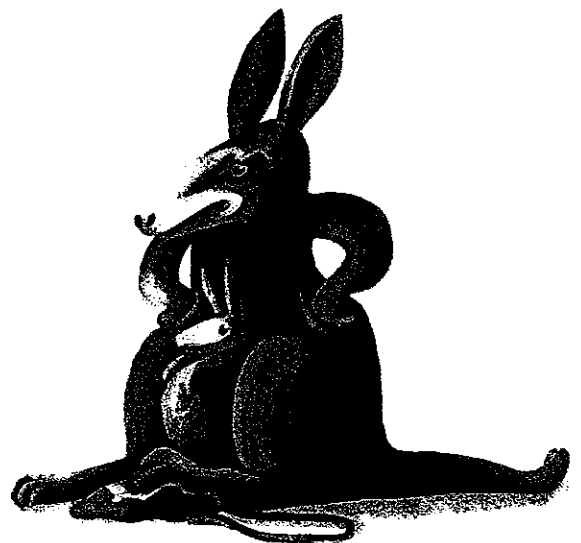


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*Keeping People and Property Safe  
in the Education Environment*



## When is a reinstated pupil not reinstated?

*Mui Kim Teh & Kenneth Stott*

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### Abstract

Bullying is, regrettably, prevalent in many countries, and schools are under considerable pressure to implement anti-bullying policies and disciplinary mechanisms to curb such dysfunctional behaviour. The most severe disciplinary measure is undoubtedly that of excluding (or expelling) the child. The procedure for this drastic action is provided for in England in the School Standards and Framework Act 1998 ("the Act"). However, under Section 67 of the Act, the parents of an excluded child may appeal to an independent panel that has the power to direct that the excluded child be reinstated.

Where a school principal is faced with the prospect of reinstating an excluded child (i.e. the bully), what are the steps that can be taken to discharge the obligations to the excluded child, other pupils and members of staff? Must the excluded child be reintegrated into the class or should special arrangements be made for conducting his education separately? Can the teachers refuse to teach the excluded child?

This is a situation that arose in the case of *L (a minor), Re (2003) UKHL 9* and this paper discusses the case and other related cases, and analyses the House of Lords' decision concerning the meaning and effect of "reinstatement" and "reinstated", an issue that is of importance not only to individual pupils, but also to education authorities, school governing bodies, principals, teachers and parents.

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This is a situation that arose in the case of *L (a minor), Re (2003) UKHL 9* and this paper discusses the case and other related cases, and analyses the House of Lords' decision concerning the meaning and effect of "reinstate" and "reinstated", an issue that is of importance not only to individual pupils, but also to education authorities, school governing bodies, principals, teachers and parents.

### ***Introduction***

In recent years, legal actions arising out of bullying in schools has escalated in several jurisdictions. The cases show a common trend, where the victim alleges that the school fails to respond to complaints or information about the bullying, thus resulting in injury. It is thus not surprising that schools have taken steps to implement anti-bullying policies and disciplinary mechanisms to curb such dysfunctional behaviour. The most severe disciplinary measure is undoubtedly that of excluding (or in a more traditional term, expelling) the child. In England, the procedure for this drastic action is provided for in the

School Standards and Framework Act 1998 (“the Act”). However, under Section 67 of the Act, the parents of an excluded child may appeal to an independent panel that has the power to direct that the excluded child be reinstated. From a principal’s point of view, having made a professional judgement to exclude a child, such an order would be the last thing a principal would want to deal with. This paper tells the story of such a principal, who was faced with the prospect of reinstating an excluded child and his efforts to discharge the obligations of the school to the excluded child, the other pupils and members of staff.

### *The events*

“L”, 16 years old at the time of the incident, was a pupil at a voluntary aided secondary school with an intake of 200 pupils. During one lunch break, L and a group of boys violently assaulted another boy, “A”, from the same school year. The attack took place in the lavatories, where A was repeatedly stamped and kicked, and, as a result, A suffered substantial injuries. The principal investigated the incident almost immediately and concluded that L had kicked A several times while A lay on the ground. After the investigation, the principal exercised his power under Section 64 of the Act to exclude L permanently. As required under Section 65 of the Act, the governing body of the school, on receiving information about the permanent exclusion, reviewed the principal’s decision and considered whether L should be reinstated. The governing body upheld the principal’s decision. L’s parents then exercised their rights under Section 67 of the Act to appeal to an independent panel to reverse the decision. On reviewing the evidence, the independent panel was of the view that L was not guilty of the specific behaviour of which he was accused and that exclusion was not the appropriate response. The independent panel allowed the appeal and directed that L be reinstated immediately.

### *The quandary*

If L’s teachers had readily reintegrated L into the class, this case would not have reached the courts, let alone the House of Lords. Instead, the teachers informed the principal that they were unwilling to teach or supervise L and were in fact balloting on industrial action<sup>1</sup>. This left the principal the difficult task of deciding how to reinstate L without involving his teachers.

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<sup>1</sup> In *P v National Association of School Masters/Union of Women Teachers* (2003) UKHL 8, the House of Lords had to consider whether it was lawful for teachers to threaten industrial action in opposition to the decision of the independent appeal panel. It was held by the House of Lords that the teachers’ actions were lawful. This leads to the unsatisfactory situation of the school having to comply with the appeal panel’s

### *The principal's cunning plan*

In a meeting with L's parents, the principal informed the parents that L had been reinstated on the school roll and that the school would resume responsibility for L's continuing education in accordance with its obligations under Section 67. To overcome the problem he was facing with the teaching staff and at the same time to fulfill the school's obligations towards L, the principal decided to institute a special regime whereby L was taught separately from the rest of the pupils, making use of a specially engaged retired teacher and a small room about 10 feet square. L was also segregated socially from the other pupils in the following ways:

- he was denied any contact with other members of the school community at any time during the course of the school day, or in the journey to and from school;
- he was to spend all breaks in the parlour;
- he was to use only toilet facilities in the reception area; and
- he had to report directly to the main reception area immediately upon arrival. No other entrances to the school were accessible to him.

Meanwhile, the outcome of the teacher unions' ballot was to support industrial action short of a strike. It was not disputed that, had the teachers and teaching unions not refused to teach or supervise L, the principal would have reintegrated L into ordinary classroom life.

### *The lawsuit*

L was subsequently subjected to the special regime planned by the principal and decided to seek judicial review in the courts. His complaint was that the regime set out by the school did not amount to reinstatement and the school had breached the appeal panel's decision that he be reinstated. The judge who heard the application applied the reasoning given in an earlier case<sup>2</sup> dealing with a similar question and dismissed L's application. In the earlier case, the presiding judge had said:

“...In my judgement reinstatement is not to be given any elaborate meaning: what is intended to be achieved is the removal of the exclusion. It does not follow that everything has to be put back exactly as it was before the exclusion. What matters is that the regime applied to the pupil after the date for

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direction to reinstate L on the one hand while on the other hand, none of the teachers is required to teach or supervise L in or out of the classroom.

<sup>2</sup> R (C) v Governors of B School (2001) ELR 285

reinstatement is a regime that does not involve the continuing exclusion of the pupil from the school...I do not think that reinstatement necessarily entails full reintegration into the classroom even where that was the previous state of affairs.”

L then appealed to the Court of Appeal<sup>3</sup>, which unanimously upheld the lower court’s judgement. The Court of Appeal concurred with the following leading judgement:

“...A pupil is reinstated if he is no longer excluded. The notion of reinstatement cannot in my judgement demand a precise, or even approximate, restoration of the conditions in which the pupil’s life at school was carried on before his exclusion. There may be all manner of factors which will require different conditions... The reality is that once he is reinstated, his exclusion is cancelled, and he is to be treated like any other pupil; and in respect of any pupil, special or particular measures or initiatives may be required at any time.”

L and his lawyers did not agree with the lower court and Court of Appeal. In their view, the conditions imposed on L on his return to the school amounted to subjecting him to “a correspondence course in a prison” and that it was in actual fact “constructive exclusion”. The issue was thus taken up to the House of Lords for the law lords to determine the meaning and effect of the words “reinstatement” and “reinstated” in the school context.

### *Opposing views*

The House of Lords was divided as to the meaning and effect of the word “reinstatement”. The Law Lords who allowed the appeal applied the definition of reinstatement in employment cases<sup>4</sup> to opine that if L was to be reinstated, he should be put back in substantially the same position as he was in before the exclusion. In the employment cases, it was held that

“The natural and primary meaning of ‘to reinstate’...is to replace him in the position from which he was dismissed, and so to restore the *status quo ante* the dismissal.” and “...reinstatement involves putting the specified person back, in law and in fact, in the same position as he occupied in the undertaking before the employer terminated his employment.”

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<sup>3</sup> In re L (a minor) (2001) EWCA Civ 1199

<sup>4</sup> William Dixon Ltd v Patterson 1943 SC(J) 78 and Hodge v Ultra Electric Ltd (1943) KB 462

The Law Lords felt that the school was not expected to put L into a regime that was identical to that before the exclusion in every minute particular. However, for L to be legally reinstated, he should be “substantially reintegrated”. Although the teachers were unwilling to teach L, and although L might pose a threat to other pupils’ education, they were simply considerations as to how L should be reinstated, and should not affect the issue of reinstatement. L was either reinstated or he was not. Section 67 does not say that industrial action excuses the school from complying with the independent panel’s direction to reinstate. As it was, L was not reinstated because he was not substantially reintegrated and as such, the school had breached the binding decision of the panel to reinstate L.

The Law Lords who dismissed the appeal on the other hand felt that to “reinstate” means neither restoring the pupil to *status quo ante* nor does it mean simply replacing the pupil’s name on the school roll. Since legislation does not define the word “reinstate”, it then becomes an ordinary English word, the precise meaning of which depends on the context in which it is used. In the present case, it cannot be denied that L had committed an offence that required disciplinary action by the school. Even if L had not been permanently excluded, his indiscipline and the threat and damage it caused to the functioning of the school would have had to be dealt with in some other way. The introduction of any disciplinary measures or special regime for an offending pupil, where no permanent exclusion is proposed, is wholly outside the scope of Sections 64 to 67 of the Act. As such, the same principle should apply when, after reinstatement, the school finds it right to introduce such a regime for the reinstated pupil. As for the meaning of “reinstatement”, it is simply a resumption of the pupil-school relationship, and if the school is acting in good faith, and if the purported reinstatement is not a sham, then it is an inescapable fact that L was reinstated. “It is wrong to treat a requirement of reinstatement as involving a judgment on the quality of the educational and managerial decisions which the school makes after resuming its relationship with the pupil...it gives the decision of the independent panel a content beyond that authorised by the statute.”

### ***Discussion and the Final Outcome***

School bullying is a widespread phenomenon and is a prevalent problem in many education systems. The school, being seen as the “agent of social control” (Furniss, 2000:13), has a moral duty to manage and reduce bullying problems. In the case of *Bradford-Smart v West Sussex County Council (2001)*, the judge, whom the Court of Appeal concurred with, held that it was fair, just and reasonable to place a duty on the school to take such steps as were necessary to ensure that a pupil was not bullied while on

the school premises, or possibly during school activities outside school premises. Seen from this perspective, it can be argued that it would be difficult for L's principal to "substantially reintegrate" L into the classroom without enforcing special measures to encourage good behaviour from L and discourage further bullying by L or other pupils.

Some academics have argued that permanent exclusion is closely linked to educational underachievement, social alienation and even criminality (Harris, 2000:37). Many pupils excluded from school may not get back into education and even risk "exclusion" from mainstream society in their later years in life. Permanent exclusion should, therefore, be enforced only as a last resort. In what situation would permanent exclusion be justified, then? Many teachers will probably agree that even one pupil's misbehaviour and disruption can undermine the smooth running of an entire class. But in such instances, a stern admonition may suffice. However, some pupils' behaviour is so bad and such a serious breach of the school's discipline policy that anything other than a severe response is inadequate. In such cases, Harris (2002:64) rightly points out that "if allowing the pupil to remain in school would seriously harm the education and welfare of the pupil and others at the school", then exclusion should be justifiable.

The appeal panel's role in L's case was to review the evidence before it and decide whether L was culpable in the circumstances, whether the principal's decision to exclude L was justifiable and whether L should be reinstated. On the balance of probabilities, the appeal panel concluded that L should be given the benefit of doubt when he claimed that he had only aimed to kick at A once but had missed, and had not kicked A several times, as alleged by the principal. Having decided that L should be reinstated, the responsibility of managing L's return to the school in the interest of L, other pupils and the whole school community then fell entirely on the principal or the school governors, as legislation does not provide for the appeal panel to make any orders in that regard. The School Standards and Framework Act 1998 places a duty on the principal of the school to lay down and enforce rules that promote good behaviour and discipline among pupils. In setting up a special regime for L on his reinstatement to the school, the principal was not only fulfilling his obligations under the Act, but he arguably considered the "best interest" of every child as stipulated under Article 3 of the Convention on the Rights of the Child<sup>5</sup>.

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<sup>5</sup> Article 3 of the Convention on the Rights of the child stipulates that "the best interests of the child" should be a "primary consideration" in any action undertaken by the relevant institutions, authorities or courts of law.



L had admitted that he had aimed to kick at A. This admission, in our view, was damning evidence in itself. Missing the victim was irrelevant. The fact remains that L had committed a serious disciplinary offence that warranted special measures, even if he was reinstated. Although the teachers' industrial action in refusing to teach L almost caused the principal to breach the appeal panel's order, the principal was able to find a suitable and willing retired teacher to teach and supervise L. It was then argued on behalf of L that he should enjoy the same privileges and liberties as the other pupils after reinstatement. But this argument is untenable, because interfering with the principal's professional judgment on how a pupil should be reinstated would not only rule out any special regime, but would deprive the principal (and governors) their right and duty to manage the school.

Having carefully considered the matter, the House of Lords came to a majority decision (3 to 2) that the principal's and governors' action in introducing a special regime for L upon his reinstatement to the school was lawful, and, accordingly, L's appeal was dismissed.

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