

Homophobic Bullying in Schools: Is there a Duty of Care?

Christopher Kendall & Naomi Sidebotham
Murdoch University, Western Australia

Introduction

Homophobia is the learnt fear and hatred of homosexuals and those perceived to be homosexual.

Heterosexism is the learnt belief that everyone is or should be heterosexual and that heterosexual relationships are normal and better than homosexual relationships.¹

'Faggot'. 'Poofter'. Cans being thrown. Groups of twenty children bashing him up to four times a week. Death threats. His house sprayed with anti-gay graffiti. These were just some of the taunts, behaviours and abuses that fourteen year old Christopher Tsakalos had to endure throughout high school, at not just one but at four different schools in New South Wales. Teachers failed to come to his assistance and sometimes just watched. He had already 'lost' his father and his elder brother who had left home as they were unable to cope with his homosexuality, something which he had shared with his family when he was only thirteen. Yet the New South Wales Department of School Education, the body responsible for those schools which Christopher had attended, considered that Christopher had received nothing but support and special attention from the schools and that there was more to this case than met the eye. Christopher, after all, had learning difficulties and a history of non-attendance at school.² Of course, when asked whether these 'learning difficulties' and 'non-attendance' might have been the result of years of abuse and torment from Christopher's classmates, no response was forthcoming.

Christopher Tsakalos' story is not unique. It indicates a personal tragedy for a young boy struggling to cope with being gay in a world in which religious leaders condemn lesbians and gay people as deviant, abnormal, or even to quote our own political leaders, as adding nothing to the 'the survival of the species'. More broadly, however, Christopher's story indicates a systemic failing on the part of educators and educational authorities to do what must be done; introduce and use those educational strategies that combat homophobic stereotype and instil the self confidence needed to ensure that young gay boys and lesbian girls do not do what so many do; commit suicide or self-harm in ways that effectively destroy their lives.

Despite numerous attempts to do just that (self harm) Christopher did not give in and for that we all owe him a great deal of gratitude. We also need to applaud his courage. In April 1997, in the first case of its kind in Australia, Christopher commenced legal action against both the Department of School Education and one of the schools he had attended, Cranebrook High School in Sydney's west, alleging that they had breached the duty of care owed to him as a student at the school. The action against the Department was settled with the Department agreeing to

allow Christopher to return to school and, perhaps most importantly, to train staff and students at his new school about the harms of homophobia, how best to tackle the types of gender and homophobic stereotypes that result in bullying, and the needs of lesbian and gay youth wanting to learn more about their own sexuality.³ Christopher also sought damages from Cranebrook High School for breaching the duty of care that it owed him – a duty of care that required them to take reasonable care to provide him with a safe school environment. He sought damages for pain and suffering and loss of enjoyment of life.⁴

Cases such as Christopher's are not isolated incidents, nor is his the most extreme example of homophobic bullying in Australia today. Most recently, for example, Tim, a sixteen year old student from Hillcrest Christian College in Melbourne alleged that he had suffered discrimination at the school because of his sexuality. He alleged that a staff member at the school told him that he 'had the devil in him' and that he suffered constant bullying from his classmates. This allegedly encouraged the school principal to advise Tim to hide his sexuality.⁵ 'Invisibility', 'discretion', he was assured, would offer him the protection he needed.

This article examines the frightening long term impact of homophobic vilification of school age children. It argues that there is a legal responsibility to protect children from this form of bullying. In particular, it examines the responsibility and potential liability of teachers, schools and education authorities to protect children from homophobic violence perpetrated by other students and teachers and to educate students against such abuse. While it is possible to bring a bullying case based on anti-gay prejudice before an equal opportunity tribunal, this article argues that a tortious duty of care should be recognised and enforced in situations where children suffer homophobic abuse whilst at school and schools do nothing to address the heterosexist stereotypes that make homophobic abuse possible.

As will be discussed below, teachers, schools and education authorities owe a duty of care to children in a number of situations. It is argued here that teachers and education authorities owe students a duty of care to take reasonable steps to protect them from all forms of bullying and that this extends to and includes anti lesbian and anti-gay bullying. This duty of care, it is argued, does not merely encompass the duty owed by teachers and education authorities to protect children from their peers. It extends to the protection of children from homophobic abuse (both verbal and physical) by teachers. It is further argued that if the immediate and long term impacts of such abuse are to be eliminated then this duty of care must also encompass a duty to educate children about sexuality, homosexuality and sexual difference and must also address the heterosexist assumptions that paint lesbians and gay men as deviant, non-conformist and thus deserving of abuse and ridicule. Until this is done, anti-gay bias will remain the norm, resulting in low self esteem amongst lesbian and gay youth and an assumption that because homosexuality is 'simply not something we talk about', violence directed at these young people remains acceptable. A society which values equality, respect and which professes to be compassionate cannot allow ignorance to be used as an excuse for ongoing hostility and discrimination.

Lesbian and Gay Youth and the Need for High School Education Strategies that Combat Homophobia

Silence is where the hate grows that killed my son.

Gabi Clayton, mother of Bill Clayton, found dead from suicide, aged 17.⁶

Gay youth counsellor Kevin Jennings explains that in a society in which homophobic violence and gender inequality remain rampant, being a gay or lesbian youth is, suffice it to say, less than easy. What makes gay and lesbian youth different from other minority and disenfranchised groups is that they do not, for the most part, grow up with people like themselves or with the support of their families or peer groups.⁷ Their isolation becomes more encompassing, for a homophobic social environment can be duplicated in the home. As Jennings notes, lesbian and gay youth are predominantly the product of heterosexual families, and come from communities where lesbian and gay adults are rarely visible. They also attend schools with few, if any, openly gay staff, and belong to peer groups where ‘fag’ is the favoured insult and ‘that’s so gay’ is a common term of abuse.⁸

According to Professor James Sears of the University of South Carolina, the average student realises his or her sexual orientation at the age of thirteen.⁹ For a heterosexual adolescent, there are many avenues of support through which they can overcome, or at least discuss, developmental or peer pressure difficulties that inevitably accompany adolescence. By contrast, gay youth rarely feel able to ask their families, friends, schools, or communities to help them out, fearing the possible and often likely negative response they might receive.¹⁰ This is supported by research conducted by the ‘London Gay Teenage Group’, which found that 25% of young gay men and lesbians felt isolated, 21% suffered verbal abuse, 12% were physically assaulted and one in five young gay men and lesbians attempted suicide because of anguish, loneliness and despair.¹¹ Still others have concluded that young gay men account for seven out of every ten completed suicides.¹² Isolation thus becomes intrinsic to the existence of a large number of lesbian and gay adolescents, and this feeling of isolation is often accompanied by self-hate and confusion as to their future.¹³

Like many of its counterparts worldwide, the Western Australian Health Department released a Report aimed at reducing the increase in youth suicide entitled *Making a Difference: Youth Suicide Prevention Manual*.¹⁴ With respect to gay and lesbian youth, the Report’s findings indicate that young gay, lesbian and bisexual people often live in hostile and condemning environments, with verbal and physical assaults both evident and rampant.¹⁵ There is a lack of positive role models and information about homosexuality, with little opportunity for gay youth to recognise, take pride and act on their sexual identity. This affects their self-esteem, leaving them isolated, vulnerable, internalising self-hatred or denying their sexuality. This, in turn, may lead to a situation where their sexual activity takes place anonymously (such as at ‘beats’) or gay and lesbian bars and nightclubs. This increases their sense of isolation, and exposes them to the risks of access to alcohol and other drugs, and the chance to engage in opportunistic sex work.¹⁶

In 1994, J Griffin released The School Watch Report, which examined the extent of anti-lesbian and anti-gay harassment in Australian schools. Griffin’s report noted the following emotional and psychological effects of homophobic violence in schools:

- 80 per cent of respondents stated they felt emotionally or psychologically affected by the most serious incident. The most common responses were being ‘stressed’ and ‘shattered’ or ‘devastated’.
- 11 ex-students who reported anti-lesbian/gay harassment and violence had left school citing homophobia as the major reason
- 56 per cent of the 43 students and ex-students who reported anti-lesbian/gay verbal harassment, threats of violence and or physical violence had left school or has felt like leaving school, citing homophobia as the main reason.¹⁷

All of the above create an environment in which suicide becomes a tangible option for young lesbians and gay men. As Jennings notes, according to the United States Department of Health and Human Services, gay and lesbian youth are two or three times more likely to *attempt* suicide than heterosexual youth (with 500,000 suicide attempts in the United States annually).¹⁸ Up to 30 percent of *successful* teen suicides each year are by lesbian or gay teens (1500 out of a total of 5000 deaths). Using the Department's statistics, this means that a gay or lesbian youth tries to kill him or herself every thirty-five minutes in the United States, and that a gay or lesbian youth succeeds in killing him or herself every six hours.¹⁹ In Australia, research indicates that 'one in three young lesbians between the ages of 14 and 18 attempted suicide because of their sexuality'.²⁰

What one sees from a reading of the above is a significant relationship between homophobia and low self esteem²¹ resulting from the 'painful experience of being different',²² of being considered a lower order of humanity. As Martin explains, the gay youth, raised in a society in which gay equals deviant, may come to accept that gay men 'are predatory, unsuitable for the hard professions, unable to form mature non-erotic relationships, inimical to the survival of the race, criminal seducers, haters of the opposite sex, immature and the victims of pathological development, sexually disordered, the cause of crime in the streets and the cause of AIDS'.²³ The result can be catastrophic.

It is not surprising, given the above, that many young gay men choose not reveal their insecurities and concerns to their families and those who they might normally turn to for support. As MacDonald explains, many young gay men simply become:

...half-members of the family unit: afraid and alienated, unable to ever be totally open and spontaneous, to trust or be trusted, and to develop a fully socialized sense of self or self-affirmation. This sad stunting of human potential breeds stress for gay people and their families alike – stress characterized by secrecy, ignorance, helplessness and distance.²⁴

And what of the long term? That is, what happens to those who internalise the stereotypes through which we are told to form an identity? For many, the stereotypes attached to being gay means that they are stigmatised, hence less worthy of respect and dignity:

...A hostile and rejecting world unfolds for homosexuals in which the objective understanding they have of homosexuality as unnatural, abnormal, and despised becomes a statement of self-definition. These interactions are particularly influential because they take place within the major socializing contexts for humans, that is family and peers.²⁵

As Savin-Williams notes, for some, the only response is to run away or get involved in prostitution and other crimes 'because they are unable to cope with the obligatory deception, isolation and alienation'.²⁶ Some find solace on the streets where they are able to find an identity model that 'corresponds to the cultural image of the male homosexual'. Others, sexually abused as children, normalise this abuse, and, thinking that violence is sex, turn to the types of abuse that first shaped their sexual identity, thinking that this is what it means to be gay:

Due to the stigma associated with homosexuality, males who have been sexually abused seldom report the abuse. Consequently, they seldom receive

the help they need to resolve the incident. But most importantly, the sexually abused possess knowledge and experience other delinquents may not have. They know there is a market for certain kinds of sexual activity.²⁷

Some believe that doing ‘tricks’ is the only way to meet other gay people. Still others turn to prostitution because this is where society has told them they belong. As one study of young gay prostitutes reveals, prostitution provides an identity that corresponds with the cultural image of the male homosexual – a ‘distorted and exaggerated sexuality, of promiscuity, and deviance’ – with male prostitutes literally practicing. ‘As prostitutes, they enact the myths and reflected the images of stigma they had learned’. Any elation at finding a community and identity, however, is short-lived, with these young men soon finding ‘themselves coping with the added stigma of prostitution’.²⁸ For many the result is a world of drug dependency,²⁹ sexual abuse, AIDS and, for still others, suicide – a social phenomenon all too readily produced by the cultural constructions of sex and gender.³⁰

While not all young men reacting to the stigma of being gay become prostitutes, many do take considerable steps to avoid the stigma attached to being gay – steps that result in considerable harm. As Troiden explains, these can range from inhibiting behaviours or interests they have learned to associate with homosexuality, limiting exposure to the opposite sex to prevent peers or family from learning about one’s relative lack of heterosexual responsiveness, assuming anti-homosexual postures, engaging in heterosexual immersion, and pursuing escapism in the form of drugs and alcohol.³¹

One of the main effects of homophobia is to encourage lesbians and gay men to hide any sexual identity that threatens gender male privilege. It would appear from the above that as a strategy aimed at silencing and penalising difference, homophobia has proven remarkably effective. Given this, it is not surprising that young gay men have also been quick to ‘assume anti-homosexual postures’ or to attempt to ‘pass’ as straight men in order to avoid the stigma attached to gay identity. While this strategy has much broader systemic effects, within the context of safe sex and youth suicide prevention strategies, it is clear that attempts to hide sometimes inflicts a deeper personal toll on the young. As Troiden explains, passing as a heterosexual is probably the most common stigma-evasion strategy and can lead to considerable emotional despair.³² As Berger explains, it can hinder the formation of a positive social support network for gay youth, as it tends to isolate gay youth from those most able to offer them the support they need and it impedes the formation of intimate relationships, as these young men fear that these relationships will reveal their true identity.³³ It also alienates them from those social support networks that can help them accept and deal with their confusion and sexual fears.³⁴

Given the amount of effort that young gay men are putting into ‘passing’, into ‘hiding’ who they are, it should not surprise us that other debilitating effects, also linked to low self-esteem, are now rampant. As Griffin explains:

Academic research indicates that anti-lesbian/gay harassment and violence may result in some victims’ internalized homophobia reappearing or intensifying. This can lead to self-blame, with depression and feelings of helplessness. ... The consequence of verbal victimization is to challenge the victim’s routine sense of security and invulnerability. Some people adapt by avoiding possible assault situations and consequently their day to day behaviours are restricted,

with considerable loss of control over their lives. The research also indicates that harassment and violence against lesbian and gay students has consequences such as truancy and dropping out of school.³⁵

If, as seems to be the case, escapism is required in order to survive, then, for those who do actually survive, external quick-fixes that promise escape will also find an increasingly eager market desperate to consume anything that offers a coping mechanism. The results, however, are anything but life enhancing. Alcoholism in the gay community, for example, has now reached the stage of being pandemic,³⁶ as has the use of illegal drugs.³⁷ Although far too much extremely important work has been done in this area to do it justice here, it is worth noting, albeit briefly, that with respect to alcoholism for example, much of the research undertaken concludes that not accepting being gay as a positive self-attribute goes a considerable way towards explaining the high incidence of alcoholism among gay men. Alcohol, like most drugs, serves as a denial and coping mechanism for gay men's often internalised homophobia.³⁸

Hence, in an attempt to avoid confronting their homoerotic feelings, some gay men will abuse both drugs and alcohol. As Troiden explains, 'getting high on drugs provides temporary relief from feelings of identity confusion and may be used to justify sexual feelings and behaviours ordinarily viewed as unacceptable'.³⁹ Gabriel Rotello notes similar findings in his groundbreaking work on gay men and AIDS, *Sexual Ecology*. In particular, Rotello notes with respect to drug use amongst young gay men that many are increasing their drug intake in an attempt to lose the inhibitions that inevitably result in a society in which gay sex is stigmatised. The result, unfortunately, is an increase in the types of unsafe sexual behaviours that can only result in a community in which self-respect and respect for others assumes a back seat. Rotello notes that up to 60 percent of those who have unsafe sex are either drunk or high at the time and while education strategies to combat alcohol and drug dependency can and have been implemented, these strategies can do little to combat the more frightening finding that some gay men deliberately use drugs in order to engage in the kinds of sexual activity they might not engage in were they sober. 'They get intoxicated precisely because they want to have unsafe sex are unable to have it when sober. Only when they are drunk or stoned are they able to lose their inhibitions, forget about AIDS, and have the sex they dream of'.⁴⁰

Although Rotello's comments in this instance refer to the links between HIV/AIDS and substance abuse, his message has much wider implications for those concerned about the health of a community lacking self-confidence and in which self-inflicted harm is a daily reality. While it is true that many do ultimately choose death over anguish, it is also true that others simply fail to take those precautions that ensure that death and suffering through HIV/AIDS will not be forthcoming. The two, youth suicide and HIV/AIDS transmission are not unrelated.⁴¹ Both find their roots in shame and non-acceptance, for as Rotello again notes, 'shame, after all, is the force that society has traditionally used to try to prevent gay people from being gay in the first place. One of the primary evils of homophobia is the way it has instilled a sense of shame in gay men and lesbians around the most basic sense of self and identity'.⁴² Rotello further notes that the need to address this fact is particularly evident when dealing with gay youth as 'one of the central goals of gay liberation has been to create a social atmosphere in which young homosexuals can grow up without shame, free to express themselves and their sexuality as openly as heterosexual young people do'.⁴³

Unfortunately, many gay youth today do not feel free to express themselves and those who do, often do so in ways that have the potential to harm themselves or others. And not many schools, appear to offer any educational information for the young homosexual wanting to learn about both sexual identity and the need for safe sex. As the authors of *Writing Themselves In* explain, an overview of Australian sexuality education initiatives reveals the following shortcomings:

- Information about heterosexual relationships was easily accessed and readily available with most young people learning about this topic from family, media, friends and school.
- Information about gay and lesbian relationships was far more difficult to access. Around half had received information about gay and lesbian relationships from the media and friends, one-tenth from the family and about 15% from school.
- With regard to safe-sex information, four out of five young people learned about heterosexual safe sex from school and the media, and about half from family and friends.
- At school, there was little information about gay or lesbian safe-sex and the situation was even worse in the context of the family.
- Rural young people had more difficulty accessing information about gay and heterosexual safe sex, than young people from metropolitan areas.

Given the above, it is worth asking what schools need to do to stop this trend. A reading of much of the literature on gay youth indicates that the self-esteem of young people must underlie any comprehensive health (both mental and physical) education approach. As Cranston explains, self-esteem is considered the linchpin to the ability to use the content of health education.⁴⁴ Young people cannot be expected to self-preserve or choose healthy behaviours (whether it be good nutrition, seat belts, or safer sexual practices) if they do not possess a strong sense of personal worth. Hence, if we do not offer young gay men positive role models and instill in them a sense of self-worth that merits preservation, we do little to encourage them to protect themselves, for we merely reinforce the belief that they are socially devalued, hence not worthy of the protection offered by safe sexual practices.

Similarly, we need to ensure that safe-sex education programs deal with the realities of same-sex sexual activity such that young gay men are made aware of what is and what is not safe sexual activity. This requires an at times blunt and explicit description of what gay sex is and how best to ensure that any sexual activity engaged in is in fact safe. Given that most high schools have adopted sex education curriculums, the responsibility to do so should and must rest upon those charged with developing and implementing these programs. Safe-sex education is not just about wearing condoms, however. Young gay men and lesbians must also be taught that self-loathing and shame are not normal or acceptable and their non-lesbian/gay peers must be taught that there is nothing inherent in being lesbian or gay that warrants verbal and physical abuse inflicted on those who are 'different' from them.

Teaching self-confidence, while normalising sexual difference and combating heterosexism will assist in saving lives by indicating to lesbian and gay youth, and students in general, that homosexuality is not a taboo subject best not discussed, that homosexuals are not socially deviant (hence worthy of abuse and ridicule) and that heterosexuality is not the only sexual orientation worthy of respect, support and basic human rights protections. Until this occurs, young lesbians and gay men will not be in a position to make the types of choices needed to ensure personal safety. As Cranston argues:

High self-esteem and competency in certain personal skills combine to create a sense of self-efficacy, the belief that one possesses the ability to use the learned skills in defence of personal well being. Self-efficacy emerges in much of the research into adolescent HIV prevention as a crucial component in the successful adoption of risk reducing practices.⁴⁵

Cranston and others argue that this process must begin within schools and cannot be left entirely to the gay community. Which brings us to the question posed in the next section of this paper: what happens when schools fail to do what they should do to combat homophobia and the often catastrophic results that accompany this failure. Similarly, what, if anything, can parents do legally to challenge inaction or the harms that result from inaction?

Is there a Duty of Care?

Thirteen percent of the young people in the study reported being assaulted because of their sexual orientation. When asked to write about the assaults, they described a range of violent attacks. Some of these attacks were single incidents, such as, 'Got my arm broken' and others constituted systematic abuse, such as, 'I had rocks thrown at me every day on my way home from school'. Many recalled abuse at school, for example: 'Punched discreetly while teacher wasn't looking' or 'broken bones in my fingers when a desk lid was slammed on my hand'.

National Report on Same Sex Attracted People⁴⁶

Legal challenges to teachers', schools' and education authorities' failure to take reasonable steps to prevent students in their care from being physically, verbally and sexually abused are becoming more common, both in Australia and overseas, raising important questions about the extent of the legal responsibility of such authorities to protect their students. It is argued here that there should be a tortious duty of care imposed on schools, teachers and education authorities to take reasonable care to prevent homophobic abuse of students by their peers and by teachers, and a duty to take reasonable care to educate against homophobia, while combating heterosexist stereotypes. Included in this is a necessary education strategy that educates all students that homosexuality and same-sex sexual activity per se is not deviant or abnormal.

Traditionally, negligence has been a tort that protects an individual's bodily integrity, proprietary interests and associated economic interests. While the categories of negligence have not been closed, any development in this area of the law has not, until recently, moved with any great speed. Courts have been unwilling to allow recovery in negligence for interests that do not fit easily within this traditional framework. Concerns about floodgates, unlimited liability and the protection of interests that cannot be easily defined or quantified have hindered the incremental development of the law. More recently, however, there has been an expansion in the kinds of rights that the courts are willing to protect. These now include, for example, a plaintiff's psychiatric well being and their pure economic interests. We would argue for a further expansion of such categories to include the duty to protect children from homophobic bullying and to educate against the further perpetuation of homophobic abuse that flows from heterosexist assumptions about what is 'normal' and what is not.

As detailed above, the effects of homophobia are severe. The damage that can be caused by bullying and homophobia to lesbian and gay youth in schools that may be compensated for in

the law of torts includes the physical injuries inflicted by bullying, the immediate and long term psychiatric damage caused by bullying, and a loss of earning capacity caused when a student is unable to attend school due to the bullying.

The failure to educate children about same-sex sexuality, a strategy that is needed to discourage homophobic bullying, is also serious. Silence on the part of educators allows the behaviour which leads to the bullying to continue, not only in the school yard but outside the school and beyond, into the workplace, at the supermarket, in all aspects of daily life. Any successful action to seek compensation for such damage requires the establishment of a duty owed by teachers, schools and/or education authorities to all students, the breach of that duty and the satisfaction of the tests of causation and remoteness of damage. Each of these inquiries has its own particular difficulties. The rest of this paper will focus on those associated with the establishment of the duty of care.

Duty of Care – General Principles

A duty of care can be defined simply as an obligation that one party owes to another to take reasonable care to prevent reasonably foreseeable injury. In the words of Lord Atkin in the seminal case of *Donoghue v Stevenson*:

You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour. [That is] persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.⁴⁷

As with many legal principles, however, the establishment of a duty of care it is not as simple as this classic formulation would lead us to believe. Lord Atkin's formula has been subject to much interpretation, debate and reinterpretation. In an attempt to prevent a duty from being too readily imposed, thereby placing an unreasonable and onerous burden on defendants and the community at large, courts have devised various 'controls' designed to limit the application of Lord Atkin's reasonable foreseeability test. Essentially these 'controls' mean that while the starting point for determining whether a duty of care exists in any given situation is to satisfy the test of reasonable foreseeability of both plaintiff and damage, this in itself will not always be sufficient to establish the existence of a duty of care.

The exact 'controls' that have been used vary. English courts, for example, have largely favoured a policy based approach to the establishment of a duty of care as encapsulated in the three tier test put forward by Lord Bridge in *Caparo Industries Plc v Dickman*.⁴⁸ This approach requires the satisfaction of the test of foreseeability, that the relationship between the parties in question is sufficiently proximate and that the situation in question is 'one in which the court considers that it is fair, just and reasonable that the law should impose a duty'.⁴⁹

With the exception of Justice Kirby, this approach to the determination of duty has been firmly rejected by the High Court of Australia. It has in the past attempted to devise a more scientific approach to the limiting foreseeability. This has taken the form of Justice Deane's proximity test,⁵⁰ or when dealing with purely psychiatric damage, the need for a sudden shock and a direct perception of the event giving rise to the injury.⁵¹ Fortunately, the High Court has now dismissed the first of these as failing to provide any useful guidance in determining whether there exists a duty of care in any given situation.⁵² It has also questioned the utility of maintaining sudden shock

and direct perception as necessary for the establishment of a duty in cases of psychiatric injury.⁵³ The current law in Australia in relation to the establishment of a duty of care is, however, less than certain. The High Court's recent decision in *Sullivan v Moody* clearly identifies those tests or principles which should not be adopted in the formulation of a duty of care.⁵⁴ It fails, however, to replace those approaches which it rejects with anything that is easily applicable or identifiable.

In *Sullivan v Moody* the High Court determined that a duty of care was not owed by officers of the South Australian Department of Community Welfare to fathers who had been accused of sexually abusing their children. The argument that was presented by the appellants was that it was foreseeable that they would suffer psychiatric harm if those investigating the allegations of sexual abuse did not exercise sufficient care towards them in making their inquiries. This was the case even though the officers had had no personal dealings with the appellants. The Court clearly indicated that even if a test of foreseeability could be satisfied, this is not sufficient alone to give rise to a duty of care. Clearly something more was needed. This 'something' was neither proximity nor the *Caparo* test. The latter, in particular, was rejected as giving too great a scope for the question before the court to be reduced to one of discretion based on a sense of fairness, justice and reasonableness. While it is not clearly expressed what this 'something' is, the Court made it clear that to impose a duty of care in these circumstances would place too onerous a burden on the respondents. The concern here was twofold. Firstly, there were concerns over floodgates and indeterminacy. Secondly, the officers here were under a statutory duty contained in the *Community Welfare Act 1972* (SA). This scheme was one for the protection of children which required the officers to treat the interests of the children as paramount. In light of this, the Court concluded that, 'it would be inconsistent with the proper and effective discharge of those responsibilities that they should be subjected to a legal duty ... to take care to protect persons who were suspected of being the sources of that harm'.⁵⁵ The Court also made it clear that to impose a duty of care 'would subvert many other principles of law'. In particular, the allegation here was damage through being told of something. This is something that should be dealt with in the law of defamation not negligence.⁵⁶

The conclusions to be drawn from the case would seem to be that in order to establish a duty of care the plaintiff and the damage must be reasonably foreseeable, but that if the imposition of a duty would conflict with other principles of law, be incompatible with relevant statutory schemes or indeed lead to potentially indeterminate liability, for example, then no duty should be allowed to exist. This is despite its express rejection of the *Caparo* approach. It leaves us with both a degree of flexibility and uncertainty. Indeed it seems to have failed to produce any clear formulation of principle for determining novel fact cases. Rather, it sets the scenario for each case to be decided according to its own particular circumstances. This flexibility in approach seems to be supported in the later cases of *Annetts* and *Tame*, dealing with the imposition of a duty of care for purely psychiatric injury.⁵⁷ As mentioned above, they too question the need for the maintenance of factors that operate to limit foreseeability. Although leaving open a number of questions, the High Court once again appears to be moving towards a less stringent approach to the determination of a duty of care, yet an approach which brings with it a degree of uncertainty.

Duty of Care – Teachers, Schools and Education Authorities

These principles, of course, relate to the imposition of a duty of care in novel fact situations. There are, however, many recognised duty categories such that it is not, in every case, necessary to argue the existence of a duty. That is, it is accepted that a duty of care is owed by a defendant to the plaintiff. In relation to teachers, schools and education authorities it is well established in

Australia that a duty of care *is* owed towards a student to take reasonable care to prevent them from suffering a physical injury.⁵⁸ This duty requires, for example, that a teacher exercise reasonable care in the supervision of students both during school hours and prior to the commencement of the school day,⁵⁹ or even at the bus stop after the school day has ended.⁶⁰ It also extends to taking reasonable care to ensure that facilities and equipment at the school are safe and appropriate.⁶¹ As stated by Justice Stephen in *Geyer v Downs*, the scope of this duty will depend ‘upon whether the particular circumstances of the occasion in question reveal that the relationship of schoolmaster and pupil was or was not then in existence. If it was, the duty will apply’.⁶²

The nature of this duty is also well established. It is clear, for example, that if a teacher fails to exercise sufficient care he or she will have breached their duty. It is also clear that this breach can give rise to an action against the school or the education authority on the basis of vicarious liability. That is, if the teacher has been negligent in the course of their employment then the school or education authority will be responsible for that negligence.⁶³ It is also clear that the relationship between an education authority and pupil is considered of such importance that the duty of care that arises between them is a non delegable duty. That is, it is not a duty that can be delegated to another. A person who is subject to a non delegable duty ‘has a responsibility either to perform the duty, or to see it performed, and cannot discharge that responsibility by entrusting its performance to another’.⁶⁴ Thus an education authority cannot discharge its duty by delegating it to a school, a school principal or any of its teachers. The authority must itself take care.

The existence of such a duty in relation to education authorities was firmly established in *Commonwealth v Introvigne*.⁶⁵ This was a case in which the High Court considered the existence and nature of the duty of care owed to a student who suffered physical harm as a result of the negligence of a teacher. The student and his friends were swinging on a flagpole in the school grounds. Consequently part of the flagpole detached itself and hit the student on the head, injuring him. The accident occurred in the school yard but before school had commenced. In a non-controversial application of duty of care principles, it was found by the High Court that at the time of the accident there was only one teacher on supervision duty and that consequently the staff were negligent in failing to provide adequate supervision in the playground. That is, they owed a duty to take care to provide sufficient supervision and failed to do so.

The importance of the *Introvigne* decision lies in the fact that it clearly established that the duty of care owed by education authorities to its students is non delegable. That is, the duty owed by education authorities is a direct one. It cannot be discharged simply by the authority delegating the task to another. This is distinct from a case of vicarious liability. The authority was not vicariously liable for the negligence of the teachers. The authority *itself* was negligent. *It* failed to exercise sufficient care to ensure the safety of students under its control and protection. As stated by Justice Mason:

By establishing a school which was ‘maintained’ on its behalf at which parents would enroll their children for instruction ... the Commonwealth ... came under a duty of care to the children attending the school. ... It was a duty owed directly by the Commonwealth for breach of which it is liable. It was not a case of vicarious liability for the omissions of the acting principal and members of his staff. ... The fact that the Commonwealth delegated the teaching function to the state, including the selection and control of the teachers, does not affect its liability for breach of duty. Neither the duty, nor its performance, is capable of delegation.⁶⁶

Clearly, these principles establish that a non delegable duty of care exists to take care to ensure that a child is not physically harmed by another child while in the care of the school, and that a child is not physically harmed by a teacher while in the care of the school. This must extend to physical harm caused by a deliberate act of bullying.

The scope of this non delegable duty has recently been considered by the High Court in *New South Wales v Lepore*; *Samin v Queensland*; *Rich v Queensland*.⁶⁷ These cases concerned neither bullying nor homophobic violence. They were concerned with sexual abuse. All involved similar fact situations. In each it was alleged that a teacher had sexually abused students while they were in the care of the school. It was argued that the relevant education authorities owed these children a non delegable duty of care to ensure that they were not subject to this kind of physical abuse while in the care of the school.

In each of these cases the Court examines the nature and extent of a non delegable duty. Accepting the authority of *Introvigne* it found that a non delegable duty of care can certainly be owed by an education authority to its students. This duty is not however an absolute duty. It is not equivalent to strict liability. That is, a non delegable duty is no different from other duties in that it requires the body owing the duty to act carelessly. The authority is not liable unless it has done something wrong. To hold otherwise would be to impose too high a burden on bodies such as education authorities. In the cases before it the Court concluded that the authorities had done nothing wrong. Thus, the only way these actions could succeed was on the basis of vicarious liability. On this issue one of the cases was sent for retrial and in the other two there was not sufficient evidence. The clear conclusion from *Lepore* is that education authorities owe a non delegable duty to take care that their students are not harmed while under the care of schools, but that this duty is not absolute.

Duty of Care – What About Bullying?

How do cases such as those discussed above effect the establishment of a duty of care when a child is the victim of a deliberate act of bullying, in particular bullying motivated by homophobia. It is a straightforward application of the principles discussed in *Sullivan* and *Introvigne* to conclude that a non delegable duty of care is owed by an education authority to take care to ensure that students are not bullied whilst in the care of the school. This includes bullying by other students. It should also include bullying by teachers. That is, if it is reasonably foreseeable that a lack of care by a teacher or school could result in an injury to a student then a duty of care should exist. There appear to be no reasons such as those touted in *Sullivan* for concluding that a duty should not exist. There are no conflicting statutory schemes. In fact, care of the child is a prime function of the teacher and school. The importance of cases such as *Lepore* in this context means that if an authority has exercised sufficient care their duty will not have been breached. This of course does not mean that if a teacher has failed to exercise sufficient care the authority or school will not be vicariously liable for that negligence or indeed that the teacher him or herself will not be found directly liable.

Surprisingly however, bullying, and the multiple harms that it causes, has not been the subject of many negligence actions in Australia. And yet bullying is a significant problem in our schools. Research reported by Philip Slee and David Ford shows that, based on a survey of over 25,000 students from around Australia, between one in five and one in seven students were bullied at least once a week and that although most bullying lasts a day or two for 12% of students it lasts at least a week.⁶⁸ In fact bullying has become such a problem that in Western Australia

the Perth Children's Court has dealt with up to seventeen restraining order applications a month against juveniles, most of which were concerned with bullying⁶⁹ and in Victoria the Victorian Children's Court dealt with about 300 such applications in 2001.⁷⁰ In 2001 a bullying incident at Sydney's Trinity Grammar School was dealt with through the criminal law. Clearly, if a teacher or school has not taken sufficient care to prevent children from being injured through such bullying an action in negligence is also possible.

In *Haines v Warren*⁷¹ approximately \$250,000 in damages were awarded to a female student who was injured by a male student. It was found in this case that the New South Wales Department of Education owed a duty of care to the student to exercise reasonable care to protect her from the bullying. In this case the aggressive behaviour of the male student occurred in the school quadrangle which was under the supervision of the teachers. Thus, the teachers should have known of the student's behaviour. The injury to the victim was thus foreseeable. A duty of care was clearly owed and breached.⁷²

More recently the Victorian County Court has also upheld the duty of care owed to protect students from bullying. In 2001, Aaron Emonson was awarded \$60,000 in damages by the Court for the bullying which he suffered at school which caused him physical and psychological injuries. Aaron had been subject initially to verbal bullying only. This progressed to physical bullying which itself became more violent. At one point, for example, he had been choked with a piece of cord. His parents were aware of the problem and had requested on a number of occasions that the school address the issue. Clearly in this case the school was aware of the problem. It was found by the Court that the school owed Aaron a duty of care which it had breached in failing to take sufficient measure to deal with the bullying.⁷³

In June 2003 the Victorian County Court once again awarded damages to a student for bullying whilst at school. Lisa Eskinzi was awarded damages of approximately \$75,000 for the verbal and physical abuse and intimidation that she suffered at school. These incidents culminated in serious physical assaults. The Court found that the Victorian Education Department owed and breached a duty of care towards Ms. Eskinazi. In particular, the Court found that this duty had been breached by the failure of the year 8 coordinator to discipline the students, contact parents or arrange consultations with the school principal, the failure of the student welfare coordinator to pursue Ms. Eskinazi's complaints or appreciate the severity of the situation and the failure of the principal to ensure that reasonable care was taken towards Ms. Eskinzi.⁷⁴

Clearly, if a case such as these is to succeed it is necessary that the bullying be a reasonably foreseeable risk. In Emonson's case this was arguably not that difficult to establish given that his parents had made repeated requests to the school that the problem be dealt with. The school had actual knowledge of the danger in this case. However, when dealing with a duty of care the test is usually that a duty will exist if a reasonable person should foresee damage to a plaintiff. That is, it is not just actual knowledge that goes to the establishment of a duty of care, but knowledge that the defendant should have had. That is, should a reasonable teacher exercising reasonable care have known that the student in question could suffer injury by the bullying of another student? This inevitably will depend upon the facts of each particular case. In Eskinzi's case this level of foresight was satisfied as Ms. Eskinazi had made complaints about the situation.

Homophobia, Heterosexism and Bullying – Is There a Duty of Care?

When schools fail to challenge homophobia, they give a clear message that homophobia is ok.⁷⁵

When it comes to homophobic bullying and the heterosexist belief systems that allow it to happen (in deed, which make it possible in the first place) such case law simply does not exist. The reasons for this are manifold. Clearly gay students, as with many targeted groups, rely on their anonymity to protect them. They have a vested interest in maintaining their invisibility, not just as a tool of protection but also out of an associated and legitimate fear of what could eventuate should their sexuality become public knowledge.⁷⁶ Yet, as with the bullying described above, this homophobic abuse and its effects are serious problems in our schools. Hillier, Harrison and Dempsey report that of 749 questioned students almost half were verbally abused and thirteen per cent were physically abused. Of those questioned over two thirds reported such experiences occurring at school.⁷⁷ The serious and sometimes devastating consequences of this are described above.

There is no reason why an action in negligence for bullying motivated by homophobia should not succeed because of the lack of a duty of care.⁷⁸ Clearly a duty of care exists in this situation just as it does in those described above. The reason or motivation for the bullying should not be determinative of the existence of a duty of care. If a child is physically attacked whilst at school and the injury is foreseeable then a duty of care should be owed.

The major issue in dealing with homophobic bullying is satisfying the threshold test of foreseeability. That is, should a teacher or school have foreseen that a child may be injured by anti-lesbian or anti-gay bullying? This may require that the teacher have knowledge that the child was actually lesbian or gay. This would then alert the teacher to the potential for this form of bullying to occur. It may simply require that the situation was such that any reasonable teacher or school would have known that the child could be subject to bullying. Certainly once some form of bullying has begun then a reasonable teacher should foresee or at least infer that the student may suffer injury. Likewise, if a student, or the student's parents, alerts the teacher or school that they are being bullied then the test of foresight should be satisfied. However, the standard of foresight required at this level of the negligence inquiry is not specific.⁷⁹ A reasonable person is accorded with a fairly general degree of foresight. Thus, there is no need for a teacher to foresee the particular form of bullying, the extent of the bullying or the nature of the bullying, for example. All that is needed is that a reasonable teacher or a reasonable school would foresee that some damage could occur to someone such as the plaintiff.

Hence, if a teacher was aware of occasional 'name calling', for example, then perhaps it would be reasonable to foresee that this could escalate into severe verbal or physical abuse. Or perhaps if a teacher was aware of a particular student's sexuality and that they were not being included in group activities then again a reasonable teacher should foresee that this could be the beginnings of a bullying problem. The answer to what a reasonable teacher should foresee will, of course, depend upon the facts of a particular case.

When it comes to purely psychiatric injury, that is, damage which is not consequent upon any physical damage, such as that caused by verbal abuse, the question remains the same. That is, did the teacher foresee or should they have foreseen that the student could suffer psychiatric injury if the bullying continued? The level of foresight required here may be higher than that discussed above. The teacher would need to foresee more specifically that psychiatric injury could result and would also need to have a more specific level of foresight of the particular plaintiff.⁸⁰ Certainly this may be more difficult to establish. However, in light of the increasing research that is emerging about the long term psychological and psychiatric effects of anti-lesbian and anti-gay bullying on school age children this required level of foresight will become easier to satisfy.⁸¹

As noted above, the Health Department of Western Australia released a campaign strategy aimed at assisting educators responsible for educating and counselling gay youth in West Australian High Schools.⁸² The thrust of this Report is a recognition that being sensitive to and knowledgeable about some of the issues and problems these young people face will greatly improve the level and type of support educators are able to offer them. Its recommendations for educators, summarised in a resource manual distributed to all West Australian schools, are as follows:

- Be aware of the issues, and equip yourself with current, accurate information about the particular needs of gay, lesbian and bisexual service users and where they can go for help. Create a resource list of relevant community groups.
- Acknowledge the reality of homophobia (which is fear of and prejudice against homosexual men and women). Be prepared to confront your own attitudes as well as those of others. This is especially important in schools, refuges and youth agencies where we need to provide positive examples of sensitivity to, and acceptance of, difference.
- Challenge **all** anti-homosexual language and behaviour.
- Ensure that policies and procedure in your agency reflect a commitment to non-discrimination of gays, lesbians and bisexuals. Make sure this is included in all published service documents.
- Include relevant material for young lesbians, gays and bisexuals in all service programs.
- Display pamphlets, books and posters on gay, lesbian and bisexual issues.

Finally, the Manual notes that, when working directly with young lesbian, gay and bisexual people who may be at risk of suicide or injury, educators should consider the following:

- Wherever possible, encourage the use of gay, lesbian and bisexual counselling services and support groups if this is what the young person wants.
- Create a safe, accepting environment in which the young person can discuss issues of sexuality. Sometimes it is important to let the person know that you are comfortable talking about these issues by asking open, direct questions.

Recommendations such as these are aimed at assisting lesbian and gay youth feel more accepted by the community in which they live, an objective which, if successful, may ultimately have the concurrent effect of reducing the sense of isolation so often felt by those youth so clearly at risk of self inflicted injury.

This leads us to the final issue for comment. In our opinion, it is the responsibility of schools and education authorities in Australia to provide their students with sex education and those heterosexual stereotypes that lead some to assume that same-sex sexuality simply does not occur or, if it does, is wrong or immoral. Education about same-sex sexuality serves a number of important functions and goes some way towards addressing bullying issues. To begin with, it instills confidence in the lesbian or gay youth by telling them directly that their sexual feelings are not 'unnatural'. In doing so, it goes a long way towards avoiding the social problems and health risks, including suicide, faced by lesbian and gay youth. In addition, by mainstreaming discussion of same-sex sexuality into sexuality education programs, we avoid singling out homosexuality as something not worthy of discussion, as 'deviant', as 'abnormal'. This, in turn, sends a powerful message to those students most likely to bully. Obviously, it cannot avoid all schoolyard, but if it stops even one homophobic attack, then this is one success story worth applauding.

The WA Health Education Report notes that the issue of HIV/AIDS education is of the utmost importance for all young people and recommends implementing education programs that reflect the need for safe sexual behaviour as well as those which focus on sexual identification. This is of crucial and urgent need given recent North American statistics which indicate an alarming increase in HIV/AIDS transmission amongst gay male adolescents between the ages of 14 and 19.

Reasons for the increase in HIV transmission rates amongst young gay men are unclear, although many in the gay community believe it reflects a failure on the part of both society at large and the gay community itself to offer the type of support needed to develop the level of self confidence and self respect required for safe sexual practices to be a viable option.⁸³ It has been argued, for example, that if we do not offer young gay men positive role models and instil in them a sense of self-worth that merits preservation, we do little to encourage them to protect themselves, for we merely reinforce the belief that they are socially devalued, hence not worthy of the protection offered by safe sexual practices. Similarly, we need to ensure that safe-sex education programs deal with the realities of same-sex sexual activity such that young gay men are made aware of what is and what is not safe sexual activity. This requires discussions about what gay sex is and how best to ensure that any sexual activity engaged in is in fact safe. Given that high schools throughout Australia have adopted sex education curriculums, the responsibility to do so should and must rest upon those charged with developing and implementing these programs. Not only will this assist in saving lives, it will indicate to gay youth, and students in general, that homosexuality is not a taboo subject, that homosexuals are not socially deviant (hence worthy of abuse and ridicule) and that heterosexuality is not the only sexual orientation worthy of respect, support and basic human rights protections.

Clearly, given what has been argued above, it is unquestionable that a duty of care is owed by teachers, schools and education authorities towards students that are in their care. This is firmly established by the case law discussed above. This duty of care clearly includes a duty to take care to prevent a student from being physically or psychologically injured whilst in the care of the school and this includes such injury as caused by bullying. Thus, should a child, such as Christopher Tsakalos, be the subject of homophobic bullying where it is reasonably foreseeable that they could be the victim of such bullying and that the bullying could cause them some injury then they would be able to argue an action in negligence against the teacher, the school or the relevant education authority. Once it is established that a duty of care is owed then, of course, it must be established that the defendant breached that duty and that the breach caused a not too remote injury to be suffered. Clearly the time is ripe for such an action to be brought. As is the time for education aimed at tackling the rampant heterosexism that, if addressed in schools, could go a long way to stop the harms discussed in this paper.

Conclusion

Part of the educational effort aimed at teachers and school administrators must be focused on averting violence and harassment; teachers have to be encouraged (or required) to stop harassment and gay-baiting of kids on school grounds. 'Faggot' is such a common epithet that adults barely hear it – but you can bet closeted gay kids hear it every time, whether it's addressed to them or not. Coaches and athletic directors use words like 'sissy' and 'pussy' as

motivators. They'd be the first to claim 'fag' has nothing to do with putting down gays, but tell that to the kids.⁸⁴

We have argued throughout this paper that a duty of care exists in Australia to take reasonable care to ensure that students are not subject to homophobic abuse, whether physical or verbal, whilst at school and that steps are taken to ensure that the harms that result from anti-lesbian/gay bullying are avoided. It is our assertion that not only should teachers and those who govern them be 'encouraged' to stop harassment and the flow on effects of violence and harassment, they have a legal responsibility to do so.

It is clearly established in Australian law that a duty of care is owed by teachers, schools and education authorities to students to protect them from bullying at school. It has been argued here that this incorporates a duty to protect them from homophobic abuse. This includes a duty to tackle those heterosexist assumptions that make homophobic abuse more likely to occur. It has also been suggested that if the further perpetuation of such behaviour and the harms that flow from it, are to be curtailed then this duty of care should also extend to the provision of those educational strategies that instill self-confidence, eradicate homophobic stereotype and eliminate the distinction between gay and non-gay that now pervades our school systems. A failure to do so brings with it the likelihood of legal action and, far worse, the unnecessary continuation of many of the harms of discrimination and neglect highlighted in this paper – many of which are foreseeable and avoidable.

Address for correspondence: A/Prof Christopher Kendall, Dean of Law, Murdoch University, GPO Box S1400, Perth WA 6849, Australia. Email: c.kendall@murdoch.edu.au

Endnotes

1. T Klein and N Simmons, Homophobia: Get Over It!, located at http://www.uq.net.au/get.over.it/HTML_REPORT_ONE/Homophobia_GOI.html
2. R Yallop, 'Playground Prejudice', *The Australian*, 3 April 1997 at 9; K Glascott, 'Gay Schoolboy Tests Vilification', *The Australian*, 2 April 1997 at 3; D Passey, 'Gay Pupil's Victory – Now It's Back to School', *The Sydney Morning Herald*, 2 April 1997 at 3; .
3. Abigail Thonemann, 'Enabling and Disabling Conditions for Teaching Against Homophobia', presented as part of the Symposium, 'Challenging Heterosexuality and Homophobia in Schools', Melbourne, 1 December 1999 at <http://www.aare.edu.au/00pap/tho99040.htm>
4. Yallop, above note 2; Glascott, above, note 2.
5. L Milligan, 'Gay Student Sues Christian School for Discrimination', *The Australian*, 26 August 2002 at 2.
6. Iain Clacher, 'Silence is the Where the Hate Grows', dated 9/8/97, located at <http://www.youth.org/loco/PERSONProject/Alerts/International/suicide3.html>
7. Kevin Jennings, *Becoming Visible: A Reader in Gay and Lesbian History for High School and College Students* (Boston: Alyson Publications, 1994) at 262.
8. *Id.*
9. James Sears, *Growing Up Gay in the South* (New York: Harrington Park Press, 1991), cited in Jennings, supra, note 7 at 263.
10. *Ibid.* at 263.

11. As quoted in S Jeffrey-Poulter, 'A Smell of Weimar 1987-8', in *Peers, Queers, and Commons* (London: Routledge, 1991) at 222.
12. Iain Clacher, 'Silence is where the hate grows: gay teenagers and the frightening final solution', *Campaign Magazine*, Sydney, September 1997 at 27. Research worldwide supports these findings, such that it can now be concluded that gay and lesbian youth are at least three times more likely than heterosexual youth to attempt suicide. See P. Gibson, *Gay Male and Lesbian Youth Suicide, Report of the Secretary's Task Force on Youth Suicide*, U.S. Department of Health and Human Services, 1989; A. Bell, and M. Weinberg, *Homosexualities: A study of diversity among men and women*. (New York: Simon & Schuster, 1978); K Jay and A Young, *The Gay Report: Lesbian and gay men speak out about their sexual experiences and lifestyles*. (New York: Summit, 1977); T Roesler and R Deisher, 'Youthful man homosexuality', (1972) *Journal of the American Medical Association* 1018; G Remafedi and JA Farrow, 'Risk factors for attempted suicide in gay and bisexual youth', (1991) *Paediatrics* 87.
13. Jennings, above note 7 at 263.
14. *Making a Difference: Youth Suicide Prevention Manual* (1994) Health Dept. of WA, Perth, Australia.
15. A recent LaTrobe University survey of 750 young people between the ages of 14 and 21 reveals that almost half reported they had been verbally or physically assaulted because they were attracted to people of the same sex. See Quinn KT., Establishing an association between rural youth suicide and same-sex attraction. *Rural and Remote Health* 3 (online), 2003: 222. Available from: <http://rrh.deakin.edu.au>. Almost 70 percent experienced this abuse at school; 60 percent of this abuse was inflicted by other students. See 'Same Sex Attraction Meets School Hostility', *The Australian*, Monday 23 November 1998 at 17 and 'Much Delayed Report Due at Last', *West Side Observer*, 20 November 1998 at 3. See also Richard Yallop, 'Playground Prejudice' *The Australian*, 3 April 1997 at 9; Katherine Glascott, 'Student's Harsh Lesson in Sex Education' *The Australian*, 3 April 1997 at 9; Katherine Glascott, 'Gay Schoolboy Tests Vilification' *The Australian*, 2 April 1997 at 3.
16. A recent report by the Western Australian AIDS Council, entitled 'Here for Life: Youth Sexuality Project', reveals similar findings. Specifically, the Report notes that 'the process of realising a same-sex orientation typically results in: damaged self esteem, distancing from family and peers, attempts to avoid disclosure, distortion of nearly all relationships, increasing sense of isolation and a sense of inferiority and self loathing'. A copy of the Report is available from the WA AIDS Council, 664 Murray Street, West Perth, WA, Australia 6005 or via e-mail at waac@highway1.com.au.
17. J Griffin, 'The School Watch Report: A Study Into Anti-Lesbian and Gay Harassment and Violence in Australian Schools (Sydney: Suzzane Jones Pritchard. 1994) cited in Jacqui Griffin, 'Anti-Lesbian/Gay Violence in Schools', in Gail Mason and Stephen Tomsen, *Homophobic Violence* (Annandale, NSW: The Hawkins Press, 1997) at 107-108. See also, Lynne Hiller *et al.*, *Writing Themselves In: A National Report on the Sexuality, Health and Well-Being of Same-Sex Attracted Young People* (La Trobe University: National Centre in HIV Social Research, 1998).
18. Jennings above note 7 at 264.
19. *Id.*
20. Griffin, above note 17 at 107.

21. Geraldo Lima *et al.*, 'The Relationship Between Homophobia and Self-Esteem in Gay Males with AIDS', (1993) 25(4) *Journal of Homosexuality* 69.
22. Iwan Bloch, *The Sexual Life of Our Time* (New York: Rebman, 1937) cited in A Damien Martin, 'The Stigmatization of the Gay and Lesbian Adolescent', (1988) 15 (1) *Journal of Homosexuality* 163.
23. A Damien Martin and Emery Hetrick, 'The Stigmatization of the Gay and Lesbian Adolescent', (1988) 15 (1) *Journal of Homosexuality* 163 at 167. As Martin explains, the effect of these stereotypes on a naive, developing adolescent is a cognitive dissonance that will radically affect that person's sense of self. As Goffman also notes:

The standards he has incorporated from the wider society equip him to be intimately alive to what others see as his failing, inevitably causing him to agree that he does indeed fall short of what he really ought to be. Shame becomes a central possibility, arising from the individual's perception of one of his own attributes as being a defiling thing to possess.

Citing E Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs, NJ: Prentice Hall, 1963).
24. GJ MacDonald, 'Individual Differences in the Coming Out Process for Gay Men: Implications for Theoretical Models', (1982) 8(1) *Journal of Homosexuality* 1 at 1 and 4.
25. Debra Boyer, 'Male Prostitution and Homosexual Identity', (1989) 17(1) *Journal of Homosexuality* 151 at 167.
26. Ritch Savib-Williams, 'Coming Out to Parents and Self-Esteem Among Gay and Lesbian Youths' (1989) 17(1) *Journal of Homosexuality* 1 at 2. Research indicates that the majority of male prostitutes are gay men between the ages of 15 and 23. In another study, it was noted that:

...the majority were either gay identified, struggling to find a place in the gay male subculture, or both. Only 15% of the youth regarded themselves as 'straight'. Although many of the habitual and situational prostitutes in the study identified themselves as gay, few were able to report any kind of permanence in their homosexual relationships. The researchers found that for many of these boys, intimacy was thwarted by their fears of closeness and affection, their 'promiscuous past', and their dislike for control or restriction in relationships.

Eli Coleman, 'The Development of Male Prostitution Activity Among Gay and Bisexual Adolescents', (1989) 17(1) *Journal of Homosexuality* 131 at 137.

Many of the young gay men who end up on the street flee their homes for fear of negative reaction from their parents, while others flee as a direct result of the violence inflicted on them by their families once their sexual orientation is revealed. Many turn to prostitution because it promises a sole outlet through which to meet other gay people or because they have internalised society's expectation that this is what gay people do.
27. Debra Boyer, 'Male Prostitution and Homosexual Identity', (1989) 17(1) *Journal of Homosexuality* 151 at 167.at 172. For an excellent overview of some of the many problems associated with homeless gay youth, see G Kruks, 'Gay and Lesbian Homeless/Street Youth: Special Issues and Concerns', (1991) 12 *Journal of Adolescent Health* 515.
28. Boyer, *Ibid.* at 176-177.
29. As Coleman explains, many of the young gay men now prostituting themselves on the streets turn to drug use – a factor which only ensures that they remain there as they find themselves unable to pay for their drug addiction:

In one of the studies on male juvenile prostitution Schick found that 20% of his 144 subjects eventually overdosed on heroin. Furnald, in his study of male juvenile prostitution, also found a significant history of drug abuse among the subjects, especially after entry into hustling. Similarly, Alien found that 29% of his sample were regular users of hard drugs and 42% were heavy drinkers or alcoholics. Drug dealing is common. Alien and Fisher *et al.* found that the degree of drug use is related to the type of prostitution -- with habitual prostitutes being the heaviest users. Many of these boys use drugs while they are hustling (76% in the URSA study).

Eli Coleman, 'The Development of Male Prostitution Activity Among Gay and Bisexual Adolescents', (1989) 17(1) *Journal of Homosexuality* 131 at 137. Citing, F Schick, 'Service Needs of Hustlers', unpublished manuscript, available from author, 111 N Wabash 1320, Chicago Il 60602; R Furnold, *Male Juvenile Prostitution*, unpublished masters thesis, University of Southern California, Los Angeles, CA; DM Alien, 'Young Male Prostitutes: A Psychological Study', (1980) 9 *Archives of Sexual Behaviour* 399 and B Fischer *et al.*, 'Young Male Prostitutes: A Psychological Study' (1980) 9 *Archives of Sexual Behaviour* 399.

30. Boyer, above. note 28 at 178.
31. Richard Troiden, 'The Formation of Homosexual Identities', (1989) 17(1) *Journal of Homosexuality* 43, at 62.
32. Ibid. at 62.
33. Raymond Berger, 'Passing and Social Support Among Gay Men', (1992) 23(3) *Journal of Homosexuality* 85 at 89.
34. Ibid. at 89.
35. Griffin, above note 17 at 107.
36. Robert Kus, 'Alcoholism and Non-Acceptance of Gay Self: The Critical Link', (1988) 15(1) *Journal of Homosexuality* 25.
37. See Gabriel Rotello, *Sexual Ecology: AIDS and the Destiny of Gay Men* (New York: Dutton, 1997) and Lynette Lewis and Michael Ross, *A Select Body: The Gay Dance Party Subculture and the HIV/AIDS Pandemic* (Cassell: London, 1995). As noted in Lewis and Ross:
 In Stall and Wiley's comparative cross sectional investigation (drawn from the prospective San Francisco Men's health Study sample), gay men under 35 years of age were significantly more likely to use a wider range of specific drugs (including marijuana, poppers or anal nitrates, MDA and other amphetamines) for their idiosyncratic or disinhibitory effects, than were heterosexual men or older gay men. They also found that these gay men were seven times more likely to use five or more drugs, and more frequently than were heterosexual men of the same age.
 Citing R Stall and J Wiley, 'A comparison of alcohol and drug use patterns of homosexual and heterosexual men; the San Francisco men's health study' in *Drug and Health Dependence* (1988).
38. Robert J Kus, 'Alcoholics Anonymous and Gay American Men', (1987) 14(2) *Journal of Homosexuality* 253.
39. Troiden, above note 31 at 57.
40. Rotello, above note 37 at 139.

41. This is a point again best articulated by Cranston, who writes:
 ...lesbian, gay, and bisexual youth are at increased risk because of their lower self-esteem. A body of evidence exists to document higher rates of suicidal ideation and suicide attempts in this population compared to heterosexual adolescents, a problem believed by most researchers to be secondary to low self-esteem. Gary Remafedi, of the University of Minnesota, the Hetrick-Martin Institute for the Protection of Lesbian and Gay Youth in New York City, and the U.S. Department of Health and Human Services Report of the Secretary's Task Force on Youth Suicide each confirm heightened suicide risk. Associated risks include higher rates of alcohol and substance abuse, violent victimization, school problems, and conflict related to sexual orientation issues. ... A person with a poor sense of personal worth has less ability to pursue healthy behavioural options. And if the use of alcohol or other drugs is linked with sexual activity, unsafe sexual are more likely to occur.
 Kevin Cranston, 'HIV Education for Gay, Lesbian and Bisexual Youth: Personal Risk, Personal Power, and the Community of Conscience', (1992) 22(3) *Journal of Homosexuality* 247 at 251-152.
42. Rotello, above note 37 at 259.
43. Ibid. at 289.
44. Cranston, above note 41.
45. Ibid. at 251. A similar analysis is offered by De Bruyn, who notes that because 'homosexuality identity is not acknowledged, permitted and supported as a natural development of human personality...(this) inevitably leads to negative self-esteem and a lack of negotiating skills and consequently to a heightened vulnerability to HIV infection amongst gay men'.
 See T de Bruyn, 'HIV/AIDS and Discrimination: A Discussion paper', Canadian HIV/AIDS Legal Network and Canadian AIDS Society, Montreal, as found at <http://www.aidslaw.ca/elements/disc/DISCdiv.html>, 1998, 1 at 12. See also *Report of the Evaluation of the National HIV/AIDS Strategy*, National Evaluation Steering Committee (Canberra: Commonwealth of Australia, 1992) and R Sanatioso, 'A Social Psychological Perspective on HIV/AIDS and Gay or Homosexually Active Asian Men', (1999) 36 *Journal of Homosexuality* 76. An excellent overview of these issues is found in Darryl Pereira, 'HIV/AIDS and its 'Willing Executioners': The Impact of Discrimination' in (1999) 6(4) *E Law - Murdoch University Electronic Journal of Law*; found at <http://www.murdoch.edu.au/elaw/issues/v6n4/pereira64.html>.
46. Lynne Hillier *et al.*, *Writing Themselves In: A National Report on the Sexuality, Health and Well-Being of Same-Sex Attracted Young People* (LaTrobe University: National Centre in HIV Social Research, 1998) at 35.
47. [1932] AC 562 at 580.
48. [1990] 2 AC 605.
49. *Ibid* at 617.
50. See *Jaensch v Coffey* (1984) 155 CLR 549 at 583 – 585 and *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 497 - 498
51. See, for example, *Jaensch v Coffey* (1984) 155 CLR 549.
52. *Sullivan v Moody* (2001) 207 CLR 562.
53. *Tame v NSW; Annetts v Australian Stations Pty Ltd* (2002) 191 ALR 449.

54. Above note 52
55. *Ibid* at 582.
56. *Ibid* at 580 – 581.
57. Above note 53
58. *Commonwealth v Introvigne* (1982) 150 CLR 258.
59. *Geyer v Downs* (1977) 138 CLR 91.
60. *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* (1996) Aust Torts Rep 81-399 (NSW CA).
61. *Commonwealth v Introvigne* (1982) 150 CLR 258.
62. Above note 59 at 94. See also H Luntz, & D Hambly, *Torts: Cases and Commentary* 5th ed. (Butterworths, 2002) at 493; R Watson, ‘Which Remedies are Available to Australian School Children Whose Learning is Impaired or Injured by Inadequate or Inappropriate Teaching?’ (unpublished research paper, Murdoch University School of Law, 2002) at 25.
63. The nature of vicarious liability in this context has been discussed most recently in *New South Wales v Lepore*; *Samin v Queensland*; *Rich v Queensland* [2003] HCA 4.
64. *Ibid* at para 20 per Gleeson CJ.
65. Above note 61.
66. *Ibid* at 271 – 272.
67. Above note 63.
68. P Slee, & D Ford, ‘Bullying Is A Serious Issue – It Is A Crime!’ (1999) vol.4 no.1 *Australia and New Zealand Journal of Law and Education* 23 at 26. Slee and Ford also discuss here the impact of bullying on a child.
69. K Watts, ‘Parents Get Tough on School Bullies’, *The West Australian*, 13 November 1998 at 1.
70. ABC Radio, The Law Report: Classrooms and Courtrooms, ABC (2001), <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s420793.htm>
71. (1987) ATR 80-115.
72. Slee and Ford, above note 68 at 35.
73. The Law Report: Classrooms and Courtrooms, above 79. It clearly should be noted that decisions of the Victorian County Court do not create precedent. However, this does not mean that these decision are neither useful nor influential should similar fact scenarios arise in higher level courts. Also, to date, this is one of the few arenas where these decisions are being handed down.
74. S Butcher, ‘Student Wins \$76,000 Nine Years On’, *The Age*, 21 June 2003, <http://www.theage.com.au/articles/2003/06/20/1055828492584.html>
75. Klein and Simmons, above, note 1 at 10.
76. L. Hillier, L. Harrison, & D Dempsey, ‘Whatever Happened to Duty of Care? Same Sex Attracted Young People’s Stories of Schooling and Violence’, (1999) *Melbourne Studies in Education, Special Issue, Sexualities and Schools*, 59 at 61 – 62.
77. *Ibid* at 63 – 64.

78. This of course does not mean that an action may nevertheless fail due to lack of a breach of that duty or because causation and remoteness of damage cannot be established.
79. *Chapman v Hearse* (1961) 106 CLR 112.
80. The requirements for the establishment of a duty of care in cases of nervous shock have recently been considered by the High Court in *Annetts v Australian Stations*; *Tame v NSW*, above note 62.
81. See for example Hillier *et al.*, above note 76.
82. Health Department of Western Australia, *Clearing the Way*, Perth 1997. Copy on file with authors.
83. See generally Christopher Kendall, 'HIV/AIDS Education and the (Mis)Representation of Safe Sex', (1997) 22(3) *Alternative Law Journal* 130 and Christopher Kendall 'The Harms of Gay Male Pornography: A Sex Equality Perspective Post Little Sisters Book and Art Emporium' (2001) 2 *Gay and Lesbian Law Journal* 1-36; C Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (Vancouver: UBC Press, 2004).
84. Linnae Due, *Joining the Tribe: Growing Up Gay and Lesbian in the '90s* (New York: Anchor Books, 1995).

