

---

2016

## A Tort Perspective on Cyberbullying

Denis Binder

*Chapman University, Fowler School of Law, [dbinder@chapman.edu](mailto:dbinder@chapman.edu)*

Follow this and additional works at: <https://digitalcommons.chapman.edu/chapman-law-review>



Part of the [Law Commons](#)

---

### Recommended Citation

Denis Binder, *A Tort Perspective on Cyberbullying*, 19 CHAP. L. REV. 359 (2016).

Available at: <https://digitalcommons.chapman.edu/chapman-law-review/vol19/iss2/1>

This Article is brought to you for free and open access by the Fowler School of Law at Chapman University Digital Commons. It has been accepted for inclusion in Chapman Law Review by an authorized editor of Chapman University Digital Commons. For more information, please contact [laughtin@chapman.edu](mailto:laughtin@chapman.edu).

# A Tort Perspective on Cyberbullying

*Denis Binder\**

The Internet has opened the world to the rapid dissemination of knowledge. It has also, like every revolution, opened the door to new crimes and torts. The law is now responding to the new phenomenon of cyberbullying.

School bullies used to ply the hallways, schoolyards, and playgrounds. The traditional victims of bullying knew who their bullies were.

These traditional bullies still exist, but the Internet and social media have created a whole new class of bullies, who, often anonymously, from a distance, use the Internet, to electronically torment their victims through smart phones, tablets and personal computers, and any other forms of electronic communications on blogs, bulletin boards, chat rooms, Twitter, and their own websites. They post, text, hack, and instant message. Photos are photoshopped to picture a person in a false light. Their aim is to disparage, humiliate, or torment the victim. Social media empowers, but also destroys. The harassment can be felt 24/7. Occasionally the victim's distress has been so great that the victim has committed suicide.<sup>1</sup>

Attention is focused on teenage bullying both because it is very common and because teenagers often have insecurity issues as they traverse the difficult years between childhood and adulthood with hormones kicking in. Teenagers are also well known for sarcasm and meanness, both of which are manifested in cyberbullying incidents. The Internet, through its various electronic means, is an integral part of the culture and lifestyle of today's younger generation. They are electronically wired.

However, cyberbullying is not limited to students. Adults can also be perpetrators and victims.

---

\* Professor of Law, Chapman University Dale E. Fowler School of Law. S.J.D. 1973, L.L.M. 1971, University of Michigan; J.D. 1970, A.B. 1967, University of San Francisco.

<sup>1</sup> See, e.g., *Vidovic v. Mentor City Sch. Dist.*, 921 F. Supp. 2d 775 (N.D. Ohio 2013) (cyberbullying based on national origin).

Traditional bullying was physical, often with psychological complications. Today's cyberbullying is psychological, often with physical complications. Traditional bullying was limited in time and space. Today's cyberbullying can occur at any time on a global basis through the World Wide Web.

The prototypical case involved thirteen-year-old Megan Meier in O'Fallon, Missouri, an upper-middle-class community thirty-five miles northwest of St. Louis.<sup>2</sup> Megan suffered from depression since the third grade and was receiving medication for attention deficit disorder and bipolar syndrome.<sup>3</sup> She was teased for being fat. Megan had considered suicide in the past. Her friendship with Sarah Drew, a close friend, had recently ended.

Megan created a MySpace account. She shortly connected with sixteen-year-old Josh Evans.<sup>4</sup> The two bonded on the Internet. Megan was happy.

"Josh" was not Josh, though. Indeed, he did not exist. He was the creation of Lori Drew, Sarah's mother, who lived four doors away. Lori created Josh with Sarah and an eighteen-year-old employee, Ashley Grills, to determine if Megan was "trashing" her daughter. It evolved into a campaign to inflict pain on Megan. Lori had posted a photo of a boy, without the boy's permission, as Josh.

The online relationship turned negative when "Josh" sent this message: "I don't know if I want to be friends with you any longer because I heard you are not a very good friend." The exchanges became increasingly unfriendly. His final message said: "You are a bad person and everybody hates you. Have a shitty rest of your life. The world would be a better place without you."<sup>5</sup>

Megan was devastated and committed suicide in her bedroom the next day on October 16, 2006. This tragedy reverberated nationally.

The prosecutor for St. Charles County, Missouri, declined to prosecute because he could divine no crime under state law. Instead, the United States Attorney in Los Angeles proceeded with a felony conspiracy count and several misdemeanor charges

---

<sup>2</sup> For a detailed analysis of the case, see Kristopher Accardi, *Is Violating an Internet Service Provider's Terms of Service an Example of Computer Fraud and Abuse?: An Analytical Look at the Computer Fraud and Abuse Act, Lori Drew's Conviction and Cyberbullying*, 37 W. ST. U. L. REV. 67 (2009).

<sup>3</sup> Steve Pokin, *Megan's Story*, MEGAN MEIER FOUNDATION, <http://www.meganmeierfoundation.org/megans-story.html> [<http://perma.cc/F9ML-Q3WK>].

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

against Lori Drew for alleged violations of the Computer Fraud and Abuse Act.<sup>6</sup>

In essence, she posted on MySpace in violation of MySpace's terms of service. He claimed jurisdiction because MySpace, the host, is headquartered in Beverly Hills, California. Ashley Grills was granted immunity to testify against Lori. The criminal charges were based on Lori Drew (1) setting up the MySpace account under a fictitious name, (2) acquiring information about Megan, and (3) inflicting emotional distress upon Megan. The federal statute provides that "[w]hoever . . . intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer" has committed a crime.<sup>7</sup>

The jury convicted Lori Drew of three misdemeanors and deadlocked on the conspiracy charge. The federal district judge subsequently threw out the case, holding the federal statute did not apply.<sup>8</sup> It was unconstitutionally vague and failed to provide "minimal guidelines to govern law enforcement."<sup>9</sup>

The impact of the Megan Meier case and similar cases prompted states to enact cyberbullying statutes.<sup>10</sup> Irrespective of the availability of criminal law for cyberbullying, causes of action are available under tort law. They include defamation, intentional infliction of emotional distress, the prima facie tort, and state statutes, if available.

Potentially liable parties include the bully, parents of the bully, school districts, and Internet service providers ("ISPs").

## I. STATUTES

### A. Hate Crime Legislation

If the cyberbullying is based on the victim's sexual identity, race, religion, or sex, then existing hate crime statutes may apply. For example, California's Hate Crime Statute criminalizes crimes committed based on the following characteristics of the victim: disability, gender, nationality, race or ethnicity, religion,

---

<sup>6</sup> 18 U.S.C. § 1030 (2012).

<sup>7</sup> *Id.*

<sup>8</sup> *United States v. Drew*, 259 F.R.D. 449, 468 (C.D. Cal. 2009). The judge held the statute was unconstitutionally vague, had notice deficiencies, and did not provide minimal guidelines to govern law enforcement. *Id.* at 466–67.

<sup>9</sup> *Id.* at 464.

<sup>10</sup> One provision, in addition to general anti-bullying statutes, is to ban the creation of an impersonation website, as was done with "Josh Evans." *See, e.g.*, CAL. PENAL CODE § 528.5 (West 2016).

sexual orientation, or association with a person or group with those actual or perceived characteristics.<sup>11</sup>

Hate crime statutes should be a major cause of action in cyberbullying complaints in states with these statutes. Homophobic and racist statements seem to abound in cyberbullying cases. Many cases involve students committing suicide after being cyberbullied for being gay.<sup>12</sup> The New York case of *T.E. v. Pine Bush Central School District* is an example of cyberbullying based on religion.<sup>13</sup> Years of anti-Semitic taunting of Jewish students were not effectively addressed by the school district. The court held that the school's knowledge that the responses were inadequate can constitute deliberate indifference for purposes of liability.<sup>14</sup> The U.S. Supreme Court has held that a school district's "deliberate indifference" to a student's sexual harassment of another student violated Title IX of the Education Amendments of 1972.<sup>15</sup>

## B. Cyberbullying Statutes

Every state, and the District of Columbia, has anti-bullying statutes. Their breadth and depth vary greatly. Many have been amended to include cyberbullying among the actionable offenses.<sup>16</sup> Questions to ask about these statutes are:

- 1) Are they criminal, civil, or both?
- 2) Do they provide a private cause of action?<sup>17</sup>

<sup>11</sup> CAL. PENAL CODE §§ 422.55, 422.6 (West 2016).

<sup>12</sup> See, e.g., *Walsh v. Tehachapi Unified Sch. Dist.*, 997 F. Supp. 2d 1071, 1073 (E.D. Cal. 2014).

<sup>13</sup> *T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332 (S.D.N.Y. 2014) (lawsuit was brought pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 1983, and New York's Civil Rights Law).

<sup>14</sup> *Id.* at 379; see also *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 673 (2d Cir. 2012) (racial taunting and harassment resulting in award of \$1,000,000 plus fees and costs).

<sup>15</sup> *Davis ex rel LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

<sup>16</sup> ARK. CODE ANN. § 6-18-514 (West 2016); CONN. GEN. STAT. ANN. § 10-222d(a)(2) (West 2016); FLA. STAT. ANN. §§ 784.048(2), 1006.147(3)(b) (West 2016); GA. CODE ANN. § 20-2-751.4(a) (West 2016); MASS. GEN. LAWS ANN. ch. 71, § 37O(a); N.H. REV. STAT. ANN. § 193-F:4(II)(b) (West 2016); N.J. STAT. ANN. § 18A:37-14 (West 2016); N.Y. EDUC. LAW § 11(7) (McKinney 2016); S.D. CODIFIED LAWS § 13-32-15 (West 2016); TENN. CODE ANN. §§ 49-6-4502, 4503 (West 2016); VT. STAT. ANN. tit. 16, § 11(a)(32) (West 2016).

<sup>17</sup> For example, California expressly grants a private cause of action. CAL. CIV. CODE § 52.1(b) (West 2016). On the other hand, the New Hampshire statute expressly provides that it does not create a private right of action for enforcement of the chapter against any school district, chartered public school, or the state. N.H. REV. STAT. ANN. § 193-F:9; see also *Gauthier v. Manchester Sch. Dist.*, SAU #37, 123 A.3d 1016, 1019–20 (N.H. 2015) (holding that § 193-F:9 barred a lawsuit brought against the school district for failing to notify the parent of bullying within forty-eight hours).

- 3) What do they cover?<sup>18</sup>
- 4) What are the penalties?
- 5) Do they only apply to schools?
- 6) If so, do they apply to off-campus bullying, or just on-campus acts involving school computers, servers, and networks?<sup>19</sup>
- 7) Do they apply to private schools as well as public schools?<sup>20</sup>
- 8) Do they apply to the parents of minor perpetrators?
- 9) Do they apply to all perpetrators, minor or adult?
- 10) Do they grant immunity to school boards, administrators, or employees?<sup>21</sup>

A problem with such statutes is that if written or construed too broadly, they may interfere with the First Amendment freedom of speech rights of the student.<sup>22</sup> The Supreme Court held in *Tinker v. Des Moines Independent Community School District* that student protests are protected by the Free Speech Clause of the First Amendment.<sup>23</sup> The dividing line between protected speech and unprotected speech is unsettled, but it is clear that threats of physical violence are not protected.<sup>24</sup> The

---

18 For example, the North Carolina anti-bullying statute expressly includes building a false profile or website, posing as a minor in an internet chat room, email or instant messaging, or following a minor online. N.C. GEN. STAT. ANN. § 14-458.1 (West 2016).

A commonality in the statutes is to reference cyberbullying in terms of “electronic communications devices.” See, e.g., CAL. PENAL CODE § 653.2(b) (West 2016). For an analysis of California’s approach to cyberbullying, see generally Atticus N. Wegman, *Cyberbullying and California’s Response*, 47 U.S.F. L. REV. 737 (2013).

19 For example, New Hampshire’s anti-bullying act applies to both on-campus and off-campus “if the conduct interferes with a pupil’s educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event.” N.H. REV. STAT. ANN. § 193-F:4(I)(b); see also TENN. CODE ANN. § 49-6-4502(a)(3)(B) (West 2016).

20 California permits a private postsecondary educational institution to adopt rules and regulations designed to prevent hate violence. CAL. EDUC. CODE § 94367(f) (West 2016).

21 For example, Tennessee’s statute grants immunity to school employees who promptly report acts of harassment, intimidation, bullying, or cyberbullying to the appropriate official in accordance with the procedures set forth in the school district policies. TENN. CODE ANN. § 49-6-4505(c) (West 2016); see also CONN. GEN. STAT. ANN. § 10-222(a) (West 2016).

22 See, e.g., *People v. Marquan M.*, 19 N.E.3d 480, 486 (N.Y. 2014).

23 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding students wearing black armbands to protest the Vietnam War were protected under the First Amendment).

24 For detailed analysis of the First Amendment issue, see generally Matthew Fenn, *A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in a Sticky Situation?*, 81 FORDHAM L. REV. 2729 (2013); Daniel Marcus-Toll, *Tinker Gone Viral: Diverging Threshold Tests for Analyzing School of Regulation of Off-Campus Digital Student Speech*,

Court held that prohibitions on expressive conduct could be upheld if the conduct “would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.’”<sup>25</sup>

In *United States v. Alvarez*,<sup>26</sup> the Supreme Court noted that the First Amendment does not protect fighting words, true threats, incitements, obscenity,<sup>27</sup> child pornography, fraud, defamation, or statements integral to criminal conduct.<sup>28</sup> Websites for the purchase of illegal drugs are not protected.<sup>29</sup> A posting about killing a teacher should not be protected.<sup>30</sup>

On the other hand, the parody of a school principal should be protected speech.<sup>31</sup> Similarly, bad reviews and student comments on a professor’s teaching are protected speech.<sup>32</sup> The embarrassment of administrators is not a ground for banning student non-school sponsored material.<sup>33</sup>

## II. ON-CAMPUS OR OFF-CAMPUS CYBERBULLYING

We start with the premise that school boards have more power to regulate on-campus speech and conduct than off-campus speech and conduct. The issue remains open as to the extent of the jurisdiction of school boards to punish off-campus cyberbullying. Much of the traditional schoolyard bullying occurred on school grounds. Today, anyone with an electronic connection anywhere in the world can initiate a cyberbullying attack. Anyone else in the world can join in if the website used to incite the attack is an open one. The communications may be through an off-campus web host. The only “on-campus” link might be that a few students, teachers, or administrators will see it and discuss it at school.

The Supreme Court held in *Morse v. Frederick*<sup>34</sup> that the school could act against on-campus vulgar and lewd speech. However, Justice Brennan, in his concurring opinion in *Bethel*

---

82 FORDHAM L. REV. 3395 (2014); Renee L. Servance, *Cyberbullying, Cyber-Harassment and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213.

<sup>25</sup> *Tinker*, 393 U.S. at 509 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

<sup>26</sup> *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

<sup>27</sup> *Id.*; see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (holding the school district was able to prohibit and punish lewd and vulgar speech or behavior).

<sup>28</sup> *Alvarez*, 132 S. Ct. at 2544.

<sup>29</sup> *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

<sup>30</sup> *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007).

<sup>31</sup> *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587 (W.D. Pa. 2007); see also *Beverly v. Watson*, 78 F. Supp. 3d 717 (N.D. Ill. 2015) (attempt by administration to shut down an off-campus professor blog critical of the administration).

<sup>32</sup> *Schmisky v. Higgins*, 2014 WL 1710962 (Cal. Ct. App. Apr. 29, 2014).

<sup>33</sup> *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988).

<sup>34</sup> *Morse*, 551 U.S. at 410.

*School District v. Fraser*, wrote that the situation would be different with off-campus speech: “If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.”<sup>35</sup> Chief Justice Roberts in his majority opinion in *Morse v. Frederick*<sup>36</sup> echoed Justice Brennan’s concurrence in *Fraser*: “Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.”<sup>37</sup>

State and federal courts have wrestled with the defining line between the ability of school boards to discipline off-campus web postings that reflect poorly on some students, teachers, or administrators. A consensus seems to be evolving around the issue of whether or not the act had a substantial interference (substantial disruption) with school discipline or the rights of others. Looking to language in *Tinker*, “conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized . . .”<sup>38</sup>

Courts have upheld disciplinary actions against students whose off-campus postings carried over to the school campus, such as in *Kowalski v. Berkeley County School*.<sup>39</sup> The student’s off-campus website singled out a specific student for harassing, bullying, and intimidation, tagging her with herpes.

Postings that interfere with the work and discipline of the school, that create a substantial disorder and disruption in the school, that interfere with students’ rights to be secure and left alone, are subject to disciplinary action by the school.<sup>40</sup>

An off-campus rap entitled “PSK The Truth Needs to Be Told,” which named two teachers and described violent acts against them, was not protected speech.<sup>41</sup> The rap was directed at the school and contained threats of physical violence.<sup>42</sup>

Yet, off-campus electronic postings are not necessarily subject to school discipline, even if made directly toward students at the school. For example, a student followed up on a creative

---

<sup>35</sup> Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688 (1986).

<sup>36</sup> *Morse*, 551 U.S. at 393.

<sup>37</sup> *Id.* at 405.

<sup>38</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

<sup>39</sup> *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011).

<sup>40</sup> *Id.* at 573–74; *see also* *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008); *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821 (7th Cir. 1998).

<sup>41</sup> *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015).

<sup>42</sup> *Id.*



writing assignment the previous year of writing your own obituary by posting two mock obituaries of students at the school. The page said the site was not sponsored by the school and was for entertainment only. The student also asked readers to submit suggestions on who should die next, i.e. receive a mock obituary.

The media called it a “hit list,” but it was clear that no student at school felt threatened by it. The court overturned the student’s discipline and held the posting was protected speech.<sup>43</sup>

An off-campus tweet not posing a risk to the school was protected by the First Amendment.<sup>44</sup> Off-campus postings, that are neither school-sponsored nor at a school-sponsored event, and which do not present a substantial disruption at the school, are not subject to school discipline.<sup>45</sup>

### III. DEFAMATION

Defamation, usually libel since the defamation is by written means, is generally defined as the publication of a false statement that holds one up to hatred, contempt, or ridicule, or causes one to be shunned or avoided. The publication need only be to one person.

Defamation would clearly apply in cyberbullying cases where the perpetrator is publishing a defamatory statement about the victim. The false statement constitutes libel since the electronic statement is in written form.

California defines libel as “a false and unprivileged publication by words . . . which expose any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or has a tendency to injure him in his occupation.”<sup>46</sup>

Anyone publishing or republishing<sup>47</sup> the defamatory remark can be liable as a publisher. That would seemingly include the ISP. However, Congress in the Communications Decency Act of 1996, exempted ISPs from liability as publishers in Section 230, commonly referred to as the Internet Freedom and Family Empowerment Act. The section provides: “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>48</sup> Courts have held the immunity applies

---

43 *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

44 *Sagehorn v. Indep. Sch. Dist. No. 728*, 2015 WL 4744482 (D. Minn. Aug. 11, 2015).

45 *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 933 (3d Cir. 2011).

46 CAL. CIV. CODE § 45 (West 2016).

47 *Khawar v. Globe Int’l, Inc.*, 965 P.2d 696, 704 (Cal. 1998).

48 47 U.S.C. § 230(c)(1) (2012); *see also* *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006).

even if the third party submitted a false profile<sup>49</sup> or if the ISP acted negligently.<sup>50</sup>

Under the privilege of fair comment, the common law generally protects the right to express an opinion, such as negative reviews or statements, but not false facts about movies, books, plays, and politicians, not to mention administrators and teachers.<sup>51</sup>

#### IV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The tort of intentional infliction of emotional distress is a well-developed cause of action for a young tort that traces back to the mid-twentieth century.<sup>52</sup> The Restatement (Third) of Torts provides: “[a]n actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm.”<sup>53</sup>

California adopted the tort in *State Rubbish Collectors Association v. Siliznoff*,<sup>54</sup> which involved physical threats, and then extended it to racial and ethnic insults in *Alcorn v. Anbro Engineering, Inc.*<sup>55</sup> The next, logical step will be to formally extend it to cyberbullying.

#### V. PRIMA FACIE TORT

The early common law was very strict in its pleadings. If a cause of action did not fit into one of the established writs, then it could not proceed. Thus, an intentional, wrongful act, no matter how egregious, which did not fit into such traditional writs as assault, battery, false imprisonment, trespass to chattels, conversion, or trespass, would fail.

The American common law therefore developed the catch-all “prima facie” tort,<sup>56</sup> based on dicta by Lord Bowen in the 1889

49 *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).

50 *Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir. 2003).

51 See RESTATEMENT (SECOND) OF TORTS § 566 (AM. LAW INST. 1977); see also *Baker v. L.A. Herald Exam’r*, 721 P.2d 87 (Cal. 1986); *Schimsky v. Higgins*, 2014 WL 1710962 (Cal. Ct. App. Apr. 29, 2014) (protecting inconsistently bad evaluations and reviews of adjunct professor).

52 For one of the most famous cases exemplifying this cause of action, see *State Rubbish Collectors Ass’n v. Siliznoff*, 240 P.2d 282 (Cal. 1952).

53 RESTATEMENT (THIRD) OF TORTS § 46 (AM. LAW INST. 2012).

54 *State Rubbish Collectors Ass’n*, 240 P.2d at 282.

55 *Alcorn v. Anbro Eng’g, Inc.*, 468 P.2d 216 (Cal. 1970).

56 For a history of the prima facie tort, see Kenneth J. Vandeveld, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447 (1990). See Morris D. Forkosch, *An Analysis of the “Prima Facie Tort” Cause of*

British case of *Mogul Steamship Co. v. McGregor, Gow & Co.*<sup>57</sup> He wrote: "[I]ntentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse."<sup>58</sup>

Justice Oliver Wendell Holmes advanced the prima facie tort in the 1904 Supreme Court case of *Aikens v. Wisconsin*: "It has been considered that, prima facie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."<sup>59</sup> He cited *Mogul Steamship* and the earlier Massachusetts decision in *Walker v. Cronin*.<sup>60</sup>

The prima facie tort remains underutilized and underrecognized. Under the prima facie tort, anyone who intentionally causes injury to another shall be liable unless the acts were privileged. The Restatement (Second) of Torts provides:

One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.<sup>61</sup>

The prima facie tort has not been uniformly adopted in the United States. Jurisdictions are split on establishing the prima facie tort cause of action,<sup>62</sup> with many jurisdictions not recognizing it.<sup>63</sup> Others only allow the prima facie tort to proceed if no other cause of action exists.<sup>64</sup>

*Action*, 42 CORNELL L. REV. 465 (1957); Note, *The Prima Facie Tort Doctrine*, 52 COLUM. L. REV. 503 (1952). In New York, see Note, *The Prima Facie Tort Doctrine in New York—Another Writ?*, 42 ST. JOHN'S L. REV. 530 (1968).

<sup>57</sup> *Mogul S.S. Co. v. McGregor, Gow & Co.*, 23 QBD 598 (1889), *aff'd.* [1892] App. Cas. 25 (HL).

<sup>58</sup> *Id.* at 613.

<sup>59</sup> *Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904).

<sup>60</sup> *Walker v. Cronin*, 107 Mass. 555, 562 (1871) ("The intentional causing of such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong.").

<sup>61</sup> RESTATEMENT (SECOND) OF TORTS § 870 (AM. LAW INST. 1979).

<sup>62</sup> States that have recognized the prima facie tort include: California (*Cervantez v. J.C. Penney Co.*, 156 Cal. Rptr. 198, 206 (Cal. 1979)); Delaware (*Kaye v. Pantone, Inc.*, 395 A.2d 369, 373 (Del. Ch. 1978)); Missouri (*Porter v. Crawford & Co.*, 611 S.W.2d 265, 268 (Mo. Ct. App. 1980)); and New York (*Advance Music Corp. v. Am. Tobacco Co.*, 70 N.E.2d 401, 403 (N.Y. 1946)).

<sup>63</sup> These jurisdictions include: District of Columbia (*Nix v. Hoke*, 139 F. Supp. 2d 125, 132 (D. D.C. 2001)); Florida (*Whitney Info. Network, Inc. v. Gagnon*, 353 F. Supp. 2d 1208, 1213 (M.D. Fla. 2005)); Ohio (*Phung v. Waste Mgmt., Inc.*, 532 N.E.2d 195, 200 (Ohio App. 1988)); Pennsylvania (*Hughes v. Halbach & Braun Indus., Ltd.*, 10 F. Supp. 2d

Cyberbullying should fall into the *prima facie* category in jurisdictions which accept the tort because of the intentional outrageousness of the act lacking justification. The intent is clearly to injure the victim.

## VI. CALIFORNIA

Very few civil cyberbullying cases have worked their way through the judicial system. A California case, *D.C. v. R.R.*,<sup>65</sup> is not a good auger for the future even though California makes it illegal to use any electronic communication with intent to instill fear or harass another person.<sup>66</sup>

Daniel Caplin, a fifteen-year-old student at the private Harvard-Westlake School in Los Angeles, was an aspiring actor and singer with several gigs and an album coming out. He opened a website to promote his activities and allowed members of the public to post comments on a "guest book."<sup>67</sup> The responses were not always what he expected.

The favorable comments were accompanied by scurrilous comments, including homophobic slurs and threats of violence, which are all too common in cyberbullying scenarios. Thirty-four posts were viewed as offensive with six perceived as death threats. Twenty-three asserted Daniel was gay, some using the word "faggot."<sup>68</sup> One student wrote: "I want to rip out your fucking heart and feed it to you . . . I've . . . wanted to kill you. If I ever see you I'm . . . going to pound your head in with an ice pick. Fuck you, you dick-riding penis lover. I hope you burn in hell."<sup>69</sup>

Daniel's father, Lee Caplin, contacted Harvard-Westlake and the Los Angeles Police Department, which in turn contacted the FBI. The LAPD viewed the threats as credible and suggested the Caplins move. They moved to Northern California, placed Daniel in a school there, and the father commuted back and forth between Northern California and his business in Los Angeles. The Harvard-Westlake student newspaper published two articles

---

491, 499 (W.D. Pa. 1998)); Texas (*Perdue v. J.C. Penney Co.*, 470 F. Supp. 1234, 1239 (S.D.N.Y. 1979) (applying Texas law)); and Virginia (*Unlimited Screw Prod., Inc. v. Malm*, 781 F. Supp. 1121, 1130 (E.D. Va. 1991)).

<sup>64</sup> See, e.g., *Richard A. Pulaski Const. Co. v. Air Frame Hangers, Inc.*, 950 A.2d 868, 876 (N.J. 2008) (New Jersey); see also *Long v. Beneficial Fin. Co.*, 330 N.Y.S.2d 664, 668 (N.Y. App. Div. 1972) (New York).

<sup>65</sup> *D.C. v. R.R.*, 106 Cal. Rptr. 3d 399 (Ct. App. 2010).

<sup>66</sup> CAL. PENAL CODE § 653.2 (West 2016).

<sup>67</sup> *D.C.*, 106 Cal. Rptr. 3d at 404–05.

<sup>68</sup> *Id.* at 407–08.

<sup>69</sup> *Id.* at 405. A more detailed version of the comments is found in the dissent. *Id.* at 440–45.

about the case, one of which disclosed the Caplins' new residence and Daniel's school. Harvard-Westlake did not suspend or expel the offending students. The Los Angeles District Attorney exercised prosecutorial discretion and declined to prosecute.<sup>70</sup>

Daniel and his parents, Lee and Gina Caplin, filed suit against six students and their parents, Harvard-Westlake School, the school's Board of Directors, and three school employees. The original complaint contained eleven causes of action, including: negligence, assault upon another with death threats and hate crimes, invasion of privacy, defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, fraud in the inducement of a contract, and various conspiracy counts attached to these claims.<sup>71</sup> A statutory violation of California's Hate Crime Laws<sup>72</sup> was added later.<sup>73</sup>

Defendants sought to dismiss the case on several grounds, including: violation of California's anti-SLAPP suit statute,<sup>74</sup> protected speech pursuant to the First Amendment, and on a factual basis, the statement was meant as a joke, intended as "jocular humor."<sup>75</sup> The anti-SLAPP statute was enacted to protect public participants, especially opponents, of projects against lawsuits by the proposal's developers and supporters with the intent of muzzling the opponents. The statute is broadly written: "A cause of action against a person arising from any act of that person in furtherance of the right of petition or free speech under the United States Constitution or California Constitution in connection with a public issue shall be subject to a special motion to strike . . . ." <sup>76</sup>

The result is that the statute is often raised by other defendants, such as cyberbullies who claim both First Amendment protections and the statute as legal defenses. They claim that their views represent a matter of public importance.

The vicarious liability of the parents, if proven, is limited by statute to \$25,000.<sup>77</sup> The case against the parents of the alleged cyberbully in *Caplin v. Harvard-Westlake* was subsequently

---

<sup>70</sup> The Assistant District Attorney assigned to the case filed a declaration "stating that, based on the evidence, the district attorney's office declined to prosecute any of the students who had posted messages on D.C.'s Web site." *Id.* at 412.

<sup>71</sup> *D.C. v. Harvard-Westlake Sch.*, 98 Cal. Rptr. 3d 300, 304 (Ct. App. 2009).

<sup>72</sup> CAL. CIV. CODE §§ 51.7, 52.1 (West 2016).

<sup>73</sup> *D.C.*, 106 Cal. Rptr. 3d at 406.

<sup>74</sup> CAL. CIV. PROC. CODE § 425.16 (West 2016).

<sup>75</sup> *Caplin v. Harvard-Westlake Sch.*, No. BC 332406, 2008 WL 4721598, at \*2 (Cal. Super. Ct. Mar. 12, 2008).

<sup>76</sup> CIV. PROC. § 425.16.

<sup>77</sup> CIV. § 1714.1.

dismissed.<sup>78</sup> Other courts have reiterated the common law view that parents are not vicariously liable for the acts of their children, but can be liable for negligence in failing to supervise or control their children. For example, negligence could lie in not removing the offending page after learning of its existence.<sup>79</sup>

Harvard-Westlake invoked the mandatory arbitration provision in the school's enrollment contract. The provision provided the prevailing party would receive attorney fees and costs. The arbitrator held for Harvard-Westlake and awarded the school \$521,227.68 from the parents. The California Court of Appeals held that only the prevailing plaintiff can recover attorney fees under California's Hate Crime Statute.<sup>80</sup> These fees were therefore improperly awarded and the case was remanded for reconsideration.<sup>81</sup> The court on remand awarded \$208,928.34 in attorney fees and costs against the plaintiff parents, Lee and Gina Caplin, with the statutory rate of interest added to it.<sup>82</sup>

California has since enacted a statute that now purports to bar this type of clause in cases similar to that in *D.C. v. Harvard-Westlake*.<sup>83</sup>

### CONCLUSION

We are still in the early days of the computer revolution. Social media has transformed the old schoolyard bully into the cyberbully. The schoolyard bully's anti-social behavior was usually limited in time and space. The victim could usually identify the bully.

Today's cyberbully can anonymously attack anyone anytime from anywhere with an internet connection. The resulting psychological injury may be severe in vulnerable victims, sometimes leading to suicides. The cyberbullies, often teenagers, can be especially malevolent, clever, and creative in their actions, ranging from threats to defamation. Teenagers who could never be a physical bully can easily become a cyberbully.

The law, both statutory and common, is responding to the new phenomenon of cyberbullying. However, an overall consensus has yet to emerge. In addition, resolution may depend

---

<sup>78</sup> Caplin v. Harvard-Westlake Sch., No. BC 332406, 2011 WL 10653443, at \*1 (Cal. Super. Ct. Nov. 1, 2011).

<sup>79</sup> See *Boston v. Athearn*, 764 S.E.2d 582, 587 (Ga. Ct. App. 2014).

<sup>80</sup> *D.C. v. Harvard-Westlake Sch.*, 98 Cal. Rptr. 3d 300, 323 (Ct. App. 2009).

<sup>81</sup> *Id.* at 325.

<sup>82</sup> *Caplin*, 2011 WL 10653443, at \*1.

<sup>83</sup> CAL. CIV. CODE § 51.7 (West 2016).

upon a United States Supreme Court decision because of an ambiguity in students' rights of free speech from an off-campus source. Prosecutors are often unwilling to bring criminal charges because of a lack of clarity in the criminal law.

Legislatures are mandating that school districts adopt anti-bullying policies and procedures. Less than half, though, have to adopt cyberbullying measures.

A larger gap exists in that many statutes only apply to public schools. Courts will thereby have to apply, with the flexibility of the common law, existing rules in defamation, emotional distress, and the *prima facie* tort to the new cyber tort.