

**CYBERBULLYING FROM  
CLASSROOM TO COURTROOM:  
APPROACHES TO PROTECTING CHILDREN  
IN A DIGITAL AGE\***

*Panel 1—Cyberbullying In The Courtroom:  
Law, Litigation, And The First Amendment*

**REMARKS OF SCOTT CAMASSAR\*\***

I'm the personal injury lawyer on the panel, so I'm the target of all your bad lawyer jokes. First, before I start, I just want to say thank you very much to Clare and thank the Law Journal for having me here. This is a great honor for me. I'm not sure I deserve to be up here with all these other legal and academic heavyweights, but I do appreciate the honor very much.

In addition to being an injury lawyer, I'm a husband of a teacher and the father of a thirteen year-old son. So bullying is something that I hear about from different perspectives and something I've tried to stay up on.

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\*On October 20, 2011 the Albany Law Journal of Science and Technology presented a symposium on the intersection of cyberbullying and the law. These are these remarks have been annotated and edited by the Journal staff. The webcast of the event is available at at <http://www.totalwebcasting.com/view/?id=albanylaw> (last visited Aug. 23, 2012).

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I first became interested in the topic of cyberbullying just a couple of years ago when I came across a report by the CDC called, *Electronic Media and Youth Violence: A CDC Issue Brief for Educators and Caregivers*.<sup>1</sup> And what they talk about was a term called “electronic aggression,” which they define as any kind of harassment or bullying that occurs through e-mail, instant message, text message, chat rooms, websites or blogs. And it had a summary of the research that has been done up to until this point and some disturbing statistics—some surprising statistics, at least what I found surprising—such as that girls tend to do more of this and that kind of thing.

But it prompted me to look for the first time at Connecticut’s anti-bullying statute, which was vague to say the least. And I wrote a short piece called *Connecticut Law and Cyberbullying: More Is Needed*,<sup>2</sup> in which I concluded that Connecticut statute, although vague would encompass online aggression, but that Connecticut should do more to prohibit and prevent cyberbullying. Two years later I’m pleased to report—and I’ll talk about in a few minutes—Connecticut has done much more, although I take absolutely no credit for that.

As we all know cyberbullying is a pervasive and growing problem. As one commentator has noted, if I may quote, “[c]yberbullying is the epitome of covert aggression; it is anonymous, destructive, and now, instantaneous.’ Although internet harassment, for the most part, originates outside of school, it functions as the electronic bathroom wall, insidiously disrupting the school environment.”<sup>3</sup> Most states have anti-bullying statutes, and I came across the same website that Jonathan mentioned, the Cyberbullying Research Center.<sup>4</sup> Many of these statutes do specifically include prohibitions on cyberbullying, but as Jonathan mentioned, the statutes did not

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<sup>1</sup> MARCI FELDMAN HERTZ & CORINNE DAVID-FERDON, *ELECTRONIC MEDIA AND YOUTH VIOLENCE: A CDC ISSUE BRIEF FOR EDUCATORS AND CAREGIVERS* (2008), available at <http://www.cdc.gov/ViolencePrevention/pdf/EA-brief-a.pdf>.

<sup>2</sup> SCOTT CAMASSAR, *CONNECTICUT LAW AND CYBERBULLYING: MORE IS NEEDED* (2009), available at <http://www.jdsupra.com/post/documentViewer.aspx?fid=c40c066b-3740-4481-bbb4-2733cd448ceb>.

<sup>3</sup> Laurie Bloom, Note, *School Bullying in Connecticut: Can the Statehouse and the Courthouse Fix the Schoolhouse? An Analysis of Connecticut’s Anti-Bullying Statute*, 7 CONN. PUB. INT. L.J. 105, 112 (2007) (quoting *The Current State of Relational Aggression*, THE OPHELIA PROJECT, [http://www.opheliaproject.org/main/ra\\_current.htm](http://www.opheliaproject.org/main/ra_current.htm) (last updated Sep. 2006)).

<sup>4</sup> CYBERBULLYING RESEARCH CENTER, <http://www.cyberbullying.us/> (last visited May. 20, 2012).

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include or provide for a private right of action, meaning they don't authorize a suit for damages for a violation of the statute. So, victims needed some other statutory or common law remedy in order to hold bullies liable and possibly recover for their damages.

Now, in addition to the types of constitutional claims that he just talked about, other tort theories of recovery include harassment, defamation, intentional infliction of emotional distress, and invasion of privacy, as well as a more traditional negligence claim against a municipal board of education where that is appropriate and viable. These cases are said to be on the rise. In an article in *USA Today* just last month called "More Bullying Cases Have Parents Turning to Courts,"<sup>5</sup> reporter Natalie DeBlasio quoted Francisco Negron, the general counsel for the National School Boards Association, stating that bullying lawsuits are on the rise nationwide. While there are no studies showing it, he said anecdotal evidence shows an obvious increase.

Despite this growing trend however, and it's my conclusion that the proliferation of bullying statutes, and the increased awareness that goes along with that, has not really translated into meaningful civil remedies that are likely to lead to compensation for the victims of cyberbullying, or even bullying in general. And of course bullying behaviors are at the same time punishable by criminal statutes, but that's an entirely separate matter from victims' compensation, and I'm not going to talk at all about criminal statutes. I do want to give you a flavor of what some of the anti-bullying statutes are, and then just a brief overview of some of the more traditional tort remedies.

So, according to the Cyberbullying Research Center, only Hawaii, Michigan, Montana and South Dakota do not have anti-bullying laws, although Michigan has a proposed law pending. Locally, I looked at Connecticut, Massachusetts and New York; Connecticut and Massachusetts have a fairly comprehensive statutory scheme that includes prohibitions on cyberbullying. New York's statute, as far as I can tell, is really an anti-harassment and discrimination statute, although there is a proposed amendment that would add prohibition on cyberbullying.

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<sup>5</sup> Natalie DiBlasio, More Bullying Cases Have Parents Turning to Courts, USA TODAY (Sep. 11, 2011 9:29 PM) <http://www.usatoday.com/news/education/story/2011-09-11/bullying-lawsuits-parents-self-defense-courts/50363256/1>.

So first just to tell you about Connecticut. In July of this year Connecticut repealed its anti-bullying statute, which was Section 10-222d, and by unanimous vote of the Legislature enacted Public Act number 11-232, which completely overhauled the law and among other things changed the definition of bullying to include cyberbullying.<sup>6</sup>

According to the Connecticut Commission on Children, the new law responds to alarming evidence that bullying impedes Connecticut's student's abilities to succeed in school. And they said that fully 25 percent of Connecticut high school students and 35 percent of the state's ninth graders reported having been bullied or harassed on school property in the previous year. And to the extent that most cyberbullying takes place outside of school or originates outside of school, this is probably an under-representation.

But in any event, if I may paraphrase the statute, bullying now means the repeated use of a written, oral or electronic communication such as cyberbullying, or a physical act or gesture repeatedly directed at another student that either causes physical or emotional harm to the student or damage to property, places the student in reasonable fear to himself or herself, creates a hostile environment at school for the student, infringes on the rights of the student at school or substantially disrupts the educational process or the orderly operation of the school.

Cyberbullying is defined to mean any act of bullying through the use of the Internet or interactive and digital technologies, cellular, mobile telephone or mobile electronic device or other electronic communication. So it pretty much covers the whole gamut. In Connecticut, there's now a new focus on school climate, which is defined as the quality and character of school life with particular emphasis on the quality of the relationships within the school community between and among students. The new law in Connecticut requires that all schools adopt clear policies against bullying behaviors, gather data to assess the extent of bullying, train all staff who interact with students on how to prevent bullying, and all staff—even bus drivers and custodians—are required to take immediate action whenever staff observe or receive a report of bullying.

Now, the new law also provides protections for those who report and investigate bullying, and it goes so far as to provide

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<sup>6</sup> 2011 Conn. Acts Pub. A. No. 11-232.

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immunity to school employees and boards of education if a safe-school climate plan is implemented and the employees respond to bullying in good faith—whatever that means. There’s also a similar protection for students and parents who report bullying. So not only is there no private right of action, but there’s now an immunity provision if the conditions set forth in the statute are met. And although I’ve always said that there’s never been an immunity provision that couldn’t be defeated by some clever lawyer, only time will tell as to whether the legislature really gave us one that’s rock solid.

The definition in Massachusetts is very similar to that in Connecticut. In Massachusetts the statute is chapter 92 of the Acts of 2010, it’s called an Act Relative to Bullying in the School.<sup>7</sup> It defines cyberbullying as bullying through the use of technology or any electronic communication. And the statute specifically mentions e-mail, Internet communications, instant messages, or faxes, the creation of a website or a blog in which the creator assumes the identity of another person—knowing impersonation of another person as far as posted content, and posting material on electronic medium that can be accessed by others.

The Massachusetts law includes prohibitions on activity that materially and substantially disrupts the educational process or to the operation of the school, kind of the same language as Connecticut. It covers bullying that occurs at locations outside of school, functions that are not school related and even if it involves the use of a communication device that’s not school owned or leased, so long as the bullying creates a hostile environment at school for the victim or infringes on the victim at school or disrupts the educational process.

New York has what’s called the Dignity for All Students Act, signed by the Governor last year and is scheduled to take affect July 1, 2012.<sup>8</sup> It is at least intended to afford all students in public school an environment free of harassment and discrimination. Harassment is defined as the creation of a hostile environment by conduct or verbal threats, intimidation or abuse. The law would establish anti-harassment and discrimination policies, create school training programs in harassment and discrimination, increase staff awareness and develop a

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<sup>7</sup> 2010 Mass. Acts ch. 92.

<sup>8</sup> 2010 N.Y. Sess. Laws ch. 482 (McKinney) (codified at N.Y. EDUC. LAW § 12(2)).

curriculum including courses on citizenship and character education for grades K–12.

There also is a proposed amendment, House [Assembly] Bill A04028,<sup>9</sup> which would add a provision to the educational law to prohibit bullying and cyberbullying on school property, including a school function. I think even this proposal won't go far enough since most cyberbullying starts outside the school, but that's for the legislature to decide, not me.

The other thing that I found was something called the Law to Encourage Acceptance of all Differences, abbreviated as LEAD.<sup>10</sup> It's not really a law because it was only passed by the Senate last year, it's not been passed by the Assembly, or signed by the Governor. But it's out there, and it appears to target bullying behaviors more generally, not just that which is based on discrimination or originating in discrimination.

So these statutes, I think, underscore the severity of bullying and its consequences, and they certainly will be something that has to be factored into a negligence claim against a school board to the extent that mandatory duties may be required and possibly not met. But they don't give a remedy to the victims of the bullying.

So, I want to talk first about claims against a board of education, in addition to the other types of claims that Jonathan had mentioned earlier. Now, as far as claims against the school, the school board has the duty to discipline students. The main hurdle is what's called governmental immunity. Municipal actors have qualified immunity for actions that are discretionary versus those that are ministerial. A discretionary act is one that involves the exercise of judgment. A ministerial act is one where there's a duty to perform the act in a prescribed manner without the exercise of judgment or discretion.

There are some limited exceptions to governmental immunity, such as where a victim is an identifiable person subject to imminent harm. This is the exception that often applies where school children are injured while participating in classroom activities and would likely apply in the situation where bullying

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<sup>9</sup> A.4028, 231st Leg., Reg. Sess. (N.Y. 2009). Assembly Bill A.4028 and its sister Senate Bill S.7158 was not voted on in the 2009–2010 session. Proposed cyberbullying legislation in the 2011–2012 session includes A.8895 (“prohibits cyber-bullying”), A.9535/S.7108 (“expands provisions relating to cyber-bullying in schools”), and A.10176/S.6614 (“prohibits cyber-bullying”).

<sup>10</sup> S.4921-A, 234th Leg., Reg. Sess. (N.Y. 2012).

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behavior is brought to the attention of school administrators. But in general, when presented with issues of supervision and control of students, or the implementation of school policies, the Superior Courts in Connecticut generally hold that these are public duties, affecting students generally and are carried out through discretionary acts.

I did come across one recent case in Connecticut. *Girard v. the Town of Putnam*,<sup>11</sup> where the judge held that a student's suicide as a result of bullying could be a foreseeable result of the school staff's failure to follow a suicide prevention policy. Now this was a decision on a motion to strike, which in Connecticut is a motion that tests the sufficiency of the pleadings; whether a plaintiff has alleged a cause of action that's legally sufficient. It's not a decision on the merits or a decision on whether this plaintiff could actually prove their case. But to the extent that the decision held that allegations that school staff failed to follow their own mandatory procedures could state a viable claim, I think that's where the focus is going to be—on whether the school meets their duty, and under the new statute they've got a lot more mandatory requirements. But I think, generally speaking, schools are going to be exposed to liability if someone witnesses bullying or learns of it and then makes a conscious decision not to address it, or chooses to ignore it. But I honestly think that those kinds of cases are going to be increasingly rare as states and municipalities continue to focus on this issue. And other than the case that Jonathan Bruno<sup>12</sup> mentioned a few minutes ago, I'm not aware of any cases reported in Connecticut involving cyberbullying and certainly none between students or a student against a board of education for failing to protect them.

And as far as bullying cases in general, most bullying cases in which plaintiffs have tried to hold school boards or administrators accountable for failing to provide a safe school environment have been unsuccessful, although victims of assault or other overt bullying behaviors have succeeded in holding wrongdoers accountable. Also in Connecticut, parents of unemancipated minors are jointly and severally liable with their children for willful or malicious injury caused to others, but

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<sup>11</sup> Estate of Girard v. Town of Putnam, No. CV085002754-S, 2011 WL 783599 (Conn. Super. Ct. Jan. 28, 2011).

<sup>12</sup> See *Remarks of Jonathan Bruno*, 22 ALB. L.J. SCI. & TECH. ###, ### (referencing Brodsky *ex rel.* S.B. vs. Trumbull Bd of Educ., Civ. No. 3:06cv1947, 2009 WL 230708 (D. Conn. Jan. 30, 2009)).

they're only liable up to \$5,000. So it's not a big deal.

So given the hurdles that we face in trying to make a claim against a municipality, the only other target of course is the bully itself. I think the principal common law tort claims that come into play in these cases are defamation, intentional infliction of emotional distress, and invasion of privacy. They all have some limits.

Defamation, as you guys may know, includes the torts of libel and slander. Slander is oral defamation and libel is written defamation. A defamatory statement is defined as a communication that intends to harm the reputation of another as to lower him in the community or deter others from dealing with him. To establish defamation a plaintiff has to demonstrate that the defendant published the defamatory statement, that he was identified to a third person, that there was publication and that his reputation suffered as a result. So, you can see that a defamation claim is not going to apply where the cyberbullying is kind of a one-on-one, e-mails, or instant messaging or that kind of thing, there's got to be some general publication and damage to someone's reputation.

The claim that I think is probably most applicable is intentional infliction of emotional distress. In order to prevail on this claim, there are four elements: the first is that the defendant has to intend to inflict emotional distress; the second, that the conduct is extreme and outrageous; the third, the defendant's conduct was the cause of the plaintiff's distress; and fourth, the emotional distress sustained by the plaintiff has to be severe. It's a pretty high threshold. The general rule on this is that there is liability for conduct exceeding all bounds usually tolerated in a decent society, the nature of which is especially calculated to cause and does in fact cause mental distress of a very serious kind. The Restatement (Second) of Torts has a similar definition.

Now in my research I actually came across another law review article by Shira Auerbach, in the *Cardozo Law Review* in 2009, called *Screening Out Cyberbullies*.<sup>13</sup> And talking remedies, she also felt that this particular claim has the best chance of being relied upon or applicable. One thing she did not discuss is what I see as the main problem with this claim, as well as that of invasion of privacy, is that there's no insurance coverage for this

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<sup>13</sup> Shira Auerbach, *Screening Out Cyberbullies: Remedies for Victims on the Internet Playground*, 30 *CARDOZO L. REV.* 1641 (2009).

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type of claim. There's no liability insurance coverage for intentional acts. What this means is that victims, even if they go get a lawyer, file suit, prove their claim, are not likely to recover any money.

And without digressing into a discussion about insurance coverage law, the general rule is there's no liability coverage for intentional actions, there's only liability coverage for actions or mishaps that occur as a result of negligence. Car accidents for example, if you go rear-end somebody—that's an accident. If you go to a bar and get drunk, then pound somebody in the face—that's intentional. Although I suppose some clever lawyer could figure out a way to make that negligent.

But in any event, that's the main hurdle is that you can go to all the trouble and maybe not see any money. And since money is the only remedy that our law provides for, that's a problem. Not to mention the fact that if you're the lawyer you're not getting paid, but that's another issue.

Lastly, invasion of privacy. What is invasion of privacy? Unreasonable intrusion upon the seclusion of another, appropriation of another person's name or likeness, unreasonable publicity given to another's private life, or publicity that places someone in a false light in front of the public. Again, this is an intentional claim, probably a lot of bullying situations or cyberbullying situations would fall within this claim, but again not likely to lead to a recovery.

So, while I applaud the attention that states and municipalities are finally giving to this problem, I do fear that there are a lot of injured people, a lot of deserving people that, frankly, are not going to get compensation for a lot of their injuries.