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Beware of bullies! Lessons in liability from Cox v State of New South Wales

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Beware of Bullies! Lessons in Liability from *Cox v State of New South Wales*

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Judging by the words of Bertrand Russell, a well-known philosopher, bullying is part of the human condition. He wrote:

> 'I found one day in school a boy of medium size ill-treating a smaller boy. I expostulated, but he replied: "The bigs hit me, so I hit the babies; that's fair." In these words he epitomised the history of the human race.'[1]

This truth about human existence recently seemed to take centre stage in a number of areas. For this year's High Schools' Mooting Competition at Bond University (discussed later in this issue of *Legal Eagle*), the case of *Cox v State of New South Wales*[2] (the *Cox* case) formed the basis of the moot problems. It was not only my involvement with the competition that prompted me to write an article about bullying – bullying just seemed to be a topic everywhere. On a current affairs program on national television a young boy spoke out about the bullying he endured at school, hoping to thereby encourage other victims of bullying.[3] Sadly, also, in August 2008 the suicides of two teenagers who both attended the same school in New South Wales were attributed to the effects of bullying at school,[4] and in Victoria a teenager committed suicide allegedly because of the bullying he experienced.[5]

Bullying is a topical and serious matter – and as it turns out, quite a costly one as well. In 2007, in the *Cox* case, the court ordered that the victim should be paid an amount in the region of $1 million in damages. It is perhaps the amount of money involved that attracted people's attention, especially in light of other recent noteworthy cases about bullying. For instance, in *Naidu v Group 4 Securitas Pty Ltd and Anor*[6] (the *Naidu* case) in 2005, the amount to be paid to the victim of workplace bullying by one of the defendants exceeded $1.9 million. In 2007 in another case about workplace bullying, *Goldman Sachs JB Were Services Pty Ltd v Nikolich*[7] (the *Nikolich* case), damages in excess of $500,000 were granted to the victim of bullying.

It is therefore understandable that many victims of bullying (at school and in the workplace) may feel that the *Cox*, *Naidu* and *Nikolich* cases announce the revenge of the victims. Simultaneously, many schools and employers may have heightened anxiety about the effects of possible bullying in their institutions, and what it could possibly cost them. As it is not the perpetrator of the bullying that had to pay the amounts ordered by the courts in these cases, it is clear that it is not only possible victims of bullying that should watch out for bullies – third parties need also to be told 'beware of bullies'.

The *Cox* case may very well sound a warning to schools and school authorities, but it also has many lessons for students in legal studies classes about how the law works in this area – particularly the law of negligence. This article will therefore firstly focus on some of the lessons about the law of negligence and liability from the *Cox* case. It will then deal with some more general questions about bullying.

What is bullying?

There is no law against bullying; neither is there a tort or crime called 'bullying'. There is also no formal generally accepted legal definition of bullying. Most people understand bullying to mean the deliberate and repeated aggressive actions – whether physical, verbal, direct or indirect – of one person (the aggressor, perpetrator, abuser, or bully) aimed at another person (the victim), who is usually in a weaker position than the first person. The bully's objective is generally to cause harm, injury, embarrassment or humiliation and it is not uncommon for the bully to be bigger, stronger, older or more senior than the victim, and in a position to abuse his/her power.

Providing a definition of bullying is not strictly necessary, but only a useful practical tool. The terms 'bully' and 'bullying' will be used fairly loosely in this article, and within their common meanings.

The *Cox* case

1. What happened to Benjamin Cox?

Benjamin Cox (the plaintiff) was 18 years old when his claim for damages against the State of New South Wales was heard in the New South Wales Supreme Court. He suffers from various psychiatric illnesses including depression and anxiety disorder, separation anxiety disorder, and (possibly) post-traumatic stress disorder and as these conditions will unlikely improve or be cured, the plaintiff will probably never be able to work or earn a living for himself. The plaintiff's action was brought against the State of New South Wales (the defendant) as the State is responsible for the administration and management of public schools in New South Wales, and was based on the alleged negligence of the defendant in failing to keep him safe from bullying at school.

The plaintiff first suffered bullying at Woodberry Public School in 1994 and 1995 when he started school. There were various incidents and the plaintiff complained about a 'big boy', TH, pinching stuff off him, scaring him and shoving bim into walls. The plaintiff suffered nightmares and headaches, his schoolwork deteriorated and he often came home from school crying and upset. Mrs Cox, the plaintiff's mother, reported the matter to a teacher at the plaintiff's school, who promised to keep an eye on him. In February 1995 Mrs Cox complained to the principal of the school about the plaintiff being bullied. The principal indicated that TH suffered from attention deficit disorder but she promised Mrs Cox that she would keep the two boys separate at school times.

On 23 February 1995, Mrs Cox was called to school

because of an incident during which TH had apparently tried to choke or strangle the plaintiff, leaving red and burn marks on his neck. Mrs Cox spoke to officers of the Department of Education and complained about the lack of action by the school. Mr Wilson, of the Department of Education, stated that he believed that bullying builds character and that it was a good thing that the plaintiff had been bullied.

After further instances of bullying, Mrs Cox spoke to the vice-principal of the school who indicated that TH's parents would be required to come to school to supervise TH during recess, and before and after school. It was unclear whether these measures were ever implemented. At this point the plaintiff developed a stutter and panicked when his mother left the house. His school work deteriorated further and he suffered because of insecurity, nightmares, headaches, and problems sleeping.

In July 1995 TH attacked the plaintiff again, leaving welts across his back. TH also threatened the plaintiff. Mrs Cox complained to the vice-principal who said that TH would be placed on detention, a letter would be sent home, and one of TH's parents would be required to come and supervise him at school. Again there was no evidence that these measures were implemented.

On 8 August 1995 Mrs Cox was phoned to come to school because of an incident during which TH had tried to shove a jumper down the plaintiff's throat. One of the plaintiff's teeth was dislodged and his lip was swollen and bleeding. Mrs Cox's discussions with the principal and vice-principal resulted in a promise that a letter would be sent to TH's parents and that he would be placed on detention. Mrs Cox also reported the incident to the police who visited TH's house. On the plaintiff's return to school, TH threatened to kill him if the police came to TH's house again. The plaintiff did not return to the school again after this incident. The principal of the school made enquiries about the plaintiff's absence from school and when Mrs Cox explained that the plaintiff was not to be exposed to further bullying and hurting, the principal replied that 'you lose some kids and you keep some'.[8]

When Mrs Cox had difficulties getting the plaintiff to attend school (he had been enrolled in a different school but had refused to go), she again spoke to officials of the Department of Education. Mr Wilson repeated his belief that bullying builds character.[9] The plaintiff eventually completed Years 1-6 at two different schools although he still displayed anxiety and required additional support in various activities. Serious problems started again when the plaintiff had to go to high school and he displayed symptoms of severe anxiety. Suffice it to say that the plaintiff did not com-

plete his schooling. As a young adult, the plaintiff is therefore not employable because of lack of education and his psychiatric illnesses.

2. Why was the case brought against the State of New South Wales?

One of the first things that students may note about the *Cox* case is who the defendant is – not TH, not the school principal, not the teachers, but the State of New South Wales. The State of New South Wales is responsible for public schools and the education system in New South Wales and is therefore the appropriate defendant.

There are different ways that a third party such as the State of New South Wales (being neither the bully nor the victim) can be liable for the actions of the bully.

- The third party can be responsible for the safety of the victim, and could have failed to properly discharge that responsibility. This type of responsibility can arise through statute, such as legislation imposing obligations with regard to workplace health and safety. The third party's responsibility can also arise as a principle of common law. When it is reasonably foreseeable that a person's actions can harm another, a duty of care is owed to this person – the so-called 'neighbour' principle in the law of torts. Some relationships, such as that between a school and a student, give rise to a duty of care on the part of one of the parties (the school) toward the other (the student). An obligation to provide for another's safety can also spring from a contractual obligation where one party's duty to provide for the other's safety is an express or implied term of the contract.
- The third party can also be vicariously liable for the actions of the bully. When parties are in a specific legal relationship, one of the parties can be held liable for the wrongs of the other party.[10] Typically vicarious liability arises when the bully is an employee. The employer will then be liable for the actions of the employee in the course of his/her employment.

3. A quick detour to the *Naidu* and *Nikolich* cases

In the *Naidu* case, Mr Naidu was an employee of Group 4 Securitas Pty Ltd (Group 4) which in turn had a contract with News Ltd. It was arranged that Mr Naidu, whilst remaining an employee of Group 4, would work at the premises of News Ltd, directly under the supervision of Mr Chaloner, an employee of News Ltd. As a result of Mr Chaloner's severe bullying of Mr Naidu over an extended period of time, Mr Naidu was eventually diagnosed with major depression and post-traumatic stress disorder and was no longer able to work. The court held Mr Naidu's employer, Group 4, liable for part of the damages on the basis that there was a breach of a contractual obligation of the employment contract of Mr Naidu. Group 4 was also liable in negligence. As Mr Naidu's employer, it had a non-delegable duty for Mr Naidu's safety at work. Although News Ltd was not Mr Naidu's employer, the company was held to be vicariously liable for the actions of Mr Chaloner, its employee, as (with the exception of a small number of specific instances) Mr Chaloner's bullying took place in the course of his employment.

In the *Nikolich* case, the bullying that Mr Nikolich complained of, and that led to him suffering a major depressive disorder, occurred at the hands of his supervisor during his employment with Goldman Sachs JB Were Pty Ltd (Goldman Sachs). The court found that Goldman Sachs did not adequately attend to the complaints of Mr Nikolich about the behaviour and actions of his supervisor, and that the company was liable for the damage on the basis of breach of contract. Mr Naidu's employment contract and Goldman Sachs' 'Working with us' policy document, which the court found formed part of the contract of employment, contained specific provisions which amounted to a contractual obligation on the part of Goldman Sachs to provide a healthy work environment for its employees.

It should be noted that although occupational health and safety legislation did not play a role in the findings of the courts in the *Naidu* or *Nikolich* cases, there have been many cases in which bullying became a workplace health and safety issue, and where the employer and/or offending employees were fined.

In the *Cox* case, the defendant was liable for the safety of the plaintiff because of the relationship between a school and its students, and it may have been vicariously liable for the insufficient and inadequate actions of individual employees, being teachers, officials and principals. It is important to note that the defendant was not vicariously liable for the actions of TH.

4. Negligence in a nutshell

Generally, to prove that a defendant is liable because of his/her allegedly negligent actions, the plaintiff must first prove that the defendant owed the plaintiff a duty of care. The court will consider whether a reasonable person in the position of the defendant would have foreseen that his/her actions could cause harm to the group of people to whom the plaintiff belongs. Once a duty of care has been established, the court considers the standard of care that should have been taken (generally what a reasonable person in the position of the defendant would have done). The actions of the defendant can then be judged against that yardstick. If the actions fall short of that standard, a breach of duty will have been established. Once a breach has been proven, the plaintiff is then required to prove that the breach of duty caused the harm which the plaintiff suffered, and that the harm was reasonably foreseeable. The defendant may raise defences (for instance contributory negligence on the part of the plaintiff, or a voluntary assumption of risk by the plaintiff) but if found liable, the defendant will likely be ordered to pay damages. Damages are aimed at placing the plaintiff in the position that he/she would have been had it not been for the breach.

The *Cox* case illustrates many of these principles well.

5. Did the defendant owe the plaintiff a duty of care?

It was generally accepted by both parties and the court that the defendant did owe the plaintiff a duty of care, because of the relationship between a school and a student. In fact, Simpson J stated that one could not seriously doubt the existence of a duty of care on the part of the defendant.[11]

6. How did the defendant breach the duty of care?

In any claim based on a negligent breach of a duty of care, it has to be established what the standard of care was that was owed to the plaintiff. In the case of *Williams v Eady*[12] it

was stated that the duty owed by a school to a student is that of a careful parent.[13] Schools have a duty to take steps that would reasonably prevent injury to students and protect them against foreseeable risks, but this duty does not require of a school to ensure that no harm will befall students.[14]

Here the court considered that the defendant was clearly aware of TH's behavioural problems probably as a result of attention deficit disorder. It was therefore necessary for the defendant to take 'greater than normal steps to eliminate the bullying in this case'.[15] The expert evidence of Dr Tronc about the steps that should have been taken after the bullying incidents highlighted the defendant's failure to act reasonably. Simpson J was of the view that the school's responses were 'dismally inadequate' and that they 'grossly failed in their duty to the plaintiff'.[16] The general attitude of some of the school authorities, demonstrated by the statements of Mr Wilson and the school principal, also led the court to conclude that the defendant had failed to discharge its duty of care.[17]

7. Damage

To succeed in an action in negligence, the plaintiff needs to show that actual damage was suffered. Although there were some discrepancies between the different diagnoses of various psychiatrists, the court found that there was in essence no dispute about the fact that the plaintiff suffered from a severe psychiatric condition (diagnosed by different experts as depression and anxiety disorder, separation anxiety disorder, and post-traumatic stress disorder), and could not be employed.

It is important to note that mere distress, discomfort, embarrassment and feelings of sadness will usually not be recognised as 'harm' or 'damage' that will lead to an order for damages by a court. This common law position is reiterated in the *Civil Liability Act* 2002 (NSW) (the CLA) in s 31, where it is made clear that the plaintiff must demonstrate a recognised psychiatric illness to be entitled to compensation.

8. The 'causation' hurdle – did the defendant's failure to take reasonable care cause the plaintiff's damage?

The plaintiff had to prove that 'but for' the negligence of the defendant, he would not have suffered the harm. This common law test has now been encapsulated in s 5D of the CLA. The question was: But for the negligence of the school in not protecting the plaintiff from bullying, would the plaintiff still have suffered these illnesses? The plaintiff argued 'no' – without the negligence of the defendant, he would not have suffered from these illnesses. The defendant however argued 'yes' – even if there was no negligence on its part, the plaintiff would still have suffered these illnesses. The defendant led expert evidence that there were other possible causes of the plaintiff's illnesses, notably his family history of psychiatric disorders and his enmeshed relationship with his mother.

Two experts, Drs Samuell and Milch, argued that the plaintiff's conditions were largely caused by Mrs Cox's long history of depression, for which she had been treated in hospital. There was also a strong family history of psychiatric disorders. It was their view that the negligence of the defendant did not cause the plaintiff's harm and that it was likely that the plaintiff's psychiatric conditions would have appeared in any event, even if there was no bullying. However, Dr Samuell later conceded that he did not know whether or not the assaults by TH 'played any significant role in the evolution of the separation anxiety',[18] and Dr Milch acknowledged that the bullying was probably a precipitating event, although the plaintiff would have been vulnerable from the start.[19] Thus, in the latter's view, the psychiatric illnesses that resulted were 'certainly in part' caused by the trauma brought on by the bullying incidents.[20]

Dr Lamberth, a third expert, gave evidence that the 'depression and anxiety disorders [were] more probably than not the result of the constant harassment and assaults at the school.'[21] In his opinion, the bullying was a 'major precipitating factor'.[22] He also disagreed with the contention that the apparent 'calm' period, when the plaintiff did not experience bullying after he had changed schools, indicated that the problem had been solved. Simpson J accepted his views in this regard, as during that time the plaintiff still exhibited some symptoms, such as a refusal to use public toilets and to change in change rooms at football. The plaintiff also needed 'extensive support' to participate in certain activities, such as school excursions.[23]

This case illustrates the difference between factual and legal causation. Whilst the medical experts focused on factual causation, the court was not concerned with arguments that the plaintiff might still have suffered injury even if there was no negligence on the part of the defendant. The court is required to look at the particular harm that the plaintiff actually suffered. Martin Davies and Ian Malkin, well-known experts in Tort Law, observe that '[i]t is immaterial that the plaintiff may have suffered a similar, but different kind of harm, even if the defendant had not been negligent.'[24] The court's analysis focused on the harm actually suffered, the chain of events, the evidence led (such as the fact that symptoms persisted after 1995), and Simpson J concluded that the negligence of the defendant was indeed 'a necessary condition' of the occurrence of that harm.[25] For the causation test to be satisfied, it is not a requirement that the negligence of the defendant should be the only cause – it is sufficient if it was one of the causes. The court found that the plaintiff had successfully crossed the causation hurdle and had proven that the harm was caused by the negligence of the defendant.

9. The remedy

The clock cannot be turned back; the harm cannot be undone by the court. The plaintiff is merely entitled to damages – being monetary compensation. Damages represent the amount of money which the court believes will put the plaintiff in the position that he/she would have been in had the breach not occurred. In general, a plaintiff can be compensated for money already lost (expenses incurred and income that the plaintiff could not have earned because of the harm suffered) and future monetary losses (expenses still to be incurred, and future income that will not be earned).

The plaintiff in this case suffered financial losses, but also lost enjoyment of life, will likely continue to suffer as a result of his psychiatric disabilities throughout his life, and will not have what one may call, for lack of a better description, a 'normal' and 'happy' life. Simpson J stated:

> 'His adolescence has been all but destroyed; his adulthood will not be any better. He will never know the satisfaction of employment. He will suffer anxiety and depression, almost certainly, for the rest of his life. He is unlikely to form any relationships, romantic or platonic.

He has no friends and is unlikely to make any ... his injury is, in effect, a whole of life injury.'[26]

The different categories of damage (that is, economic and non-economic) are generally broken up into different 'heads of damage'.[27] Accordingly, damages were awarded to the plaintiff for non-economic loss at the level of 50% of a most extreme case.[28] The court also awarded damages for economic loss, which had to be calculated based on average weekly earnings.[29] In addition, provision was made for out-of-pocket expenses and superannuation.[30]

A court may reduce the amount of an award for damages by making an allowance for the vicissitudes of life, as Simpson J did in this case.[31] Vicissitudes of life are all of life's normal disappointments such as personal illness or injuries, or changes in personal circumstances or the economy or industry. All of these events can negatively affect a person's future ability to earn an income. The amount of damages is therefore reduced to account for the vicissitudes of life that may reduce the plaintiff's entitlement to income. Generally an allowance of 15% is made but, considering the pre-existing vulnerability of the plaintiff, Simpson J indicated that a deduction of 25% had to be made.

Some difficult questions

1. In recent years, the victims in the *Cox, Naidu* and *Nikolich* cases have been awarded sizeable damages. Has the law changed? Is this a new trend?

The answer is probably 'not really'. Although the law is not static, and one can often discern trends in judicial decisions, these cases, in my view, will not likely 'set a new trend', except in two regards. First, these cases may prompt potential plaintiffs into action. Victims of bullying (whether at school or in the workplace) who up to now may not have considered litigation as a means of obtaining compensation for the harm suffered as a result of bullying, may be encouraged by the obvious successes of the victims in these three cases. Second, the decision of the court in the *Nikolich* case is somewhat unusual in that the court was willing to award damages for psychological injury on the basis of breach of contract. Whether this case is the start of a new trend in claims for breach of employment contracts, however, remains to be seen, and is beyond the scope of this article.

What has however changed over the last 20 years or more is society's view of bullying. There is now strong public disapproval of bullying and activities such as 'initiation' rites. This trend may be spurred on by the growing awareness of the need to protect human rights and the unacceptability of discriminatory practices. When bullying amounts to discriminatory conduct – as it often does – anti-discrimination legislation that exists in all Australian states and at federal level, may become applicable. This legislation protects persons against humiliation, vilification, victimisation and harassment in a discriminatory context.

2. Does the *Cox* case mean that victims of schoolyard bullying will now be assured of being successful in court?

Not at all. If a claim for damages is brought on the basis of negligence, as in the *Cox* case, a breach of duty will have to be proven on the part of the defendant, as well as the elements of causation and foreseeability. If a plaintiff cannot prove that he/she suffered damage (which has to be more than disappointment, distress, sadness, embarrassment or reduced self-esteem), a claim in negligence will likely fail. The same principle, namely that the plaintiff must still prove all the relevant elements, applies in respect of other causes of action as well. If the bullying conduct amounted to assault or battery, other actions in tort may be available to a plaintiff, or criminal charges may be brought against the bully, but all the elements will still have to be proven, and there is always a risk in litigation that a case may fail in court. Many possible plaintiffs may also be deterred by the high cost of litigation.

In fact, Alastair Nicholson, previously a judge of the Supreme Court of Victoria and Chief Justice of the Family Court of Australia, and now involved with anti-bullying groups, is of the view that the legal framework is not the best way to deal with bullying – because it has been designed to deal with something else. The problem of bullying is not best solved by legal remedies.[32]

3. In the *Cox* case, the bully escaped liability. Does this mean that the bully will always go free?

No. Depending on the actual actions, and the age of the bully, the bully could be held criminally liable and civilly liable for the damage caused. Some acts associated with bullying could be criminal in nature – such as assault and battery – and a child over the age of 14 years can be charged with and convicted of a criminal offence.[33] Criminal sanctions include fines, imprisonment and good behaviour bonds. Civil remedies may also be available. Schools may of course impose their own sanctions on students who transgress the school's code of conduct or rules.

4. Will a school always be responsible for the harm caused to a student by bullying?

No. A plaintiff is always required to prove his/her case. A plaintiff may for instance not be able to prove that a school breached its duty of care. A good example is the case of *Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Hadba,*[34] where the school was held not to be liable for the injuries of a child because the duty of care did not entail physically supervising every single child at all times. The court held that the actions of the school were reasonable and there was no breach of a duty of care.

A court may also find that the negligence of a school did not actually cause the harm complained of – something else caused it.

In addition it is generally more difficult (but not impossible) to hold a school liable for harm caused by bullying that did not take place on the school premises, or by bullying of which the school was not aware – as may be the case with cyber bullying.

5. Will an anti-bullying program protect a school (or employer) from liability?

A note of caution should perhaps be sounded here. The answer is at best 'maybe' or 'hopefully'. Where a plaintiff alleges negligent breach of a duty of care on the part of a school or employer, the courts will evaluate the reasonableness of the conduct of the defendant, judged against the conduct of a reasonable defendant in the same position.

Therefore, if a defendant had instituted an anti-bullying policy or program that is ineffective, or did not implement and apply the policy or program correctly, or followed the policy or program indiscriminately or mechanistically when different actions should have been taken, the defendant may still have acted unreasonably, because its actions fell short of the yardstick of 'what a reasonable defendant would have done'. The defendant may still be found to have breached its duty of care.

A well-researched, effective and properly implemented anti-bullying policy and program will nevertheless probably go a long way in protecting schools and employers against claims for negligent breach of a duty of care. More importantly, though, the policy or program will likely benefit potential victims of bullying.

Conclusion

After the *Cox* case, schools may be forgiven if for them, Bertrand Russell's quotation reproduced at the beginning of this article would sound truer if it went like this:

> 'We found one day in school a big child ill-treating a small child. We expostulated, but the small child replied: "The big child hit me, so I'll see you in court." In these words the child epitomised the future of the education system.'

This article, through its analysis of the *Cox* case, has shown how a third party can be held liable for the harm caused by bullying. It has argued that not only potential victims should be wary of bullies, but that other parties, such as schools and employers, can be made to pay dearly for the consequences of bullying, and should be similarly cautious.

Sadly, although the defendants in the *Cox*, *Naidu* and *Nikolich* cases certainly had to make what can only be said to be painful payments, these sizeable amounts will probably never fully compensate the victims for what they have suffered.

References

1 Bertrand Russell, *Education and the Social Order* (1932), available at http://www.quotationspage.com.
2 [2007] NSWSC 471.
3 'Bullying', *A Current Affair*, Channel Nine (12 August 2008).
4 'Letter reveals bullies drove Tim Winkler to suicide', *The Daily Telegraph* (13 August 2008).
5 'Bullying killed our boy, family says', *Geelong Advertiser* (20 August 2008).
6 [2005] NSWSC 618.
7 [2007] FCAFC 120.
8 Above n 2, [43].
9 Ibid [45].
10 See Peter Butt (ed), *Butterworths Concise Legal Dictionary*, 3rd ed (2004) 450, where vicarious liability is defined as '[t]he liability imposed on one person for the wrongful acts of another on the basis of the legal relationship between them, such as that of employer and employee.'
11 Above n 2, [72].
12 (1893) 10 TLR 41.
13 Ibid 72.
14 In *Geyer v Downs* [1977] HCA 64, the High Court pointed out that a school takes care of many more children than a parent, and is only obliged to take reasonable care.
15 Above n 2, [85].
16 Ibid [93].
17 Ibid [101]-[102].
18 Ibid [127].
19 Ibid [139].
20 Ibid.
21 Ibid [140].
22 Ibid [142].
23 Ibid [146].
24 Martin Davies and Ian Malkin, *Torts*, 5th ed (2008) 113.
25 Above n 2, [155].
26 Ibid [164]-[165].
27 Ibid [161].
28 Ibid [165].
29 Ibid [167].
30 Ibid [168]-[169].
31 Ibid [170].
32 Alastair Nicholson, 'Legal Perspectives on Bullying' (2006, February) *Teacher: The National Education Magazine* 22, 22.
33 There is an irrebuttable presumption that a child under the age of 10 cannot be criminally responsible for his/her acts. For children who are 10 years old but younger than 14, there is a rebuttable presumption that the child cannot be criminally responsible for his/her acts. If the presumption is rebutted, criminal liability can result.
34 [2005] HCA 31.

Class discussion:

Some questions to think about after reading this article – voice your opinion!

- *Should Australia adopt anti-bullying legislation that applies in schools?*
  - *Consider what the contents of anti-bullying legislation could likely be, arguments for and against a Bill of Rights for Australia (see previous issues of Legal Eagle), and the effectiveness of the current common law and legislative protections in Australia.*
- *As in the case of Benjamin Cox, the victim may have to rely on the evidence in court given by others, such as his/her mother. Mrs Cox's evidence was largely hearsay evidence which would generally be excluded. How did the court deal with Mrs Cox's evidence? Do you agree with this approach?*
  - *Consider paras [9]-[17] of the Cox case.*
- *Does your school have an anti-bullying policy and/or program? Can you suggest improvements to the policy/program or its implementation that will: (i) better protect potential victims; (ii) still balance the rights of the victims with those of the bullies, and the duty that the school owes to both of them; and (iii) better protect the school from possible claims in negligence?*
  - *Consider the Cox case as a starting point and supplement your research with an internet search. There is a wealth of information!*