Parents in Education: the Legal Issues

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David has presented at conferences in the United Kingdom, Belgium, the Czech Republic, South Africa, New Zealand and throughout Australia, and published numerous papers on topics as varied as student rights; teachers' liability; tort law reform; investigations; teachers, counsellors and confidentiality; bullying; cyber bullying; outdoor education; multiculturalism in education; discrimination; and child protection. He regularly presents in-school seminars for both teachers and administrators on education law matters. He also consults to schools and their boards on governance issues.

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The only reason I always try to meet and know
the parents better is because it helps me
to forgive their children.
A Teacher

What is this paper about?

Education without parents is inconceivable. As J Wilson Hogg wrote over 50 years ago:

> *The School can build upon the work of the home. It cannot substitute for it. Home and School working together can produce heroic results - but the basic material, that from which truly great things can be wrought, is firstly, firmly and unequivocally, the responsibility of the home.*[1]

Sadly, home and school do not always work together. This paper examines from a legal perspective some of the situations where parents and school are at odds rather than in harmony.

I begin with the period leading up to enrolment by considering parental responsibility to the school as all parties seek to determine whether the school is right for the child and the child for the school. I continue by considering whether the school's duty of care to the students is matched by a comparable duty of care on the part of parents. I then ask what right, if any, parents have to be involved in student discipline. Finally, I consider how school principals and teachers might cope with parents whose lack of self-discipline leads them to say and do things that ruin reputations or put children and staff at risk.

[1] From a 1958 address quoted in *Reflections on a Shifting Scene*, J Wilson Hogg , 1989, page 85

What if parents mislead the school?[2]

Misleading and deceptive conduct

In my paper on *Enrolment Contracts*[3], I noted that schools must not engage in conduct that is misleading or deceptive or is likely to mislead or deceive. There is a statutory basis for this[4] but it only applies because it has been held that schools can engage in trade or commerce.

Parents in relationship to the schools their children attend do not engage in trade or commerce. Accordingly, the legislation of which schools must be so mindful does not assist those schools when parents mislead them.

So if the statutes don't assist schools, does the common law?

Misleading conduct before enrolment

Both government and independent schools require parents to provide information about their children - before the children start at government schools and before any offer of a place is made at independent schools. For a host of different reasons, many parents will omit relevant information or, even worse, provide information which is either only partially true[5] or which is to some extent incorrect. In all these cases, this will be misleading.

Unfortunately, some parents with children who have disabilities believe that schools will not want to take their children if the full extent of those disabilities is made known. Therefore, the parents completely hide the existence of the disabilities or seek to minimise them.

Although the statutory proscriptions against misleading and deceptive conduct do not apply, the common law may be of some assistance to schools dealing with parents like this. During what I might call the enrolment process, if parents mislead the school (for example, by either deliberately lying or negligently providing incorrect information), the school may sue in tort for any resulting losses. If there has been deliberate lying, the action will be based on the tort of deceit (or fraudulent misrepresentation). If the misinformation has been negligently provided, the action will be based on the tort of negligent misrepresentation.

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[2] In this section of my paper, I am indebted to the very helpful commentary on Misrepresentation in Thomson Reuters' *The Laws of Australia*.
[3] Delivered at the UNSW School Law Alert 2009 and available at www.emilford.com.au
[4] Section 42 *Fair Trading Act (NSW)*; section 52 *Trade Practices Act (Cwlth)*
[5] In *Gluckstein v Barnes* [1900] 240 at 251, Lord Macnaghten said the half-truth, without disclosure of the other half, is "no better than a downright falsehood".

It will be difficult to succeed in a claim based on deceit because to do so the school must prove that the parents lied or made statements not caring whether they were true or not. On the other hand, an action in negligent misrepresentation requires the school to show that the parents owed it a duty of care and that the duty was breached. In other words, the school would have to show that the parents did not, in all the circumstances, take reasonable care in what they wrote or said.

The main remedy in each case will be damages. This means that the school must prove that it has suffered some loss as a result of the parents' deceit or negligent misrepresentation. It will be very difficult for a government school to show what loss it has suffered when it essentially has an obligation to take all students who turn up.

In addition to damages, as I discuss in more detail in the next section, in the case of an independent school, the school may be able to terminate the enrolment contract if the misleading information induced, at least in part, the school into entering the contract.

Misleading conduct which induces the school to enter an enrolment contract

Most commonly, the misleading conduct by parents will be a "misrepresentation" made by them when completing enrolment applications or when being interviewed by staff as part of the enrolment process. The parents will make a false statement about a past or existing fact hoping to induce the school to make an offer of a place to their child. Such a misrepresentation can allow the school to take action if it is, as a result of the misrepresentation, induced to offer a place which is then accepted by the parents so that an enrolment contract is formed.

The misrepresentation does not have to be the only thing inducing the school to enter into the enrolment contract. It is sufficient as long as the misrepresentation plays some part, even if only a minor part, in contributing to the formation of the enrolment contract.[6]

Misrepresentations may be innocent meaning that they are an honest, but false, statement of a past or existing fact as opposed to a representation of an intention to do something in future[7]. Where an innocent misrepresentation

[6] *Gould v Vaggelas* (1984) 157 CLR 215 per Wilson J at 236
[7] *The Civil Service Co-Operative Society Of Victoria Limited v Blyth and Others* 17 CLR 601 per Griffith CJ at 607

induces, at least in part, the school to enter into an enrolment contract with the parents, the school may rescind the contract.

Unlike an innocent misrepresentation, a fraudulent misrepresentation is a statement of fact made without any honest belief in its truth, with the intention of inducing the school to act upon it by offering a place. However, unlike an innocent misrepresentation, the fraudulent misrepresentation is not limited to that purpose and an intention to induce detrimental reliance of any kind is sufficient. In both cases, the school must have been actually induced to rely upon the representation.

There must be an intention to induce. "Intention to induce can be presumed if the language of the representation is calculated, or of its nature, would be likely to induce a normal person to act as the representee did."[8]

Where the only remedy sought is rescission, proof of fraud or negligence is immaterial and it is sufficient to simply establish a misrepresentation which we can call an innocent misrepresentation. Although fraud provides an independent entitlement to rescission, the complex proofs required and the stringent onus involved often make that course impractical. Fraud or negligence need only be established where an award of damages is sought.

Misrepresentations of fact must be distinguished from promises, predictions, advice and expressions of opinion, belief, expectation or intention. The falsity of a representation cannot be demonstrated except by reference to a statement of fact. In contrast, whether or not a promise is false depends on future contingencies, a characteristic which means they cannot be described as false. Expressions of advice, opinion or belief may be foolish or ill-advised but not false. Despite this, the distinction is more apparent than real as promises and predictions or expressions of advice, opinion, belief, expectation or intention are rendered actionable by the identification of and reliance upon implied, associated and inherent misrepresentations of fact.

What if the parents say nothing?

In the context of fraud, it has been said that silence in isolation, "however morally wrong, will not support an action of deceit".[9] However, discussions

[8] Per Beazley JA in *Macquarie Generation v Peabody Resources* [2000] NSWCA 361 at [75]–[77].
[9] *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 per Viscount Maugham at 211

normally lead to a contract and, invariably in that context, silence will amount to a misrepresentation.

Technically, there is no duty on a parent to divulge information to a school with whom an enrolment contract is contemplated. However, although a parent need not say anything at all, if any discussion relating to the proposed enrolment occurs, there is an obligation to provide full details of any matters in relation to which silence or an incomplete statement could be misleading.[10]

Silence will often amount to a positive representation and, if false, a misrepresentation. What is left unsaid may be as telling a statement as what is said. Concealing a fact may be equivalent to a representation of the irrelevance or non-existence of that fact.[11] For example, a failure to respond to a request by a school for information, where the school is obviously labouring under a misapprehension and would reasonably expect its correction, may amount to a misleading representation.

What can the school do?

The remedies available in respect of a particular misrepresentation depend upon its character. The remedy of rescission is available for innocent and fraudulent misrepresentations. In other words, the school could terminate the enrolment contract. However, the absence of a remedy in damages for innocent misrepresentation limits the capacity of the general law relating to misrepresentation to give proper assistance to a school and do justice where reliance results in loss. In the case of fraud, however, remedies of both rescission and damages are allowed.

From a practical point of view, it is clearly very important for a school to ask the right questions during the enrolment process, preferably in writing, and to keep the parents' answers. It is also important to take comprehensive notes during pre-enrolment interviews. If litigation is ever necessary, it is far more likely to be successful if all the evidence is available, preferably in the form of contemporaneous notes and documents. Indeed, having this evidence is also likely to increase the possibility of settling disputes in this area without expensive and time consuming litigation.

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[10] *Coaks v Boswell* (1886) 11 App Cas 2332 per Earl of Selborne at 235-236
[11] *Schneider v Heath* (1813) 170 ER 1462

Do parents have a duty of care to their children?

The school's duty of care

Schools are quite familiar with their duty of care to their students. I have dealt with this subject on many occasions.[12] In the context of this paper, Gleeson CJ put it nicely in *Lepore*:

> *The legal responsibilities of* [a school] *include a duty to take reasonable care for the safety of pupils.*[13]

Many years ago, it was said that this duty flowed from the fact that teachers were acting *in loco parentis* - in the place of the parents. Although this analysis is no longer correct, it makes one wonder what responsibilities parents have in relation to the care of their children.

When a student is injured, the law asks, with the benefit of hindsight, several questions to help determine if the school or its teachers have failed to take precautions that a reasonable person in their shoes would have taken. If they have not, they will be in breach of their duty of care. Does a similar analysis hold good for parents?

The parents' duty of care

In the High Court of Australia, in *Harriton v Stephens*, Kirby J said that "Australian law does not recognise any principle of parental immunity in tort."[14] While the mere existence of a parent/child relationship does not bring about a duty of care on the part of a parent towards a child, the circumstances of a particular situation may give rise to such a duty.

This question arose in 2009 in *Tweed Shire Council v Carly Eden Howarth (by her tutor Trent Howarth)*[15] when a father sued the local council on behalf of his daughter who had suffered brain damage after she fell into a pond. The father alleged that the council had been negligent in not fencing the pond. The council cross claimed against the father, alleging he had a duty of care to his daughter. The cross claim was initially refused as the trial judge did not find that there was any such duty of care.

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[12] For example, *Tort Reform: does it affect teachers and schools?* UNSW School Law Alert 29 July 2004 (paper available at www.emilford.com.au)
[13] *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* [2003] HCA 4 (6 February 2003) at paragraph 2
[14] [2006] HCA 15; (2006) 226 CLR 52 at [129]
[15] [2009] NSWCA 103

On appeal from this refusal, Giles JA stated (with Ipp JA and Basten JA agreeing) that there was a strong case to argue that the father did in fact owe a duty of care to his daughter to take reasonable care not to expose her to foreseeable harm. He may have breached this duty as he had taken her near a source of danger and had left her without supervision. Giles JA re-emphasised the point that there is no parental immunity under Australian law.

The same point arose in the school context in *St Mark's Orthodox Coptic College v Abraham*[16] where a 9 year old boy fell from a balustrade at school in Western Sydney and suffered significant injuries. He sued the school. The school said that the boy's father was responsible as he had left the child on the premises before school hours knowing that there would be no formal supervision. Because Australian law does not recognise any principle of parental immunity, the school was permitted to bring a cross claim against the father.

There are many situations where home and school overlap and in each of them there is the potential to argue that a parent's negligence has been the cause or one of the causes of the injury that has occurred. Typical situations are before or after school; activities which include parents such as excursions and sports days; and so on. In these situations, one must remember that the duty of care on the school will be different to that on the parent. In the *St Mark's Case*, Ipp JA noted that the College owed a duty not only to the individual students but to the students (all 382 of them) as a class. He added:

> *St Mark's was required to take into account the risk of injury to the class comprised of 382 students (including Christopher). The risk so to be assessed involved the risk of one or more of those students suffering harm during the period from 7.45 am each day (when students had already begun to arrive and from which time, according to St Mark's, supervision should have been formally undertaken (but, in practice, was not) until 8.35 am (when classes commenced). Mr Abraham, on the other hand, was required to take into account the risk of injury to Christopher, alone, on a single occasion on 23 August 2000 between 8.00 am and 8.20 am. The risk*

[16] [2007] NSWCA 185 (10 August 2007)

> *was that Christopher, a dutiful child, might be mischievous and something untoward might happen to him in that short period.*
>
> *Accordingly, the risk of harm that St Mark's was required to take into account differed substantially from that which Mr Abraham had to consider. The former was far greater than the latter and obviously required the taking of precautionary measures that did not apply to the risk that Mr Abraham had to bear in mind.*[17]

Perhaps more importantly, Ipp JA emphasised that parents are not expected to molly coddle their children:

> *The legal principles applicable to the law of negligence must accommodate the practical realities of everyday living…. One of those practical realities is that the bringing up of children cannot be made risk-free. It is inevitable that children, even in the most careful and ordered households, will be exposed from time-to-time to risks of harm. This is inherent in the process of growing up, undergoing new experiences, and maturing in an appropriate way.*[18]

Accordingly, schools cannot expect too much of parents and must continue to be diligent in managing the risks that schooling brings into the lives of young people.

What role do parents have in the discipline of other children?

In my paper on *Discipline and Procedure Fairness*[19], I noted that Section 35 of the *Education Act* allows for the Minister for Education to control and regulate student discipline in government schools. On the other hand, independent schools gain their ability to discipline students from the contractual arrangements with parents and from the general law[20].

P W Young (now Young JA of the NSW Court of Appeal) in his text, *Law of Consent* wrote:

> *It used to be thought that the school teacher possessed a delegated power from the parent, but more modern thinking suggests that it is the relationship of master and pupil which gives the teacher his*

[17] [2007] NSWCA 185 at[42] and [43]
[18] [2007] NSWCA 185 at[51]
[19] Delivered at the UNSW School Law Alert 2008 and available at www.emilford.com.au
[20] *Smith v O'Byrne; Ex parte O'Byrne* QCR 252, 5 QLJ (NC) 126

> *authority and by virtue of the existence of the relationship, the pupil impliedly consents to that authority, see* ***Ramsay v Larsen*** *(1964) 111 CLR 16 at 28-29.*
>
> *The relation of the parties will accordingly mean that the teacher will from time to time lay hands on the pupil to guide him or her, for instance, as to how to hold a cricket bat properly or to separate pupils in some squabble. The teacher may also enforce the discipline of the school by physical means.*[21]

That last sentence has of course been overtaken by legislative change prohibiting corporal punishment.

Ramsay v Larsen concerned the vicarious liability of the Government of New South Wales for the negligence of a school teacher in its service which resulted in injury to a pupil in his class. The passage referred to by Young is found in the judgment of Kitto J and reads:

> *The doctrine of a delegation of authority by the parent has often been stated as the ground upon which the principle rests that reasonable chastisement of a child by his schoolmaster is justified in law. It necessarily asserts a delegation to the particular person who relies upon the principle as making his action lawful. But the duty to take care of a pupil is not normally the personal duty of the teacher alone. In the absence of a special arrangement to the contrary, it is, I think, the necessary inference of fact from the acceptance of a child as a pupil by a school authority, whether the authority be a Government or a corporation or an individual, that the school authority undertakes not only to employ proper staff but to give the child reasonable care. The particular teacher, who performs the tasks of care and tuition in a State school therefore performs them as a civil servant of the Crown and not on his own account only. It may be suggested, with the support of such cases as* ***Hansen v Cole*** *(1890) 9 NZLR 272 and* ***Murdock v Richards*** *(1954) 1 DLR 766 at 769, that a school-master's power of reasonable chastisement exists, at least under a system of compulsory education, not by virtue of a delegation by the parent at all, but by virtue of the nature of the relationship of schoolmaster and pupil and the necessity inherent in that relationship of maintaining order in and about the school.*

[21] *Law of Consent* (1986), p 134

What rights do parents have in relation to discipline in the school context? It is apparent that many parents believe they have a significant role, particularly when their child has been seen, in their eyes, to be the victim of some inappropriate behaviour by another student. Proactive parents in this situation will either tell the school principal what he or she should do to punish the offender or take the law into their own hands and punish the offender themselves.

Must the Principal do what the Parents want?

Clearly, the answer is **No**. As I explain in much more detail in the paper referred to above, school principals must act in a way which is procedurally fair when administering discipline. No doubt, this includes listening to the child who has been the subject of some inappropriate behaviour and to that child's family. However, there is a big difference between listening and taking into account on the one hand and slavishly following on the other. Principals must resolutely maintain their independence and objectivity when facing the demands of the parents of the various students involved in playground or classroom frays.

Can parents take the discipline of other children into their own hands?

In one sense, the answer to this question may be **Yes** because there is not much a school can do to stop parents behaving in particular ways when they do so away from the school itself.

However, independent schools are able to incorporate in their enrolment contracts conditions which can be of assistance in this area. For example, I have been advising schools for some time to include a condition which allows the school to terminate the enrolment contract if the behaviour of parents goes beyond certain limits. A condition like this would allow the school, upon getting notice of a parent improperly chastising a child of other parents, to engage with the parent and ultimately, if there was no change in attitude or behaviour, to terminate the enrolment contract.

Parents themselves need to realise that, when dealing with other people's children, they do not have the benefit that the law affords both parents[22] and teachers who administer discipline. For example, it is a crime to assault

[22] The common law allows a parent or a person in the position of a parent to inflict moderate and reasonable punishment on a child: *Mansell v Griffin* [1908] 1 KB 160; *R v Terry* [1955] VLR 114

another, whether it leads to actual bodily harm[23] or not.[24] However, section 61AA of the *Crimes Act 1900 NSW* provides that, in criminal proceedings brought against a person arising out of the application of physical force to a child, it is a defence that the force was applied for the purpose of the punishment of the child, but only if:

(a) the physical force was applied by the parent of the child or by a person acting for a parent of the child, and

(b) the application of that physical force was reasonable having regard to the age, health, maturity or other characteristics of the child, the nature of the alleged misbehaviour or other circumstances.

In this section, "parent of a child" means a person having all the duties, powers, responsibilities and authority in respect of the child which, by law, parents have in relation to their children.

A "person acting for a parent of a child" means a person who:

(a) is a step-parent of the child, a de facto spouse of a parent of the child, a relative (by blood or marriage) of a parent of the child or a person to whom the parent has entrusted the care and management of the child, and

(b) is authorised by a parent of the child to use physical force to punish the child.

In other words, there is a "lawful correction" defence for parents physically disciplining their own children. The defence extends to a person to whom the parent has entrusted the care and management of the child. This probably envisages more than just allowing your child to visit another parent's home. It certainly does not extend to protecting the parents of one student seeking to discipline another student.

The *Crimes Act* has other provisions which may be relevant. Section 60E makes it a crime to assault, stalk, harass or intimidate any school student while the student is attending a school, although no actual bodily harm is occasioned. However, this does not apply to any reasonable disciplinary action taken by a member of staff of a school against a school student.

[23] Section 59 *Crimes Act NSW 1900*
[24] Section 61 *Crimes Act NSW 1900*

The section also makes it a crime to assault a school student while the student is attending a school and by the assault occasion actual bodily harm. Similarly, a person who recklessly by any means wounds a school student or inflicts grievous bodily harm on a school student while the student is attending a school is liable to imprisonment for 12 years.

The impact of these provisions is limited by the requirement that the prohibited behaviour has to take place "while the student is attending a school". However, a school student is taken to be attending a school while entering or leaving school premises in connection with school or before school or after school care. This can be helpful as it is not unusual for incidents to occur just outside school at the start or end of a school day.

If teachers believe that parents are in breach of any of these provisions of the *Crimes Act* or that they appear likely to breach them, they ought to draw to the parents' attention the fact that their behaviour is or could easily become criminal and indicate that, unless they stop, the police will be called. Obviously, the police should be called immediately if there is a risk to students. A school's duty of care clearly extends to the area immediately surrounding the school campus and indeed may extend somewhat further[25].

Are parents free to sound off about teachers?

Teachers may feel besieged or helpless when dealing with negative comments from problem parents. Although many teachers may want to do something about parents who set out to ruin their reputation, often it seems the only option available is to wait for the school year to finish or the child to leave the school.

Canadian teachers fight back

In 2006, the British Columbia Supreme Court awarded more than $650,000 damages (including $50,000 in punitive damages) and injunctive relief in favour of 11 people: nine teachers, a retired school board trustee and a parent-member of a school community (the plaintiffs) in a defamation case[26].

The main defendant in the case (the plaintiffs also sued several Internet service providers and hosts) was Susan Halstead, a parent whose children

[25] *The Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman and Anor* [1996] NSWSC 346 (9 August 1996)
[26] *Newman v. Halstead* [2006] BCSC 65

attended public schools in the Comox Valley area of British Columbia and who was active in both local parent advisory councils and a provincial organisation of parent advisory councils. The Court found that Halstead had conducted prolonged on-line character assassinations against each of the plaintiffs, including making innumerable defamatory statements about them regarding alleged improper conduct (that is, allegations of sexually inappropriate statements to students; assaults on students, threats to special need students and intoxication at school functions).

Most of the defamatory statements were made through email, chat rooms and internet sites. Halstead had created a website called "GAFER" (Growing Advocacy for Education Reform), containing links she created called "B.C.'s Least Wanted" with a chart "Least Wanted Educators".

The chart named people in the education system, accusing them of:

- a history of criminal charges and convictions; and
- having been decertified and/or disciplined by the British Columbia College of Teachers.

Some of the plaintiffs were labelled "bully educators" and "school board bullies". Photographs of two of the teacher plaintiffs were also posted. Others were depicted by a cartoon image of an apple with a worm in it.

The GAFER site also contained a link to a page entitled "RCMP investigations". One of the plaintiffs was called a "bullying educator" on this page. The plaintiff parent was described as a "bully parent", represented by a cartoon image of a boxer and linked to commentary with her alleged misdeeds. The parent had two children in the school system at the time and had served on the Parent Advisory Committee with Halstead for several years.

The Court found the labels "least wanted educators", "B.C.'s least wanted", "bad apple" and "bully educators" impaired the plaintiffs' personal and professional reputations in the community because they:

- suggested that the plaintiffs' fitness as educators had been assessed and found to be the lowest in the British Columbia school system;
- suggested that the education system would be better off without these individuals;

- constituted a play on the "Most Wanted" label used by police TV shows.

The Court noted that the word "bully" has taken on an increasingly negative significance in the education setting.

The "Least Wanted Educators" showed names and photographs of the plaintiffs along with notorious sex offenders and paedophiles. The page was designed to encourage contempt for the plaintiff teachers, none of whom had ever been charged with a criminal offence, decertified by the College of Teachers or otherwise disciplined.

The plaintiffs expressed shock, horror, revulsion and nausea upon seeing their names and depictions on this chart.

The Court held that the serious, sweeping and false defamatory statements were part of a prolonged character assassination campaign motivated by malice on the part of Halstead. The shockingly vicious attacks on the plaintiffs were the basis of the damages award. The Court stated:

> *All involved in this lawsuit accept that discourse on matters of public interest, education being one such subject, is to be encouraged. The law carefully guards the rights of citizens to freely express their views, however unpopular.*
>
> *However, Ms Halstead's widely published statements are vitriolic and untrue; they are defamatory. Her actions are malicious and cruel. Such publications and actions have absolutely nothing to do with freedom of expression. Ms Halstead has seriously transgressed the boundaries which prescribe that hallowed right.*
>
> *Further, by refusing to participate in the trial process and by continuing to assert the truth of her allegations, Ms Halstead has attempted to thwart the plaintiffs' efforts at seeking vindications and repairing the damage to their reputations. Accordingly, I award punitive damages in the amount of $50,000 to be shared equally by the plaintiffs.*[27]

An injunctive order was issued to prevent Halstead from publishing any references to any of the plaintiffs by name, depiction or description, whether on the internet or elsewhere.

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[27] *Newman v. Halstead* [2006] BCSC 65 at [294] ff

A New South Wales teacher fights back

In 2009, a NSW primary school principal decided that she too would not put up with the destruction of her reputation. She brought a defamation claim against a parent in the Supreme Court of New South Wales.[28] The parent, a father of two children at the school, sent an email to 14 other parents, calling for the principal to resign. The email described the principal as incompetent, dishonest and untrustworthy and accused her of causing a decline in the school's educational standards.

Not all negative comments from parents are defamatory. First, defamation can only arise when the comments are published. Therefore, if an email is only between a teacher and a parent, it is not defamatory. In this case, because the parent sent the comments to many parents, the email was "published".

Second, the teacher must prove that the imputations claimed were conveyed. This means that the teacher must prove that the comments made say what he or she says they do. For example, if a comment is ambiguous or unclear, the teacher must prove that the parent intended the comment to convey a particular meaning. In this case, the parent admitted that the comments were published and agreed with the school principal's interpretation of their meaning.

The last point is that the comments must be capable of being defamatory of the teacher; that is, by ordinary community standards, they were likely to be damaging to her reputation.

The law allows various defences to defamation. The defences are:

- justification,
- contextual truth,
- absolute privilege,
- publication of public documents,
- fair report of proceedings of public concern,
- qualified privilege for provision of certain information,
- honest opinion,
- innocent dissemination, and

[28] *Ryan v Premachandran* [2009] NSWSC 1186 (6 November 2009)

- triviality.

A general idea of each defence may be gleaned from its name. However, as a broad guide, defamatory comments must be false, unjustified, stated as fact rather than opinion and sufficiently serious.

In this case, the parent was unsuccessful in each defence he pleaded. The principal was awarded $80,000 in damages for the great distress and emotional upset that she suffered, and her continuing sense of hurt. Damages for defamation are compensatory rather than punitive. However, in determining the amount in this case, the court took into account far more than the single email that contained the defamatory statements.

The email was part of a series of emails and letters sent by the parent, which included letters to federal government ministers and the Indian High Commission. The parent's conduct "demonstrated persistence in his attack" upon the principal and was "in defiance of the letters from her solicitors". He also refused to retract his statements or apologise, despite the commencement of the proceedings.

The judge, Nicholas J, said: "I am satisfied that [the parent's] allegations were groundless, and were the product of fantasy fuelled by enduring ill-will towards the [principal], and his desire to discredit her and bring her down."[29]

Lesson to be learned from these cases

Before commencing proceedings it is important to remember that defamation cases are difficult to prove and there can be no guarantees of success. The parent in *Ryan's case* was self-represented and did not produce any evidence in support of many of his claims. It would appear that this gave a significant advantage to the principal's case. Other teachers or principals may not have the same advantage.

A defamation suit is not a chance to get rich. Usually, making a claim for defamation will be difficult and a lot of hard work. The comments made must be very serious or part of a prolonged attack in order to recover a significant amount of damages. Teachers should be cautious in considering taking such action. However, if the comments amount to a persistent, false and damaging attack, teachers have the option to protect their reputations and be compensated for the harm done.

[29] *Ryan v Premachandran* [2009] NSWSC 1186 at [112]

Freedom of speech is not absolute. The law of defamation protects a person's reputation. A parent does not have complete freedom to criticise a school council member or teacher. Defamatory statements made in the area of education are actionable and, as seen in *Newman's Case* and *Ryan's Case*, the courts will not tolerate behaviour that violates individual dignity and reputation.

Can parents come and go as they please?

An ongoing issue for many schools is the need to control access to the campus and to the students. Access to the campus can be an issue at all times. Access to students is obviously only an issue during school hours (by which I include the time students are engaged in off campus activities). Security generally has been of greater concern to schools in recent years. Parents are normally quite supportive of whatever schools do to improve security because they are keen to ensure their children are kept safe. However, they do not see themselves as a security risk and so are surprised to find that teachers are not always happy for parents to have open access to the school campus and the students.

As in other areas, independent schools can try to anticipate problems by incorporating conditions in their enrolment contract. For example, I commonly include a provision under which parents agree only to access the school through the school office. I also include an acknowledgment by parents that they will observe school security procedures for the protection of students from direct contact with those outside the school during school hours.

Such conditions can be very helpful when a parent, usually one who is separated from the other parent and engaged in bitter family law proceedings, tries to come onto the school campus well before the end of the school day to take the child with a view to preventing the other parent from having contact with the child that afternoon. Keeping the parent at the school office well away from classrooms and students, including their own child, often allows the principal to check Family Court orders on file and/or make a quick call to the school's solicitor.

An often overlooked item in a principal's armoury is the *Inclosed Lands Protection Act 1901*. No, *Inclosed* is not a spelling mistake. As Justice Kirby of the New South Wales Supreme Court said in *DPP v Wille & Ors*:

> *The antiquity of the Statute, which was a consolidating Act passed in 1901, can be seen ... from the spelling of the "Inclosed".*[30]

The Act's key provision[31] states that any person who, without lawful excuse (proof of which lies on the person), enters into inclosed lands (all schools are inclosed lands) without the consent of the owner, occupier or person apparently in charge of those lands (the school principal), or who remains on those lands after being requested by the owner, occupier or person apparently in charge of those lands to leave those lands, is liable to a penalty.

A complementary provision[32] states that any person, who remains upon the inclosed lands of another person after being requested by the owner or occupier or the person apparently in charge of those lands to leave those lands and while remaining upon those lands conducts himself or herself in such a manner as would be regarded by reasonable persons as being, in all the circumstances, offensive, is also liable to a penalty.

Cases on the Act are rare. *DPP v Wille & Ors* did not involve a school. Rather, it arose out of construction of the Eastern Distributor, the freeway which now links the city with the Airport. The road includes a section of tunnel. During construction, an area of land was set aside to construct the tunnel entrance. The land was surrounded with a cyclone wire fence with barbed wire on top. There were a locked gate and signs on the fencing and the gate such as:

NO UNAUTHORISED PERSONNEL

CONSTRUCTION SITE

and

NO PEDESTRIAN ACCESS

Three people protesting against the construction of the road broke the fence, entered the land and chained themselves to a crane. They were charged under the *Inclosed Lands Protection Act* with entering the inclosed lands of

[30] [1999] 47 NSWLR 255; [1999] 114 A Crim R 150
[31] Section 4(1)
[32] Section 4B(1)

another person without lawful excuse and without the consent of the person apparently in charge of those lands.

The case turned upon the meaning of the phrase without lawful excuse. The Court found that having a purpose for entering the land which was not itself unlawful (such as protesting) did not provide a lawful excuse for entering that land without the owner's consent.

School premises are inclosed lands whether fenced or not. Therefore, a principal can make it clear to a person whom he or she does not want on the school's grounds that they must not enter the school without consent. If the person does so anyway, it will not be sufficient for that person to say that they are on the school premises for a purpose which in itself is lawful, such as coming to see their child's teacher.

But, a word of warning: think carefully before calling the police. In a 2000 decision[33], the Human Rights and Equal Opportunity Commission was very critical of a principal who called the police to remove a parent of a child with a disability. The relationship between the principal and the parent had been deteriorating for a long time. On the occasion in question, the child's mother had come to see the principal, very angry because he had caused the gate through which she brought her Year 1 daughter to school in a wheelchair to be locked!

So where does all this leave us?

It has been said that a child educated only at school is an uneducated child. School and home should work together while respecting each other's space. And thankfully this is what happens most of the time with most parents and teachers. The situations I have considered in this paper rarely arise. Nevertheless, it is sensible for principals and teachers to be aware of the way the law applies to such situations for they will raise their ugly heads from time to time!

Now let me end on a positive note - a poem about how it should be.

[33] *Murphy v New South Wales Department of Education* [2000] HREOCA 14 (27 March 2000)

Whose Child Is This?

"Whose child is this?" I asked one day
Seeing a little one out at play.
"Mine", said the parent with a tender smile
"Mine to keep a little while.
To bathe his/her hands and comb his/her hair,
To tell him/her what he/she is to wear,
To prepare him/her that he/she may always be good,
And each day do the things he/she should".

"Whose child is this?" I asked again,
As the door opened and someone came in.
"Mine", said the teacher with the same tender smile.
"Mine, to keep just for a little while.
To teach him/her how to be gentle and kind,
To train and direct his/her dear little mind,
To help him/her live by every rule,
And get the best he/she can from school".

"Whose child is this?" I asked once more,
Just as the little one entered the door.
"Ours", said the parent and the teacher as they smiled.
And each took the hand of the little child.
"Ours to love and train together.
Ours this blessed task forever."

Author Unknown