

## **Bullying: Finding Schools Liable Changes Everything**

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### **Introduction**

Civil litigation against school boards is justified in many cases of bullying if the boards have not provided the protection owed to the children in their charge. For society and the Courts to test the truth of this premise, it is important to establish that persistent bullying causes serious physical and psychological harm, is foreseeable, is preventable, and school authorities are liable for not stopping it.

Serious physical harm is not difficult to establish and, in fact, bullying can have the same kinds of effects as criminal assault: it jeopardizes the physical health of the victim, it breaks bones and fracture joints, it causes bruising, swelling and broken blood vessels.<sup>1</sup> No less damaging than physical harm is serious psychological harm, for example, PTSD and depression. The path from being a victim of bullying to a victim of Major Depressive

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<sup>1</sup> Adrienne Nishina, Jaana Juvonen & MR Witkow, "Sticks and Stones May Break My Bones, But Names Will Make Me Feel Sick: The Psychosocial, Somatic, and Scholastic Consequences of Peer Harassment" (2005) 34:1 Journal of Clinical Child and Adolescent Psychology 37.

Disorder, and its sequelae, has become so well worn that the term “bullycide” has arisen, referring “to suicide attributable to having been bullied”.<sup>2</sup>

Studies show that childhood victimization can also be followed by PTSD. Once thought to be caused by a “single, major life-threatening event”, research now shows that PTSD can be caused by an “accumulation of small, individually non-life-threatening incidents”, labeled “complex PTSD”.<sup>3</sup> Furthermore, because of the painful combination of intense anger and fear, victims suffer from a range of other psychological problems, from fantasizing about taking revenge on the bullies<sup>4</sup> to developing eating disorders, learned helplessness, insomnia and suffering fatigue.<sup>5</sup> In summary, not only is bullying harmful in the moment, and in the days after, but the harm caused by bullying can be persistent, affecting many areas of the child’s development.

That parents, teachers, and school boards have made attempts to discourage bullying is rejected as sufficient to protect a school board against civil litigation if bullying persists.

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<sup>2</sup> N Marr & T Field, *Bullycide: Death at Playtime*, (Oxfordshire: Success Unlimited, 2001).

<sup>3</sup> Marylene Cloitre, Regina Miranda, K. Chase Stovall-McClough & Hyemee Han, “Beyond PTSD: Emotion Regulation and Interpersonal Problems as Predictors of Functional Impairment in Survivors of Child Abuse” (2005) 36 *Behaviour Therapy*, 119.

<sup>4</sup> Deborah Lee, “Case Conceptualization in Complex PTSD: Integrating Theory With Practice” in N Terrier (ed.) *Case Formation in Cognitive Behavioral Therapy: The Treatment of Challenging and Complex Cases* (New York: Routledge, 2006) at 142-145.

<sup>5</sup> Claire Fox & Michael Boulton, “The Social Skills Problems of Victims of Bullying: Self, Peer and Teacher Perceptions” (2005) 75 *British Journal of Educational Psychology* 313.

In such cases, we believe there is a prima facie case for civil litigation against school authorities.

In addition to making the case for civil litigation against school authorities, the paper identifies the reasons for the snail's pace of creating effective interventions to reduce bullying. The linguistics of bullying offers both an explanation of why we as a culture seem to face an unsolvable problem, and why the necessary changes in social and institutional structures remain to be undertaken. The argument is made that the language of bullying is "soft" and does not encourage vigorous intervention.

### **The Litigation and Linguistics Interaction**

New civil litigation against school authorities and a new, better discourse on bullying are interactive. The pursuit of civil damages against public institutions is supported by a different discourse that does not involve ineffective criminalization, moral condemnation, or acceptance of youthful rites of harmful behavior. Such suits will change the focus from sympathy for the black-eyed victims to a perception of the bully as fiscally kneecapping the schooling authority. Conversely, successful litigation works to move the discourse on bullying away from concepts and language that characterize bullying behavior and bullies, like, "Bullies are mean" and toward institutional responsibility, and concepts like negligence. At first blush, it may seem unsympathetic to divert the focus of attention away from the victim to the school authority's finances, but we propose that this change will enervate interventions to reduce bullying because it creates self-interest on

the part of the school authority and the taxpayers to whom the school authority, is accountable.

### **The Language and Imagery of Bullying**

‘Bullying’, like any cultural construct, can be explored by examining the language used to represent it. In contemporary Western culture, bullying is often expressed in the sentiments like, “Kids will be kids”, “They’re just roughhousing” or “He has to learn to take his knocks”. These linguistic representations pair up with cartoon images of bullies as schoolyard punks. These cartoons do not illustrate what happens; rather they remove the situation from reality. Even if there are bruises and scrapes on the cartoonized victim, they are not real. Furthermore, when we see a picture of a real child, with real bruises, it feels wrong to use the language of “Kids will be kids”. Instead, one thinks of words like “violence”, “assault”, and “crime”.

From time to time, mainstream media pick up a serious bullying story and the language used does change. For example, during NBC’s Today Show coverage of a bullying incident in Philadelphia in February, 2011, the host, Matt Lauer, concluded the segment with the words, “As a parent, it makes you ill to watch that.” But, as with many media crises, the coverage and the use of that language are short-lived, and we spring back to outmoded language and concepts like “Kids have to stand up to bullies”. The persistent mismatch between our language for vicious acts and the harm done demands an explanation.

## **Bullying as a ‘Natural’ Phenomenon**

Apart from the occasional use of the language of violence to describe bullying, there is a culturally embedded mismatch between the language *about* bullying and the actual activity *of* bullying. For example, cited below are the first several sentences from an anti-bullying article on the “Empowering Parents” website (italics ours):<sup>6</sup>

### **Why Bullying Exists –and Why Schools Have the Chance to Stop It**

*Sadly*, we start *noticing* bullying in our schools on the first day of kindergarten. If we agree that our schools are a microcosm of our society at large, we can then begin to see the pervasive *nature* of bullying in all levels of our schools. Bullying is happening in all areas of *our society* as people *jockey for their rung on the ladder of status*. Part of this is *natural* and an aspect of *human nature* that has been with our species throughout our development.

One might expect a parent blogger writing a piece aimed at stopping bullying to use much stronger anti-bully rhetoric. Yet this piece is just the opposite. First, the article is framed by the use of “sadly”, a word we tend to use for things we feel we cannot change. Second, the author directs the readers’ perspective towards “noticing”, a verb of *observation*, rather than a verb of *action* or an emotionally or physically *reactive* verb like Lauer’s “makes you ill” above. Third, bullying is equated to broader competitive activities in “our society” that bring one higher on the “ladder of status”, for example, the

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<sup>6</sup> Marc Ladin, *Why Bullying Exists - and Why We Have the Chance to Stop It*, online: Empowering Parents, <http://www.empoweringparents.com/blog/bullying/why-bullying-exists-and-why-schools-have-the-chance-to-stop-it>

pushy businessperson who lies to steal the account of a friend. Finally, bullying has a “nature”, is at least partly “natural”, and is part of “human nature”, painting it as an inevitable activity that we must endure. In summary, we see a mismatch between what victims and parents of victims label “violence” or “abuse” and what this author and the general public label an unfortunate, but natural part of our society that one must simply sit back and observe.

This softening of language around bullying becomes even more striking when compared to language we use about other forms of violence and assault. For instance, a parent blogger would never begin an article about sexual assault in college in this way:

“Sadly, we start noticing sexual assault the minute young women start college. The pervasive nature of this assault is a natural part of the process of young men jockeying for their position on the ladder of status in college.”

Sexual assault is not something we would “sadly notice”. Rather, it is a tragedy that makes us angry, and that we actively work to change.

### **The Competing Discourses of Bullying**

This paper argues that the answer to why there is a contradiction between the violence of bullying and the way we talk about it can be discovered by using a tool from the discipline of linguistics: *Discourse*. A discourse is, broadly defined, a way of speaking

that is attached to a specific social practice, for example, the discourse of the social practice of MEDICINE focuses on illness, diagnosis and treatment and this way of speaking ‘goes with’ what doctors and patients *do* in medicine: attend to bodies and what is wrong with them.

When we employ the language of bullying and the language of violence, we enlist two *competing* discourses: CHILDHOOD and CRIMINALITY. The social practices of childhood are characterized by concepts like *innocence*, *purity*, and *defenselessness*.<sup>7</sup> In contrast, the social practices of criminality are characterized by concepts like *adulthood*, *violence*, *imprisonment*, *guilt*, and *psychopathy*. Our culture opts for the *innocence* aspect of the CHILDHOOD discourse. Thus, notwithstanding the serious harm caused by brutal attacks children perpetrate, we substitute “Kids taking knocks” for “grievous bodily harm.”

Furthermore, it is not only the case that we do not *talk* about our children as committing crimes, but as a society we have made certain not to apply the discourse of CRIMINALITY to children by creating a Criminal Code that does not apply to children: In Canada, below the age of twelve, the law does not allow us to prosecute children. There is an age cutoff for criminality because in our culture we believe that our children should not, and must not be treated like adult criminals. As the discourse of criminality is deemed inapplicable to children, the solutions offered by it are off limits.

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<sup>7</sup> Henry Jenkins, “The Innocent Child and Other Modern Myths” in H Jenkins (ed.) *The Children’s Culture Reader* (New York: New York University Press, 1998) at 1-41.

### **A Third Discourse: ‘Bad Kids’**

There is a discourse that applies to bullying that *is* actually compatible with CHILDHOOD: The discourse of MORALITY. While we are uncomfortable labeling children as criminals, we are willing to label bullies as ‘bad’ or ‘mean’. The trouble with this discourse is that the solutions reside within the family and religious bodies, and these groups are neither regulated nor have common values, standards and practices. There is no mechanism for requiring these bodies to enforce a standardized set of rules for child behaviour; we cannot make them solve the problem of bullying.

There is an upside to school authorities supporting the application of the discourse of MORALITY to bullying. This discourse makes it easy for teachers, the schools and school boards to off load responsibility onto parents and community and religious organizations. School authorities can simply say, and do say, that these kids were not raised right: they watched too much violent television, played too many video games, and did not receive enough effective moral teaching from the responsible institutions. Taking this tack absolves the schools of their responsibility to safeguard our children, and leaves our children in a precarious position.

### **Reject Previous Discourses: Forge a New Path**

This paper proposes that we reject all of the discourses of CHILDHOOD, CRIMINALITY and MORALITY as suitable frameworks for understanding and addressing the pervasive problem of bullying, and instead draw on the discourse of CIVIL INSTITUTIONS AND THE LAW, which states that the *school, and school authorities*, institutional defendants in a

civil suit, a civil action brought in court against an institution, were *responsible for*, or *negligent in their duty to protect* “John”, a plaintiff whose case is brought on his behalf by his parents. Within this discourse, we accept that if John was badly hurt, then under the law, under some circumstances, a negligent party or institution can be held liable for damages.

Our culture can sustain this discourse because it does not involve making the bully out to be a criminal and prosecuting him/her. Our culture has sustained this discourse in cases in which an institution causes harm or damages: if, for example, the school does not repair gym equipment and a student is injured, then, perhaps, no one is criminally culpable, but the school can be found to be liable and made to pay damages to the students.<sup>8</sup> This is a feasible and well-worn discursive path.

### **New Path Offers More and Better Options**

How do we address the damages to students whose only option currently is to drop out of school, move to another town, and get a minimum-wage job? Under the new approach to bullying that focuses on the discourse of CIVIL INSTITUTIONS AND THE LAW, we are in a powerful position to address harm like chronic and often life-long physical and psychological illness. In this discourse, it makes perfectly good sense to hold an institution liable if a student is not protected, is bullied, misses school because of it, and learns less, performs poorly or even loses a year of school.

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<sup>8</sup> *Myers v. Peel County Board of Education*, [1981] 2 SCR 21

Using the discourse of CIVIL INSTITUTIONS AND LAW for the general good depends on answers in the affirmative to the following questions:

1. Is it possible to be no more skeptical of a bullying victim's account than a child, sexual assault victim's account?
2. If we are accepting of a child's testimony, can we establish that the child suffered damages?
3. Can we establish that school authorities are liable if they do not protect a child against bullying?
4. If principals, schools and school boards are found accountable, liable, and made to pay damages, will that improve school authorities' response to bullying?
5. If such suits favor the plaintiffs, and if school authorities' response to bullying changes for the better, will the linguistics of bullying change in schools and the larger culture?

### **Civil Action Against a School Board**

Provincial and territorial legislation places a legal obligation on parents and guardians respecting school attendance by their children. Children are “invitees” of the schooling system, not trespassers, not transient interlopers, and attendance takes place under a legal compulsion. A greater duty of care is owed to an “invitee”. If a student wishes to attend a public schooling system, then the system must provide that specific student with a safe schooling environment, and the specific attributes of that student – vulnerability to bullying, brittle psyche, bad acne – should never justify a schooling system refusing

entrance to that student because home or private schooling options, theoretically, exist. The right to a publicly funded and administered education must mean that the victim gets to go to a safe schooling environment, and the duty falls on the schooling system to deliver that safe environment.

### **Skepticism of Children's Reports**

Even in the absence of physical evidence, and even years after the alleged event, children's testimony of sexual assault is considered seriously. There is no reason to discriminate against a child's testimony because the content of it is about physical assault, and not sexual assault.

### **Damages**

Many children who are bullied are damaged, for example, the cost of necessary, counseling, medication, transportation to a different school, tutoring, and the loss of enjoyment. "Pecuniary" or "Specific Damages" seeks to address past, present and future out-of-pocket expenses including the significant cost of psychological and other medical treatments, for example, for headaches and gastro-intestinal issues. Where verbal taunting and demeaning behavior has driven that young person to the point of self-harm, resulting in lasting physical injuries, issues of lost future income could also arise.

Canadian courts have imposed significantly lower awards of "General Damages" (which includes "pain and suffering") than those regularly determined by jury trials in American

courts.<sup>9</sup> Nevertheless, simply accounting for inflation and other adjustments, Canada's judicial trilogy now supports an "upper limit" on specifically non-pecuniary damages that equates to an award in excess of \$300,000.

It is fully acknowledged that factual circumstances are at the heart of every civil claim involving student-on-student harm. A school authority should not be found civilly liable because one student struck another student walking in the hallway, without the slightest indication that this physical act would take place. While a first blow or intimidating verbal attack cannot be intercepted, the repetition of harmful behavior perpetrated by one student to the detriment of another student can be prevented. Serious, recent episodes in which bullying has placed student victims at risk of harm, including self-harm, have involved a pattern of repeated acts of physical violence and verbal insult and harassment. While it may not be possible to prevent *initial* harmful acts, it is reasonable to expect *further* acts be prevented or at least made significantly more isolated by, for example, removing known or reasonably foreseeable perpetrators from the school environment.<sup>10</sup>

### **How has the schooling system's duty to protect students been defined legally?**

A review of Canadian legal decisions finds no modern decision in which the school-wide or systemic standard of care has been directly addressed. Moreover, the issue of standard

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<sup>9</sup> *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 SCR 229; *Thornton v. Prince George Board of Education*, [1978] 2 SCR. 267; *Teno v. Arnold*, [1978] 2 SCR 287.

<sup>10</sup>EM Roher, *Violence in Schools* (Ontario: Canada Law Book, 2010).

of care has yet to be directly applied to a school-based incident or incidents relating to student-on-student physical or mental harm.

In a markedly different context, that of a school teacher's dismissal for propagating anti-Semitic views outside school, the Supreme Court of Canada did offer commentary on a more generalized obligation of a school board. The Court stated in *Ross v. New Brunswick School District No. 15*<sup>11</sup>:

A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. **As the Board of Inquiry stated, a school board has a duty to maintain a positive school environment for all persons served by it. (Emphasis added)**

In the relatively simple context of students at play at school, the Supreme Court of Canada has rejected the notion of “any principle for the exact measurement of the degree of care”. Instead, in *Bd. of Education for Toronto v. Higgs et al.* the Court described the duty of care as “taking such care as a careful father would take in the circumstances”, guarding the students “against danger that could reasonably be foreseen”.<sup>12</sup> In the more recent decision of *Myers v. Peel County Board of Education*, the Supreme Court described the standard of care “to be exercised by school authorities in providing for the

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<sup>11</sup> [1996] 1 SCR 825, at para. 42.

<sup>12</sup> [1960] 1 SCR 174, at 181.

supervision and protection of students for whom they are responsible” to be that of “the careful or prudent parent”.<sup>13</sup>

The few publicized lawsuits in Canada, which have been launched concerning school place “bullying”, appear to have arisen in situations where a student was *repeatedly* subject to verbal harassment. In those instances where the schooling authority is made aware of the victim’s plight obtaining reliable evidence of bullying is essential. While this may prove to be challenging, the challenge must be borne by the school authority especially as such evidence enhances the schooling authorities ability to exclude the perpetrator from the schooling environment. If the school authority obtains this evidence, it could be used against the institution in the legal matter; on the other hand, if it does not, the lack of initiative to protect the student victim could be used against the institution.

This paper supports the position that the existing standard of care applies to the prevention of student-on-student harm, by taking proactive steps to prevent it, and to certainly prevent any re-occurrence of student-on-student harm once the initial harmful act is made known to a school authority. It is our view that the courts should take a dim view of schooling environments hosting not only repeated physically harmful acts (that are readily detectable and preventable once a first occurrence takes place), but also repeated, psychologically harmful acts. Simply, the profile and prevalence of verbal, damaging acts makes it reasonable to expect that schooling authorities will develop systems to reliably detect these acts, or will accept the report of them, so that those

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<sup>13</sup> *Supra*, at 31-32.

perpetrating them can be appropriately removed from the schooling environment in which the recipients of these acts are educated.

Many of these acts are not secrets: It is our view that repeated physical acts and verbal harassment by students is now well known to any reasonable school authority as a feature of daily school life. Moreover, by virtue of certain students' appearance, gender, sexual orientation, personality or other individual features, those within a schooling environment can reasonably predict which students are at a higher risk of this type of verbal harassment and the psychological harm it causes. Therefore, both the general risk of harm and many of the likely individual victims of that harm will be known to any reasonable schooling authority: with this foreseeability a duty of care arises to maintain the well being of these susceptible students.

### **Impact of civil litigation**

Frequent, successful litigation will elevate anxiety and costs for school authorities. Fortunately, for victims of bullying, that anxiety and those costs will encourage school authorities to find solutions.

Will successful litigation change what we do? Will it change our perception of bullying? Will successful litigation change the linguistics of bullying in the school system and the larger culture? Having to pay out large cash awards will create self-interest on the part of school authorities to stop bullying. Losing money in this way will act as punishment for not putting into place effective interventions. In addition, taxpayers who experience the

connection between these suits and an increase in their taxes will suffer bullying differently, or at least they will become financial victims of the bully and will be motivated to find ways to protect their self-interests.

Successful litigation will shift the discourse of bullying from the child or student victim, who is hurt, and who is deserving of sympathy, to a discourse of school authority liability, losses of school resources, accountability of school board members, and increases in taxes for taxpayers who pay the school authority's bills. Until now, sympathy has been diffused by moral judgments, "Some kids are just bad kids", but we can't do anything about their upbringing and the influences of our violent culture. When a steep financial cost is applied to bullying via damage awards, it will be the taxpayers contributing to the applicable schooling authority who will be victims. School authorities will think about and talk about acts of bullying as putting school authorities at risk, not as acts that put a defenseless child at risk. School authorities will "see" an act of bullying as causing harm to the school authority's finances, the public face of the school system, and their own reputations.

When taxpayers have to pay, not only will they act differently toward bullying, they will see bullying differently too. Like school authorities, they will see bullying, think about bullying, and talk about bullying differently.

In this paper, we will leave to the school authorities the responsibility to identify effective interventions. If society has succeeded in addressing intra-family child sexual assault

matters by believing child complainants and taking effective action to protect children, for example, removing the assailant from the family home, then we can protect the victims of bullying too, perhaps, by removing the perpetrator from the school environment.

## **Conclusions**

Like no other force in society, litigation can serve to identify deficiencies in human systems permitting or even condoning harmful activity. Without an enhanced concern about real, imminent civil liability, and without concrete, notable successful and expensive lawsuit results, the deficiencies in school bullying approaches will continue, and the harmful effects of bullying will be more severe and widespread than they should be. By shifting the discourse away from “Kids will be kids”, and from notions of student criminality and immorality, we view the obligations of the school as a public institution as the appropriate place for bullying discourse to focus, and for the corrective force of litigation to be directed.

We think that the best discourse of bullying is neither CHILDHOOD, nor CRIMINALITY, nor MORALTY, but is CIVIL INSTITUTIONS AND LAW. Apart from changing the discourse of bullying, we think that the single best solution is found in one legal remedy, civil litigation against school authorities. Furthermore, we argue that if we do not make use of this remedy, bullying will persist, there will be more victims, and there will be more harm. At the same time, while we propose the use of civil litigation is necessary, it is not itself sufficient to change our culture, and the bully’s behavior. Other

forces of change, for example, legislation, different use of community resources, and engagement by both the parents of victims and bullies, must also be employed.