

Chapter 1: Introduction and problem statement

1.1 Introduction

It is said that courage can be likened to fire and bullying can be likened to smoke.¹ Bullying is a phenomenon that is elusive, conniving and hard to define properly because times change and so do means by which to inflict harm upon others. It is thus stated that bullying behaviour is a cowardly action, in all probability caused by some or other childhood pain.² In order to remedy the problem, one has to find and treat the root. One can not hope to solve a problem by merely scratching the surface. In recent years, school bullying and related violence have escalated to the point where multiple newspaper reports pertaining to bullying-related incidents are published annually.³

Ideally, even on school level, a spirit of *ubuntu*⁴ ought to be maintained. An important quality, which would ultimately bring an end to bullying, is mutual respect. Respect for oneself, respect for peers, respect for authority figures. This study aims to explore bullying; to examine cause and effect and to propose possible solutions from a legal point of view. It must be borne in mind that bullying behaviour has certain legal consequences, even though the alleged bully may be a minor. A myriad of rights come into play when bullying is considered, from a criminal as well as civil law point of view, not to mention, most importantly – constitutional rights.⁵

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- 1 Paraphrasing of the original quote: “Courage is fire, and bullying is smoke” of Benjamin Disraeli.
 - 2 A well-balanced child will not bully others, as he/she will not have the need to deflect a lack of self-esteem.
 - 3 See par 1.2.1 footnote 12.
 - 4 Nussbaum “*Ubuntu*: Reflections of a South African on our common humanity” 2003 *Reflections* 21-26 describes *ubuntu* as follows: “Ubuntu is the capacity in African culture to express compassion, reciprocity, dignity, harmony, and humanity in the interests of building and maintaining community. Ubuntu calls on us to believe and feel that: Your pain is My pain, My wealth is Your wealth, Your salvation is My salvation.”
 - 5 Constitutional rights infringed upon when a child is bullied are, *inter alia*: equality (section 9), human dignity (section 10), freedom and security of the person (section 12), rights of the child (section 28) and education (section 29).

When considering all the rights infringed upon when a child is bullied, one of the most important rights transgressed, is the right to education. Education plays an integral part in the development of a well-balanced young person and by eliminating this basic right, the balance is disturbed. To illustrate: suppose that a child is beaten up at school by a fellow learner, to such an extent that his physical injuries keep him from school for a number of weeks. His emotional injuries cause him to develop didaskaleinophobia⁶ and therefore a total imbalance occurs. This is counterproductive to study, withholding this child from laying the foundation for his future and so a negative snowball effect starts. In effect, one violent lash-out can ruin a child's life by keeping him from obtaining the necessary intellectual tools needed to further himself in life.

1.2 Problem statement

1.2.1 *Bullying statistics*

In 2012, a study conducted by Unisa established that out of a research sample of 3371 learners, 1158 learners (34.4%) had been victims of bullying.⁷ Furthermore, emotional bullying is evidently more prevalent, with 55.3% of learners falling victim to emotional bullying, 38.4% being victimised physically, 16.9% being tormented via social media (social media) and 2.8% being the victims of verbal bullying.⁸ This study also shows that 29.3% of bullying incidents transpire at school after class; and 32.2% of bullying incidents occur during class.⁹ In 2008, over a million South African learners were subjected to some form of violence¹⁰

6 Definition of didaskaleinophobia accessed from <http://common-phobias.com/didaskaleino/phobia.htm> on 2011-09-24 and states the following: "Didaskaleinophobia is the fear of going to school. The origin of the word Didasko is Greek (meaning teach) and phobia is Greek (meaning fear)."

7 Youth Research Unit "Nature, extent and impact of bullying among secondary school learners in Gauteng" 2012 A research report compiled on behalf of the Bureau of Market Research University of South Africa.

8 *Ibid.*

9 *Ibid.*

10 Anon "Bullying vs Violence" (2009) accessed on 2011-06-23 from <http://www.bullyingstatistics.org/content/bullying-vs-violence.html> notes that bullying is a form of violence and the two ought to be regarded as parallel, co-dependent fields.

at school.¹¹ It is unlikely that these statistics have declined over the last four years, as media reports on bullying have been escalating.¹² Studies have also shown that a survey of 207 learners, indicated that 60,9% had been bullied.¹³ The first South African national youth risk behavioural survey was conducted by the Department of Health in 2002.¹⁴ According to the results, 49,3% of secondary school pupils in the Free State had been bullied in the month before the survey was undertaken.¹⁵

A previous¹⁶ National Schools Violence Study undertaken by the Centre for Justice and Crime Prevention, the largest national survey conducted with regards to school violence to date,¹⁷ included 120 primary schools, 139 principals, 277 teachers and 6 787 learners.¹⁸ The findings of this survey were:

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- 11 Burton "Snapshot results of the CJCP National Schools Violence Study" 2008 <http://www.cjcp.org.za/admin/uploads/Research%20Bulletin%202%20final.pdf> [2012-07-03]. The Centre for Justice and Crime Prevention (CJCP) undertook the National Schools Violence Study (NSVS) in 2008 and found that 15,3% of all learners (roughly 1 821 054 learners) have experienced some or other form of violence at school.
- 12 *The Star* 7 February 2007 "Parents sue government over daughter's death-leap, blame bullying letters"; *The Star* 10 February 2007 "Hi-Tech bullying: cell phones used for "abuse""; *Citizen* 12 June 2007 "Mom in court to stop school bully"; *The Times* 12 June 2007 "Mom in court to 'stop bully'"; *Die Rapport* 3 Julie 2011 "Ma begin veldtog om skoolboelies te stuit"; *Die Beeld* 4 September 2011 "Meisie hang haar nadat sy glo by skool geboelie is"; *IOL News* 10 February 2012 "Bullying on the increase"; *The Star* 9 February 2012 "Girl's bullying ordeal"; *News 24* 22 February 2012 "Girl stripped to panties at school"; *Parent* 24 22 February 2012 "Bullying, stripping and suicide"; *News 24* 3 March 2012 "Jhb pupils revolt after murder"; *Health* 24 5 March 2012 "Bullying linked to suicidal thoughts"; *News 24* 3 May 2012 "Headmaster sues parent for libel"; *News 24* 7 May 2012 "Teen sex rife in Eastern Cape schools"; *News 24* 10 May 2012 "Schoolboy 'raped' on rugby tour"; *News 24* 24 May 2012 "Satanic rituals reported at CT school"; *The Star* 23 May 2012 "School guard with a history of rape"; *News 24* 28 May 2012 "Rape investigation failed my son – dad"; *Die Beeld* 30 Mei 2012 "Bfn se 666-nes"; *Die Beeld* 4 Junie 2012 "Kleuter glo by crèche geslaan"; *News 24* 8 June 2012 "Mute girl, 14, raped at school"; *News 24* 5 June 2012 "Principal, teacher, suspended for assault".
- 13 De Wet "The nature and extent of bullying in Free State Schools" 2005 *South African Journal of Education* 83 notes that a survey was undertaken in 2002 in a Gauteng research project into bullying, which showed that, in the preceding year (2001), 90% of learners had been bullying victims.
- 14 De Wet "Educators perceptions on bullying prevention strategies" 2007 *South African Journal of Education* 191-208.
- 15 *Ibid.*
- 16 See footnote 11.
- 17 Van der Westhuizen and Maree "Student teachers' perceptions of violence in primary schools" 2010 *Acta Criminologica* 1.
- 18 *Ibid.*

- i) 10,8% of participants had been threatened with violence at some point;
- ii) 7,5% of participants had been assaulted at some or other time;
- iii) 3,19% of participants had been robbed;
- iv) 1,4% of participants had been the victim of some sort of sexual violence; and
- v) 12% of participants had been shouted at or made to feel inferior.¹⁹

1.2.2 *Background and historical overview*

Bullying in schools is a real problem.²⁰ By sending one's children to school, one lays the foundation for their life. Bullying is a harmful external factor that sets the stage for permanent damage which will ultimately have a lasting, negative effect on the child's life, reaching beyond puberty, to adulthood. Bullying may be physical or psychological, which in turn means that it is much more complex than mere playground pushing and shoving. In South Africa, no successful measures have been taken yet to eradicate bullying, whether legislative, or through policy, awareness or any other means by which to stop the terror that is bullying.

Bullying has always been an omnipresent phenomenon. However, the general attitude of people towards bullying in the past caused bullying to be glanced over as a "right of passage".²¹ Only in recent years have professionals such as lawyers and educators realised that bullying is in fact a form of abuse.²² The fact that bullying has only been labelled a problem in the last 30 to 40 years, makes it difficult to trace the roots.

19 Van der Westhuizen and Maree 2010 *Acta Criminologica* 2.

20 See footnote 12.

21 Carpenter and Ferguson "History of Bullying" accessed on 2011-08-26 from <http://www.netplaces.com/dealing-with-bullies/what-is-bullying/history-of-bullying.htm>

22 *Ibid.*

However, if one examines literature in the form of novels,²³ it is evident that bullying has always been present.

Olweus²⁴ started a large-scale study on bullying in 1970, which is now generally regarded as the world's first study of its kind.²⁵ The findings²⁶ of this study were published in Scandinavia in 1973 and in the United States of America in 1978.²⁷ In the 1980s Olweus conducted the first intervention study against bullying which is known today as the *Olweus Bullying Prevention Program* (OBPP).²⁸ Suffice to say, most, if not all of what is currently understood about bullying can be attributed to the work done by Olweus and the OBPP.

1.3 Research methods

1.3.1 Literature study

A literature review of relevant South African law pertaining to children's rights, schools and school safety, as well as criminal and delictual liability for any form of bullying behaviour will be conducted. The review will include, *inter alia*, legislation, statutes, case law, common law, textbooks, articles and electronic media.

23 *Oliver Twist* was written by Charles Dickens and published in 1838, it tells the tale of how Oliver had been bullied and mistreated; *Lord of the Flies* was written by William Golding and published in 1954 and describes a group of children's descent into barbarism when left unsupervised by an adult; *The Outsiders* was written by S.E Hinton in 1967 and tells the story of the bullying of a 14-year-old boy; *Blubber* was written by Judy Blume in 1974 and tells the tale of how a fifth-grader had been viciously bullied. Even though these are works of fiction, all of them depict a similar, real-life phenomenon, which is bullying. Therefore, if one looks at the timeline, it only proves the fact that bullying is not a new problem. These examples were accessed from <http://www.netplaces.com/dealing-with-bullies/what-is-bullying/history-of-bullying.htm> on 2011-08-26.

24 An authority figure regarding bullying prevention who is also the person who started the Olweus Bullying Prevention Program. His research and programmes are used globally. See also footnote 25 below.

25 Information on Olweus accessed on 2011-08-26 from http://www.hazelden.org/OA_HTML/hazAuthor.jsp?author_id=4206&item=9444

26 The title of this book is *Aggression in the Schools: Bullies and Whipping Boys*.

27 Information accessed on 2011-08-26 from http://www.hazelden.org/OA_HTML/hazAuthor.jsp?author_id=4206&item=9444

28 *Ibid.*

1.3.2 *Legal comparative study*

Bullying is far from a mere local problem. Bullying in schools happens globally. It would however, be near impossible to include every country's view on bullying and its measures eradicating bullying in schools. Australia's legal system is similar²⁹ to the legal system of South Africa and therefore the *status quo* of the South African legal system will be compared to that of Australia.³⁰ Sources to be used for the study will inter alia include the *Australia Capital Territory Schools Authority Act 1976*, the *Charter of Human Rights and Responsibility Act 2006 (VIC)* and the *Child Wellbeing and Safety Act 2005 (VIC)*.

1.4 Point of departure, assumptions and hypothesis

1.4.1 *Point of departure*

Every child enjoys constitutional protection, which includes basic socio-economic rights, as well as protection against any unlawful act or omission that leads to maltreatment and abuse. Bullying violates five

29 Bekker, Rautenbach *et al Inleiding tot Regspluralisme in Suid Afrika* 5 makes the point that South Africa is a multi-cultural society within which many legal systems flourish. Customary law is used as umbrella term to describe the various legal systems of the indigenous populace found in South Africa. Stately law in the South African context means Roman-Dutch law as influenced by the English common law; interpreted and developed through court decisions and legislation, as well as customary law incorporated into case law and legislation. Australia's common law was developed from English law. Key elements of the Australian legal system are *inter alia*, the rule of law, justice and independence of the judiciary. Principles such as procedural fairness, judicial precedent and *trias politica* are of crucial importance in the Australian legal context. The rule of law is entrenched in the South African Constitution in section 1, containing the founding provision. *Trias politica* is governed by section 165 of the South African Constitution. The mere fact that Australia and South Africa share the same common law heritage; together with the abovementioned examples of legal principles is enough to state that there are similarities between the two legal systems. Information on the Australian legal system accessed from http://www.dfat.gov.au/facts/legal_system.html on 2011-10-05.

30 See chapter 8 for an overview of Australian law.

constitutional rights enshrined in the Bill of Rights.³¹ The child's best interest is always paramount.³²

1.4.2 Assumptions

- i) Schools inclusive of all teaching and non-teaching staff, as well as all stakeholders, are obliged to protect and respect the rights of children, even protect children from one other.
- ii) By protecting the rights of children constitutionally, a possibility is created for the drafting of legislation in keeping with present times to protect children.
- iii) Where schools' jurisdiction ends, it is the obligation of the State to create another body to work in conjunction with schools to oversee the upholding, respect and protection of children and their rights.³³
- iv) Violating any rights afforded to a child will leave such a person with a liability; whether criminal, delictual or both.
- v) The child's best interest would entail upholding all the constitutional values enshrined in the constitution, human dignity, freedom, equality, *et cetera*.³⁴

1.4.3 Hypothesis

It takes a village to raise a child,³⁵ in other words a team effort is required to address bullying properly. A holistic³⁶ approach would

31 These rights are: equality (section 9), human dignity (section 10), freedom and security of the person (section 12), rights of the child (section 28) and education (section 29).

32 Section 28(2) of the Constitution; section 9 of the Children's Act 38 of 2005.

33 Bray "Law, Education and the Learner" in Boezaart (ed) *Child Law in South Africa* (2009) 456-474 makes the point that the state is a basic provider of public education in South Africa (in accordance with sections 12(1) and 34(1) of the South African Schools Act). The state also has important partnership obligations to work together with schools and their local communities to promote school education. It is thus stated that these partnership obligations, include an obligation to ensure that children are safe in and out of school.

34 See par 5.2.

35 This is an African proverb but has been adopted by Hillary Rodham Clinton in her 1996 book "It Takes a Village: And Other Lessons Children Teach Us".

36 The *Oxford English Dictionary* 359 defines holistic as: "treating the whole person rather than just the symptoms of a disease."

therefore properly address the issue of bullying by getting all stakeholders involved. By either drafting anti-bullying legislation or amending current legislation to bring to life a national anti-bullying movement³⁷ in keeping with the spirit of *Ubuntu*,³⁸ bullying in South African schools can be abolished.³⁹

1.5 Legal questions

Following the above problem statement, the primary question to be answered can be formulated: Is current legislation providing a solution with regard to bullying in South African schools? Following this question, a few subsidiary questions arise, which are -

- i) What is bullying?
- ii) What is the legal status of minors pertaining to criminal liability?
- iii) Can anti-bullying legislation rectify the situation?
- iv) What should such legislation contain?
- v) Is it possible to make bullying a crime?
- vi) Will the criminalisation of bullying address the issue?

1.6 Framework of the dissertation

The introductory chapter will familiarise the reader with the position in South Africa, pertaining to bullying as it currently stands. Statistics on the high prevalence of bullying will prove that a huge problem exists within both the South African legal system and society. However, solutions and findings will only be given in the final chapter. This chapter

37 It must be borne in mind that one cannot right one wrong with another and especially when working with children, special care must be taken not to do more harm than good. It is thus stated that one cannot declare war when the aim is peace. The process to be followed to eradicate bullying ought to be a stern but peaceful and humane system of restorative justice.

38 See par 1.1 footnote 4.

39 A restorative justice approach is preferred above a punitive approach. See section 2(b)(iii) of the Child Justice Act 75 of 2008, which states that *ubuntu* needs to be promoted by *inter alia* reconciliation through restorative justice.

will create the foundation for the research to be conducted throughout the study, by giving background information on bullying, familiarising the reader with the research methods to be used, establishing the point of departure, assumptions and hypothesis and following this, the legal questions to be answered.

Chapter 2 further builds upon the understanding the reader has of bullying, as it contains definitions of *inter alia* violence, bullying, bullycide and restorative justice. Literature has made it evident that violence and bullying goes hand in hand, but these two terms are not the only important definitions to keep in mind when researching bullying. Therefore an entire collection of terminology needs to be studied. This chapter also includes the limitations of the study, making mention of the areas of bullying that will not be dealt with, since bullying in itself is such a broad field.

Chapter 3 will delve deeper into the problem of bullying, by discussing material by experts on the field of bullying,⁴⁰ to form a clear picture of why bullying behaviour occurs, what causes it and what might solve the problem, for to solve any problem fully, the cause must be understood. Chapter 3 will build further upon the definitions of both violence and bullying, set out in chapter 2. This chapter will also sketch the *status quo* in South African schools, for the purpose of comparing it to Australian schools later on in the study.

Building upon the milieu sketched in chapter 3, chapter 4 will delve deeper into bullying by exploring and unravelling a bullying incident and compartmentalising the key role players. These role players are: bully (bullies), passive bullies or henchmen, bystanders, defenders and victims.⁴¹ In this chapter, the phenomenon known as bystander behaviour will also be discussed as a possible cause and catalyst for

40 Olweus, De Wet, Joubert, etc.
41 Information accessed on 2011-11-27 from
<http://olweus.org/public/bullying.page>.

bullying.⁴² It is important to look at a bullying incident from “ground level” in order to grasp the intricate goings-on fully. Possible solutions to bullying might be found inwardly instead of introducing external stimuli.⁴³

Chapter 5 will discuss the current legal position in South Africa pertaining to the rights of children with regard to violence, school safety and human rights extensively. Sections of the Constitutions will be explored, *inter alia* sections 9, 10, 12, 14, 28, 33 35(3)(l) and 39. Once the constitutional framework has been established, legislation will be added to form a clearer picture. This will form the basis of the legal comparative study. Legislation to be made use of will *inter alia* be the South African Schools Act 84 of 1996,⁴⁴ the Education Laws Amendment Act 31 of 2007,⁴⁵ National Education Policy Act 27 of 1996,⁴⁶ the Employment of Educators Act 76 of 1998,⁴⁷ Child Justice Act 75 of 2008⁴⁸ and the Children’s Act 38 of 2005.⁴⁹ Government notices such as Government Notice 776 of 1998⁵⁰ are also relevant.

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- 42 Rigby and Johnson “Expressed readiness of Australian schoolchildren to act as bystanders in support of children who are being bullied” 2006 *Educational Psychology* 425-440 state that bullying has been reduced in schools where bystanders have been encouraged to step in for victims of bullying.
- 43 It is thus stated that a restorative justice system where learners take the leading role in mediation might be the key to solving the problem, rather than blowing a situation further out of proportion. However, in serious cases where criminal charges can be brought, it is a different matter altogether.
- 44 The South African Schools Act 84 of 1996 regulates all matters pertaining to basic public education and creates a uniform system for the organisation of matters relating to schooling.
- 45 The Education Laws Amendment Act 31 of 2007 ought to be read along with the South African Schools Act 84 of 1996, since this Act repeals certain sections or amends certain sections of the Schools Act in order to keep legislation current and up to date.
- 46 The National Education Policy Act 27 of 1996 lays down basic principles for national education policy as well as amending certain parts of the National Policy for General Education Affairs Act 76 1984.
- 47 The Employment of Educators Act 76 1998 regulates the employment of educators of public schools, terms and conditions of service, discipline and discharge and any other issue pertaining to employment of educators.
- 48 The Child Justice Act 75 of 2008 establishes a criminal justice system for child offenders.
- 49 The Children’s Act 38 of 2005 gives effect to the rights of children as stated in the Constitution as well as the United Nations Convention on the Rights of the Child 1989 and the African Charter on the Rights and Welfare of the Child 1999.
- 50 GG 18900 1998-05-15 lays down guidelines for the drafting of a code of conduct for learners in schools.

The applicable rules of common law are also very important and will be discussed and added to the framework. Areas of common law that are applicable to this study are:

- i) the principle of legality;
- ii) *audi alteram partem*;
- iii) aspects of criminal law;
- iv) the law of delict;
- v) due process; and
- vi) *in loco parentis*.

A review of relevant case law will follow, discussing cases such as *Dowling v Diocesan College and others*,⁵¹ *Danielle Antonie v Governing Body, The Settler High School and Head Western Cape Education Department*,⁵² *High School Vryburg and the Governing Body of High School Vryburg v The Department of Education of the North West Province*⁵³ and *Jacobs v Chairman, Governing Body, Rhodes High School and others*.⁵⁴

51 *Dowling v Diocesan College and others* 1999 (3) SA 847 (CPD). This case dealt with a school's liability for the actions of its prefects. A young boy was bullied, beaten and humiliated by two prefects. His parents instituted legal proceedings against the school board. The finding was that schools are obliged to protect the inherent dignity of their learners. The prefects assaulted the boy while acting in a duly appointed capacity (as prefects), thus they acted on behalf of the school. Therefore, the school was held liable for the actions of the prefects.

52 *Danielle Antonie v Governing Body, The Settler High School and Head Western Cape Education Department* 2002 (4) SA 738 (C). This case dealt with human dignity. A learner challenged her suspension because she refused to tie her hair back. The court ruled that a too severe punishment can only have a negative effect, on both her development as well as her dignity. The suspension was set aside. This case is especially important when regarding the position of a bully, since one must instil good values by rehabilitation instead of punitive punishment.

53 *High School Vryburg and the Governing Body of High School Vryburg v The Department of Education of the North West Province* (CA 185/99). This case highlighted the crucial importance of following due process. A grade 9 pupil was charged with assault with intent to do grievous bodily harm after he allegedly stabbed another pupil with a pair of scissors. The grade 9 pupil appeared before the governing body. He was also charged criminally and upon his arrival back at school was told to leave, as he had been suspended. He later arrived with members of the African National Congress Youth League and Congress of South African Students, demanding his reinstatement. He was tried before the school board again and suspended again. The matter went to the High Court where it was found that the disciplinary hearing's outcome was to be regarded as null and void. The reason for this was that the

International law will not be discussed in this chapter; however, it is still applicable and will be discussed in a following chapter dealing with international law.

It is of crucial importance to stop bullying, but it cannot be done “by any means necessary”. It will be argued that the aim should always be to restore justice, dignity, harmony and mutual respect.⁵⁵ This chapter seeks to explore what restorative justice means,⁵⁶ how it can be applied to the South African school system and how that might affect the prevalence of bullying. Restorative justice is a corner stone of this study and therefore critically important.

Chapter 7 will deal exclusively with international instruments such as charters and conventions that influence the rights of children. Instruments to be reviewed will be the *United Nations Convention on the Rights of the Child 1989 (CRC)*,⁵⁷ *African Charter on the Rights and*

disciplinary hearing could not be seen as fair and just and therefore he could not be expelled. His parents had not been notified and the rules of natural justice had not been applied. This case is of crucial importance when working with bullies, since one needs to follow due process to the letter in order for change to take effect.

54 *Jacobs v Chairman, Governing Body, Rhodes High School and others* 2011 (1) SA 160 (WCC). This case dealt with violence directed at an educator. A learner bludgeoned a teacher against the head with a hammer. The learner was charged and convicted of attempted murder. The incident resulted in the educator being hospitalized for three days and suffering thereafter from severe depression and trauma. The question to be asked was, did an obligation rest upon the school to ensure that no harm befell its staff? It was found that indeed a legal duty rested upon the school to protect not only its learners but also its staff from harm. Failure to do so would result in the application of the *Acquilian* action. This case is important because it highlights the fact that educator-targeted bullying is a reality, but also, that a school has a legal duty to protect learners, teachers and non-teaching staff alike.

55 See par 1.4.3 and footnote 35.

56 See par 2.2.6.

57 The preamble to the UN Convention on the Rights of the Child *inter alia* mentions the following: “Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, ...”.

Welfare of the Child 1999 (ACRWC),⁵⁸ the *Universal Declaration on Human Rights 1948*⁵⁹ and the *Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples 1965*.⁶⁰ These international instruments together with the framework established in chapter three, form a cohesive unit through which children ought to be fully protected. However, this is not the case and in this chapter the persisting *lacunae* will also be highlighted and discussed. By doing this, one can solidify the link between South African and international law.⁶¹

Australia's legal system was developed from England's common law.⁶² Needless to say, South Africa has also been influenced greatly by English common law and thus certain commonalities will exist between the legal systems of Australia and South Africa.⁶³ Australia has quite an impressive list of legislation and policy regarding human rights as well as children's rights. Legislation to be considered more closely will be the *Child Wellbeing and Safety Act 83 of 2005*,⁶⁴ *Schools Authority Act 1976*,⁶⁵ *Children and Young Persons (Care and Protection) Act 157 of*

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- 58 An extract from the preamble states the following: "RECOGNIZING that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality. The child should grow up in a family environment in an atmosphere of happiness, love and understanding."
- 59 The preamble *inter alia* states: "Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations...".
- 60 This declaration's preamble *inter alia* states the following: "*Taking into consideration* the fact that in the conflagrations which have afflicted mankind it is the young people who have had to suffer most and who have had the greatest number of victims."
- 61 Section 39 of the Constitution states the following – "(1) When interpreting the Bill of Rights, a court, tribunal or forum a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; b) must consider international law; and c) may consider foreign law." This means that international law is both applicable and important to form an objective and clear picture of bullying and how to address the issue.
- 62 Leeming "Common Law within three federations" 2007 submitted at the International Association of Constitutional Law Conference June 2007 Athens (unpublished conference paper).
- 63 See footnote 23 for a discussion on the similarities between the Australian and South African legal systems.
- 64 This Act aims to establish principles for the wellbeing of children and create certain bodies to oversee the wellbeing of children.
- 65 This Act aims to establish a framework for the Australian school system and is much like the South African Schools Act 84 of 1996.

1998,⁶⁶ *Charter of Human Rights and Responsibilities Act 2006*,⁶⁷ *Human Rights and Equal Opportunity Commission Act 1986*,⁶⁸ *NSW Anti-Discrimination Act*⁶⁹ and the *Sex Discrimination Act 1984*.⁷⁰ Policy regarding children, violence and bullying to be looked at will *inter alia* be *Behaviour Management in Schools*,⁷¹ *Anti-discrimination, Harassment and Bullying Policy*⁷² and *Student Discipline in Government Schools: Anti-bullying Plan for Schools*.⁷³ This is, however, not an exhaustive list and more legislation will be added throughout the study.⁷⁴ The literature will be discussed, examined and compared with the legal framework of South Africa to find a possible solution within legal comparative research.

In chapter 9, a conclusion will be drawn from the aforementioned research. After comparing the legal position of South Africa with that of Australia, an analysis can be made from which new understanding can

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- 66 This Act aims to provide and care for children and young persons, as well as to provide for services as needed by children and young persons, much like the South African Children's Act 38 of 2005.
- 67 This Act establishes human rights and is similar to the Bill of Rights found in Chapter 2 of the Constitution of the Republic of South Africa, 1996.
- 68 This Act puts a commission in place to oversee that human rights are enforced equally.
- 69 The Anti-discrimination Act builds upon the protection of human rights of the people of Australia by ensuring that no unjust discrimination takes place.
- 70 This Act deals with discrimination based on sex, marital status, pregnancy, potential pregnancy, family responsibilities or sexual harassment.
- 71 This policy aims to promote positive social relations, a healthy school environment and procedural fairness regarding any decisions made pertaining to learners.
- 72 The Anti-discrimination, Harassment and Bullying policy brings to the foreground the responsibilities of teaching and non teaching staff in Catholic institutions, regarding bullying and harassment and thus promotes a harmonious environment where rights are respected.
- 73 This plan sets out a strategy for bullying behaviour in New South Wales schools, as well as developing and implementing anti-bullying strategies.
- 74 Examples are: *Children and Young People Act 2008* (Australian Capital Territory), *Care and Protection of Children Act 2007* (Northern Territory), *Child Protection Act 1999* (Queensland), *Children's Protection Act 1993* (Southern Australia), *Children, Youth and Families Act 2005* (Victoria), *Children, Young Persons and their Families Act 1997* (Tasmania), *Children and Community Services Act 2004* (Western Australia), *Education Act 2004* (Australian Capital Territory), *Education Act 8 of 1990* (New South Wales), *Education Act 2007* (Northern Territory), *Education (General Provisions) Act 2006* (Queensland), *Education Act 1972* (Southern Australia), *Education and Training Reform Act 2006* (Victoria), *Education Act 1994* (Tasmania), *School Education Act 1999* (Western Australia). These pieces of legislation and other sources along with their applicable sections will be examined in detail in chapter 8.

be gained of bullying and violence in schools. A structure for the fight against bullying in schools can be built on this. Recommendations will be made on the best way forward, whether the drafting of anti-bullying legislation in conjunction with anti-bullying policy or pure amendments to current legislation.

1.6 Conclusion

It is evident, if one only looks at the statistics and media reports that something needs to be done.⁷⁵ The best place to start would be by doing research into the cause of the problem, the effect of bullying behaviour and the legal consequences of bullying. This will yield a clearer picture of what can be done about the matter. Many studies in the fields of psychology, education and sociology have been undertaken regarding bullying; however, legal research into the problem of bullying is scarce.

Legal research into bullying is necessary in order to obtain a solution that is both sustainable and enforceable in the long run. This will help to ensure safe schools and raise responsible, respectable young adults and could ultimately have a positive effect on the crime rate.⁷⁶

75 See par 1.2.1 and footnote 12.

76 Mollo *A Legal Perspective on the Establishment of Anti-bullying Policies in Public Schools* (MEd dissertation 2009 UP) 25 and Sampson *Bullying in Schools* (2009) 2 both make the point that bullies can ultimately turn into criminals as adults and it is thus stated that by eliminating bullying behaviour, criminal behaviour as an adult could be greatly limited.

Chapter 2: Definitions and conceptual framework

2.1 Introduction

It is evident that bullying is a problematic issue.¹ One of the biggest problems is the fact that a plethora of definitions for bullying exist, without uniform application thereof. Therefore, in order to fully conceptualise, understand and address it properly within this study, a framework of definitions is needed. The conceptual framework thus also delimits the study to set parameters to guide the research.² When considering bullying, terms such as bullying, violence, bullycide, restorative justice, learner and educator, are of crucial importance and will be explored and discussed.

2.2 Limitations of the study

Bullying is a topic encompassing various fields³ of study not limited to law⁴ alone. Because of the vastness of bullying as a concept, it is imperative to delimit this study in order to achieve the desired depth. The following areas will not be considered:

2.2.1 *Workplace bullying*

This form of bullying takes place at a person's place of employment and although some of the elements are the same, it does not have much to do with learner-on-learner bullying in schools. Workplace bullying can be defined as –

Workplace bullying is repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators that takes one

1 See par 1.2.1 and footnote 12 in chapter 1 above in this regard.

2 See par 2.2.

3 These fields are *inter alia* psychology, sociology, anthropology, criminology and education.

4 Bullying touches on aspects of criminal law, the law of delict, child law, education law, labour law, internet laws etc.

or more of the following forms: Verbal abuse; Offensive conduct/behaviours (including nonverbal) which are threatening, humiliating, or intimidating; Work interference: sabotage.⁵

Workplace bullying can take place at a school, as educator-targeted bullying⁶ is a reality; however, this study focuses purely on the imbalance of power between learners, not educators and learners.

2.2.2 Cyberbullying

Cyberbullying can be defined as - “Cyber-bullying is harassing, humiliating, threatening or embarrassing another person through electronic methods, such as instant messaging, email or text messaging”.⁷ It is a phenomenon all on its own and an entire study can be devoted to cyberbullying alone. Cyberbullying shares elements with learner-on-learner bullying as learners use social media to inflict emotional damage upon fellow learners, but that constitutes cyber crime and is governed by a set of entirely different legal principles.

2.2.3 Educator-targeted bullying

Educator-targeted bullying (ETB) is bullying directed at the educator, whether verbal or physical abuse.⁸ The same basic definition of bullying applies; however, as stated, it is not directed at a learner in this instance, but at an educator. However, this would constitute work place bullying and therefore it is excluded from the study.

5 Definition for workplace bullying accessed on 2011-03-14 from targetedindividualscanada.wordpress.com/2011/03/14/definitions/.

6 See par 2.2.3.

7 Definition for cyberbullying accessed on 2011-03-14 from education.scholastic.co.uk/content/6030.

8 De Wet “Victims of educator-targeted bullying: a qualitative study” 2010 *South African Journal of Education* 189-201 defines ETB as: “For the purposes of this study, ETB is defined as aggressive behaviour in which there is an imbalance of power between the aggressor (learner/s) and the educator. The aggressive acts are deliberate and repeated and aim to harm the victim physically, emotionally, socially and/or professionally. Acts of bullying may be verbal, non-verbal, physical, sexual, racial and/or electronic.”

2.2.4 *Educator-on-learner bullying*

Educator-on-learner bullying almost seems to be an urban myth, given the fact that so little research has been done on the matter; however, it occurs in schools daily. The South African Council of Educators (SACE) explicitly prohibits⁹ the bullying of learners by educators. It states that educators should refrain from any conduct which humiliates a learner, any form of abuse (whether physical or psychological) and any form of sexual harassment.¹⁰ Very little research has been done on the matter and more empirical evidence is needed to substantiate proper findings and therefore this form of bullying will also be excluded.

2.2.5 *Play fighting*

Learners engaging in violent activities and/or games, but where consent was given, will be excluded. This will typically be the case where boys engage in sporting type games such as rugby and touch rugby, but it is not exclusive to sport. A fine line must be drawn between consent and intentional harm or humiliation, which would fall within the gist of bullying. When play fighting falls in this category, it will be discussed in this study.

2.3 Focus of study

This study will deal exclusively with learner-on-learner bullying, whether direct (physical) or indirect (verbal).

2.4 Conceptual framework

2.4.1 *Violence*

Violence lays the foundation for bullying. Therefore one needs to understand what violence is and how it links to bullying in order to grasp

9 The Code of Professional Ethics par 3 accessed from http://www.sace.org.za/Legal_Affairs_and_Ethics/jit_default_21.The_Code_of_Professional_Ethics.html on 2011-09-15.

10 De Wet "Free State educators' experiences and recognition of bullying at schools" 2006 *South African Journal of Education* 61-73.

the concept of bullying. The *Oxford English Dictionary* defines violence as – “(n) behaviour involving physical force intended to hurt, damage or kill”.¹¹ However, this definition alone is too narrow.

In reality, violence encompasses quite a few elements.¹² Still, this is not all, since violence does not solely comprise a physical element. The World Health Organisation (WHO) created a very broad definition for violence, which includes aspects of physical, emotional and sexual abuse.¹³ It must be borne in mind that bullying is very similar to, if not identical, to, assault.¹⁴ A key component of assault is violence, by either

11 *Oxford English Dictionary* 1613.

12 Definition of violence accessed from the <http://www.thefreedictionary.com/violence> on 2011-06-21 states the following: “Violence (n) -
1. Physical force exerted for the purpose of violating, damaging, or abusing: crimes of violence.
2. The act or an instance of violent action or behaviour.
3. Intensity or severity, as in natural phenomena; untamed force: the violence of a tornado.
4. Abusive or unjust exercise of power.
5. Abuse or injury to meaning, content, or intent: do violence to a text.
6. Vehemence of feeling or expression; fervor.”

13 Definition of violence accessed from the <http://www.justice.govt.nz/publications/global-publications/s/safer-communities-action-plan-to-reduce-community-violence-sexual-violence/definition-of-violence> on 2011-06-21 states the following: “The intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, mal-development or deprivation. The definition should be understood to include physical, sexual and psychological abuse (such as the significant abuse of power arising from a dependent relationship, threats, intimidation and neglect). Violence can result in psychological and social problems as well as physical problems, all of which are of concern to communities and place considerable burdens on the health, social and justice systems. This definition recognizes that the outcomes of violence are broader than physical injury, disability or death and demonstrates that violence is not only an issue of concern to Police and the justice sector, but to the social sector as a whole.”

14 Burchell *Principles of Criminal Law* 680 interestingly describes assault as: “unlawfully and intentionally (1) applying force to the person of another, or (2) inspiring a belief in that other person that force is immediately to be applied to him or her.” Snyman *Strafreg* 432 defines assault as - “Aanranding bestaan uit enige wederregtelike en opsetlike doen of late (a) wat tot gevolg het dat iemand anders se liggaamlike integriteit direk of indirek aangetas word, of (b) wat iemand anders laat glo dat so ‘n aantasting van haar liggaamlike integriteit omniddellik sal plaasvind.” Note that the *Oxford English Dictionary* 293 defines force as: “1 physical strength or energy accompanying action or movement. 2 pressure to do something backed by the use or threat of violence [in other words assault].” Burchell does not make mention of violence, but uses the word “force” instead. The application of force, according to Burchell, encompasses

involving violent behaviour towards the victim or by putting the victim under the impression that he or she is under immediate threat of violence.¹⁵ A link can thus be drawn between violence and bullying and it is therefore stated that bullying is in fact a form of violence.¹⁶

2.4.2 Bullying

The *Oxford English Dictionary* defines bullying as – “Bully (n): a person who deliberately intimidates or persecutes those who are weaker (v) (bullies, bullying, bullied) intimidate or persecute (someone weaker).”¹⁷ This basic definition lays the foundation for research into the phenomenon.

The *Oxford* definition is however not the only definition and to conceptualise the real issue fully, one needs an accurate definition first. Such a definition ought to be detailed enough to give a clear picture, but should also not be too wide, to prevent confusion. Olweus¹⁸ defines bullying as – “a person is bullied when he or she is exposed, repeatedly and over time, to negative actions on the part of one or more other persons, and he or she has difficulty defending himself or herself”.¹⁹

Three key components can be identified in this definition of Olweus: –

-
- 15 violent force applied to a human person, which leads to wounding, bruising, mutilation etc. Thus, violence and force can be deemed as synonymous terms. Burchell *Principles* 685 note that to inspire fear also constitutes assault. Inspiring the conviction in someone’s mind that he or she is under immediate threat of force or violence constitutes assault. See also Snyman *Strafreg* 448.
- 16 Burchell *Principles* 680 point out that society in general believes in the sanctity of the physical human being, which is an echo of the general belief pertaining to the sanctity of human life. This is in turn reflected by the criminal justice system, as force and violence directed towards a human being are prohibited and punishable.
- 17 *Oxford English Dictionary* 184.
- 18 An authority figure regarding bullying prevention and the person who founded the Olweus Bullying Prevention Program (OBPP). His research started in 1970 in Sweden and progressed to the United States. In 1983 three teenage boys committed suicide, most likely in response to severe bullying and this incident triggered the development of the first OBPP. His research and programmes are used globally. Information obtained from http://www.olweus.org/public/bullying_research.page?menuheader=2 and accessed on 2011-10-03.
- 19 Definition of bullying accessed from the Hazelden Foundation on 2011-05-24 at <http://www.olweus.org/public/bullying.page>.

- i) Bullying in essence is aggressive behaviour where a bully acts negatively.
- ii) It forms a pattern over time.
- iii) Bullying involves a power imbalance.²⁰

For the purposes of a legal definition for bullying, it should be neither too wide, nor too narrow. Therefore, other options should also be explored. According to Bully OnLine (the world's largest online resource regarding workplace bullying and related matters),²¹ bullying can be defined as –

Bullying is persistent unwelcome behaviour, mostly using unwarranted or invalid criticism, nit-picking, fault-finding, also exclusion, isolation, being singled out and treated differently, being shouted at, humiliated, excessive monitoring, having verbal and written warnings imposed, and much more. In the workplace, bullying usually focuses on distorted or fabricated allegations of underperformance.²²

From this definition of bullying it is evident that there has been some expansion, adding more elements and characteristics. Taking into account all the above-mentioned definitions, a clearer picture surfaces of what bullying is and what the problem entails.

Bullying is a wrongful, intentional act; whether a physical act, gesture, verbal, written or electronic communication, taking place repeatedly and is performed by either a single individual or more than one person. Bullying can be characterised as frightening, intimidating treatment to which a learner is repeatedly subjected by another learner/learners or an educator resulting in:

- i) Physical harm to the learner or his or her property;

20 *Ibid.*

21 Bully OnLine has been a project of the Tim Field Foundation since 1996. Field had a vision of a world free from bullying and published a book, "Bully in Sight", and also started bullyonline.org. These are only two examples of the work Field has done to eradicating bullying and in 2009 the Tim Field Foundation received a makeover carrying the vision of the late Field. Information obtained from <http://timfieldfoundation.org/component/content/article/9-overview/1-introduction> on 2011-10-03.

22 Definition of bullying accessed from <http://www.bullyonline.org> on 2011-05-24.

- ii) emotional harassment the learner;
- iii) making the learner fear for his or her own safety or the safety of his or her property;
- iv) substantial disruption of the orderly functioning of school activity; and
- v) the ultimate creation of a hostile environment that is counterproductive to learning.

The above definition will serve as an interim definition of what bullying is for the purposes of this research. Throughout this study, the definition will be developed further in order to be used in school policies and anti-bullying legislation.

2.4.3 *The relationship between violence and bullying*

Bullying is considered a form of violence; however it has been argued that it has different root causes from some other forms of violence and therefore preventing bullying requires a different approach than other forms of violence.²³ Rather than seeing these two fields as two separate and unrelated entities, they should be seen as parallel and co-dependent fields.²⁴

Bullies and victims of bullying will more often than not exert themselves violently; because of low self-esteem and often depression issues.²⁵ However, these are not the only catalysts to violent behaviour in children who are involved in bullying behaviour.²⁶ Bullies rather than victims are more likely to engage in violent activity.²⁷

23 Anon "Bullying vs Violence" (2009) accessed on 2011-06-23 from <http://www.bullyingstatistics.org/content/bullying-vs-violence.html>.

24 *Ibid.*

25 *Ibid.*

26 Psychological problems associated with bullying are not explicitly mentioned in psychological texts as such, since the link has not yet been drawn specifically. However, symptoms from certain behavioural disorders in children can be ascribed to bullying. Theron "Gedragversteuring by kinders en adolessente" in Louw (ed) *Suid-Afrikaanse Handboek van Abnormale Gedrag* (1990) 415-446 mentions, *inter alia*, the following behavioural disorders in children: "opponerend-uitdagende versteuring, vermydingsversteuring, oormatige-angsversteuring". These behavioural disorders mentioned can be caused in

The WHO defines physical violence as “the use of physical force against another person or group that results in physical, sexual or psychological harm”.²⁸ Harassment or bullying, on the other hand, is defined as “intentional use of power against another person or group that can result in harm to physical, mental, spiritual, moral or social development”.²⁹

From this, it can be seen that violence has a more serious physical effect, whereas bullying has a more serious psychological effect.³⁰ However this is not necessarily a mutually exclusive occurrence. The definition pertaining to bullying mentioned here, defines workplace bullying. The only difference between workplace and school bullying is, in most instances the milieu (when considering educator bullying, however, it is similar); the elements and the most important effects³¹ remain the same. It should be borne in mind, however, that this study is about a horizontal power imbalance (learner on learner) and not a vertical power imbalance, as would be the case with workplace bullying, educator-on-learner or learner-on-educator bullying.

2.4.4 Bullycide

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- victims as a result of bullying, and in bullies as a result of a negative home environment. Chapter 3 discusses the link between child law, bullying and psychology and will look more closely at the psychological effects of bullying.
- 27 Anon “Bullying vs Violence” (2009) accessed on 2011-06-23 from <http://www.bullyingstatistics.org/content/bullying-vs-violence.html>.
- 28 European Foundation for the Improvement of Living and Working Conditions “Violence, bullying and harassment in the workplace” (2007) report compiled on behalf of the European Union (EU) by Eurofound, a tripartite EU agency that provides expertise on living and working conditions, industrial relations and managing change in Europe.
- 29 *Ibid.*
- 30 This statement was inferred from the definitions given of violence and harassment or bullying in the paragraph above. However, De Wet “The voices of victims and witnesses of school bullying” 2005 *Koers* 705-725 makes the point that bullying has various negative long and short term effects on the learners involved. These effects could even extend to affect their mental and physical health owing to the fact that bullying can place a child under immense stress. Therefore it is clear that there is a fine line between violence, bullying and the physical and psychological effect these phenomena have on people.
- 31 A victim of bullying will suffer emotional, psychological and more often than not physical damage as a direct result of the bullying behaviour and these elements are the same, whether school or workplace bullying.

Bullying has gone so far as to cause young people to take their own lives. This phenomenon is known as “bullycide”.³² If one takes a look at the definition of bullycide, a direct nexus can be drawn between the bullying behaviour and the eventual suicide and thus it can be argued that such a bully could be held criminally liable for the death of the victim.³³

2.4.5 Suicide, murder and culpable homicide

Suicide, culpable homicide and murder all result in death and when linked to bullying behaviour, can also be called “bullycide”. The loss of life results in severe trauma for those left behind.

2.4.5.1 Suicide

Suicide means to take your own life.³⁴ Synonymous with suicide is the archaic Latin expression *felo de se*.³⁵ However, when reading the

32 Definition of bullycide accessed on 2011-09-20 from <http://dictionary.reference.com/browse/bullycide> and states the following: “bullycide –n the act or an instance of killing oneself intentionally as a result of bullying [C21:from bully + (sui)cide]”. Another definition for bullycide accessed on 2011-09-20 from <http://www.jaredstory.com/bully.html> correlates with the abovementioned definition. It is thus stated that bullycide ought not to be applied exclusive to “bully” and “suicide” but in some instances, to “homicide” as well.

33 However, in this instance, the concept of *novus actus interveniens* must be taken into account. The *Trilingual Legal Dictionary* 243 defines it as “a new cause intervening”. Burchell *Principles* 213 describe *novus actus* as: “The *novus actus* (or *nova causa*) *interveniens* concept is often described in terms of an ‘abnormal’ intervening act or event which will serve to break the chain of causation. The normality or abnormality of an act or event is judged according to the standards of general human experience.” This would mean that, if a victim of bullying died by his or her own hand later in time and not at the hand of a bully during a bullying incident, a defence of *novus actus interveniens* can be raised thus absolving an accused of criminal liability. However, there is no hard and fast rule as each case is judged upon its own merit. See *Road Accident Fund v Russell* (656/98) [2000] ZASCA 66; 2001 (2) SA 34 (SCA); [2001] 1 All SA 160 (A) (24 November 2000); *S v Haileka* (CA92/2006) [2006] NAHC 62; *The Premier of the Western Cape Province v Loots* (214/2010) [2011] ZASCA 32. It must be stated that these cases explain *novus actus interveniens* and do not link to bullycide. A more in depth discussion of *novus actus interveniens* and the possibility of criminal liability due to bullycide will be dealt with in chapter 5. See also footnote 37.

34 The *Oxford English Dictionary* 759 defines suicide as “1 the action of killing yourself deliberately. 2 a person who commits suicide”.

definition of suicide in conjunction with the definition of bullycide,³⁶ the general picture changes. It can be argued that a direct nexus is present between the bullying behaviour and the ultimate suicide. This can be proven by asking whether, if the bullying behaviour were to be removed from the equation, the youth would still have committed suicide. The answer would probably be no. This raises the issue of liability. If a bully's actions are the cause of another youth's suicide, he or she could be held liable for the death of the victim.³⁷

2.4.5.2 Murder

Murder³⁸ is conventionally defined as killing someone.³⁹ It ought to be borne in mind that murder consists of a few elements, namely, causation of death, whether through an act or omission, of another human being, which is unlawful and intentional.⁴⁰ When regarding these elements in

35 Burrill *Law Dictionary and Glossary* (1987) 612 defines *felo de se* as: "a felon of himself; a self murderer".

36 See par 2.4.4.

37 To illustrate the seriousness of the matter, consider section 241 of *Canada's Criminal Code* which states: "Every one who counsels a person to commit suicide, or aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years." Burchell *Principles* 212 note that where the questioned conduct took place in the form of a positive act, it begs the question as to whether, without the accused actions, the consequence would have occurred. If the answer is yes, then the conduct is a factual cause of the consequence (*conditio sine qua non*). However, where an omission instead of conduct is under scrutiny, a hypothesis is created of the action which should have been performed. If, after addition of the hypothetical action, the consequence disappears, omission is a factual cause of the consequence. Snyman *Strafreg* 81 states that in certain cases the *conditio sine qua non*-formula may be used in order to ascertain whether the act is a factual cause of the position after the act has been carried out. According to this formula, one has to ask what would have happened had X not acted; would the eventual position (as it currently stands) still be the same? If the answer is no, then X's action is indeed a factual causation of the current position. If, however, the answer is yes, the action is not a factual causation of the current position, as it would not have changed the circumstances. See also footnote 33 in this regard.

38 Burchell *Principles* 667 notes the interesting evolvement of the word murder. It originates from its stem which means death. The Latin word, '*mori*', (mortality), followed by the Germanic word '*mord*', Afrikaans '*moord*', Old English '*mothor*' and '*murdre*' all play a part in what is now murder.

39 Burchell *Principles* 667 describe murder as: "the unlawful and intentional killing of another person". Snyman *Criminal Law* 447 defines murder as: "the unlawful and intentional causing of the death of another human being".

40 Snyman 447.

the milieu of a school yard, it could be argued that a minor would foresee that his actions or lack thereof could lead to the death of a fellow learner. Consider the following real-life scenario: A 16-year-old girl was allegedly forced to drink “Jik” by three school bullies and as a result of this, she died.⁴¹ This poses the issue of premeditated action. A court needs to apply the reasonable person test in order to resolve such an issue.⁴²

2.4.5.3 *Culpable homicide*

A human life can also be taken by culpable⁴³ homicide.⁴⁴ Culpable homicide and murder differ from each other by virtue of the difference in culpability required to distinguish the separate offences.⁴⁵ In the instance of culpable homicide, negligence is required; whereas, when dealing with murder, intention is required.⁴⁶ In this instance it can be argued that if someone knew of a bullying incident or ongoing bullying relating to a specific child, then that person can be charged with culpable homicide.

2.4.6 *Restorative justice*

In a bullying incident there will be a victim and a bully.⁴⁷ More often than not these participants are children. Therefore alternative means other than a punitive system of justice needs to be sought. Restorative justice can be defined as dealing with issues of both victim and transgressor in

41 De Wet “The voices of victims and witnesses of school bullying” 2005 *Koers* 705-725.

42 This test will be discussed in more detail in chapter 5; however, it basically encompasses the following: would a reasonable person (a person of similar age, circumstances and with the same mental capacity) have acted the same? This test is objective.

43 Culpable can be defined as: “adjective deserving blame or censure; blameworthy. Origin: 1275–1325; Middle English < Latin *culpābilis*, equivalent to *culpā* (*re*) to hold liable (derivative of *culpa* blame) + *-bilis* *-ble*; replacing Middle English *coupable* < Middle French < Latin as above”. Definition accessed on 2011-11-18 from <http://dictionary.reference.com/browse/culpable>.

44 Snyman 451 defines culpable homicide as “the unlawful, negligent causing of the death of another human being”.

45 Snyman 452 further makes the point that all the elements of culpable homicide and murder are the same, except for negligence (with regard to culpable homicide).

46 Snyman 452.

47 These are, however, not always the only role players, see chapter 4.

such a way that there is healing on both sides, as well as communal healing.⁴⁸ The concept of *ubuntu*⁴⁹ is critically important when dealing with restorative justice, as the aim of restorative justice through healing is to cement core values such as mutual respect, love, sympathy and empathy.⁵⁰

2.4.7 Child

This study involves children. Conventionally, a child is seen as a person under the age of 18. The Constitution defines a child as - “In this section “child” means a person under the age of 18 years”.⁵¹ The CRC states the following in article 1: “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”⁵² The ACRWC defines a child as follows in article 2: “For purposes of this Charter a child means every human being below the age of 18 years”. The Children’s Act 38 of 2005 describes a child as: “a person under the age of 18 years”. The Child Justice Act 75 of 2008 defines a child as:

any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4(2).

For the purposes of this study, it will be accepted that a child is a person under the age of 18.

48 Batley “Restorative Justice in the South African Context” in Maepa (ed) *Beyond Retribution Prospects for Restorative Justice in South Africa* (2005) 21-32. Skelton *The influence of the theory and practice of restorative justice in South Africa with special reference to child justice* (LLD thesis 2005 UP) 12 is of the view that it is difficult to fully conceptualise and define restorative justice as such, since it means different things to different people. Further more, people take different approaches to restorative justice, as some advocates and theorists prefer a wide definition in order to leave room for development whereas others prefer parameters to be laid down. Chapter 6 deals with restorative justice in schools.

49 See chapter 1, footnote 4 for a definition of *ubuntu*.

50 *Ibid.*

51 Section 28(3) of the Constitution.

52 See par 7.3.1.

2.4.8 Learner

Following the definition of a child, the correct definition of the term “learner” is also paramount.⁵³ The South African Schools Act 84 of 1996 defines a learner⁵⁴ in section 1 as – “any person receiving education or obliged to receive education in terms of this Act”.⁵⁵ The Schools Act takes it a step further and states in section 3(1) that it is compulsory for a learner to attend school from the first day of the school year in which he or she turns seven up to and until the last school day of the year in which he or she turns 15 (or ninth grade), whichever occurs first.⁵⁶

2.4.9 Educator

An educator is commonly known as a teacher, the legally correct term is, however, “educator”.⁵⁷ For the purposes of this study, the definition adopted in the Schools Act will be deemed correct.

53 It is thus stated that a child can be a learner, but a learner is not necessarily a child.

54 Bray “Law, Education and the Learner” in Boezaart (ed) *Child Law in South Africa* (2009) 456-474 adds to this definition of a learner: “Descriptions of a learner may include a person in the Early Childhood Development (ECD) stage or a person receiving Adult Basic Education and Training (ABET), who is involved in any kind of formal or non-formal education and training activity.”

55 South African Schools Act 84 of 1996.

56 Bray in Boezaart (ed) *Child Law in South Africa* (2009) 456-474.

57 The National Education Policy Act 27 of 1996 describes an educator in section 1 as: “any person who teaches, educates or trains other persons at an education institution or assists in rendering education services or education auxiliary or support services provided by or in an education department, but does not include any officer or employee as defined in section 1 of the Public Service Act, 1994 (Proclamation No. 103 of 1994)”; the South African Schools Act 84 of 1996 defines an educator in section 1 as: “any person, excluding a person who is appointed to exclusively perform extracurricular duties, who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at a school”. The Employment of Educators Act 76 of 1998 states in section 1 that an educator is: “any person who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at any public school, further education and training institution, departmental office or adult basic education centre and who is appointed in a post on any educator establishment under this Act”.

2.4.10 Policy

Drafting and successful implementation of certain policies are imperative for good governance on any level, also in an educational context. The *Oxford English Dictionary* defines policy as – “(n) (pl. policies) a course of action adopted or proposed by an organization or person.”⁵⁸ It is thus stated that a policy is a guideline, setting out basic compulsory elements to be adhered to, but leaves space for schools to adapt it to their own circumstances.⁵⁹ For the purposes of this study, policy will be regarded as an action plan adopted and implemented by schools, specifically pertaining to bullying.

2.4.11 Code of conduct

Section 8 of the South African Schools Act 84 of 1996 governs a code of conduct for learners.⁶⁰ A code of conduct contains disciplinary rules for learners and is thus imperative to the maintenance of proper school discipline.⁶¹ The aim of a code of conduct is to promote proper, positive behaviour and to help instil a sense of responsibility and pride in learners.⁶² However, a code of conduct also deals with negative discipline in addressing unacceptable behaviour and the consequences

58 *Oxford English Dictionary* 576.

59 Mollo *A Legal Perspective on the Establishment of Anti-Bullying Policies in Public Schools* (MEd dissertation 2009 UP) 11 adds the following, with regards to the implementation of an anti-bullying policy in schools: “The policy itself is a statement of intent that guides action and organisation with the school. The policy therefore establishes a clear set of agreed aims that provide learners, staff and parents with a sense of direction and an understanding of the commitment of the school to do something about bullying behaviour.”

60 This section states *inter alia* the following: “(1) Subject to any applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school. (2) A code of conduct referred to in subsection (1) must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.” This section has seven more subsections and will be discussed in more detail in chapter 5.

61 Bray “Codes of conduct in public schools: A legal perspective” 2005 *South African Journal of Education* 133-138.

62 *Ibid.*

thereof.⁶³ Duly important in the instance of a code of conduct is the incorporation of the principle of due process.⁶⁴ Therefore, a code of conduct is a set of rules which sets the standard for learner behaviour, encouragement of self-discipline and mutual respect but it also includes negative discipline (conduct that will not be tolerated) and the procedures that go along with learner misconduct. However, a code of conduct rarely, if ever explicitly mentions bullying.⁶⁵

2.5 Conclusion

By determining a conceptual framework of definitions, an outline is drawn of what exactly the study entails. It is also evident that bullying is far more complex than mere name-calling or pushing and shoving. Bullying has become a serious matter, to such an extent that it has acquired a criminal element when regarding terms such as bullycide, suicide, murder and culpable homicide. Restorative justice is a cornerstone to this study, as it encompasses not only the philosophy of *ubuntu*,⁶⁶ but could also, if applied correctly, instil values in the youth of South Africa as stipulated in the Constitution.⁶⁷ Therefore, bullying could

63 *Ibid.*

64 Due process is explicitly mentioned in section 8(5)(a) of the South African Schools Act 84 of 1996, but is also enshrined in section 33 of the Constitution of the Republic of South Africa and will be discussed in more detail in chapter 5.

65 Mollo *A Legal Perspective on the Establishment of Anti-Bullying Policies in Public Schools* (MEd dissertation 2009 UP) 93 found that schools rarely use separate anti-bullying policies but opt to discipline bullies by using the measures as stipulated in the code of conduct. It is worrying to note that some of the aspects as stipulated in the codes of conduct have nothing to do with bullying. In order to address bullying sufficiently, a separate policy is needed, as an addendum to the code of conduct. This bullying policy should include guidelines on how to induce positive classroom and playground behaviour to minimise bullying, how to deal with a bullying incident and steps to take afterwards, as well as support for victims and bullies. The underlying principles of such a policy should be *ubuntu*, restorative justice and human dignity.

66 Skelton *The influence of the theory and practice of restorative justice in South Africa with special reference to child justice* (LLD thesis 2005 UP) 1.

67 Section 1 of the Constitution contains the founding provisions and states: "1. The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-

ultimately be eradicated if a shift in perspective is achieved through the correct implementation of restorative justice in schools.⁶⁸ This framework now serves as the basis for the rest of the study, as it is imperative to know exactly what one is dealing with and the limitations⁶⁹ must be clear.

party system of democratic government, to ensure accountability, responsiveness and openness.”

68 See par 2.4.6.

69 Limitations of this study can be found in par 2.2.

Chapter 3: Violence and bullying in South African schools

3.1 Introduction

Bullying touches upon various fields of study.¹ In order to address bullying² properly the causes of bullying, as well as its psychological effects on both the bully and victim must be understood.³ The approach of this study is holistic in nature and therefore it is imperative to discuss the psychological aspect of bullying as well.⁴ The aim of this chapter is to look at the root of the problem and to place it in context. Furthermore, chapter 3 sketches the *status quo* of what a South African school currently looks like, in order to highlight the importance of this study.⁵

3.2 The relationship between child law and psychology

Psychology can be defined as –

The scientific study of the nature, functions, and phenomena of behaviour and mental experience. The etymology of the word [psychology] implies that it is simply the study of the mind, but much of modern psychology focuses on behaviour rather than the mind, and some aspects of psychology have little to do with the mind.⁵

1 See par 2.2.

2 See par 1.4.3.

3 *Loc cit.* It must be borne in mind that, when working with children, especially in the instance of a bullying incident, various disciplines come into play such as law (child law, criminal law, education law and law of delict), psychology, sociology etc. These disciplines must work in conjunction with one another to ultimately find a cohesive solution. It takes a village to raise a child (see chapter 1, par 1.4.3 and footnote 35) and therefore, it would also take a multi-disciplinary effort to eradicate bullying.

4 The psychological aspect of bullying will not be delved into too deeply, as this is not a psychological study. However, it is necessary to place bullying into context, by broadly examining its psychological roots. This may ultimately help to find a solution for bullying from a legal perspective.

5 Swanepoel *Law, Psychiatry and Psychology: A Selection of Constitutional, Medico-Legal and Liability Issues* (LLD thesis 2009 UNISA) 89 also defines behaviour: “The term ‘behaviour’ has a much wider meaning for the psychologist than for the layman. Both use the term to refer to those actions which are overt and directly observable by other people, such as social interaction, speech and motor skills. In addition, most psychologists extend ‘behaviour’ to include also ‘private’ experiences and processes, such as

The modern approach to child law is multi-disciplinary in nature⁶ and a more holistic means of looking at child law has been sought.⁷ There is a link⁸ between child law and social sciences, *inter alia* psychology.⁹ When a child's rights are affected, in that same instance, he or she will be affected psychologically.¹⁰ Thus, in order to ensure that minimal damage is done to a child, or to rectify damage already done, law and psychology are two disciplines that need to be applied in conjunction.¹¹

3.3 The relationship between child law and bullying

thoughts and emotions. The importance of the term 'behaviour' in psychology is that it emphasises *how* the phenomena under consideration should be studied. The main technical problem in psychology is therefore to devise behavioural indices of private experience such as thoughts and feelings."

6 Boezaart "Child law, the Child and South African Private Law" in Boezaart (ed) *Child Law in South Africa* (2009) 4.

7 *Ibid.*

8 Currie and De Waal *Bill of Rights 292* make the point that section 12 of the Constitution not only guarantees a person personal freedom and security, but also bodily and psychological integrity. Currie and De Waal 600 also state that section 28 of the Constitution affords children protection additional to the overall protection guaranteed by the Bill of Rights. Therefore, it is evident that children also have the right to bodily and psychological integrity. Section 2(b) of the Children's Act 38 of 2005 stipulates that one of the objectives of the Act is to provide structures to promote, monitor and protect the stable development of children, physically, psychologically, emotionally, intellectually and socially. This makes it abundantly clear that law; specifically child law, and psychology are co-dependent, intertwining fields of study.

9 Boezaart in Boezaart (ed) *Child Law in South Africa* 4.

10 The preamble to the UN Convention on the Rights of the Child *inter alia* states the following: "Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding." An extract from the preamble to the African Charter on the Rights and Welfare of the Child states the following: "RECOGNIZING that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality the child should grow up in a family environment in an atmosphere of happiness, love and understanding." Section 28 of the Constitution aims to afford children, specifically, protection, additional to the rights protected as in the Bill of Rights. The preamble to the Children's Act 38 of 2005 *inter alia* states the following: "AND WHEREAS it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community as well as that the child, for the full and harmonious development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding." Therefore, it can be said that legislation, regional and international documents are used to protect the psychological integrity of children and thus the link between child law and psychology is evident.

11 See par 1.4.3.

Children make up an important societal group.¹² Therefore, the promotion and protection of their rights are equally important.¹³ As stated above, bullying is a very serious issue, transgressing a myriad of constitutional rights.¹⁴ Section 7(2) of the Constitution determines that the state is obliged to respect, protect and promote the rights set out in the Bill of Rights.¹⁵ Because bullying infringes upon the constitutionally protected rights of children, it is clear that this instance ought to be regulated by both child law and education law as bullying often transpires between learners (children) at school.

3.4 The relationship between bullying and psychology

Bullying is a phenomenon that is hard to pin down; because, people differ, some learners might be more susceptible to become bullying victims than others and some learners might be more likely to bully, than others.¹⁶ When considering the above definition of psychology, it is clear that psychology deals with behaviour and behavioural problems. Bullying is a behavioural problem.¹⁷ Bullying is not limited to physical violence.¹⁸ It also encompasses name-calling, verbal abuse, social exclusion, being treated differently *et cetera*.¹⁹ Bullying can have an

12 Boezaart in Boezaart (ed) *Child Law in South Africa* 3.

13 Not only does the Bill of Rights apply to children (where applicable), section 28 encompasses children's rights. Flowing from section 28, is the Children's Act 38 of 2005, a piece of legislation aimed at furthering protection of children as set out in the Constitution.

14 See chapter 1, footnote 5, 12 and par 1.2.1 in this regard. Also see chapter 2 par 2.4.2 and footnote 30.

15 Constitution of the Republic of South Africa, 1996.

16 The possible causes of bullying will be discussed in more depth in par 3.5.

17 See par 3.5. Korbin "Children, childhoods, and violence" 2003 *Annual Review of Anthropology* 438 makes the point that children "absorb" aggression and violence, in other words, if a child grows up in violent surroundings, he or she will in turn become a violent and/or aggressive person. Wolke, Woods, Bloomfield *et al* "The association between direct and relational bullying and behaviour problems among primary school children" 2000 *Journal for Child Psychology and Psychiatry* 998 state the following: "A key finding is that behaviour problem ratings of parents for children involved in direct bullying according to individual interviews with the children were increased. All groups involved in direct bullying had significantly higher scores than neutral children on total difficulties, conduct problems, and hyperactivity and lower scores than neutral children for prosocial behaviour." Therefore, it is evident that bullying is in fact a behavioural problem not only among bullies, but also among victims.

18 See par 2.4.2.

19 *Ibid.*

adverse effect on a child's mental and physical health.²⁰ A person's sense of self-worth is tied into his or her "good name" and dignity and once that has been infringed upon, he or she is affected psychologically.²¹ This is where bullying and psychology ties into one another.

The fact that bullying²² is a behavioural problem, which has a psychological effect on the victim, relates bullying directly to psychology.²³ It must be borne in mind that not every instance of bullying has a psychological root.²⁴ However, it is hypothesised that, in most instances, the source is psychological.²⁵ It is thus stated that bullying is a psychologically motivated act with legal consequences.

3.5 Causes of bullying

There is no single set of rules that applies to every child, as each set of circumstances differ. It is acknowledged that, because this study focuses purely on children, it is hard to delimit a single set of rules and factors, as each child is different. However, through research, commonalities have been distilled and it is not too hard to spot a "bully in the making". It has

20 Wolke, Woods, Bloomfield *et al* 2000 *Journal for Child Psychology and Psychiatry* 989-1002; De Wet 2005 *Koers* 705-725.

21 Neethling and Potgieter *Visser Deliktereg* 17 note that a claim for pain and suffering can be instituted in instances where pain, suffering and deformity are caused by an act or omission. This course of action is aimed at rectifying the physical and psychological infringement upon personality rights. Therefore it is evident how important a person's psychological integrity is, as it is protected through law.

22 Wolke, Woods, Bloomfield *et al* 2000 *Journal for Child Psychology and Psychiatry* 990 point out that bullies as well as bullying victims are more susceptible to behavioural problems and when tests were conducted both bullies and victims scored higher on neuroticism and psychoticism scales than children who were not involved in acts of bullying. Further studies found that children involved in bullying behaviour, whether as victim or bully, had much more behavioural problems than those children who were not involved in bullying behaviour.

23 See footnote 5 for a definition of behaviour.

24 See par 3.5.

25 It must be reiterated at this point that this study is not a psychological study, but legal research. As stated earlier, it is imperative to give a psychological overview as well, to place bullying in context. As the basis of this study is holistic, it is necessary to determine the source of the problem in order to provide a proper solution.

been argued that bullying is a direct result of competitiveness.²⁶ More specifically, it has been noted that bullying behaviour can be attributed to frustration due to failure in school.²⁷ It is doubtful that this could be the most significant characteristic of bullying.

For the purposes of this study, it is hypothesised that the causes of bullying behaviour can be broken down into two categories, namely externally influenced causes and those of internal origin.

3.5.1 *Externally influenced causes of bullying behaviour*

Olweus identified four important factors that may lead to bullying behaviour.²⁸ These are:

- i) The emotional attitude of the parents (specifically the primary care-giver) towards the child, particularly in the child's developing years. When the parents' attitude is negative, this increases the risk that the child might become aggressive later in life.²⁹
- ii) The extent to which the primary care-giver has allowed aggressive and negative behaviour in the child is equally important. If the primary care-giver is tolerant without setting boundaries, the child's aggression levels will most likely increase.³⁰
- iii) If parents use aggressive child-rearing methods such as spanking, it could also lead to heightened aggression in a child.³¹

26 Mollo *A Legal Perspective on the Establishment of Anti-Bullying Policies in Public Schools* (MEd dissertation 2009 UP) 23.

27 *Ibid.*

28 Mollo 24. Note that the fourth factor will not be discussed under 3.5.1 but rather 3.5.2 which discusses causes of internal origin.

29 Mollo 24.

30 *Ibid.*

31 *Ibid.*

- iv) A child's temperament also plays a role in how he or she develops. A child with a more volatile temperament is more likely to be aggressive and thus the chances are higher for such a child to ultimately bully. It must be stated however, that this factor has a much smaller effect than the abovementioned causes.³²

Furthermore, the community a child grows up in also plays a major role in his or her aggression levels.³³ If a child grows up in an aggressive environment, he or she will ultimately "absorb" that aggression and become aggressive.³⁴ This would also mean that such a child is more likely to bully than a child living in a peaceful community.

Another external factor is exposure to aggressive and violent television and movies and violent video games.³⁵ Exposure to violence in these ways puts children at risk of developing aggressive and antisocial problems.³⁶ It must be stated, however, that it is not the media in themselves that catalyse violent behaviour in children, but what they express (murder, assault *et cetera* are portrayed as normal in many television shows, movies and games). Therefore, it is evident that violence³⁷ underpins bullying behaviour and is also an external catalyst to possible bullying behaviour.

3.5.2 Causes of bullying behaviour of internal origin

A cause of bullying behaviour of internal origin refers to psychological causes, where the stimuli are not external, but internal. These problems are referred to as conduct problems.³⁸ It can be further distilled down to

32 *Ibid.*

33 Korbin "Children, childhoods, and violence" 2003 *Annual Review of Anthropology* 438.

34 *Ibid.*

35 Nelson and Israel *Abnormal Child and Adolescent Psychology* 199.

36 *Ibid.*

37 See par 2.4.1 for a definition of violence.

38 Mash and Wolfe *Abnormal Child Psychology* 156.

rule-breaking³⁹ and aggressive⁴⁰ behaviour.⁴¹ The former encompasses behaviour that would put a child in conflict with the law, for instance vandalism, drug and alcohol abuse *et cetera*.⁴² This is commonly seen as the aftermath of bullying, if it is not stopped.⁴³ Aggressive behaviour can be depicted as classic bullying behaviour. It is characterised as including fighting, disobedience, defiance, threats and disruptive behaviour at school.⁴⁴

Children who persistently fight (physically) are at a high risk of psychiatric problems later in life.⁴⁵ A few psychological disorders will be briefly discussed.⁴⁶

3.5.2.1 *Oppositional Defiant Disorder*

Children with oppositional defiant disorder (ODD) display recurring stubbornness, hostility and defiance that is unnatural for their age.⁴⁷

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- 39 Nelson and Israel *Abnormal Child and Adolescent Psychology* 195 ascribe the following characteristics to this behavioural problem: “drinks alcohol, lacks guilt, breaks rules, bad friends, lies, cheats, prefers older kids, runs away, sets fires, sex problems, steals at home, swearing, thinks of sex too much, tardy, uses tobacco, truant, uses drugs, vandalism”.
- 40 Nelson and Israel *Abnormal Child and Adolescent Psychology* 195 describe aggressive behaviour as having the following main attributes: “argues a lot, defiant, mean to others, demands attention, destroys own things, destroys others’ things, disobedient at home, disobedient at school, gets in fights, attacks people, screams a lot, explosive, easily frustrated, stubborn, sullen, mood changes, sulks, suspicious, teases a lot, temper, threatens others, loud”.
- 41 Mash and Wolfe *Abnormal Child Psychology* 156. Nelson and Israel 195 make the point that the aforementioned behavioural problems are in fact empirically derived syndromes, falling within a wider variety of syndromes, they have been given more names, wider treatment measures have been employed and as such, efforts have been taken to narrow down the field.
- 42 Mash and Wolfe *Abnormal Child Psychology* 156.
- 43 Mollo 25; Sampson *Bullying in Schools* (2009) 2.
- 44 Mash and Wolfe *Abnormal Child Psychology* 156.
- 45 *Op cit* 157. Bullies commonly fight, whether physically or verbally and are therefore at risk of major psychological damage.
- 46 These disorders might not be the only disorders linked to the cause of bullying in children; however, it must be borne in mind that this study is not a psychological study, but legal in nature. Thus, a brief overview is given of the psychological side of bullying.
- 47 Mash and Wolfe *Abnormal Child Psychology* 158. Nelson and Israel *Abnormal Child and Adolescent Psychology* 193 describe ODD as developmentally extreme.

These children are also antisocial and aggressive.⁴⁸ It is a common yet practical problem specifically pertaining to discipline.⁴⁹ To diagnose ODD, at least four of the following criteria must be present for at least six months:

- i) regular temper tantrums;
- ii) frequent arguments with adults;
- iii) defiant attitude to adults;
- iv) deliberately annoying people;
- v) blaming other people for his or her own faults or misbehaviour;
- vi) becoming annoyed easily;
- vii) regular resentment; and
- viii) vindictiveness.⁵⁰

When looking at these factors or signs, it is not hard to spot a bully or “bully in the making”. Therefore, it is imperative that such a child gets help as soon as possible.⁵¹

48 *Ibid.*

49 Nelson and Israel *Abnormal Child and Adolescent Psychology* 194.

50 Mash and Wolfe *Abnormal Child Psychology* 159; Nelson and Israel *Abnormal Child and Adolescent Psychology* 193.

51 The most important question in this instance, is who is responsible for getting a child help. Section 18 of the Children’s Act 38 of 2005 *inter alia* reads as follows: “18. (1) A person may have either full or specific parental responsibilities and rights in respect of a child. (2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right- (a) to care for the child”. It is thus stated that a person with parental rights and responsibilities (which can include parents, grandparents, family, a guardian or educator) have a legally imposed duty to care for their child or children is enforced by the Children’s Act. When it comes to their attention that their child has a problem, the duty lies with the person (or persons) who have parental rights and responsibilities in respect of that child to have a professional examine the child and to prescribe a course of action. Neglecting this duty would mean that such parents failed to carry out their parental responsibilities in terms of s18(2)(a) of the Children’s Act 38 of 2005. Chapter 4 of the Act deals with the provisions pertaining to the children’s court. Section 45 states that a children’s court may adjudicate matters regarding care, protection, support, instances of maltreatment, neglect, abuse, excluding criminal proceedings against the child; temporary safe care, etc. Furthermore, a children’s court may convict an individual based upon non-compliance with a children’s court order or similar order. Section 150 of the Act *inter alia* states that a child is in need of care and protection when he or she displays uncontrollable behaviour, has been exposed to psychologically detrimental circumstances, has been physically or psychologically neglected or is a victim of maltreatment or abuse. According to section 151, where it is evident that a

3.5.2.2 Conduct Disorder

Conduct disorder (CD) can generally be characterised as repetitive, persistent severe aggression, antisocial acts, inflicting pain, causing harm, infringing upon the rights of others through physical and verbal violence, stealing and vandalism.⁵² Criteria for CD revolve around the repetitive pattern of infringement upon the rights of others over a period of at least three months, with at least one of the following present:

- 1 Aggression to people or animals
 - i) bullying behaviour and frequent threats to others
 - ii) initiation of physical fights
 - iii) use of weapons that can cause serious physical harm
 - iv) history of physical cruelty towards people
 - v) history of forcing a victim into sexual activity.⁵³

- 2 Destruction of property
 - i) deliberate fire-setting with the intention to cause serious damage
 - ii) intentional destruction of property.⁵⁴

- 3 Deceitfulness or theft
 - i) Breaking into someone else's property
 - ii) often deceives people;
 - iii) history of stealing nontrivial items.⁵⁵

child is in need of care and protection, the case must be referred to a social worker for further investigation. If need be, the child must be removed to be temporarily placed in safe care, pending the outcome of the investigation. See also par 5.3.1.1.6 for an overview of parental rights and responsibilities, as well as a description of the word 'care'.

52 Mash and Wolfe *Abnormal Child Psychology* 159.

53 *Op cit* 160; Nelson and Israel *Abnormal Child and Adolescent Psychology* 194.

54 Mash and Wolfe *Abnormal Child Psychology* 159; Nelson and Israel *Abnormal Child and Adolescent Psychology* 194.

55 *Ibid.*

- 4 Serious violation of rules
 - i) Freaking breaking of parental curfew even before age 13;
 - ii) Running away from home on more than one occasion, staying overnight, whilst staying with parents;
 - iii) Frequent absence from school, starting before the age of 13.⁵⁶

When considering the aforementioned criteria, it is evident that a bully could possibly suffer from CD and that it is a far more serious problem than mere competition for marks or a hot-tempered, disobedient child.⁵⁷

3.5.2.3 Conduct disorder and antisocial personality disorder

The question must be asked what happens if the aforementioned behaviour is not addressed.⁵⁸ What happens if it escalates and a child continues to display a pattern of violent behaviour?⁵⁹ It could lead to adult antisocial personality disorder (APD).⁶⁰ It is worrying to note that as many as 40% of children with CD develop APD.⁶¹ APD sufferers could also display signs of psychopathy.⁶²

56 *Ibid.*

57 Barlow and Durand *Abnormal Psychology* 445 note that a child diagnosed with CD will more often than not become a child offender.

58 Barlow and Durand 446 point out that antisocial behaviour becomes a lifelong pattern, because children who display antisocial behaviour continue to display this pattern of behaviour as they grow older. Furthermore, Barlow and Durand note that adults with APD or psychopathy, had CD as children. It has also been found that the misdemeanours committed as a youth, will be committed on a larger scale as an adult.

59 Mash and Wolfe *Abnormal Child Psychology* 160; Nelson and Israel *Abnormal Child and Adolescent Psychology* 191.

60 *Ibid.* APD is described as: “a pervasive pattern of disregard for, and violation of, the rights of others, as well as involvement in illegal behaviours”. This is yet another very important link between the law, bullying and psychology. It is evident that bullying behaviour more often than not has a psychological cause and if it is not treated in time (see footnotes 39 and 40 in this regard), it can escalate into criminal behaviour, which will be dealt with by the criminal justice system. It is reiterated that a holistic approach is needed to prevent bullying from ultimately spinning out of control. See chapter 1 footnote 70.

61 Mash and Wolfe *Abnormal Child Psychology* 160.

62 Mash and Wolfe *Abnormal Child Psychology* 161 define psychopathy as “a pattern of callous, manipulative, deceitful, and remorseless behaviour”.

It has been noted that lack of conscience or psychopathy could occur in children, but little is known about this phenomenon.⁶³ Children who lack behavioural inhibition⁶⁴ are characterised by their attraction to danger and desensitisation to punishment.⁶⁵ Children displaying these behavioural problems will come into trouble with law enforcement more frequently⁶⁶ than those not displaying such behavioural problems.⁶⁷ Callous-unemotional⁶⁸ traits could lead to adult psychopathy.

3.5.2.4 *Treatment and prevention*

It is of crucial importance to treat these disorders the moment they become evident. A very common treatment strategy when dealing with children is parent training.⁶⁹ It provides parents with the necessary knowledge to recognise behavioural patterns early on and teaches them how to deal with these.⁷⁰ There are, however, risks involved, such as

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

66 Barlow and Durand 446 note that genetic influences also play a role. Alcoholism or drug dependency can be hereditary, for example. In the same instance, a genetic influence on APD and criminality is evident. There is a relationship between genes and the environment in which a child grows up. Thus, if a child with a higher propensity towards criminality grows up in a stable home, the tendency towards criminality plummets drastically. This is not a psychological study, but for the sake of completeness, it ought to be mentioned as a possible catalyst to bullying behaviour in children.

67 Mash and Wolfe *Abnormal Child Psychology* 161.

68 *Ibid.*

69 Barlow and Durand 450.

70 *Ibid.* Research has shown that implementing this type of strategy drastically improves the behaviour of children with behavioural problems. It is thus stated that, if parents are obliged to take part in training programmes, it would ultimately lead to a better understanding of a very serious issue and it could help solve bullying. This can be achieved through not only legislation, but also existing restorative justice provisions. One possible solution might be to incorporate parent training into diversion programmes as set out by Chapter 6 of the Child Justice Act 75 of 2008. Section 51 states that the objectives of diversion are *inter alia* to find alternative means by which to deal with a child other than the criminal justice system, to hold a child accountable for his or her actions, to cater for a program suited to the individual child's needs, rehabilitation of the child offender, reconciliation between offender and victim, promotion of emotional well-being, sense of self and dignity of the child offender. If parent training is added to such a programme, parents will understand the situation and their child better, as well as how to deal with any possible future incidents. The National Institute for Crime Prevention and the Rehabilitation of Offenders has a programme called Partners in Parenting. This programme is tailor-made for the parents of child offenders and teaches

families not following through with these programs, therefore rendering them useless.⁷¹

It is worrying to note that the aggressive behaviour of children is gradually increasing.⁷² This means that a child, who behaves aggressively, will continue to do so as an adult, if he or she does not get appropriate help.⁷³ The main emphasis is being placed on schools and preschools, to implement programmes that focus on positive behaviour and skills training to improve social skills.⁷⁴

3.6 The effect of bullying on the victim

It has to be borne in mind that bullying adversely affects not only the bully but also the victim.⁷⁵ Research now shows that bullying victims are

positive parenting skills, conflict management and proper, positive discipline techniques. "Research shows a definite link between parenting styles and techniques and the likelihood of the child engaging in problem behaviour." Information accessed from <http://www.nicro.org.za/interventions/programmes/> on 2012-07-19. See also chapter 6 for a comprehensive overview of restorative justice.

71 Barlow and Durand 450 note that families might not cooperate owing to financial strain, fear of not succeeding, family dysfunction, parental history of antisocial behaviour etc. However, if this process is governed by law and/or policy, it becomes mandatory and it is less likely that people will stop training. It ought to be borne in mind that South Africa is a developing country and expecting the government to fund each and every initiative would lead to budgetary constraints. Therefore, if large corporations such as banks, food chains, universities etc partner up, professional services with regard to training and awareness can be rendered *pro bono*. See also <http://www.idasa.org/media/uploads/outputs/files/Parliament,%20the%20Budget%20and%20Poverty%20in%20South%20Africa%20-%20A%20Shift%20in%20Power.pdf#page=14> accessed on 2012-09-25; as well as <http://0-onlinelibrary.wiley.com/innopac.up.ac.za/doi/10.1111/1468-2397.00183/abstract> accessed on 2012-09-25 for an overview of the socio-economic position in South Africa pertaining to social services and children.

72 Barlow and Durand 450.

73 *Ibid.* Barlow and Durand further state that it is alarming that violence in behaviour escalates over time and children with CD and young adults with APD are more often than not the people who commit assault and homicide.

74 Barlow and Durand 450 are of the view that the results of these programmes, especially early intervention programmes look promising, since when aggression levels plummet, social skills improve and these results are generally maintained. It is also stated that it might be best to work with children, as dealing with adults has proven ineffective.

75 See par 3.5 for the causes of bullying.

more likely to manifest signs of depression than non-victims.⁷⁶ Both bullies and victims, however, are at a higher risk of depression than learners not involved in bullying.⁷⁷ A direct nexus has been drawn between continuous victimisation through bullying, depression, suicidal ideation and suicide; which also places a bullying victim at a much higher risk of depression and related mental disorders than non-victims.⁷⁸ In order to obtain a better understanding of the devastating effects of bullying, it is necessary to conceptualise these terms further.

3.6.1 Depression

Depression encompasses a myriad of terms and symptoms.⁷⁹ For the purposes of this study, the emphasis will be on the general concept of depression, as the aim of this chapter is a mere psychological overview rather than an in-depth analysis. Quite a few syndromes encapsulating depressive symptoms also include characteristics of anxiety and withdrawal.⁸⁰ Statistics show that one in four young people experience depression somewhere between childhood and adolescence.⁸¹

The long-term effects of depression are severe.⁸² However, the short- and midterm effects of depression range from a definite drop in

76 Brunstein Klomek, Marrocco *et al* "Bullying, Depression, and Suicidality in Adolescents" 2007 *American Academy of Child and Adolescent Psychiatry* 40-49.

77 *Loc cit.* The above-mentioned authors also state that it is worrying to note that bullying victims are prone to show much higher levels of suicidal ideation than non-victims and victims of bullying are more likely to attempt suicide than non-victims.

78 *Op cit* 47. Bullies, however, are also at higher risk of depression, suicidal ideation and suicide than non-victims and learners not involved in bullying.

79 Mash and Wolfe 235, classify depression into three classes, as a symptom, where a person feels sad or miserable; as a syndrome, where it is much more than a mere mood and encompasses various symptoms; a disorder, which comes in two types: major depressive disorder which is most common, and dysthymic disorder, less common and less severe.

80 Nelson and Israel 159. Mash and Wolfe 238 also point out that some disorders co-occur with depression, such as anxiety disorders (general or specific) and specific phobias. (See par 1.1 footnote 6 for example.) See also Barlow and Durand 226.

81 Nelson and Israel 161.

82 Mash and Wolfe 238 state that children and adolescents who have depression are at greater risk of becoming child offenders, dropping out of school and

intellectual and academic performance to the ultimate destruction of self-esteem and social behavioural problems.⁸³ Depression is also related to a few associated characteristics and problems. These will be discussed briefly below.

3.6.1.1 *Intellectual and academic functioning*

Children with depression perform comparatively more poorly than others in school.⁸⁴ Teachers rate these children as lower achievers who score lower grades than other learners.⁸⁵ Other characteristics *inter alia* include lack of concentration and thinking ability, slower movement, agitation, fatigue, insomnia, failing grades, truancy from school, failing to complete homework and refusal to go to school.⁸⁶

3.6.1.2 *Cognitive disturbances*

Children who suffer from depression also experience distorted thinking; this would typically encapsulate feelings of worthlessness, negative beliefs and attributes of failure.⁸⁷ One of the biggest problems is the fact that people believe it can be solved by simply telling such a child to lighten up, when the problem is much more serious than a mere bad mood.⁸⁸

being unemployed later. The risk of substance abuse, tobacco use, suicidal ideation, poor work ethic, marital problems etc is great. See also par 3.2, 3.3 and 3.4 regarding the link between the law, bullying and psychology. It is imperative that a multi-disciplinary approach be sought in order to address bullying properly, to ensure that children do not end up in the criminal justice system.

83 Mash and Wolfe *Abnormal Child Psychology* 242.

84 *Op cit* 243. One of the most important rights infringed upon, coming into play here, is the right to education, protected by section 29 of the Constitution. The right to education is of crucial importance since it lays the foundation for a child's future and when this right is infringed upon in any way that child's future is in jeopardy. Bullying is a phenomenon that places a child's future at risk, because of the severity of the effects of bullying and the brutal nature of some of the bullying incidents, physically as well as emotionally. See par 5.2.7.

85 Mash and Wolfe *Abnormal Child Psychology* 243.

86 *Ibid.*

87 *Ibid.*

88 *Ibid.*

3.6.1.3 *Negative self-esteem*

Negative and low self-esteem are key characteristics associated with depression in children and adolescents.⁸⁹ All adolescents and children with depression experience negative self-esteem issues.⁹⁰ Peer approval plays an important role in building a positive self-image; incompetence in these areas may lead to a higher risk of depression.⁹¹

3.6.1.4 *Social and peer problems*

Children and adolescents diagnosed with depression often have difficult overall relationships and few friends and may feel lonely and isolated.⁹² They feel that others do not like them and lack proper social skills.⁹³ Children and adolescents who do not have proper friendships are less than likely to recover from depression.⁹⁴

3.6.1.5 *Family problems*

It is evident that youths who suffer from depression have strenuous relationships with their families.⁹⁵ These children and adolescents feel isolated but choose to be alone rather than with their families.⁹⁶ This is not a lack of social skill, but rather a desire to avoid conflict.⁹⁷

3.6.2 *The causes of depression in young people*

It has already been established that there is a definite relationship between bullying and depression.⁹⁸ It is submitted that there are more

89 *Op cit* 244.

90 *Ibid.*

91 *Ibid.*

92 *Ibid.*

93 *Ibid.*

94 *Op cit* 245.

95 *Ibid.*

96 *Ibid.*

97 *Ibid.*

98 See par 3.6.

than one cause for adolescent depression.⁹⁹ However, one possible cause and catalyst is worthy of further exploration, namely peer relations.¹⁰⁰ Bullying is a relational, behavioural problem between peers; therefore a logical conclusion would be that peer relations and bullying are linked. There is a relationship between peer status and maladjustment, especially regarding depression.¹⁰¹ Peer relation difficulties can be seen as a double problem, as they may contribute to causing depression as well as being a consequence thereof.¹⁰²

Depression may also play a contributory role with regards to relational problems.¹⁰³ Depression distorts self-perception and young people with depression see themselves as unworthy and less competent and have negative overall views of themselves.¹⁰⁴ The negative perceptions these young people carry around are a catalyst to social exclusion, as others might become annoyed by them therefore rejecting them.¹⁰⁵ When a learner is subjected to repeated bullying, it is likely that he or she may suffer from depression as a result of the bullying. This in turn isolates the child and has a negative overall effect on his or her life.¹⁰⁶

3.6.3 *Suicide and suicidal ideation*

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- 99 Nelson and Israel *Abnormal Child and Adolescent Psychology* 164-169 note that the following factors play a definite role in the onset of adolescent and child depression: biological influences such as genetics, brain functioning and neurochemistry; social-psychological influences such as separation and loss, cognitive behaviour; parental depression. Mash and Wolfe *Abnormal Child Psychology* 250 state that it is a culmination of factors that could cause a vulnerable predisposition towards depression but further state that it is possible for a single traumatic event to lead to depression. Depression is also triggered by interpersonal stress and personal loss. It must be borne in mind that a “single traumatic event” will differ from child to child and in this instance, a single traumatic event refers to bullying. When regarding “interpersonal stress”, it is thus stated that bullying can and does cause interpersonal stress.
- 100 Nelson and Israel *Abnormal Child and Adolescent Psychology* 171 point out that peer relation difficulties do in fact contribute to the onset and maintenance of depression in adolescents.
- 101 Nelson and Israel *Abnormal Child and Adolescent Psychology* 172.
- 102 *Ibid.*
- 103 *Ibid.*
- 104 *Ibid.* See also par 3.6.1.2.
- 105 Nelson and Israel *Abnormal Child and Adolescent Psychology* 172.
- 106 Constitutional rights infringed upon when a child is bullied are, *inter alia*: equality (section 9), human dignity (section 10), freedom and security of the person (section 12), various rights of the child (section 28) and education (section 29).

Studies show that bullying victims show higher suicidal ideation than non-victims.¹⁰⁷ Furthermore, actual suicide attempts among bullying victims are much higher than among those not involved in bullying.¹⁰⁸ However, not only victims, but also bullies, are susceptible to depression, suicidal tendencies and suicide attempts.¹⁰⁹ It is also evident that there is a link between bullying and depression among adolescents and children.¹¹⁰

One third of the youths who think about suicide actually attempt it.¹¹¹ Actual suicide attempts are more common among children and adolescents who suffer from depression.¹¹² Furthermore, it is interesting to note that there is a gender difference regarding suicidal ideation, suicide attempts and completed suicides.¹¹³

107 Brunstein Klomek, Marrocco *et al* "Bullying, Depression, and Suicidality in Adolescents" 2007 *American Academy of Child and Adolescent Psychiatry* 41.

108 *Ibid.*

109 *Ibid.* See also par 3.6.

110 See par 3.5.

111 Mash and Wolfe *Abnormal Child Psychology* 245. Barlow and Durand 250 warn that the first step to suicide is to start thinking about it. A research study found that between 16% and 30% of adolescents who thought about suicide actually attempted it. "Thought" refers to serious and in-depth contemplation of the act of suicide.

112 Mash and Wolfe *Abnormal Child Psychology* 246.

113 *Ibid.* Female adolescents show a higher tendency towards suicidal ideation than adolescent males and more often attempt suicide than their male counterparts. Brunstein Klomek, Sourander *et al* "Childhood Bullying Behaviors as a Risk for Suicide Attempts and Completed Suicides: a Population-Based Birth Cohort Study" 2009 *American Academy of Child and Adolescent Psychiatry* 254-261 corroborate this finding and add that the incidence of suicidal ideation and suicide attempts among boys drop later on, whereas this is not necessarily the case with girls. A possible reason for this is a difference in coping strategies, but also the fact that girls might be more vulnerable to stressful life events. It is thus stated that boys are more likely to be subjected to direct bullying (physical fighting, for example pushing, shoving, kicking, punching etc), whereas girls are more susceptible to be bullied indirectly (name-calling, social exclusion, spreading of rumours etc). Even though direct bullying does have a psychological impact, the psychological impact of having one's self-worth infringed upon is far more devastating. See also <http://www.youtube.com/watch?v=KRxfTyNa24A> accessed on 2012-10-16 with regard to the recent suicide (2012-10-10) of Amanda Todd, an American youth following severe bullying, specifically including name-calling and spreading of malicious rumours.

Suicide¹¹⁴ is the third leading cause of death among young people in the United States of America and a leading cause of psychopathy among youths, globally.¹¹⁵ It has also been established that bullying cannot be said to be the single cause of suicide; however, little research has been done in this field and it remains a grey area.¹¹⁶ It is thus stated that, even though many risk factors ought to be taken into account when assessing suicidal ideation¹¹⁷ it remains undeniable that bullying is a major catalyst in suicidal ideation, suicide attempts and completed suicides of victims and or bullies.¹¹⁸

3.7 South African schools

The South African Schools Act 84 of 1996 lays the foundation for basic education in South Africa.¹¹⁹ Section 8 of the Schools Act prescribes a basic outline for a code of conduct for learners as to positive behaviour and conduct as well as how to deal with misbehaviour.¹²⁰ In general,

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- 114 See par 2.4.5.1 for a definition of suicide. See also chapter 2 footnotes 32 and 36 in this regard. The legal nature of suicide and possible criminal liability will be discussed in chapter 5.
- 115 Kim "Bullying and Suicide. A review" *2008 International Journal of Adolescent Medicine and Health* 133-154.
- 116 *Op cit* 151.
- 117 See chapter 3 footnote 113.
- 118 Nelson and Israel *Abnormal Child and Adolescent Psychology* 185 note that bullying, school stress, social relationships, availability of firearms etc greatly contribute to a heightened risk of suicidal behaviour.
- 119 The Schools Act is not the only piece of legislation governing education in South Africa. Other legislation of importance is *inter alia* the Education Laws Amendment Act 31 of 2007, National Education Policy Act 27 of 1996, the Employment of Educators Act 76 of 1998, as well as government notices such as Government Notice 776 of 1998.
- 120 See also par 2.4.11. GG 18900 of 1998-05-15 lays down guidelines for the drafting of a code of conduct for learners in schools. Joubert "School Discipline" in Boezaart (ed) *Child Law in South Africa* (2009) 502-520 denotes three types of discipline: "(1) Preventive discipline: This type of discipline is concerned with basic rights and clear rules and consequences. (2) Corrective discipline: This refers to educator action that is carried out to correct disruptive, anti-social or deviant behaviour. (3) Supportive discipline: This type of discipline is concerned with ensuring that 'correction' is received fairly and that positive working relationships are established with disciplined learners." Discipline (as enforced by a code of conduct for learners – see par 5.3.2.1.1, 5.3.2.1.3 and 5.3.3.2) is a means by which to correct inappropriate behaviour. Corporal punishment as a means of punitive punishment is no longer legal in South Africa (see section 10 of the South African Schools Act 84 of 1996) and therefore, other, positive and more creative means of enforcing discipline must be sought.

schools depend upon their code of conduct to address bullying even though bullying is not explicitly mentioned in most instances.¹²¹ Even though these legislative measures have been taken, schools are by no means safe.¹²² Bullying behaviour occurs on school grounds and often endangers the lives of learners. South African schools have become the centre of criminal behaviour among children, with violence taking on *inter alia* the following forms:

- i) stabbings, resulting in death;¹²³
- ii) assault leading to hospitalisation;¹²⁴
- iii) family stress, drug and alcohol abuse and child abuse culminating in behaviour that leads to a learner going on the rampage, killing a teacher;¹²⁵ and
- iv) racial tension flaring up among not only black and white, but other cultures as well.¹²⁶

121 See chapter 2 footnote 64.

122 Van Jaarsveld "Violence in schools: A security problem?" 2008 *Acta Criminologica* 175-188 states that schools have become "arenas of violence" and have become synonymous with terms such as "dangerous" and "war zone". Steyn and Roux "Aggression and psychological well-being of adolescent tae kwon do participants in comparison with hockey participants and a non-sport group" 2009 *African Journal for Physical, Health Education, Recreation and Dance* 32-43 report that South African schools have become one of the most dangerous places for young people to be, as violent acts committed range from assault to firearm-related injuries. See also chapter 1 footnote 12.

123 Smit "School violence: Tough problems demand smart answers" 2007 *South African Professional Society on the Abuse of Children* 53-59.

124 *Ibid.*

125 *Ibid.*

126 *Ibid.* The consequences of the escalation of school violence are devastating. Smit 54 notes that if the use of drugs or alcohol and violence are allowed to become accepted conduct, the following is to be expected: gang-related violence in schools will escalate, school violence will increase as the age of child offenders decreases, more learners will be at risk of unstable and violent behaviour, gang involvement in the selling of drugs and weapons in schools will increase, as will the exploitation of learners by drug sellers and there will be an escalation in violence, intimidation and bullying, as well as an increase in incidents of violence at school. It must be pointed out that ignoring a problem of such magnitude is not only ignorant, but will lead to greater damage in the long run. Section 29 of the Constitution clearly states that everyone has the right to basic education (see footnote 84), whereas section 24 regulates matters pertaining to the environment. Disregarding the fact that the general school environment has become dangerous transgresses a learner's fundamental rights. Joubert in Boezaart (ed) *Child Law in South Africa* (2009) 502-520 states that schools have a legal duty to provide learners with a safe, secure environment, protecting them against harm that might adversely affect

It must be borne in mind that certain acts not only transgress the provisions of a school's code of conduct, they are also criminal and punishable by law.¹²⁷ These acts include:

- i) possession of a dangerous weapon;¹²⁸
- ii) assault;¹²⁹
- iii) theft;¹³⁰
- iv) breaking and entering and vandalism;¹³¹
- v) rape;¹³² and
- vi) murder.¹³³

Therefore, it is of crucial importance to address this issue adequately. However, in order to do so, the cause ought to be established. A few aspects will be discussed below.

3.7.1 *Disruptive behaviour*

Some educators argue that, with the abolishment of corporal punishment, they have no means by which to discipline learners.¹³⁴ It has also been noted that because educators are no longer allowed to administer corporal punishment, they feel powerless and see no other means by which to rectify misconduct.¹³⁵ The biggest challenge facing

their physical and psychological well being, or infringe upon any basic human rights.

127 Joubert in Boezaart (ed) *Child Law in South Africa* 519.

128 *Ibid.*

129 *Ibid.*

130 *Op cit* 520.

131 *Ibid.*

132 *Ibid.*

133 *Ibid.* Such criminal acts perpetrated by learners could constitute criminal as well as civil action. See chapter 5.

134 Naong "The impact of the abolition of corporal punishment on teacher morale: 1994-2004" 2007 *South African Journal of Education* 283-300.

135 *Supra.* Other means by which to establish and enforce discipline require time, skill and patience, something that many educators lack. It is stated that corporal punishment is an inhumane and degrading form of punishment and is forbidden by section 12(1)(e) of the Constitution which stipulates that every person has freedom and security of the person and has the right to be free of any form of inhumane, degrading punishment. In *S v Makwanyane and*

educators is dealing with disruptive¹³⁶ learners within the new legal structure where corporal punishment is forbidden and health and well-being are promoted.¹³⁷

Surface behaviour¹³⁸ is generally perceived as being harmless as it is, in general, not a result of a learner's psychological issues, but rather developmental behaviour of children.¹³⁹ On the other hand, more serious disruptive behaviour gives rise to bigger challenges, as it is much harder to deal with.¹⁴⁰ Serious disruptive behaviour includes fighting and physical violence.¹⁴¹ In essence, this constitutes a threat to the safety of not only learners, but educators as well.¹⁴² Another very

Another 1995 (3) SA 391 CC par 26, the question before the court pertained to the constitutionality of capital punishment. The court *inter alia* ruled, per Chaskalson at par 26 that death is a cruel and inhuman punishment as it "involves, by its very nature, a denial of the executed person's humanity". Further, in par 88 it was contended that "a punishment may be degrading simply by reason of its enormity". Even though capital and corporal punishment are two dissimilar forms of punishment, the common factor lies in the fact that both these instances strip a person of his or her dignity. See also par 5.3.2.1.3 as well as http://www.unicef.org/southafrica/media_10381.html for UNICEF's view on corporal punishment.

136 Marais and Meier "Disruptive behaviour in the Foundation Phase of schooling" 2010 *South African Journal of Education* 41-57 define disruptive behaviour as a general result of disciplinary problems at school, which in turn adversely affects the rights and safety of fellow learners in the learning environment. Four types of disruptive behaviour have been identified, namely: behaviour interfering with teaching in general, conduct which interferes with other learners' right to education, behaviour that is psychologically unstable or unsafe, conduct that leads to destruction of property.

137 Naong 2007 *South African Journal of Education* 284 notes that in general, educators are inexperienced at implementing new measures of enforcing discipline and fostering positive social behaviour in learners. It is thus argued that skills training and development in this regard would not only help educators to understand disruptive behaviour better (see par 3.5), but it might also drastically improve learner conduct.

138 Marais and Meier 2010 *South African Journal of Education* 44 describe surface behaviour as "common" disruptive behaviour in class, passing of notes, loud talking, moving around etc.

139 Marais and Meier 2010 *South African Journal of Education* 44.

140 *Ibid.* See par 3.4.2.2 for the characteristics of CD.

141 Marais and Meier 2010 *South African Journal of Education* 44.

142 Naong 2007 *South African Journal of Education* 294-295 collected the following opinions of educators with regard to violence and discipline in schools: "...learners do not respect teachers any more, how can they perform?' 'Parents have shifted their children's lack of discipline to schools, and yet they are not co-operating with us'. 'School children are druggies; they abuse all sorts of drugs, especially cigarettes and marijuana – that is why they are so disrespectful'. 'Children bring knives and drugs to school, and their parents know about these things and want us to solve these problems for them'. 'Discipline begins at home, and yet parents are not willing to help us,

serious form of disruptive behaviour is bullying, which has severe negative effects on the learning experience of learners.¹⁴³

3.7.2 Causes of disruptive behaviour

Various risk factors are involved when determining what precisely causes disruptive behaviour.¹⁴⁴ These factors are dependent upon internally motivated factors and factors of external origin.¹⁴⁵ The societal role¹⁴⁶ as a whole is very important in this regard.¹⁴⁷ Interpersonal relationships and situations regarding family, society and community play a major role in awareness, vulnerability and susceptibility to violence.¹⁴⁸

Disruptive behaviour as displayed by a learner ought to be viewed in the context of the learner's life, in order to understand properly what

they only know how to blame when we discipline their children'. 'What is happening overseas, with children shooting one another, is the result of the abolition of corporeal punishment, and South Africa is going that route, I am telling you; when these things start happening, I don't want to be here'. '...children's rights are obviously far more important than teachers' rights, so what must we do – you just get in class, teach those who want to learn, and get the ... out when your time is over'."

143 *Ibid.* See par 2.4.2 for a description of bullying and par 3.6 for the effects of bullying on the victim.

144 Marais and Meier 2010 *South African Journal of Education* 44. Naong 2007 *South African Journal of Education* 288 states that behaviour is influenced by *inter alia* the environment; physiological, physical, psychological and biological factors such as drugs, alcohol, illness, nutrition, temperament, genetics, physical disabilities and medication; present day living: conditions at home and in the community, school factors, the general mood in the classroom and instructional tools.

145 *Ibid.* See par 3.5.1 for externally influenced causes of bullying behaviour and par 3.4.2 for causes of bullying of internal origin.

146 Marais and Meier 2010 *South African Journal of Education* 48 point out that the moral deterioration of society, racial and interracial conflict, socio-economic shortcomings, readily available firearms, poor law enforcement and unemployment could lead to disruptive behaviour in learners.

147 See footnote 17 – children "absorb" aggressive surroundings.

148 Marais and Meier 2010 *South African Journal of Education* 47 further point out that dysfunctional families also contribute to possible disruptive behaviour. When parents act and react violently and aggressively to educators and school staff, their children display the same violence and aggression, as well as antisocial behaviour. When a child is exposed to violence and aggression at home, it will imprint upon the mind of the child. Lack of parental involvement is another huge contributory factor to disruptive conduct. See also par 3.4.

motivates and causes this type of behaviour.¹⁴⁹ A study in the United Kingdom found that in response to a much more informal general environment (whether at home, socially or elsewhere), learners find the concept of appropriate behaviour hard to understand in terms of addressing peers and educators.¹⁵⁰ There is a universal desire among educators to make learning fun and informal; however, this may lead to problems with enforcement of discipline and teaching self-discipline.¹⁵¹ When the general school climate is negative, educators act unprofessionally, school grounds are ill maintained and there is a heightened inclination towards disruptive behaviour.¹⁵²

3.7.3 *Theoretical exploration of violence in South African schools*

Many empirical studies have been done to pinpoint exactly what is wrong with the schooling system in South Africa. However, for the sake of completeness, the position ought to be highlighted from a philosophical point of view as well. There are a number abstract theories regarding the decline in the quality of education in South Africa and in order to provide a sustainable solution, theory and practice must correspond.

Everyone has an inherent right to dignity.¹⁵³ The importance of this right is underpinned in section 1 of the Constitution, which states that dignity is, *inter alia*, one of South Africa's founding values.¹⁵⁴ In South African jurisprudence, the right to life, equality and freedom and security of the

149 Naong 2007 *South African Journal of Education* 290.

150 *Ibid.*

151 *Ibid.* Naong also noted that the state of the South African education system is not yet at the same point of deterioration as in the United Kingdom. However, if proper measures are not taken, it might soon happen.

152 Marais and Meier 2010 *South African Journal of Education* 48.

153 Section 10 of the Constitution.

154 Reyneke "Dignity: The missing building block in South African schools?" 2010 *Journal for Juridical Science* 71-105 further notes that the concept of dignity is hard to define and that it will never cease to evolve. Dignity is not only a constitutionally enshrined value, but also a right. See also chapter 2 footnote 65 and chapter 5 par 5.2.2.

person are directly related to human dignity.¹⁵⁵ According to Dworkin, everyone is of equal value and should therefore be treated as such.¹⁵⁶ Dignity also serves as a means by which to demarcate areas between personal and social demands.¹⁵⁷ Dignity is often at stake when the bodily and psychological integrity of a human person has been infringed upon.¹⁵⁸

There is a general misconception that children¹⁵⁹ have only rights and no obligations under the Constitution. However, this presumption is unfounded.¹⁶⁰ Since children are classified as a vulnerable group, they need extra protection.¹⁶¹ This does not mean that their intrinsic worth is higher than that of educators. It is, however, necessary to protect children against harm.¹⁶² Violence in schools is a reality and is commonly instigated by learners.¹⁶³ The impact violence has on all of the people involved is severely negative, as it also has a negative impact on their dignity.¹⁶⁴ Even though educators should cultivate young minds,

155 Reyneke 2010 *Journal for Juridical Science* 75 asserts that human dignity underpins most, if not all, human rights. See also Malherbe “The impact of constitutional rights on education” in Boezaart (ed) *Child Law in South Africa* (2009) 420-455.

156 *Loc cit.* Reyneke further states that marginalised groups whose dignity is infringed upon regularly include victims of sexual harassment, violence and bullying.

157 Reyneke 2010 *Journal for Judicial Science* 80 goes further by giving an example of a symbiotic educator/learner relationship: a learner ought to have the freedom (within bounds) to realise his or her full potential, whereas the educator has the right to be treated humanely. See footnote 160 below.

158 *Ibid.* An example here would be assault, where one learner viciously beats another. Not only has the physical integrity of the learner been damaged (section 12 of the Constitution), but damage is also done in terms of his/her dignity (reputation, good name, self-worth, etc). Dignity, in this instance, is used to “enrich” other rights with the idea of protecting human worth.

159 Any person under the age of 18 years of age in terms of section 28 of the Constitution. See par 2.4.7 for a definition of the term “child”.

160 Reyneke 2010 *Journal for Judicial Science* 89 notes that even children are obligated to protect and respect the rights and dignity of others. Section 16 of the Children’s Act 38 of 2005 holds – “Every child has responsibilities appropriate to the child’s age and ability towards his or her family, community and the state.” The African Charter on the Rights and Welfare of the Child states in article 31 that every child has responsibilities to his family, society, the State and any other legally recognised communities. See footnote 157 above.

161 Reyneke 2010 *Journal for Judicial Science* 89.

162 *Ibid.* Section 28 of the Constitution on the rights of the child.

163 Reyneke 2010 *Journal for Judicial Science* 89.

164 *Loc cit.* The impact of violence in schools can be seen in a learner’s performance, as concentration problems, poor overall performance, high

it is the duty of parents to instil these values (such as respect for dignity¹⁶⁵) in their children.¹⁶⁶ Sadly though, the general consensus is, that parents are uncooperative, unresponsive and absent in terms of taking an active role in the education of their children.¹⁶⁷

It has been established that little progress has been made to revive dignity in the South African schooling system.¹⁶⁸ In order to restore dignity fully within the educational system of South Africa, a total change in perspective and attitude pertaining to values is needed; it will also be a task undertaken by all stakeholders.¹⁶⁹ Education as it currently stands is too egocentric and therefore it will fail as a whole,¹⁷⁰ as neither respect for dignity nor the spirit of *ubuntu* is being pursued.

3.8 Bullying in context

Bullying¹⁷¹ is not anger or psychological problems that develop overnight. It is evident that many factors play a role in cultivating an eventual bully.¹⁷² However, one major factor to take into consideration is the environment.¹⁷³ Bullying takes place at school, an environment that is already dangerous.¹⁷⁴ A child absorbs his or her surroundings¹⁷⁵ and

dropout levels etc start to occur. Being subjected to violence not only affects a victim's rights to bodily integrity, but it also adversely affects his/her right to dignity. The reason being that a perpetrator of violence often sees his/her victim as no more than an object against which to vent anger and frustration.

165 See par 1.1 and footnote 4 (chapter 1) for a definition of *ubuntu*.

166 Reyneke 2010 *Journal for Judicial Science* 96 points out that parents can instil these values and foster them, by setting an example – for instance by not aggressively engaging with educators and other authority figures or acting violently towards them. Showing respect is very important.

167 Reyneke 2010 *Journal for Judicial Science* 96. People talk about leaving our children a better world, but the focus should be on leaving better children for our world.

168 *Op cit* 99.

169 *Ibid*.

170 *Ibid*.

171 See par 2.4.2 for a description of bullying.

172 See par 3.5 for the causes of bullying and par 3.6 for the effects of bullying.

173 Smit "The bully/victim problem in schools" 2003 *Acta Criminologica* 81-88 states that three-quarters of all bullying incidents take place at school, in classrooms or on playgrounds or school grounds.

174 See par 3.7 for specific criminal behaviour perpetrated within school grounds.

175 Korbin "Children, childhoods, and violence" 2003 *Annual Review of Anthropology* 431-446.

a potentially volatile situation is worsened by the mere fact that it takes place in a setting where violence is an accepted practice.¹⁷⁶ Heightened violence and exposure to aggressive behaviour may lead to bullying behaviour spinning out of control. This, in turn, could lead to “bullycide”¹⁷⁷ becoming synonymous with homicide, whereas the conventional definition for bullycide combined only bullying and suicide.

3.9 Conclusion

Modern child law is holistic¹⁷⁸ in nature.¹⁷⁹ The important relationship that exists between child law and psychology cannot be overlooked, since the transgression usually has a psychological effect on the victim, especially if that victim is a child.¹⁸⁰ Bullying is a behavioural problem, which ties it to psychology. Several causes for bullying have been identified; *inter alia* competition for marks and frustration. Upon closer inspection, two categories emerge: externally influenced causes such as parental attitude, parental allowance of negative behaviour, negative child rearing methods, *et cetera*;¹⁸¹ and causes of internal origin such as ODD, CD and APD.¹⁸² It is worrying to note that a person with APD could develop psychopathy.¹⁸³

In order to prevent possible tragedy, immediate treatment must be sought when a problem comes to light.¹⁸⁴ Aggressive behaviour in children continues throughout adulthood and worse, there is an escalation in the severity of their actions.¹⁸⁵ Bullying has an adverse

176 See par 3.7 for a list of violent acts commonly committed by learners. See also footnotes 158 and 164.

177 See par 2.4.4.

178 See 1.4.3 and footnote 36 in chapter 1 above for a definition of holistic.

179 Boezaart in Boezaart (ed) *Child Law in South Africa* (2009) 4.

180 See footnote 10.

181 See par 3.5 for the causes of bullying.

182 *Ibid.* These factors all culminate to bring bullying into existence. It is reiterated that a child of sound, healthy mind will not bully.

183 See par 3.5.2.3.

184 See par 3.6 and footnote 51.

185 Burchell *Principles of Criminal Law* 179 make the following statement regarding free will, linking it to a person’s actions: “Modern western philosophy derives the notion of individual responsibility from the doctrine of free will. This holds

effect on the victim, to such an extent that bullying victims could, as a result of repeated bullying, develop depression.¹⁸⁶ This could potentially lead to suicidal ideation, suicide attempts and even suicides.¹⁸⁷

Schools have become centres of aggression and violence, even with legislative measures in place.¹⁸⁸ Lashing out violently has become acceptable social conduct and it affects the rights of all involved adversely.¹⁸⁹ Lack of discipline and proper enforcement thereof leads to disruptive behaviour, which could potentially (and does on occasion) turn violent.¹⁹⁰ Society¹⁹¹ plays a big role in fostering disruptive behaviour, since there is a symbiotic relationship between community, family and school, which lays a child's foundation.

that all humans are born with the ability freely to choose between different courses of action. Having this freedom the individual can justifiably be held responsible for the consequences of his or her chosen actions ... It follows from this that persons will be held criminally liable only if their actions are determined by their free will." Bullies ought to be held accountable for their actions, in such a manner, that the behaviour causing them to bully stops. Boezaart in Boezaart (ed) *Child Law in South Africa* (2009) 36 notes that an *infans* is regarded as *doli et culpae incapax* and thus cannot be held liable based on fault within the law of delict. A rebuttable presumption exists regarding the accountability of a minor between age seven and 12 for girls and 14 for boys, pertaining to unlawful acts. Robinson "Children's rights in the South African Constitution" 2009 *Potchefstroom Electronic Law Journal* 5-25 makes the point that there is a differentiation in pubescent age for boys and girls because the two sexes develop differently, physiologically. This differentiation might not be constitutional when regarding age in the light of private law accountability of minors (see Robinson footnote 25). For purposes of private law, there should be one age for both sexes - 14. Lowering the age of puberty by two years for girls, is discriminatory and the margin for error is too big, since children develop differently and some children (irrespective of sex) develop more slowly than others. A consequential enforcement of one pubescent age would be beneficial in terms of eliminating confusion and other technicalities. In terms of section 7 of the Child Justice Act 75 of 2008, a child below the age of 10 has no criminal capacity. A child between the ages of 10 and 14 is presumed to lack criminal capacity, unless the state can prove otherwise. Gallinetti "Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime" in Boezaart (ed) *Child Law in South Africa* (2009) 650 states that children 14 years of age and older have full criminal capacity. If proper steps are not taken, they will have to take criminal responsibility as adults for crimes they committed. Also note her justified criticism on the gender-based differentiation amounting to discrimination. See also par 5.4.1.1 for a discussion of the Child Justice Act in this regard.

186 See par 3.6 and 3.6.1.

187 See par 3.6.3 and footnote 114.

188 See footnote 122.

189 See footnote 126.

190 See par 3.7.1 and 3.7.2.

191 Society, in this context, must be seen as an umbrella term for parents (family), community and school.

From a more philosophical point of view, the general lack of respect for people and their dignity has brought the education system to where it currently stands.¹⁹² Dignity is not only a value, underpinned by section 1 of the Constitution, but also a right, as stipulated by section 10 of the Constitution.¹⁹³ When other rights, associated with the human person¹⁹⁴ are infringed upon, dignity is an accompanying right that courts take into account.

It is imperative to note that children, like adults, have rights as well as obligations in terms of the Constitution. One of the obligations resting upon all is the duty to respect the dignity of others.¹⁹⁵ Bullying, a form of serious disruptive behaviour, takes place at school.¹⁹⁶ This gives rise to a potentially explosive situation, as the milieu is one filled with violence and aggression. The escalations of bullying incidents seem imminent. The South African education system will face dark days when bullycide becomes synonymous with homicide.¹⁹⁷

192 See par 3.7.3.

193 *Ibid.*

194 These rights would typically include all personal security rights, see footnote 158.

195 See par 3.7.3.

196 See chapter 3 footnote 136.

197 See par 2.4.4.

Chapter 4: The key role players in a bullying incident

4.1 Introduction

It is important to know exactly what bullying is.¹ However, mere knowledge of what bullying entails is not sufficient ultimately to eradicate it altogether. Bullying has been placed into context, not only in terms of the milieu in which it takes place, but also internal and external elements contributing to bullying behaviour.² This chapter uses the foundation laid by the previous chapters to look at the dynamic of a bullying incident by dissecting it. The role players will be identified and discussed, as well as bystander behaviour, a possible catalyst to bullying behaviour. This, in conjunction with cause and effect, as well as environmental factors, will lay the foundation for legislative solutions to be proposed later in the study.

4.2 The importance of dissecting a bullying incident

Irrespective of personal external and internal factors,³ other environmental causes contribute to bullying as a whole.⁴ It has already been established in chapter 3 that schools are by no means safe.⁵ It is also evident that children absorb their surroundings and will therefore become what they hear and see, thus, when left in violent surroundings, the chance of that child becoming aggressive and violent increases.⁶ However, it is also imperative to know what triggers a bullying incident, what causes it to escalate and who takes part in bullying behaviour. By establishing what these variables are, they can be eliminated and

1 In order to address a problem, it is important to know exactly what the problem entails, to provide proper, sustainable solutions. See par 2.4.2.

2 See chapter 3 for the causes and effects of bullying, as well as what a modern South African school looks like.

3 See par 3.4 for the causes of bullying. These causes refer to factors that motivate a child to become a bully.

4 Environmental factors in this regard ought to be understood as external factors contributing to the bullying incident rather than to the psychological psyche of the individual learner.

5 See par 3.7.

6 See chapter 3, footnote 17.

consequently, bullying can ultimately be eradicated in such a manner that *ubuntu*⁷ can be achieved as the moral standard according to which fundamental rights are respected.

4.3 Role players in bullying

Bullying is much more complex than two learners fighting, or one learner hitting another.⁸ Contrary to popular belief, research shows that bullying does not necessarily transpire between two people alone. More people can be, and often are, involved.⁹ It is worrying to note that 60.2% of bullying incidents are initiated by more than one learner.¹⁰ The role players in a bullying incident, whether active or passive, will be briefly discussed below.

4.3.1 Bully

A bully is commonly defined as - “a person who deliberately intimidates or persecutes those who are weaker”.¹¹ In a bullying incident, a bully can be seen as the instigator, someone who takes the lead role and who actively takes part in bullying the victim or victims.¹² The motivation that drives a child to bully is subjective, as each case and each child has a different set of circumstances and risk factors to take into account.¹³ However, one other recurring possibility for a bully’s drive towards inflicting pain upon others ought to be included: the need for power.¹⁴

7 See par 1.1 and footnote 4 (above).

8 See par 2.4.2 for a description of bullying.

9 Nesor, Ladikos *et al* “Bullying in schools: An exploratory study” 2004 *CARSA* 5-18. Information accessed from <http://olweus.org/public/bullying.page> on 2012-01-28.

10 Nesor, Ladikos *et al* 2004 *CARSA* 5 undertook research into bullying by means of a research questionnaire, given to students ranging from grade 6 to 11, from various schools in the Tshwane South area.

11 *Oxford English Dictionary* 184.

12 Information accessed from <http://olweus.org/public/bullying.page> on 2012-01-28.

13 See chapter 3 for an overview of the psychological side of bullying, inclusive of causes and effects of bullying.

14 Information accessed from <http://olweus.org/public/bullying.page> on 2012-01-28.

4.3.2 *Henchmen, active and passive bullies*

Olweus makes a definite distinction between henchmen¹⁵ or followers, supporters¹⁶ or passive bullies and passive supporters or possible bullies.¹⁷ From a legal perspective, however, they are too closely related to draw too big a distinction.¹⁸ Therefore, they will be seen as one; the only legal distinction will be drawn based upon how the learner contributed, whether through act or omission.¹⁹ Research shows that just as many bullying incidents are instigated by a group of bullies as by a single bully.²⁰

4.3.3 *Passive bystanders*

These learners neither take part in, nor do anything to stop the incident from occurring or escalating further.²¹ Curiosity might drive them to stay, to watch what happens, but fear of getting involved keeps them from taking a stand.²² Research shows that learners observe bullying at school frequently.²³ Even though these bystanders are passive in only

15 These learners show support for the bullying incident, actively take part, but do not instigate bullying incidents on their own. Information accessed from <http://olweus.org/public/bullying.page> on 2012-01-28.

16 This would typically be the case where learners openly support a bullying incident by laughing or drawing attention to the situation. Information accessed from <http://olweus.org/public/bullying.page> on 2012-01-28.

17 These learners support the bullying but show no physical, outward support. This would be the case where learners placidly look on, for example. Information accessed from <http://olweus.org/public/bullying.page> on 2012-01-28.

18 Snyman *Criminal Law* 51-58 makes the point that, in order for criminal liability to be established, there must be conduct (an act or omission). An act is a positive action, whereas an omission is failure to act. When regarding the abovementioned role players of bullying (henchmen, active and passive bullies), the only distinguishing factor is how they contribute to the bullying incident – through an act or failure to act. Even on the basis of this distinction, both instances are punishable. See chapter 2, footnotes 33 and 37.

19 *Ibid.*

20 Nesor, Ladikos *et al* 2004 CARSA 8 report that 60.1% are single individuals, whereas 60.2% are groups, bullying others.

21 Information accessed from <http://olweus.org/public/bullying.page> on 2012-01-28.

22 *Ibid.*

23 Nesor, Ladikos *et al* 2004 CARSA 8 *inter alia* note the following statistics regarding the observation of peer victimisation: 91% of the interviewees reported victimisation in some or other form (whether observing or receiving); 32.8%-47.3% of the learners interviewed witness bullying daily; 45.1% have

observing the bullying incident, their mere presence serves as motivation for the bully or bullies to continue, owing to the fact that they have an audience.²⁴

4.3.4 Defenders

These learners actively take part in the incident by showing their disapproval for what is transpiring and takes a stand against it, possibly protecting the victim or victims.²⁵ Nesor *et aliter* reports that 55.1% of the learners interviewed were assisted by friends, after bullying.²⁶ Such a learner is not only giving life to *ubuntu*²⁷ through his or her actions, but he or she is also in line with the constitutional duties placed upon every citizen by the Constitution²⁸ and the Children's Act 38 of 2005.²⁹

4.3.5 Victims

Children are exposed to very high levels of victimisation as victims and witnesses of crime.³⁰ Crimes committed against children vary, but studies have found that over 4 million learners have been exposed to some or other form of violence at school.³¹ The *Oxford English Dictionary* defines a victim as – “(n) 1 a person harmed or killed as a result of a crime or accident. 2 a person who has been tricked: the

borne witness to frequent teasing and name-calling; 26.1% report observing serious physical bullying daily.

24 See par 4.4 for a more in-depth discussion of the bystander effect.

25 Information accessed from <http://olweus.org/public/bullying.page> on 2012-01-28.

26 Nesor, Ladikos *et al* 2004 CARSA 5.

27 See footnote 7.

28 Every citizen has the duty to respect the rights of others. In this instance, a defender will typically carry out this duty by not being a passive bystander, but actively stopping or diverting the bullying incident. In so doing, the victim's bodily integrity (section 12 of the Constitution) and dignity (section 10) stays intact. See chapter 2, footnote 65. See also par 3.7.3 and footnotes 158 and 160 of chapter 3 above.

29 Section 16 of the Children's Act states the following: “Every child has responsibilities appropriate to the child's age and ability towards his or her family, community and the state.” See par 3.7.3 footnote 160.

30 Van der Merwe “Children as Victims and Witnesses” in Boezaart (ed) *Child Law in South Africa* (2009) 563-584.

31 *Ibid.*

victim of a hoax”.³² The *Service Charter for Victims of Crime in South Africa* widely interprets the term victim.³³ A victim of a bullying incident is someone whose fundamental rights³⁴ are infringed upon through continuous bullying behaviour by one or more bullies.³⁵ Nesar reports that 53.1% of the students who were interviewed reported having been subjected to peer victimisation.³⁶ It is worrying to note that 44.3% reported to having been the victims of violent bullying, for example kicking, hitting *et cetera*.³⁷

4.4 The legal relevance of the bully/henchman relationship

As seen above, there are various role players in a bullying incident. However, the relationship between a bully and henchmen is important not only from a criminal law point of view, but also delictually. The consequences of such a ‘partnership’ have serious legal implications.

4.4.1 Perpetrators and accomplices in criminal law

Generally, a bullying incident is lead or instigated by a bully. However, a bully is often assisted by so-called henchmen. This means that a henchman is complicit in acts which violate countless constitutional

32 *Oxford English Dictionary* 854.

33 For the purposes of the *Service Charter for Victims of Crime in South Africa*, a victim can be described as an individual who has suffered physical, mental, emotional and/or economic loss resulting in severe impairment of his or her fundamental rights through an act or omission that violates the South African criminal law system. Victims can also be persons assisting the police, or immediate family of the victim. Furthermore, victims are not limited to a single group in terms of age, race, gender etc. Information accessed from the Conceptual framework: Understanding the victims charter at <http://www.justice.gov.za> on 2012-08-13. See also Van der Merwe in Boezaart (ed) *Child Law in South Africa* 564.

34 See chapter 3 footnote 106.

35 See par 2.4.2 for a definition of bullying as well as par 4.3.1 and 4.3.2 for a description of bullies and henchmen.

36 Nesar, Ladikos *et al* 2004 *CARSA* 8.

37 *Ibid.*

rights.³⁸ Therefore, not only a bully, but also henchmen can be held accountable for their actions and inactions.³⁹

Criminal law draws a distinction between a perpetrator⁴⁰ and an accomplice.⁴¹ The common law rule of *qui facit per alium per se*⁴² is also relevant in this instance, as it ensures a bully's involvement and culpability. It does not, however, free a henchman from criminal liability. When more than one person commits a crime,⁴³ it is wrong to label a single individual as perpetrator.⁴⁴ For the purposes of practicality, it is not always the best option to identify the principal offender.⁴⁵ When a group of people commit a crime together (assault would suffice in this instance), identifying a principal offender is not necessary, as all involved are co-perpetrators.⁴⁶ A perpetrator and co-perpetrator's culpability is

38 See chapter 1 footnote 5.

39 See chapter 2 footnote 14 with regard to assault and its similarity to physical bullying. Thus, it could be argued that both bully and henchman could be charged with assault, depending on their age and depending on the scale of involvement of the henchman.

40 Burchell *Principles of Criminal Law* 572 define a perpetrator as someone who, with the necessary *mens rea*, commits a crime. With regard to co-perpetrators, three different situations can be applicable: (1) Where a person's conduct or negligence satisfies the elements of a crime in his or her personal capacity; which makes said individual a perpetrator in his or her own right. (2) Where such a person possesses the necessary capacity and *mens rea* but does not satisfy all of the elements of the crime. However; owing to a prior agreement or association, culpability can be attributed to such an individual. (3) Where an individual elicits the help of another, whether voluntary or unwillingly.

41 Snyman *Criminal Law* 273 defines accomplice liability by stating that a person is an accomplice even though he or she does not satisfy all the elements of a specific crime. However, through intentional conduct, such a person furthers the actual commission of a crime. When an accomplice "furthers" the commission of a crime, it means that he or she assists and/or encourages the commission of the unlawful act, gives advice pertaining to the crime as well as the creation of an opportunity to commit the crime. It is thus stated that to encourage and to incite are synonymous terms. Incite can be defined as "to provoke and urge on". Definition for incite accessed from <http://thefreedictionary.com/incite> on 2012-07-19. The relationship between a bystander and a bully in such an instance is parasitic in nature, as the bully feeds off the negative attention he or she receives from the crowd (encouragement). This can render the bystanders liable based upon failure to act.

42 This rule translates to, he who does an act through another, does it himself.

43 See footnote 39.

44 Snyman *Criminal Law* 261.

45 *Ibid.*

46 *Ibid.*

based on his or her own action; therefore his liability is independent and has nothing to do with the act of his co-perpetrator.⁴⁷

When regarding the definition of an accomplice, it would be sufficient to say that by purely egging on a bully, such a learner or henchman furthered the unlawful act.⁴⁸ Therefore, while such an individual did not physically take part in the bullying (physically fighting or verbally abusing the victim), merely encouraging a bully or henchman to continue constitutes complicity.

An important doctrine when working with perpetrators is the doctrine of common purpose.⁴⁹ Therefore, when a bully and his or her henchmen have a common purpose to bully a victim, their acts, albeit individual, are imputed to the others.⁵⁰ The most important element of the doctrine of common purpose is that all involved in commission of the act, must have the same intention.⁵¹ Thus, in this regard, the common purpose binding a bully and henchmen is causing harm to the victim, whether verbal or physical.

When one or more learners bully a fellow learner, they do not always foresee that their actions could have serious repercussions; they do, however, have the intent to cause harm.⁵² Therefore, they are not

47 *Ibid.*

48 Bullying as such is not yet recognised as a crime in South Africa; however, assault and *crimen iniuria* are crimes for which a person can be charged. Therefore, the unlawful acts referred to will be crimes such as assault, assault with the intent to cause grievous bodily harm, attempted murder, and murder, destruction of property and *crimen iniuria*.

49 Burchell *Principles* 574 ascribes the following definition to common purpose: “where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their ‘common purpose’ to commit the crime”.

50 Snyman *Criminal Law* 265.

51 *Ibid.*

52 Snyman *Criminal Law* 268 notes that, even though a person might not have the intention of, for example the death of his or her victim, it is sufficient to establish guilt owing to the fact that the perpetrator could have foreseen harm brought to the victim. This is known as *dolus eventualis*. Therefore, even though a bully and his or her henchmen might not necessarily have foreseen

absolved from liability purely because they did not foresee that serious harm could be caused. Intention to act, knowing that it could ultimately cause damage, is sufficient to satisfy one of the crucial elements of many a crime, namely, a physical act.

It must be reiterated that the age of the perpetrators⁵³ plays a very important role with regard to criminal liability.⁵⁴ According to section 7(1) of the Child Justice Act 75 of 2008, a child who, at the time the offence was committed, was under 10 years of age, cannot be prosecuted.⁵⁵ In terms of section 7(2) of the Act, a child over 10 years of age but under the age of 14 is presumed to be *doli incapax*.⁵⁶ However, this assumption is rebuttable and if it were found beyond reasonable doubt that the child had the needed criminal capacity, he or she can be held criminally liable for his or her offence.⁵⁷ In essence, the *doli incapax* rule is still in force, but the minimum age has changed.⁵⁸ A child over the

serious harm caused to the victim, this fact is irrelevant, because they had the intention to cause pain.

53 Perpetrators ought to be understood in this instance as a bully together with his or her henchmen.

54 According to the South African Law Commission, the term juvenile does not necessarily correlate with the definition of child (see par 2.4.7 for a definition of the word child). The following statement with regard to the difference between a juvenile and a child is made: "The present Correctional Service Act 8 of 1959 defines a juvenile as a person under the age of 21 years. Within the departmental practice, however, the category "child" has now been recognised as distinct from juvenile and children are those under the age of 18. In the new draft Correctional Service Bill, a definition of child has been incorporated, and the age limit of 18 is used. No definition of juvenile or youth or other than this has been included." This is relevant in view of the fact that for the purposes of this study and with regard to child law in general, the use of the word juvenile is explicitly avoided because it stigmatises the child offender. Furthermore, the Child Justice Act can protect young persons up until the age of 21. See also par 5.4.1.1.3. Information from the South African Law Commission accessed from <http://www.saflii.org/za/other/zalc/ip/9/9-3.html> on 2012-07-20.

55 Gallinetti "Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime" in Boezaart (ed) *Child Law in South Africa* (2009) 650.

56 *Ibid.* See also par 5.4.1.1.4-5.4.1.1.7 for a discussion on the Child Justice Act's relevant provisions pertaining to criminal capacity.

57 *Ibid.*

58 *Ibid.* The minimum age has changed from 7 years of age to 10. See also chapter 3 for the psychology behind bullying, as well as the *status quo* of South African schools. It is thus stated that because of the current state of schools in South Africa, specifically pertaining to violence, the change in minimum criminal capacity is a good thing, as it affords children additional protection. Even young children can bully, be bullied or be onlookers at bullying and these children ought to be assisted by programmes similar to diversion programmes

age of 14 years has full criminal capacity in terms of the Child Justice Act 75 of 2008.⁵⁹

4.4.2 Joint wrongdoers

The common law distinguished between joint and concurrent wrongdoers.⁶⁰ However, the current position in South African law of delict is that there is no distinction between these two instances.⁶¹ A person can only be held responsible as joint wrongdoer based on a delict for the same damages incurred by the victim/plaintiff.⁶² When joint wrongdoers satisfy the prerequisite, which is the instance where two or more people are liable to another for the same damage, they may be sued in the same action.⁶³ It is thus clear that intent or negligence is of little importance.⁶⁴

Therefore, when regarding a bullying incident, it is clear that a bully and his or her henchmen can be regarded as joint wrongdoers. Unlike criminal law, liability imputed to each wrongdoer only includes his/her own actions and thus they can only be held delictually liable based on their own acts or omissions.⁶⁵

4.5 An international dimension to the bystander effect

mentioned in chapter 8 of the Child Justice Act. See par 5.4.1.1.8 for a discussion on diversion in the Child Justice Act as well as chapter 6 for a comprehensive overview of restorative justice.

59 Gallinetti in Boezaart (ed) *Child Law in South Africa* (2009) 650; see also par 5.4.1.1.4-5.4.1.1.7 for a discussion on the Child Justice Act's relevant provisions pertaining to criminal capacity.

60 Neethling and Potgieter *Visser Deliktereg* 279 point out that where people purposely worked together to commit an unlawful act, they are joint wrongdoers. Where people acted individually, but their actions contributed to the same unlawful act and ultimate damage, they are concurrent wrongdoers.

61 The Apportionment of Damages Act 34 of 1956 now governs this instance and defines joint wrongdoers as: "2. Proceedings against and contributions between joint and several wrongdoers.—(1) Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action."

62 Neethling and Potgieter *Visser Deliktereg* 279.

63 See footnote 61.

64 *Ibid.*

65 Neethling and Potgieter *Visser Deliktereg* 279.

Various countries have enacted legislation aiming to curb the adverse effect of bystander behaviour. One such example is Argentina's *Argentine Penal Code* which *inter alia* determines –

a person who endangers the life or health of another, either by putting a person in jeopardy or abandoning to their fate a person unable to cope alone who must be cared for ... will be imprisoned for between 2 and 6 years.⁶⁶

Canada has a “Good Samaritan Law/Doctrine” in force. This encapsulates the basic principle of voluntarily extending a helping hand and in so doing, such an individual cannot be sued or suffer any legal repercussions in respect of the said incident.⁶⁷

In accordance with the principles of Judaism, a bystander's obligation to act is religious, ethical and legal in nature.⁶⁸ It is, however, not expected of such a person to give his life or put his life at risk to save another. The important element here is assistance of one's fellow – man.

4.6 The bystander effect – a possible catalyst to bullying

It is evident that bullying takes place between a bully or bullies and a victim, or even more than one victim.⁶⁹ However, the question must be

66 Article 106 of the *Argentine Penal Code*.

67 The *Quebec Charter of Human Rights and Freedoms* of 1975 contains a provision to the effect that every citizen is obliged to render aid if it does not pose serious risk to the “good Samaritan” or a third person. Under Quebec's Civil Code, every person is obliged to act as a *bon père de famille*, which can be encapsulated as a reasonably prudent person. Failure to act accordingly amounts to fault and negligence. Information accessed from <http://www.canadianlawsite.ca/goodsamaritan.htm> on 2012-07-20.

68 Kirschenbaum “The Bystander's Duty to Rescue in Jewish Law” 1980 *The Journal of Religious Ethics* 204 makes the following point: “Although failure to come to one's neighbor's rescue incurs no criminal sanction, the legal nature of the duty is evidenced by (1) the right of the rescuer to sue for all financial losses incurred as a result of the rescue operation, (2) the rescuer's immunity to liability, and (3) the exemption he enjoys from all positive legal, civil and ritual duties while he is actively engaged in the rescue operation.”

69 See par 4.3.

asked – do bystanders contribute to bullying, even though they do not necessarily take part in it? If this is the case, what would happen if this catalyst is removed? It is thus stated that bullies thrive on attention⁷⁰ and therefore, will more often than not bully in front of an audience.

4.6.1 *Defining the bystander effect*

In order to understand the issue, it is imperative first to know what exactly the bystander effect encompasses. The bystander effect is defined as –

“The term *bystander effect* refers to the phenomenon in which the greater the number of people present, the less likely people are to help a person in distress. When an emergency situation occurs, observers are more likely to take action if there are few or no other witnesses.”⁷¹

In the context of a bullying incident, bystanders could be henchmen,⁷² passive bystanders⁷³ or defenders.⁷⁴ The only distinguishing feature is in how they act or fail to act.⁷⁵ However, for the purposes of bystander behaviour, the focus will be placed on passive bystanders.

4.6.2 *The mechanics of the bystander effect*

There is a common misconception that by not physically taking part in bullying a fellow learner, no harm is caused. Through an omission, harm could indeed befall the victim.⁷⁶ Through not assisting the victim, whether physically or verbally, bullying behaviour is silently approved by

70 See footnote 41.

71 Definition of the bystander effect accessed from <http://psychology.about.com/od/socialpsychology/a/bystandereffect.htm> on 2012-01-30.

72 See par 4.3.2.

73 See par 4.3.3.

74 See par 4.3.4.

75 See footnote 18.

76 Information accessed from http://www.anti-bullyingalliance.org.uk/pdf/Bystanders_and_Bullying.pdf on 2012-01-30.

the observing peers.⁷⁷ Therefore, bullying in essence can be seen as a group phenomenon; not only because bullying is not necessarily undertaken by a single bully,⁷⁸ but also because onlookers take part through their presence.⁷⁹

Research has found that there are discrepancies between learner attitudes to bullying and their ultimate reactions to a bullying incident.⁸⁰ Morally, a learner might feel that bullying is wrong, but for unknown reasons, he or she does not get involved.⁸¹ Studies have also found that bystanders can be placed into two categories: a victim bystander⁸² and a bully bystander.⁸³ Even though these learners do not actively contribute to the incident, by firstly being present and secondly doing nothing to intervene;⁸⁴ they do in fact contribute to the bullying incident in a negative manner.⁸⁵

In general, learners are aware of peer victimisation.⁸⁶ Uncertainty reigns with regard to readiness to assist⁸⁷ a bullying victim, as some learners

77 *Ibid.*

78 See par 4.3.1 and 4.3.2.

79 *Ibid.*

80 *Ibid.*

81 Lenthall *Bystander Behaviour as an Influence on Bullying in High Schools* (DCom thesis 2003 Deakin University) notes that many students may say and in fact believe that they would intervene in a bullying incident, but they do not. The reason for this discrepancy is the fact that a bystander gets social reinforcement by supporting the bully, whether actively or passively.

82 Twemlow, Sacco *et al* "A clinical and interactionist perspective on the bully-victim-bystander relationship" 1996 *Bulletin of the Menninger Clinic* 296-313 point out that such a learner typically identifies with the bully victim and is often a victim of abuse at home.

83 Twemlow, Sacco *et al* 1996 *Bulletin of the Menninger Clinic* 301-302 describe a bystander as a child who engages in "voyeuristic, sadomasochistic fantasies" while observing a bullying incident. Such a child finds pleasure in the pain of the victim yet does not physically take part in the bullying.

84 Intervene, in this instance, is a broad term – a learner might get verbally or physically involved or get help from an educator. Merely walking away, however, does not constitute taking a stand against bullying.

85 Lenthall 34 argues that bystanders encourage bullying when they passively look on, as this sets the stage for a bully to "perform". It is thus stated that this makes a bystander guilty of contributory negligence in respect of the harm, loss or damage suffered by the victim, as a bystander could have intervened by merely calling an educator to stop the incident from escalating.

86 Rigby and Johnson "Expressed Readiness of Australian Schoolchildren to Act as Bystanders in Support of Children who are Being Bullied" 2006 *Educational Psychology* 425-440 did a research study into bystander behaviour among

would readily help, whereas others made it clear that they would not and the rest were unresponsive.⁸⁸ This generally passive attitude to bullying is one of the reasons why bullying does not stop, but escalates. The definition of the bystander effect makes it clear that a shift in responsibility is taking place.⁸⁹ Personal reasons for not getting involved are open to speculation.⁹⁰ However, the result is that passive onlookers do not get involved, but only observe. This eggs on the bully or bullies and irrespective of the purity of a bystander's intentions, by doing nothing, silent approval is given for the conduct of the bully.

4.6.3 *The legal aspect of the bystander effect*

The bystander effect not only has moral implications, but legal consequences as well. Section 1 of the Constitution contains the founding provisions.⁹¹ When scrutinising these provisions, which ultimately encompass the values towards which all South Africans ought to strive, it is evident that in terms of bullying, these values are by no means applied.⁹² Section 8 of the Constitution holds that all legal subjects are bound by the Constitution, whether as natural or juristic person or organ of state, insofar as the provision in question is applicable. This means that even school-going children have an

learners and found that 90% of the interviewees indicated awareness of bullying.

87 Lenthall 33 mentions five cognitive steps giving rise to assistance given by bystanders. (1) The bystander must physically see the incident where help is needed. (2) He or she must see the situation as one in need of assistance. (3) The bystander must feel that it is his or her personal responsibility to take action. (4) He or she must decide what kind of action to take, whether get verbally or physically involved or to go for help. (5) The learner must act upon his or her decision to action.

88 Rigby and Johnson 2006 *Educational Psychology* 437 give the following statistics: 43% of the interviewed students would readily help a bullying victim; 23% indicated that they would not; the rest were unsure.

89 See par 4.5.1.

90 See footnotes 81 and 82.

91 These are, *inter alia*, human dignity, equality, advancement of human rights, freedom, non-racism, non-sexism.

92 See footnote 34. Therefore, based upon the stated rights infringed upon, the values set out in section 1 of the Constitution are rendered void by bullying behaviour, with regard to the rights of the victim.

obligation to respect and protect the rights of others, in this instance, the rights of their fellow learners.⁹³

Bystanders have a legal duty to act where they witness incidents of bullying.⁹⁴ An omission can solely be punishable when a legal duty rests upon an individual to act in a certain manner.⁹⁵ A moral duty⁹⁶ does not necessarily constitute a legal duty.⁹⁷ Even though a particular situation might not be governed by legislation⁹⁸ it does not mean that such a person is alleviated from legal responsibility. The legal convictions of society also play a very important role with regard to what is expected of citizens.⁹⁹ Taking the legal convictions of society into consideration is reminiscent of the values stipulated in the Constitution.¹⁰⁰ The preamble

93 See par 3.7.3.

94 See footnotes 28 and 29.

95 Snyman *Criminal Law* 59.

96 Definition of moral obligation accessed from <http://www.thefreedictionary.com/moral+obligation> on 2012-01-30 states the following: "moral obligation - an obligation arising out of considerations of right and wrong; 'he did it out of a feeling of moral obligation' duty, obligation, responsibility - the social force that binds you to the courses of action demanded by that force; 'we must instil a sense of duty in our children'; 'every right implies a responsibility; every opportunity, an obligation; every possession, a duty'- John D. Rockefeller Jr".

97 Snyman 59 contends that, for the purpose of the law, an omission does not purely constitute failure to act, but rather a failure to act where there was a legal duty to act.

98 Snyman 59-60 mentions the following situations where a legal duty to act rests upon a person or persons: if the instance is governed by statute, common law, a court order, agreement, acceptance of responsibility for the control of a dangerous object, protective relationship regarding someone else, pertaining to a previous positive act.

99 Snyman 61 gives the following example: A manhole in a street is left open by workers and X walks in the same street, towards the manhole, not noticing the hole because her thoughts are elsewhere. Y stands on the street corner and sees that X will walk right into the manhole. It is easy for Y to prevent X from falling into the hole, by merely shouting "watch out"; however, Y fails to warn X. X sustains serious injuries owing to the open manhole. Did Y have a legal obligation to act? The answer is yes, according to the convictions of society, also because of the severity of the consequences in failing to act where action is expected. One of the questions a court will typically ask is whether the act required of the person was difficult or hard and how severe the consequences would be for the other person, if this particular act had not been carried out.

100 Snyman 61. As previously stated, section 1 of the Constitution contains the founding provisions, which are, *inter alia*, human dignity, equality, advancement of human rights, freedom, non-racism, non-sexism. Neethling and Potgieter *Visser Deliktereg* 23 state that in terms of the law of delict pertaining to the infringement upon fundamental rights, open-ended judgments play a critical role in determining liability. Important in this instance are *inter alia* the *boni mores* test for unlawfulness, the imputability test for legal

to the Constitution contains yet another core value, *ubuntu*, as is evident from the following – “Respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity”.¹⁰¹ Taking this into account, it is evident that bystander behaviour cannot be condoned in any manner, as it goes against social convictions, constitutional values and the spirit of *ubuntu*.

It stands to reason that various reasons keep learners from getting involved in a bullying incident; however, as previously stated, by being a passive bystander, silent approval is given to unacceptable behaviour. This in turn gives approval for the infringement upon fundamental rights, something which the Constitution aims to protect. Thus, a legal duty rests upon learners to act with regard to a bullying incident where they are bystanders.¹⁰²

4.7 Conclusion

Bullying is a complex phenomenon to deal with.¹⁰³ Various factors and role players are involved and certain elements may serve as a catalyst to bullying. It is important to know who are involved in bullying, whether active or passive. This in turn helps to dissect the dynamics of bullying, to pose possible solutions to the problem. In a typical bullying incident, there is a bully,¹⁰⁴ henchmen,¹⁰⁵ passive bystanders,¹⁰⁶ defenders¹⁰⁷ and a victim or victims.¹⁰⁸

causation and the reasonable person test with respect to negligence. Factors to be taken into account in these instances are reasonableness, equity and fairness. In terms of delictual liability, specifically *mens rea* and legal causation, constitutional values play an important role in adjudicating such matters. In terms of bullying, reasonableness, fairness and equity are crucial elements, seeing that the parties involved are more often than not children and even though there is delictual and criminal liability, any decision made must respect the rights of both bully and victim. See also par 5.3.1.1.2, 5.3.1.1.3, 5.4.2 and 5.4.3.

101 Preamble to the Constitution of the Republic of South Africa, 1996. See par 1.1 and footnote 4 of chapter 1 above for a definition of *ubuntu*.

102 See also the explanatory notes on *novus actus interveniens* and *conditio sine qua non*, chapter 2 footnotes 33 and 37. Further attention will be paid to the legal consequences of positive acts and omissions in chapter 5.

103 See chapter 3 and par 4.3.

104 See par 4.3.1.

In terms of learners who witness bullying, there is a phenomenon called the bystander effect.¹⁰⁹ The bystander effect not only has a cumulative psychological effect, but also sends the wrong message. By failing to act, learners are condoning the violation of fellow learners' rights and thus the message is clear: the rights of a victim are unimportant. It is thus stated that, if bystander involvement is controlled, bullying figures could dwindle. Bystanders have a legal duty to act, placed upon them by societal convictions and constitutional values.¹¹⁰ In other words, from a philosophical stand point, it can be seen as “do unto others as you would have done unto you”.

105 See par 4.3.2.

106 See par 4.3.3.

107 See par 4.3.4.

108 See par 4.3.5.

109 See par 4.5.

110 See par 4.5 for an international overview to place bystander behaviour in context, as well as 4.6.3.