon of “cyber-bullying,” which often occurs off school property and outside school hours over cell phones, the internet and other technologies over which the schools have limited control. These new technologies, which blur the line between school related and non-school related behaviours are particularly problematic for educators to deal with. In the traditional model of school responsibility, the general rule was that educators were only responsible for supervising and monitoring student behaviour during school hours. Interaction or conflict occurring outside school hours was the responsibility of parents and/or the police. The internet and other instant texting medias have, however, created increasing problems for the application of the traditional model. For example, minor interaction at school may result in escalating email abuse or ridicule after hours. This, in turn, can lead to increased conflict at school, often with disastrous results for students at a sensitive time in their development as individuals.

At least in part due to this emerging problem, recent amendments to the *Education Act*² have for the first time included “bullying” in the list of infractions for which a suspension may be imposed and have granted schools the power to discipline students for incidents occurring off school property. Although, to date, there are no reported decisions in which students and/or their parents have successfully brought a civil suit against a school board arising from bullying, we have begun to see negligence claims filed in the courts alleging that teachers and

¹ The authors wish to thank Andrew Xu, student-at-law, Leners LLP, for his dedicated research on this subject

² *An Act to amend the Education Act in respect of behaviour, discipline and safety*, S.O. 2007, c. 14

administrators failed to provide a safe school environment that protected students from bullying and harassment by their classmates.

In 2002 a male high school student in Ontario caught the attention of the media after he and his family commenced an action against a school board and three students alleging that school administrators had failed to protect him from several years of harassment and bullying by his classmates³. In 2004 a family in Alberta also issued a Statement of Claim against Calgary school administrators alleging that their son had been repeatedly bullied while the school did nothing to ensure his safety⁴. More recently, in *Jubran v. North Vancouver School District No. 44*⁵, the British Columbia Court of Appeal restored a decision of the British Columbia Human Rights Tribunal that found the school board responsible for failing to provide an educational environment free from discriminatory harassment, and liable for the discriminatory conduct of its students who had subjected Jubran to homophobic epithets and physical assaults based on his perceived sexual orientation. The school board was ordered to pay Jubran \$4,000 in compensation. While not a substantial sum, it sets a precedent for school boards being ordered to pay monetary damages for failing to protect students from verbal abuse by their classmates.

What is bullying?

There are approximately 2 million students attending school in Ontario. One in three students between grades 7 and 12 report having been bullied at school, while approximately one-third report having bullied someone else⁶.

Bullying has been defined as “a form of aggression in which there is an imbalance of power between the bully and victim”.⁷ Bullying can be physical, verbal or psychological. It can occur

3 Cyber-bullying, CBC News On-line, March 2002, Updated March 2005

4 Calgary Sun, May 14, 2004; MacKay and Sutherland, *Teachers and the Law*, p.86

5 (2005), 253 D.L.R. (4th) 294 (B.C.C.A.); reversing [2003] B.C.J. No. 10 (S.C.); quashing [2002] B.C.H.R.T.D. No. 10

6 *Shaping Safer Schools – A Bullying Prevention Action Plan 2005*, Safe Schools Action Team at p. 10

directly, in face-to-face confrontations, or indirectly behind the victim's back through gossip, rumours and exclusion. The key elements of bullying are:

- (a) power imbalance;
- (b) bully's intent to harm;
- (c) victim's distress; and
- (d) repetition overtime.⁸

Indirect forms of bullying, in particular, will not always be obvious or apparent to teachers and administrators. Bullying can be hidden from the view of adults who might otherwise intervene and "flourishes best on a bed of secrecy."⁹ Cyber-bullying poses significant challenges for schools since it occurs over cell phones, internet chat rooms and web based social networking sites which schools do not control or often even have access to.

What causes specific instances of bullying cannot easily be predicted. Innocuous comments taken the wrong way, religious or physical differences, minor physical confrontations normally forgotten can for one reason or another result in retaliatory verbal or physical behaviour against the victim by one or more individuals. On many occasions, the initial incidents may occur totally outside the school setting; however, they become reinforced during the repeated interaction that occurs on a day to day basis at school. Ironically, often the victim themselves has been a bully or engaged in harassing behaviour in the past. Also, traditional concepts of physical size imbalance do not always apply: several smaller teenage males or females can very viciously bully a six foot male footballer for some perceived slight with devastating consequences. Complicating the situation even more, those accused of bullying may, when confronted, react

7 Deborah J. Pepler and Wendy Craig "Making a Difference in Bullying" (April 2000) La Marsh Centre for Research on Violence and Conflict Resolution, Report No. 60 at p.4.

8 Deborah J. Pepler and Wendy Craig "Making a Difference in Bullying" (April 2000) La Marsh Centre for Research on Violence and Conflict Resolution, Report No. 60 at p.4.

9 Daniel B. Weddl :Bullying in Schools: The Disconnect between Imperial Research and Constitutional, Statutory and Tort Duties to Supervise, 77 Temp. L. Rev. 641 at p.6, Citing Ron Banks, Bullying in Schools, Erick Digest, April 1997 at 2 and Valerie E. Besag, Bullies and Victims in Schools: A Guide to Understanding and Management , 5 (1989)

with self destructive behaviour. Accordingly, any response to a complaint by educators must be sensitive, thoughtful and measured towards all individuals involved.

The duty of care owed by educators:

Common Law Duty

A school board has a duty to maintain a positive school environment for all persons served by it [Ross v. New Brunswick School District No.15, [1996] 1 S.C.R. 825 at para.42] and a responsibility to protect students from harm that is reasonably foreseeable. At common law, school boards and their employees are held to the standard of care of a reasonably prudent or careful parent acting in like circumstances [Myers v. Peel County Board of Education (1981), 123 S.C.R. (3d) 1]. The Ontario Court of Appeal has elaborated upon this standard, explaining that the comments of Justice McIntyre in Myers:

mean no more than that the careful or prudent parent standard of care applies, but that it must be adjusted to the circumstances where, for example, in a school setting the particular expertise expected of the school authorities – those responsible for a given group of students – may extend beyond the expertise which may be provided by a careful or prudent parent.¹⁰

The standard does not require students to be kept under constant supervision. Schools have generally not been found liable for injuries to students that were unforeseeable, even if there was a lack of supervision. Sudden, unexpected confrontations between students who were not known to be aggressive or to have behavioural problems, for example, have not historically attracted liability. The question of how the standard is to be applied in a particular case depends upon factors including the nature and size of the area to be supervised, the number and ages of the students involved and the nature of the activities or activities that are in

¹⁰ *Thomas et. al. v. The Board of Education of the City of Hamilton* (unreported) October 26, 1994 (Ont. C.A.) per Osborne J.A. at p. 14, cited in *Walsh v. Buchanan*, [1995] O.J. No. 64 (Gen. Div.) at paras. 107-109

progress [*Hentze (Guardian ad litem of) v. Campbell River School District No. 72*, [1994] B.C.J. No. 1876 (B.C.C.A.) at para.4].

In *Walsh v. Buchanan*, [1995] O.J. No. 64 (Gen. Div.), a student sued The Board of Education for the City of Hamilton and one of his classmates after he and his fellow student were involved in a fight in a school hallway. Although there was no teacher specifically supervising the hallway and it was known that the students had been involved in another altercation earlier that morning, neither the school board or the vice-principal were found liable because the trial judge concluded that the fight was not foreseeable and the supervision was reasonable.

Walsh and Buchanan were both 19 years old. They participated in an intramural floor hockey game before morning classes, fought during play and were ejected by the teacher/referee. Subsequently, they exchanged words while leaving the gymnasium and the vice-principal, who overheard, took the defendant Buchanan aside and reminded him that the incident was over and that further fighting would result in a suspension. He believed Buchanan accepted his advice and showed no signs of continuing anger. The vice-principal then spent time speaking with the plaintiff Walsh and cautioned him against fighting. Approximately 30 minutes later, however, the boys bumped into each other again in the upper hall at the plaintiff's locker, which happened to be outside the door of Buchanan's first period history class. The plaintiff initiated a verbal confrontation with Buchanan and pushed him. A serious fight ensued during which the plaintiff suffered a broken nose and chipped tooth. A teacher heard the altercation from his classroom and broke up the fight. Although there was no teacher specifically assigned to monitor the hall, teachers were required to be in their classrooms by 8:40am in anticipation of students arriving. School administrators and vice-principals also periodically patrolled the halls.

Although Buchanan was found liable, Justice Stayshyn found no liability on the part of the vice-principal or the school board. The judge considered the age of the boys and found that a reasonable and prudent parent of a 19 year old "would not feel compelled to exercise constant

unremitting supervision.” There was no evidence that the supervision system in place was unreasonable or that any other board had a higher standard. Furthermore, with respect to the vice-principal, the judge accepted that the fight in the upper hallway was “a new incident” and that it was not foreseeable that further violence was going to occur that morning.

In *Hentze (Guardian ad litem of) v. Campbell River School District No. 72*¹¹, in contrast, the British Columbia Court of Appeal upheld the trial judge’s finding that the school board was liable for failing to prevent a 7-year-old student from being injured while he was playfighting and rough-housing with bigger boys in the school yard. The trial judge found that the rough-housing had been going on for several minutes while the teacher on playground duty was engaged in a conversation at the front of the school with her back to the yard. Although it was acknowledged that schools are not required to keep students under constant supervision at all times, the judge nevertheless found that the teacher’s supervision fell below the standard of a reasonably careful and prudent parent.

Although the *Walsh* and the *Hentze* cases are instructive, they differ from bullying cases in that they arise from isolated incidents, rather than a history of prolonged and repeated harassment and assault. In circumstances where educators have received repeated reports of bullying and harassment, they will have difficulty arguing a lack of foreseeability. As will be discussed below, we can expect the courts to place less emphasis on the level of supervision available at a school on a given date at a given time, and more emphasis on the policies, programs and procedures schools have in place to combat bullying at a systemic level.

¹¹ [1994] B.C.J. No. 1876 (C.A.)

Statutory Duties

Pursuant to the *Education Act*, teachers have a duty to maintain proper order and discipline in their classrooms and while on duty in the school and on schools grounds¹². In addition to his or her duties as a teacher, a principal must also “give assiduous attention to the health and comfort of the pupils” and to refuse to admit a person “whose presence in the school or classroom would...be detrimental to the physical or mental well being of the pupils.”¹³ Under the regulations to the *Act*, principals are in charge of the “organization and management of the school” and have a duty to supervise students during the period of time each school day when school buildings and playgrounds are open to the public.¹⁴

The *Education Act* imposes statutory duties on school boards, principals and teachers to provide an education for the students under their jurisdiction while ensuring order, discipline and safety for all. While the victims of bullying and their parents may question why “bullies” are not simply expelled and removed from the school community, it must be remembered that school boards face competing duties and obligations and must struggle to achieve a balance between the rights of individual students to attend school and receive an education, and the safety and well-being of the student population as a whole. Section 170(1) of the *Education Act* requires school boards to “provide instruction and adequate accommodation... for pupils who have a right to attend a school under the jurisdiction of the Board.”¹⁵ Educators cannot, therefore,

¹² s. 264(1) It is the duty of a teacher and a temporary teacher,

- e) to maintain, under the direction of the principal, proper order and discipline in the teacher's classroom and while on duty in the school and on the school ground.

¹³ s.264(1) It is the duty of a principal of a school, in addition to the principal's duties as a teacher,

- a) to maintain proper order and discipline in the school;
- b) to develop cooperation and coordination of effort among the members of the staff of the school;
- j) to give assiduous attention to the health and comfort of the pupils, to the cleanliness, temperature and ventilation of the school, to the care of all teaching materials and other school property and to the condition and appearance of the school buildings and grounds;
- m) subject to an appeal to the Board, to refuse to admit to the school or classroom a person whose presence in the school or classroom would in the principal's judgment be detrimental to the physical or mental well being of the pupils.

¹⁴ *Operation of Schools – General*, R.R.O. 1990, Reg. 298

¹⁵ s.170(1) Every Board shall,

simply exclude “bullies” from their schools. Recent amendments to the *Education Act* require educators to follow a progressive discipline approach, with suspensions and expulsions being a last resort.

Recent Amendments to the Education Act

On February 1, 2008 amendments to the “safe schools” provisions of the *Education Act* came into effect modifying the so called “zero tolerance” legislation of the earlier Mike Harris government. Education Minister Kathleen Wynne stated that the amendments are intended to “strike a balance between more effectively combining discipline with opportunities for students to continue their education.”¹⁶

The amendments are a double edged sword for both school boards and the victims of bullying. Bullying has been explicitly acknowledged in the amendments, signalling that educators ought to be taking steps to address and prevent bullying. On the other hand, the amendments also remove certain disciplinary powers that may have been useful in addressing bullying, harassment and violence. Furthermore, the amendments have created an unwieldy process for suspension appeals and expulsion hearings and obligated school boards to fund and operate alternative educational programmes for suspended and expelled students. Arguably, the amendments are designed to reduce the number of suspensions and expulsions in the province. In the opinion of one commentator, the amendments “may undermine the ability of principals to effectively address serious problems of crime and victimization.”¹⁷

6) provide instruction and adequate accommodation during each school year for the pupils who have a right to attend a school under the jurisdiction of the Board.

16 Ontario Ministry of Education, *Safe Schools and Bullying Prevention A Priority for the McGuinty Government* (Toronto: Ontario Ministry of Education, June 5, 2007); cited in Eric Roher, “Will the New Safe Schools Legislation Make Ontario Schools Safer?” 17 *Educ. & L.J.* 203 at p. 1

17 Eric Roher, “Will the New Safe Schools Legislation Make Ontario Schools Safer?” 17 *Educ. & L.J.* 203 at p. 11

For the first time, “bullying” has been specifically identified and listed among the infractions for which suspension must be considered¹⁸. In addition, the amendments extend to school boards the right to discipline actions taken off school property and outside school activities “in circumstances where engaging in the activity will have an impact on the school climate.” Presumably, this includes activities occurring in virtual school communities, such as the posting of messages in internet chat rooms or on social networking sites frequented by the students, even if the activity does not include school computers or occur during school hours.

Under the new amendments it appears educators now have the power to discipline students who engage in out of school bullying or other harassing or abusive behaviour of fellow students where they conclude the behaviour “will have an impact on the school climate”. This assumes that (a) websites come to the attention of teachers and administrators; and (b) the participants can be identified. Given the anonymity the internet affords, it is by no means certain that school administrators will be able to identify students engaging in cyber-bullying. In addition, third party internet providers, such as Yahoo Geocities, are not easily persuaded to remove offensive sites or assist in identifying the creators and/or participants in their sites.

Given the difficulties inherent in policing virtual and real-world activities occurring outside of school, the pressing question for school boards is whether the recent amendments have opened the door to school boards being found liable if they fail to exercise this new power and discipline students for out-of-school conduct. Arguably, a failure to intervene may now amount

¹⁸ s. 306(1) A principal shall consider whether to suspend a pupil if he or she believes that the pupil has engaged in any of the following activities while at school, at a school related activity or in other related circumstances where engaging in the activity will have an impact on the school climate:

- 1) uttering a threat to inflict serious bodily harm on another person;
- 2) possessing alcohol or illegal drugs;
- 3) being under the influence of alcohol;
- 4) swearing at a teacher or at another person in a position of authority;
- 5) committing an act of vandalism that causes extensive damage to school property at the pupil's school or to property located on the premises of the pupil's school;
- 6) bullying;
- 7) any other activity that is an activity for which a principal may suspend a pupil under the policy of the Board.

to a breach of the duty of care owed to students in circumstances when the school knew about the out-of-school activity, it overlapped with or created a reasonable risk of overlapping with school based activities and it failed to take appropriate steps to attempt to prevent the continuation of the behaviour. Based on the amendments, it seems clear that schools are now under an obligation to take reports of bullying and harassment occurring off school property seriously and consider whether they have the potential to impact on the school climate. Educators are advised to document all investigations undertaken, as well as the rationale for their decisions to discipline, or not to discipline, involved students or take other steps to address the situation.

What school boards can do to address bullying and avoid liability:

Bullying is now a recognized and foreseeable problem in our schools. It is no longer enough for schools to respond to incidents of bullying, harassment and assault on an individual, case-by-case basis. The expectation is that boards will implement policies, programs and procedures to address bullying at a systemic level to prevent a bullying culture from evolving within their schools.

In *Jubran*, the British Columbia Court of Appeal accepted the Tribunal's finding that the disciplinary approach taken by the school was not sufficient:

The school administrators took a disciplinary approach, investigating each reported incident; discussing their behaviour and possible consequences with each offending student; and applying measures which included detentions, meetings with parents and suspensions. The Tribunal found that the disciplinary approach was effective vis-à-vis individual students who were identified and dealt with, but that it was not effective in reducing the harassment of Mr. Jubran.

(...)

The School Board did nothing to address the issue of homophobia or homophobic harassment with the students generally, nor did it implement a program designed to address that issue... I find that

the administration had inadequate tools to work with, and insufficient training and education to deal with the harassment. The School Board did not seek assistance from those with particular expertise in the field of harassment, homophobic or otherwise, until Mr. Jubran filed his human rights complaint. By that time, Mr. Jubran was in his fourth year of high school at Handsworth, and the harassment he was experiencing was continuing.¹⁹

The decision in *Jubran* suggests that in future it may not be adequate for school boards to point to Codes of Conduct published in student handbooks or limited discipline of identified perpetrators. Pro-active anti-bullying education for students as well as consultation with appropriate professionals may also be required where the circumstances suggest a broader response is needed to stop the problem from being perpetuated by others.

Experts in the field of bullying and bullying prevention advocate a “whole school” approach to bullying prevention²⁰. In 2004 the Government of Ontario appointed the Safe Schools Action Team²¹ to advise on the development of a comprehensive and coordinated approach to addressing physical and social safety issues in all Ontario schools. The Team’s mandate included making recommendations for a province-wide bullying prevention plan. In November 2005 the Safe Schools Action Team released its report entitled “Shaping safer schools: A bullying prevention action plan,” recommending that every school in the province should adopt both a bullying prevention *policy* and a bullying prevention *program*. The report calls for comprehensive, school-wide educational programs embedded in the curriculum and increased training and support for teachers and administrators.

School boards should consider taking the following steps to prevent bullying and harassment in their schools and to minimize their exposure to liability:

- (i) establish a Code of Conduct that is consistent with the Ontario Provincial Code of Conduct;

¹⁹ *Jubran v. North Vancouver School District No. 44* (2005), 253 D.L.R. (4th) 294 (B.C.C.A.) at paras. 68 and 89;

²⁰ Eric Roher, “When Push Comes to Shove: Bullying and Legal Liability in Schools” 12 *Educ. & L.J.* 319 at p. 15

²¹ *Shaping safer schools: A bullying prevention action plan*, November, 2005 Safe Schools Action Team, Province of Ontario

- (ii) adopt *and follow* an anti-bullying and anti-harassment policy that specifically addresses student-to-student conduct;
- (iii) ensure that school policies specifically identify cyber-bullying as prohibited conduct;
- (iv) adopt policies regarding computer, internet and cell phone use at school (controversially, the Toronto District School Board has gone so far as to ban cell phones from its schools²²);
- (v) with the advice and assistance of experts, develop and implement a “whole school”, age appropriate, anti-bullying program for students;
- (vi) provide specific training for teachers and administrators on the effects of bullying and strategies for addressing and preventing bullying;
- (vii) investigate and document reports of bullying and harassment. Incidents should be documented not only in the file of the student doing the bullying, but also in the victim’s file so that patterns and long-term victimization can be recognized;
- (vii) if the school becomes aware that a student has been a target for bullying, steps should be taken to preserve that institutional memory as the student moves through the grades and teachers and administrators come and go;
- (viii) if schools receive reports about bullying occurring off school property or after school hours that may affect the school climate they should take the reports seriously and investigate and document them. Given the amendments to the *Education Act*, schools can no longer take the position that out-of-school conduct is beyond their control and/or not their concern; and
- (ix) communicate with the parents of both the victims of bullying and the student doing the bullying and provide timely follow-up.

Conclusion

Bullying, cyber-bullying and school violence are serious problems for schools today. Negligence claims arising from bullying have been filed against school boards and it will not be long before a court wrestles with finding school administrators liable for failing to protect a student from bullying and harassment that extends outside the school environment. The *Jubran* decision, although arising from a human rights complaint, has demonstrated that the courts are open to finding schools responsible for the bullying actions of their students and that schools are exposed to damages awards being made against them. Recent amendments to the *Education Act* have explicitly acknowledged bullying and extended powers to school administrators to

²² “Schools, parents divided on expelling cellphones”, *The Toronto Star*, February 1, 2007

discipline students for incidents occurring out-of-school. With these new powers come new responsibilities and, arguably, there is a new duty owed by school boards to protect students from out-of-school bullying, including the emerging phenomenon of cyber-bullying.

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