

No Man's Land
Cyberbullying and the Canadian Legal Landscape

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Introduction

In October 2012, Canada was rocked with the news of the suicide of 15-year-old Amanda Todd of Coquitlam, British Columbia.² A video which she had uploaded to YouTube just five weeks earlier described the years upon years of bullying and exploitation that she suffered at the hands of an online predator, and those in her community.³

Less than a year later, in April 2013, 17-year-old Rehtaeh Parsons of Dartmouth, Nova Scotia attempted to hang herself in her home. She slipped into a coma, and was removed from life support several days later. The public again became outraged when it was discovered that less than two years prior, she had been gang-raped by four teenage boys at a party. To make matters worse, one of the rapists allegedly took a photograph of the assault that went viral among friends and classmates.⁴

Just months prior, in September 2012, 15-year-old Audrie Pott of Saratoga, California had committed suicide by hanging after eerily similar circumstances to those of Rehtaeh.

What the deaths of Amanda, Rehtaeh, and Audrie have in common is that they highlight the destructive epidemic known as cyberbullying. To put cyberbullying into perspective, in 2010, 49.5% of students in 33 Toronto junior high and high schools reported that they were bullied online.⁵

Cyberbullying, thankfully, has not gone unnoticed. Regulators, parents, and the courts alike have grappled with the best way to address the phenomenon and find productive

² <http://www.cbc.ca/news/canada/amanda-todd-stood-up-to-stalker-in-facebook-conversation-1.2860471>

³ <https://www.youtube.com/watch?v=vOHXGNx-E7E&feature=youtu.be>

⁴ http://www.huffingtonpost.com/2013/04/09/rehtaeh-parsons-girl-dies-suicide-rape-canada_n_3045033.html

⁵ Faye Mishna, Charlene Cook, Tahany Gadalla, Joanne Daciuk & Steven Solomon, "Cyber Bullying Behaviors Among Middle and High School Students" (2010) 80:3 American Journal of Orthopsychiatry 362.

solutions. From properly defining and identifying the issue, current enforcement strategies, anti-bullying legislation, and even with respect to insurance and coverage issues, cyberbullying is proving to be one of the most pressing social issues particularly among young Canadians moving into the 21st century.

I know it when I see it: Defining Cyberbullying

Defining cyberbullying is a difficult but important task. The importance of defining bullying and clearly differentiating it from other forms of harassment and aggression will allow for better prevention methods to be found.⁶

Bullying has been defined as a systemic abuse of power between individuals, where one inflicts physical, emotional, or social harm upon another.⁷ Cyberbullying has all the core harmful characteristics of bullying, but “the manner in which they are being carried out (i.e., via electronic means) has increased the reach and the scope of their impact”.⁸

The *Cyber-safety Act* of Nova Scotia broadly defines cyberbullying, classifying it as:

... **any electronic communication** through the use of technology including, without limiting the generality of the foregoing, computers, other electronic devices, social networks, text messaging, instant messaging, websites and electronic mail, **typically repeated or with continuing effect**, that is **intended or ought reasonably [to] be expected to cause fear, intimidation, humiliation, distress or other damage or harm** to

⁶ Wood, Sarah and Dieter Wolke, “Does the Content of Anti-Bullying Policies Inform us About the Prevalence of Direct and Relational Bullying Behaviour in Primary Schools?” (2003) 23:4 Educational Psychology 381 at 398.

⁷ Leanne Lester et al., “Problem behaviours, traditional bullying and cyberbullying among adolescents: longitudinal analyses” (2012) 17: 3-4 Emotional and Behavioural Difficulties 435 at 436; Debra Peplar & Wendy Craig, *Binoculars on bullying: a new solution to protect and connect children* (2007) PREVNet.org.

⁸ <http://www.justice.gc.ca/eng/rp-pr/other-autre/cndii-cdncii/pdf/cndii-cdncii-eng.pdf> at 3.

another person's health, emotional well-being, self-esteem or reputation, and includes assisting or encouraging such communication in any way...⁹

In a sense, cyberbullying falls somewhat into the category of "I know it when I see it".¹⁰ Perhaps this is why 85% of Canadians were found to believe that bullying is a very serious problem.¹¹ In that regard, cyberbullying is easier to define through real-life examples:

1. Posting negatively about another on an online forum, such as Facebook. In *Nova Scotia (Director of Public Safety) v. Lee*, Mr. Lee made several degrading remarks about his sister, Ms. Murray, which was classified as cyberbullying:

"If you do not wish people to disown you and out you as a lying manipulating sleazy sack of shit, then please do not be a sleazy lying manipulative sack of shit. Simple solution, you cannot blame others for something you do".¹²

"I said my sister was a lying, manipulative fraudulent thief..... I really should apologize, so here goes, and it is heartfelt and sincere. I am truly deeply and sincerely sorry that my sister is a lying, manipulative, fraudulent thief".¹³

In 2015, Traci Gauthier, a substitute art teacher at a high school in Colorado, took a photograph of one of the students and posted it to her Instagram. She added the comment: "STEM kids are trying too hard. I don't know him, but I hate him. #pothead #STEM #wannabecool #dorkywhiteboy".¹⁴

⁹ *Cyber-safety Act*, S.N.S. 2013, c. 2, s. 3(1).

¹⁰ This famous statement was made by Justice Stewart of the United States Supreme Court in the decision of *Jacobellis v. Ohio*, 378 U.S. 184 in attempting to define the limits of "hardcore pornography".

¹¹ N.S.T.U. Cyberbullying Statistics, "National Issues in Education Poll" Canadian Teachers' Federation (2010).

¹² 2014 NSSC 71 at para. 7.

¹³ 2014 NSSC 71 at para. 14.

¹⁴ <http://www.keyt.com/news/colorado-teacher-accused-of-cyberbullying/31664326>

When the student was told of the post by friend, he commented on the photograph stating “You can’t hate me you don’t know me”. She responded by saying “I know I don’t know you- but I can hate anyone I’d like. #nobig #dontbesad #meanartteacher”.

This does not mean that the medium must be public. In *R. v. L. (C.)*, the youth, C.L., privately messaged his ex-girlfriend, A.B. Justice Whalen made the following comments at C.L.’s sentencing hearing:

53. ... C.L. began a long, insulting, misogynist diatribe on Facebook towards A.B. The repetitive, vil [sic] nature clearly shows he wanted to cause harm, fear and humiliation.

54. There are 22 references to words like "dead", "die" or "death", clearly trying to provoke A.B. to commit suicide. There are 25 references to "pedo" and "bitch". There are 27 incidents of C.L. calling A.B. a "ho".

2. Creating false online profiles, which defame the intended victim. Robert Campbell, a 42-year-old from Ottawa, plead guilty to 63 charges of identity fraud, criminal harassment and defamation in 2013, which included allegations that he set up fake social media profiles of his victims.¹⁵

This also occurred in the case of Amanda Todd where she discovered a Facebook profile had been made in her name, featuring her exposed breasts as the main picture.

¹⁵ <http://www.cbc.ca/news/canada/ottawa/robert-campbell-of-ottawa-faces-181-international-cyberbullying-charges-1.2724802>

3. Sharing nude images/videos of another person without their consent. Typically this occurs when nude images are shared between two people in a relationship, but when the relationship breaks down, the receiver of the images circulates the images with the intent to be harmful.

Celebrities are often targets of this behaviour, as witnessed by the leaking of nude photographs of Jennifer Lawrence and Kate Upton in 2014.

These are just some of the examples of cyberbullying. Its naturally amorphous nature has made it difficult to prevent, and in the case of authorities, charge and prosecute.

Legislative Acknowledgement of Cyberbullying in Canada

Legislation is currently in place that *could* address cyberbullying, if employed.

For example, while there “is no explicit crime of bullying or cyberbullying there are many provisions of the Criminal Code which can apply to these situations”.¹⁶ Assault (contrary to section 265), criminal harassment (contrary to section 264) and uttering threats (contrary to section 264.1), as well as the education statutes all have sanctions which can apply to those who commit bullying. While there is no tort of harassment in the civil context, the torts of defamation, battery, nervous shock, and the newly-established tort of intrusion upon seclusion (i.e. breach of privacy) all allow for civil redress.

From the perspective of school authorities, Québec has the *Education Act* and *An Act Respecting Private Education* in place,¹⁷ which give school boards the primary responsibility to ensure school safety by instituting prevention measures, involving parents, and protecting the confidentiality of complainants. Similarly, Ontario’s *Education Act*¹⁸ seeks to prevent bullying by requiring boards to promote the prevention

¹⁶ Downloadable from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123494.

¹⁷ *Education Act*, RSQ c I-13.3 [Québec Act], *An Act Respecting Private Education*, RSQ c E-9.1 [Québec Private Act].

¹⁸ *Education Act*, RSO 1990, c E-2 (current to 11 February 2013).

of bullying, to establish and provide annual professional development programs in order to educate staff and teachers on bullying prevention strategies, and to provide programs for victims and witnesses of bullying.¹⁹ Other provinces have similar legislation with similar goals.

However, it is widely accepted that these measures are either not being employed effectively (or at all), or are ineffective at preventing the harms caused by cyberbullying. With the string of recent suicides sparking nation-wide media outrage in both Canada and the United States, various government committees were struck to canvass the issue, as well as suggest possible solutions. For example, the Report of the Nova Scotia Task Force on Bullying and Cyberbullying, entitled “Respectful and Responsible Relationships: There’s No App for That”, was released on February 29, 2012.²⁰

Later that year, the Standing Senate Committee on Human Rights released their report, entitled “Cyberbullying Hurts: Respect for Rights in the Digital Age”, was released in December 2012.²¹ Similarly, the CCSO Cybercrime Working Group, co-chaired by the Department of Justice Canada and the Ontario Ministry of the Attorney General, released their June 2013 report on Cyberbullying, and in particular, the non-consensual distribution of intimate images.²²

Nova Scotia enacted anti-bullying legislation in 2013, entitled the *Cyber-safety Act*.²³ The CSA allows for an individual to apply to a justice, on an *ex parte* basis, for a protection order.²⁴ The justice is given wide authority to include terms in the protection order that aim at ending the cyberbullying, either through restricting or prohibiting communication with or about the victim.²⁵

¹⁹ *Ibid*, ss 169(1)(a)(2), 170(1)(7).

²⁰ Downloadable from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123494.

²¹ <http://www.parl.gc.ca/Content/SEN/Committee/411/ridr/rep/rep09dec12-e.pdf>

²² <http://www.justice.gc.ca/eng/rp-pr/other-autre/cndii-cdncii/pdf/cndii-cdncii-eng.pdf>

²³ CSA, *supra* note 9.

²⁴ CSA, *supra* note 9, s. 5(1).

²⁵ CSA, *supra* note 9, s. 9(1).

The CSA specifies cyberbullying as an intentional tort, and empowers the court to award general, special, aggravated, and punitive damages.²⁶ Perhaps most importantly, the parent becomes jointly and severally liable for their children’s cyberbullying, unless they can show they exercised reasonable supervision over them.²⁷

(3) Where the defendant is a minor, a parent of the defendant is jointly and severally liable for any damages awarded to the plaintiff unless the parent satisfies the Court that the parent was exercising reasonable supervision over the defendant at the time the defendant engaged in the activity that caused the loss or damage and made reasonable efforts to prevent or discourage the defendant from engaging in the kind of activity that resulted in the loss or damage.

This provision brings Nova Scotia in line with other provinces, such as British Columbia, Manitoba and Ontario, which all have their own laws which impose joint and several liability on parents.²⁸

The unique feature of the CSA is the creation of the CyberSCAN investigation unit – essentially a team of investigators which assist those who feel they have been cyberbullied.

Exercising its jurisdiction over criminal law, the federal government recently enacted Bill C-13, known as the *Protecting Canadians from Online Crime Act*. This Bill amended the *Criminal Code* (among other Acts) to make it an offence to disseminate “intimate” photographs of others without their consent. An intimate image is defined as:

(2) In this section, “intimate image” means a visual recording of a person made by any means including a photographic, film or video recording,

²⁶ CSA, *supra* note 9, ss. 21 and 22.

²⁷ CSA, *supra* note 9, s. 22(3).

²⁸ *Parental Responsibility Act*, S.O. 2000, c. 4.

(a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;

(b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and

(c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.

Due to the fact that dissemination of (as well as possession of) child pornography is already illegal, Bill C-13's novelty concerns the "intimate" images of adults. However, the offence has been critiqued for applying too broadly, as it does not require the distributor of the image to be doing so with the intention to harass the victim.²⁹

Are Insurers Underwriting the Risk of Cyberbullying?

Inadvertently, insurers are underwriting the risk of cyberbullying *by minors* through homeowners' policies.

Homeowners' insurance policies provide third party liability coverage to the occupants of the home. Typically speaking, homeowners' policies exclude coverage for "any intentional or criminal act or failure to act".³⁰ This clause, as explained by the Court of Appeal for Ontario, "would only exclude an 'act or failure to act' that is intentional or criminal".³¹

The act of cyberbullying is, without a doubt, an intentional act. The Supreme Court of Canada in *A.B. (Litigation Guardian of) v. Bragg Communications Inc.* adopted the Nova

²⁹ <http://www.cba.org/cba/submissions/pdf/14-33-eng.pdf>

³⁰ See e.g., *Durham District School Board v. Grodesky*, 2012 ONCA 270.

³¹ *Durham*, *supra* note 30 at para. 9, adopting the reasoning of the Supreme Court of Canada in *Lloyd's of London v. Scalera*, 2000 SCC 24.

Scotia Report's definition of bullying as "behaviour that is *intended* to cause, or should be known to cause, fear, intimidation, humiliation, distress or other forms of harm".³² Homeowners' policies would therefore not respond to a civil suit that is brought against the cyberbully proper.

However, insurers should be aware that while they would not have to respond to the claim against the cyberbully, in cases where the cyberbully is a minor there may be exposure vis-à-vis the parents/guardians. Courts in Canada have recognized that parents and guardians can be liable in negligence for failing to supervise their children.³³

One example of this is *Belair Direct v. Shoup*, where Justice Morgan of the Ontario Superior Court of Justice dealt with such a case where minors had intentionally caused injury, and a civil suit was commenced against the parents.³⁴

The minor plaintiff, Kadin Kendall, was shot with a pellet gun fired from the window of a car driven by the minor defendant, Jon Mulder. Jon had spent over an hour driving around Toronto while his two friends shot pellets out the windows. Jon was subsequently convicted of possession of a weapon for a dangerous purpose contrary to section 88 of the *Criminal Code*.

Kadin brought an action against Jon and his mother, Ms. Shoup. Belair denied coverage to the defendants on the basis of the exclusion, and then brought an application to the Superior Court for a declaration that the denial was sound in law. The question on the application was therefore, whether or not the homeowners' policy, issued by Belair Direct, would have a duty to defend Ms. Shoup and her husband at the time, Mr. Moar.

Justice Morgan held the following:

³² *A.B. (Litigation Guardian of) v. Bragg Communications Inc.*, 2012 SCC 46 at para 21.

³³ It should be noted that the parents are not vicariously liable for the torts of their children. Rather, they are negligent *in their own right* for their own failure to supervise.

³⁴ *Belair Direct v. Shoup et al.*, 112 O.R. (3d) 314 (Sup. Ct.).

I would accordingly grant the declaration sought with respect to [Jon] Mulder, but would dismiss the request for a declaration with respect to Shoup and Moar. The Applicant has no duty to defend the claim against Mulder in the Main Action as that claim falls within the exclusion clause. On the other hand, the Applicant is obliged under the terms of the insurance policy to defend the claims brought against Shoup and Moar in the Main Action, as those claims are separate from the claims against Mulder and do not fall within the exclusion clause.

Justice Morgan rested her decision on the recent Court of Appeal for Ontario's decision in *Durham District School Board v. Grodesky*.³⁵ The Court similarly held, in a situation where the minor had set fire to his High School's recycling bins which subsequently spread to the school itself, that the insurer underwriting a homeowners' policy has a duty to defend the parents against a claim of negligent supervision. However, the insurer did not have to defend the child.

Interestingly, while homeowner's policies may provide coverage to parents who supervise negligently, they would not provide coverage under the joint and several liability provisions of Nova Scotia's CSA. This is due to the fact that joint and several liability stems from the child's tort of cyberbullying under the statute, and therefore, is excluded as an intentional act. The result is that the plaintiff would have to plead negligence as against the parents in their own right to trigger the defendant-parents' coverage!

Based on the recent case law, insurers who underwrite policies of homeowners' insurance should give serious consideration to including explicit exclusions which cover parental liability for failure to supervise, and thus prevent, the intentional acts of minors under their care. Carol Kreiling, Claims Expert with Reinsurance P&C suggests the following in her article with Canadian Underwriter:

³⁵ *Durham, supra* note 30.

- any "bodily injury," "property damage" and "personal injury" arising out of electronic communication and any claim for damages of negligent supervision arising out of electronic communication, or
 - any claim for damages of negligent supervision arising out of electronic communication.³⁶
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³⁶ <http://www.canadianunderwriter.ca/news/cyberbullying-as-a-tort/1002809193/>.