

# CYBER BULLYING



## Viral Internet Videos and the Rights of the Humiliated

BY TROY D. LIPP, ESQ. AND ANTHONY P. LUISI, ESQ.

**D**EMONSTRATING THE POWER of social media and the speed with which internet-based content is shared worldwide, the “viral” video has become a generational phenomenon.

While many online videos gain popularity through their good-spirited humor or creativity, many others come at the expense of people who are portrayed unwittingly and can

rise to the level of what is commonly known as “cyberbullying,” or the posting of content online, including picture or video, with the intent to hurt, humiliate, or embarrass another person.<sup>1</sup> While commonly discussed in the context of protecting children from online abuses, cyberbullying can affect people of all ages.<sup>2</sup>

Across the country, people who have been the target of intentional

humiliation and embarrassment online have sought legal recourse to try to recover damages for their injuries. However, because the First Amendment generally protects speech even if humiliating and embarrassing,<sup>3</sup> and due to the limitations of traditional common law causes of action and the fact that cyberbullying can be premised upon technically truthful yet harmful statements, these victims often come

up short and find themselves without a cognizable claim.

In April 2014, ESPN filmed a man who was sleeping in the stands of Yankee Stadium during a live telecast of a New York Yankees game. The play-by-play announcers drew further attention to him by providing live commentary of him sleeping. The next day, Major League Baseball uploaded the footage with audio to MLB.com and to its YouTube channel, where it has since been viewed more than 1.6 million times.

YouTube viewers have left thousands of comments on the video, most of which are insulting and extremely derogatory to the man's physical appearance while belittling him for falling asleep during the game, such as "[i]t's always funnier when the object of ridicule is fat," "fat slob," and "before, no one knew he was a fatty cow ... now, everyone does!"

In response to discovering the online video, the man filed a lawsuit in the Supreme Court, Bronx County, seeking damages for defamation<sup>4</sup> and intentional infliction of emotional distress ("IIED")<sup>5</sup> against ESPN New York, the play-by-play announcers, the New York Yankees, and Major League Baseball.<sup>6</sup>

The Court dismissed the defamation claim, finding that the announcers' commentary was not false, nor was the depiction of the plaintiff while sleeping at the game unauthorized because "it is a common practice during baseball games and other public sporting events to depict spectators on camera."<sup>7</sup> The Court also dismissed the IIED claim, ruling that the defendants' conduct did not rise to the level of "extreme and outrageous conduct."<sup>8</sup>

There appears to be general consensus among legal commentators that the Court reached the correct

decision in that case based on the well-settled elements of defamation and IIED.<sup>9</sup> Arguably, however, the Court's decision is notable for what it highlights, albeit implicitly, as potential gaps in modern New York law—gaps that leave little or no relief to victims who are intentionally humiliated and embarrassed online. While there is

**Courts have recognized the unique role that technology has played in exacerbating bullying through "the widespread dissemination of electronic information using social media sites." Despite accepting this reality, judicial decisions have revealed that traditional common law causes of action can fail to provide legal recourse to people who have been made the subject of intentional embarrassment and humiliation online.**

room for argument as to whether the plaintiff's claims in that case should have been brought in the first place and whether other claims could have been asserted, there is less dispute that what happened in that case can reasonably fit the definition of cyberbullying.<sup>10</sup>

Courts have recognized the unique role that technology has played in exacerbating bullying through "the widespread dissemination of electronic information using social media sites."<sup>11</sup> Despite accepting this reality, judicial decisions have revealed that traditional common law causes of action can fail to provide legal recourse to people who have been made the subject of intentional

embarrassment and humiliation online. Likewise, legislatures have struggled to craft anti-bullying laws—civil and criminal—that pass muster under the First Amendment.

For instance, in *People v. Marquan M.*, the Court of Appeals struck down a local law that intended to criminalize cyberbullying because it barred conduct "outside the popular understanding of cyberbullying," including speech aimed at adults and not just minors,<sup>12</sup> and because the statute's prohibition against non-sexual embarrassing or humiliating speech was overbroad.<sup>13</sup>

While courts have been willing to acknowledge the unique harms presented by cyberbullying when victims are subject to being "relentlessly and anonymously attack[ed] twenty-four hours a day for the whole world to witness,"<sup>14</sup> New York judicial precedent demonstrates the difficulty in finding an appropriate balance between providing legal remedies to such victims, especially where the conduct at issue does not fit into traditional common law causes of action such as defamation or IIED, and the First Amendment's inviolable protections of speech.

It remains to be seen whether and in what manner legislatures and courts can provide recourse, if any, to victims of intentionally embarrassing and humiliating online speech.

## Endnotes

- 1 <http://www.stopbullying.gov/cyberbullying/what-is-it>
- 2 <http://cyberbullying.org/advice-for-adult-victims-of-cyberbullying>
- 3 *People v. Marquan M.*, 24 N.Y.3d 1, 11, 19 N.E.3d 480 (2014)(noting that "the First Amendment protects annoying and embarrassing speech").
- 4 The elements of a claim for defamation in New York have generally been stated as "a false statement, published with-

(continued on page 8)

## CYBER BULLYING

(continued from page 7)

- out privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se." *Dillon v. City of New York*, 261 A.D.2d 34, 38, 704 N.Y.S.2d 1, 5 (1st Dep't 1999) (citing Restatement of Torts, Second § 558).
- 5 To establish a claim for intentional infliction of emotional distress, a party must allege "extreme and outrageous conduct intentionally or recklessly [which] causes severe emotional distress to another." *Murphy v. Maloney*, 43 N.Y.2d 553, 557, 402 N.Y.S.2d 991 (1978).
- 6 *Rector v. Major League Baseball Advanced Media, et. al.*, 2015 WL 5471132 (Sup. Ct. Bronx Cnty., 2014).
- 7 *Id.* at 3. Another related issue that was not addressed in the case, but which may be relevant in similar situations, is the fact that the ticket to the game included certain disclaimers and waivers of liability, including the release of rights to use the ticketholder's likeness in promotional footage for the game. Such issues are not the focus of this

article, but nonetheless raise important questions regarding the enforceability of contract provisions that purport to authorize conduct that could rise to the level of cyberbullying.

- 8 *Id.* at 4.
- 9 In determining whether embarrassing and humiliating speech is deemed "extreme and outrageous" for purposes of a *prima facie* IIED claim, courts in other cases have attached particular significance to whether the plaintiff is a private or public figure and whether the nature of the communications involved a matter of "virtually no public interest." *Esposito-Hilder v. SFX Broadcasting Inc.* 236 A.D.2d 186, 190 (3d Dep't 1997).
- 10 Much of the plaintiff's case was premised upon the fact that by posting the embarrassing video online, the defendants created a public forum in which the plaintiff was victimized. However, the plaintiff did not assert any claims against the internet service provider, YouTube, or any of the thousands of people who posted the derogatory comments. There was also no claim for

unauthorized use of likeness under New York Civil Rights Law Section 51.

- 11 *Marquan M.*, 24 N.Y.3d at 5.
- 12 *Id.* at 9.
- 13 *Id.* at 11.
- 14 *Id.* at 5.

**Troy D. Lipp, Esq.**, is an associate of Cuddy & Feder LLP in White Plains and is a member of the firm's Litigation Department. His practice is devoted to helping local and nationally based clients resolve corporate and commercial disputes, as well as real estate, land use and zoning matters.

**Anthony P. Luisi, Esq.**, is a member of the Litigation Department at Cuddy & Feder LLP in White Plains. He represents and advises companies and individuals in Westchester County and throughout the Hudson Valley in resolving their real estate, land use and zoning, and business disputes in state and federal courts.



## CLARK, GAGLIARDI & MILLER, P.C. SERVING THE INJURED SINCE 1907

"It costs no more to go with the best. I refer my serious personal injury cases to Clark, Gagliardi & Miller." Brad R. Sacks, Esq.



HENRY G. MILLER



LUCILLE A. FONTANA



ROBERT J. FRISENDA



ANGELA M. GIANNINI



JOHN S. RAND

99 COURT ST., WHITE PLAINS, NY 10601 / (914) 946-8900 / [www.cgmlaw.com](http://www.cgmlaw.com)