

THE PROSECUTION OF SOCIAL MEDIA OFFENDERS

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With the rise of bullying and cyberbullying incidents at schools and outside of schools being reported in the media, pertinent questions in relation to the prosecution of social media offenders have surfaced. So how does the prosecution of social media offenders work?

The Prosecution of Children

Children from the ages of 11 to 18 up until 18 are deemed to legally liable for their actions and can be sued for defamation civilly and for assault or *crimen iniuria* criminally. Children from 11 years of age and up to 14 years of age have criminal capacity and the onus to prove criminal capacity on the part of the child accused of having committed a crime, rests with the State. Children above 14 years of age have criminal capacity unless otherwise proven by the accused child. Another legal remedy available to the victim of a social media infringement, is obtaining a protection order in terms of the Protection from Harassment Act, 2011. The Protection from Harassment Act 2011, provides that someone who has been bullied can ask the courts for an interim protection order, which will be granted as long as the court is satisfied the respondent has harassed, or is harassing, the applicant and that harm has or may be caused. The interim order can be granted without the respondent's knowledge, as forewarning may undermine the point of the protection order, and children under 18 can approach the courts without their parents' knowledge.

Minimum and Maximum Sentences

In every matter concerning a child, his or her interests are of primary importance. The detention of a child should only be considered only as the last resort and then for the shortest possible period. If detained, he or she must be kept separately from other detained persons over the age of 18 years, to be held in the same holding cells as his/ her own sex, as well as the right to be treated and kept in conditions that are suitable for his or her age.

A well known case of cyberbullying includes that of Keeley Houghton. In August 2009, in the UK, Keeley Houghton (18) was sentenced to three months' imprisonment after pleading guilty to harassment. She cyber bullied another 18-year-old girl for four years and threatened to kill her. Keeley was the first person in Britain to be sent to prison for cyber bullying."

Civil or Criminal Case

This depends on the action the victim wants to take. If it is *crimen injuria* (unlawfully, intentionally and seriously impairing the dignity of another such as stalking, emotional or psychological abuse) or assault this is a criminal matter and once charges are pressed, the State will prosecute. If the victim wishes to sue the perpetrator for defamation this would be a civil claim and the victim would need to be represented by an attorney unless the work was done Pro Bono. Private funds would be needed for Civil action unless it is Pro Bono.

Filming of the bullying incident or videos

Any person who filmed a bullying incident for the purposes of publicly publishing the video, person could also be sued for defamation civilly and or *crimen iniuria* criminally. There would be no liability for the person filming the bullying incident for the purposes of obtaining evidence against the bully.

Any persons responsible for distributing the video on any platform provided it is a public platform can be sued for defamation if the video contains untrue statements about the victim. Defamation is the wrongful and intentional publication of defamatory words or conduct that refers to another person. The common law elements (of the delict) of defamation are (a) the wrongful and (b) intentional (c) publication of (d) a defamatory statement (e) concerning another person. The publication of this video including sharing and re-tweeting falls under this definition. Even if a person simply shares or re-tweets the video but was not the original poster of the video can be sued for defamation as they are responsible for the publication of the defamatory material. The person who distributes the video can also be charged with *Crimen Iniuria* as distributing the video impairs the the dignity of the victim.

If the video goes viral, this will be taken into account by the courts. The further the reach the more damage is caused. That is, a video that is distributed amongst a class vs thousands on social media and the media itself.

People may be prosecuted for seeing an online video of minors in a bullying incident and sharing it on their social media platforms however this depends on the circumstances. Technically there is liability for publishing defamatory material and material that can impair a person's dignity. The intention behind sharing the video would be weighed up. However the victim is entitled to take action against anyone spreading the video.

What should you do if they see a video involving minors in a bullying situation? The video should be reported to the online service provider on which it is being distributed and requested that the video be removed. The person responsible for distributing the video must as far as possible be made known to the platform such as Facebook etc. Most online service providers now have specific security and cyber bullying settings in which to report these incidents or content.

How do you protect yourself against a case of defamation? Unfortunately, there is not much one can do except to immediately remove the post and apologise to the victim and hope that the victim will not sue for defamation. The most important thing to do is, do not post, share or re-tweet information or content that could be defamatory and could infringe upon the rights of others especially children.