

A REVIEW OF LEGAL STANDARDS IN CYBERBULLYING

A Review of Legal Standards and Their Application to Cyberbullying in Saskatchewan: A Summary of the Research

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PURPOSE OF THE RESEARCH

The purpose of the research project was to undertake a comprehensive review of the nature, extent, and application of the current legal framework governing cyberbullying in the province of Saskatchewan (SK).

RATIONALE FOR THE RESEARCH

Cyberbullying has received extensive media coverage in the past month following the October 10, 2012 suicide of a 15 year old British Columbia victim of cyberbullying. Concomitant with the media coverage, a proliferation of news stories relating to cyberbullying have materialized. However, “few, if any, known cases specifically relating to cyberbullying in the school context have been decided in Canada”¹ (p. 325). In the midst of these stories, Russ Marchuk, Minister of Education for the Government of SK, acknowledged that the province currently does not possess any legislation specific to bullying or cyberbullying. He announced that the province will take a *wait and see* approach in that “the province will look at outcomes from other provinces before enacting similar laws”². In stark contrast, Alberta, Ontario, Quebec, New Brunswick, and Nova Scotia currently have anti-bullying laws². School divisions in SK face a litany of legal challenges in actively responding to cyberbullying behaviour originating off-campus.³ Currently, no SK legislation specific to cyberbullying exists.² Six contentious legal issues arise in connection with cyberbullying⁴: (1) the absence of a generally accepted legal definition of cyberbullying; (2) jurisdiction concerns and the capacity of the law to enforce rules of conduct on persons operating in cyberspace where traditional legal boundaries are blurred. This includes the delicate balance between students’ rights to a safe school and their rights to free speech; (3) the inherent deficiencies of traditional common law tort remedies such as negligence, libel and slander in curbing cyberbullying behaviour and in rendering whole victims of such activities; (4) the capacity of Human Rights legislation to proactively respond to cyberbullying activity; (5) the absence of specific Canadian Criminal Code provisions speaking directly to cyberbullying activity; and (6) alternative approaches to justice. These legal issues are further complicated by the wait and see attitude of the SK provincial government², the lack of research and scholarly activity on cyberbullying and legal issues specific to SK, and the lack of clear provincial educational policy regarding what schools and school divisions should do with respect to cyberbullying³.

The funding provided by the Centre for Forensic Behavioural Science and Justice Studies (CFBSJS) was foundational to our research program and resulted in preliminary findings for our overall research query. The investment by the CFBSJS has greatly assisted in the subsequent development of our research program. By leveraging this funding and preliminary findings, we have since been successful in acquiring additional sources of funding to complete (and carry-on) our investigations. For example, based on this funding, we acquired a Social Science and Humanities Research Council (SSHRC) Insight Development Grant. Second, graduate students connected to this program of research obtained graduate funding for study of allied topics (e.g., SSHRC Joseph-Armand Bombardier Canada Graduate Master’s Scholarship, Graduate Research Fellowship, Leadership Award). Lastly, in the Spring of 2017 Dr. Hellsten completed a Visiting Scholar position at the University of Macerata in Macerata, Italy for work related to cyberbullying. The following research questions, method and analysis, and results that are described below encompasses data that was the result of all of the aforementioned funding opportunities.

RESEARCH QUESTIONS ADDRESSED

Taking into account the aforementioned legal challenges, we attempted to improve cyberbullying and legal literacy in SK. In specific, we had three main research questions we wanted to address: (1) by reviewing the relevant legal commentary, case law, and legislation in SK and Canada (including the status of Bill C-273) with respect to what, if any, legal liability exists for acts of cyberbullying, cyber-libel, and technological harassment committed by minors within the education system; (2) we also aimed to determine how SK law currently defines the boundaries of cyberbullying and create a definition of the term cyberbullying that is relevant and applicable in both academic and legal domains. We also intend to explore

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how SK law currently interprets jurisdiction with respect to cyberbullying; and (3) we aimed to track cases of SK cyberbullying that did not become the subject of reported cases, either because they were diverted away or out of the justice system, resolved in a summary fashion, or were otherwise decided without becoming the subject of a reported decision. As part of this effort, we conversed with school administrators, school counsellors, and police officers whose job it is to liaise with educational institutions, and agencies responsible for the provision and extrajudicial measures as defined in the Youth Criminal Justice Act. We also examined the barriers to bringing cyberbullying cases into the legal and judicial system in SK and the advantages and challenges inherent in dealing with these situations outside of the courtroom.

METHODOLOGY USED

Review of Document and Case Law

We used a systematic literature review method in order to identify all eligible materials including documents and cases that may not be readily accessible. Included were literature, documents, case law review of legal commentary, and case law within SK and Canada in relation to cyberbullying. We first began by reviewing all legal commentary that was relevant to cyberbullying. Then, we broadened our search to include the Canadian context. We also examined leading texts, authors, reports, blogs, and commentary by Canadian legal experts in cyberbullying and the internet, as well as secondary materials that provide commentary and discussion about legislation and case law. The sources of legislation and case law included the electronic databases of QuickLaw, CanLII, Westlaw Canada, as well as SK legal reports.

Interviews with Community Partners

Since not all legal outcomes become the subject of reported cases, it was important to track those that did not. To address this issue, we carried out semi-structured interviews with two sources of community partners. First, we consulted school administrators who were likely involved in cases of cyberbullying that were brought to the school's attention. Second, we consulted with police personnel within the Saskatoon Police Service who may offer a unique insight to cases of cyberbullying that they dealt with. We employed purposive sampling techniques in selecting critical informants from our community partners who were rich in desirable information. We successfully recruited nine school administrators and two police officers. Following the currently completed interviews, all interviews were digitally recorded, transcribed verbatim, and underwent thematic analysis using standard qualitative procedures.⁵

FINDINGS & CONCLUSIONS

Definition of Cyberbullying

We identified a legal definition that could be applied to both bullying and cyberbullying contexts, that is "...behaviour that is intended to cause, or should be known to cause, fear, intimidation, humiliation, distress or other forms of harm to another person's body, feelings, self-esteem, reputation or property. Bullying can be direct or indirect, and can take place by written, verbal, physical or electronic means, or any other form of expression."⁶ Community members identified a definition of cyberbullying: (1) sending or posting harmful, untrue, or cruel statements about a person; (2) pretending to be someone else that causing negative repercussions; (3) purposely excluding someone from an online group; (4) sending or posting material about a person that contains sensitive, private, or embarrassing information, including private messages or images; and (5) have these acts occur at home or school, through the Internet.

Document Review and Case Law

At the time of the review, there were no SK court cases specific to cyberbullying and few cases that were tangentially related. One case in SK exists (*Gould v. Regina (East) School Division No. 77 – 1996*) of a student charging a teacher with bullying her. However, the claim was dismissed as "not alleg[ing] any conduct sufficiently egregious to warrant court intervention." This judgment noted that it was not the role

A REVIEW OF LEGAL STANDARDS IN CYBERBULLYING

of the court to establish standards of conduct for teachers, and it could only hear a claim for educational malpractice if the teacher's conduct had offended community standards of fair play and if damage was suffered. Search results in respect to Saskatchewan specifically found that in *R. v. Tremaine* (2011), the SK Provincial Court said that posting something on an open site on the internet can constitute "communication" under s. 319(2) (Wilful Promotion of Hatred) of the *Criminal Code*. Furthermore, SK Queen's Bench counted postings on a blog as defamatory in *Buckle v. Caswell* (2009). Last, in *R. v. Musqua* (SK Court of Appeal, 2011), e-mail communications were found to constitute harassment. It remains apparent that while cyberbullying is still a problem, there are few court cases appearing within our legal system. Thus, we explored reasons for this lack of official cases. First, the financial burden on the legal system could be one reason that cyberbullying cases are not subject to official litigation (e.g., the cost of a 3-day trial in Ontario is \$60,000).⁷ Further, SK has a "partial indemnity" costs regime which indicates that (1) the successful litigant will be out-of-pocket for any shortfall, reducing the actual compensation recovered; (2) the unsuccessful litigant will have to pay part of the other side's legal fees, which may discourage a party with a good but uncertain case from risking litigation; and (3) both plaintiffs and defendants may seek to avoid the cost of litigation by settling without going to court. Another major reason that so few court cases appear within the legal system is likely due to communities taking alternative approaches to justice.

Interviews with Community Partners

Community members, including school counsellors, superintendents, school principals, and police officers, were asked about their experiences of how cyberbullying is being managed. Our analysis revealed that there are several ways community stakeholders are dealing with cyberbullying without incidents escalating to become the subject of reported legal cases. First, school administrators noted that internal disciplinary action, such as suspending privileges, was a common response to cyberbullying perpetration. Second, efforts to increase parental engagement with their children in regards to technology use was a common way to mitigate effects of cyberbullying. Last, restorative efforts were implemented by the school divisions, such as providing students with digital citizenship classes and relationship or emotional workshops. It was also noted that police officers would be invited into schools to provide information sessions about cyberbullying and the legal aspects of cybercrime.

IMPLICATIONS FOR POLICY AND PRACTICE

In order to provide a safe educational environment for SK students, schools in SK need "guidelines that provide reasonable boundaries and direction as to the extent of their legal responsibility" (p. 91)⁸ with respect to cyberbullying. It is clear that there needs to be a coordinated approach to cyberbullying prevention and intervention programs involving both the justice and education systems. Results from these research studies will bridge the cyberbullying policy and legal gap that currently exists within SK. Further, educators and other important stakeholders cannot begin to address or respond to the issue of cyberbullying if they are not informed or if their information is outdated or irrelevant to their jurisdiction. The application of legal precedents from other jurisdictions should be examined with a particular focus on how those precedents are presently interpreted and applied to the SK context. Last, evidence from the interviews with our community partners provided the much needed factual information regarding how situations of cyberbullying are managed and the reasons why they do not become the subject of legal reported cases. Now that this information is identified, we can begin to develop proper intervention programs as well as inform members of the legal community in order to develop effective legislation.

A REVIEW OF LEGAL STANDARDS IN CYBERBULLYING

References

1. Shariff, S. & Johnny, L. (2007). Cyber-libel and cyber-bullying: Can schools protect student reputations and free-expression in virtual environments? *Education Law Journal*, 16(3), 307-342.
2. Fraser, D. (2012). Regina Leader-post. Sask. government to watch anti-bullying legislation in other provinces. October 17, 2012.
<http://www.leaderpost.com/news/Sask+will+watch+anti+bullying+legislation+other+provinces/7400134/story.html>
3. Coates, J. (2011). Cyber-bullying: Policy response and perceive impacts in a Saskatchewan school division. Unpublished Master of Education (M.Ed.) Thesis. University of Saskatchewan.
4. Moulton, D. (2012). Parrying thrusts of the cyberbully. *The Lawyers Weekly*, January 13,
<http://www.lawyersweekly.ca/index.php?section=article&articleid=1568>
5. Braun, V. & Clarke, V. (2006). Using thematic analysis in psychology. *Qualitative Research in Psychology*, 3(2), 77-101.
6. Supreme Court of Canada in *A.B. v. Bragg Communications Inc.*, citing *Respectful and Responsible Relationships: There's No App for That: The Report of the Nova Scotia Task Force on Bullying and Cyberbullying* (2012) pp. 42-43.
7. McLachlin, B. (2007). The challenges we face. *Technical report*.
8. Shariff, S. & Hoff, D. L. (2007). Cyber bullying: Clarifying legal boundaries for school supervision in cyberspace. *International Journal of Cyber Criminology*, 1(1), 76-118.