

The impact of COVID-19 on cyberbullying: A delictual claim for emotional harm?

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SUMMARY

Bullying as we have known in South Africa and internationally is not a new phenomenon, but as society we have become aware of its harmful effects. In the current challenging times amidst COVID-19, individuals, more especially children are spending more time engaging in online social interaction, as most private schools are resorting to online teaching and learning. This results in a further increase of incidents of online bullying, or 'cyberbullying'. As we are aware from studies, victims of both physical bullying and cyberbullying report a range of forms of psychological harm, such as depression and low self-esteem. Some victims of cyberbullying have even committed suicide. Lunfuno Mavhunga a grade 12 pupil from Nzhele in Limpopo earlier in 2021 committed suicide after a video of her being bullied by her fellow pupils went viral. Delictually victims of cyberbullying have remedies available such as a claim for defamation under the *actio iniuriarum*. In addition to this remedy the author in the paper seeks to propose that victims of cyberbullying should also explore the additional claim of emotional harm that he or she has suffered by the culpable conduct of the bully.

1 Introduction

Bullying is a sad reality for teachers and learners all over the world. The consequences of bullying are severe and include depression, anxiety, panic attacks, insecurity, low self-esteem, unassertiveness, poor academic performance, aggression, high truancy rates, school drop-out and in severe cases, antisocial personality disorders, substance use and suicide.¹

It is important to distinguish between bullying and cyberbullying. In general bullying can be verbal, which will include name-calling, teasing, making fun of the victim, threats and insults or it can be physical which will comprise of blocking someone's path, pushing, kicking and slapping. Bullying can also be inappropriate sexual conduct such as touching, distribution of compromising pictures, emails with sexual content.² The list is not closed and while the above relates to bullying in general, cyberbullying on the other hand relates to instances where the

1 Reneke and Jacobs "Can legal remedy be used to address bullying and cyberbullying in South African schools?" 2018 *Polish Journal of Educational Studies* 66.

2 Reneke and Jacobs 67.

perpetrator uses information and computer technology to bully another person or persons who in turn finds it difficult to defend or protect themselves.³ Electronic bullying includes sending text messages to the victim or posting humiliating or threatening messages, rumours etc of the victim. Other forms of cyberbullying include online harassment and cyberstalking.⁴ Different forms of electronic media are used including phone calls, social networking sites, emails, blogs, chat rooms and internet gaming.⁵ Unlike bullying that occurs in school or at after-school activities, cyberbullying follows children home with their phones and other devices.⁶ During the Covid-19 pandemic, there is an increase in kids and teenagers using digital platforms and it's not just their personal use, they are using digital platform for educational purposes, with the increased usage of smart phones and social media, students during this time who are prone to bullying are likely to cyberbully.⁷ Students are now being educated online through various sites such as Zoom and Moodle. Zoom has already come under fire for the recent disruption of strangers who hacked online business meetings with hateful and inappropriate comments.⁸ If Zoom is that easy to hack into, it's likely to expect kids and teenagers trying to follow suit. With so many parents stressed out having to now teach their kids in the home-schooling arena, parents may be exhausted and not paying attention.⁹ Cyber experts in South Africa have warned students and learning institutions about the increased cyber risks involve with online schooling, as learners are forced to turn to online lessons during lockdown.¹⁰ Over 70 percent of learners have resorted to online learning. This switch to remote learning has been unexpected, leaving little time for them to mitigate against cyber risks. Undoubtedly the increase in online usage since the Covid-19 pandemic hit has resulted in a major spike in cybercrimes.¹¹

3 Reneke and Jacobs 68.

4 Reneke and Jacobs 68.

5 Reneke and Jacobs 69.

6 Reneke and Jacobs 69.

7 See for example <https://www.unicef.org/press-releases/children-increased-risk-harm-online-during-global-covid-19-pandemic>. On 19 November 2020 a google search revealed 37 000 results.

8 See for example <https://www.unicef.org/press-releases/children-increased-risk-harm-online-during-global-covid-19-pandemic>. On 19 November 2020 a google search revealed 37 000 results.

9 See for example <https://www.unicef.org/press-releases/children-increased-risk-harm-online-during-global-covid-19-pandemic>. On 19 November 2020 a google search revealed 37 000 results.

10 See for example <https://www.unicef.org/press-releases/children-increased-risk-harm-online-during-global-covid-19-pandemic>. On 19 November 2020 a google search revealed 37 000 results.

11 See for example <https://www.unicef.org/press-releases/children-increased-risk-harm-online-during-global-covid-19-pandemic>. On 19 November 2020 a google search revealed 37 000 results.

According to a public statement released by UNICEF in April 2020,¹² it recorded more than 1.5 billion children and young people have been affected by school closures worldwide. Spending more time on virtual platforms can leave children vulnerable to online sexual exploitation and grooming as predators look to exploit the Covid-19 pandemic. The psychological effects and trauma that these learners experience have a long-term effect on their lives. This paper examines the psychological impact that victims of cyberbullying encounter and whether the harm that they suffer at the hands of bullies warrants a delictual claim for emotional harm.

The paper firstly considers the psychological implications that cyberbullying has on its victim. In addition, the current legislative framework in South Africa pertaining to cyberbullying is examined and the civil remedies available to such a victim. The paper further explores the civil remedies available to a victim in the United States and draws on the similarities and differences in South Africa. Finally, the paper proposes that victims of cyberbullying should also explore instituting a delictual claim for emotional harm in South Africa.

2 Psychological effects of cyberbullying

Researchers have demonstrated that being involved in cyberbullying has psychological, emotional and behavioural consequences both on the victim and the perpetrators and if you are a cyber-victim, you are more exposed to developing a psychological pathology.¹³

In a study conducted,¹⁴ it revealed that cyberbullying affected the emotional well-being of the victims negatively. Out of their sample of 80 participants, 21 percent confirmed that because of cyberbullying they lacked self-confidence, 35 percent were depressed, 6 percent were frustrated, 15 percent were self-conscious, while 23 percent had suicidal thoughts.¹⁵ In another study,¹⁶ psychologists identified a broad range of disorders that are associated with being a victim, including post-traumatic stress disorder, depression, anxiety, eating and substance misuse. Children and adolescents with social anxiety can choose to avoid

12 See for example <https://www.unicef.org/press-releases/children-increased-risk-harm-online-during-global-covid-19-pandemic>. On 19 November 2020 a google search revealed 37 000 results.

13 Boca-Zamfir "Psychological effects of cyberbullying in adolescence theoretical analysis" 2016 *Romanian Journal of Experimental Applied Psychology* 1.

14 Farhangpour, Maluleke and Mutshaeni "Emotional and academic effects of cyberbullying on students in a rural high school in Limpopo province, South Africa" 2019 *South African Journal of Information Management* 1.

15 Farhangpour, Maluleke and Mutshaeni 2.

16 Samara, Burbidge, Asam, Foody, Smith and Morsi "Bullying and Cyberbullying: Their legal status and use in Psychological Assessment" 2017 *Int. J. Environ Res Public Health* 14 (12) 1449.

friends or social interaction in real life so as not to feel stress or anxiety.¹⁷ Unfortunately in the virtual world, open 24/7, it is difficult for adolescents to avoid “social” situations which can produce negative feelings.¹⁸ Psychologists believed a negative view of the world to be a detrimental and long term consequences for victims because it can affect different areas of their lives, such as trust and confidence in relationships. In addition, they felt that the shame that victims experience as a result of being bullied results in reduced disclosure and more internal struggling, which contributes to psychological distress.¹⁹ The physical health consequences of bullying can be immediate, such as physical injury or they can involve long-term effects, such as headaches, sleep disturbances and somatisation.²⁰ Psychological and physical stressors, such as being the target of bullying, activate the stress system centred on the hypothalamic-pituitary adrenal (HPA) axis according to research.²¹ The role of HPA and other hormones is to promote adaptation and survival, but chronically elevated hormones can cause problems. Stress has ubiquitous effects on physiology and the brain alters levels of many hormones and ultimately behaviour. In addition, further research conducted²² suggest that being a child or youth who is bullied changes behaviour and neuroscience research suggests this experience may also change the brain. The brain can experience social pain. Social pain describes the ‘feelings of pain’ that follow the experiences of peer rejection, ostracism or loss.²³ Cyber victims also have a higher risk of school problems such as suspension, copying out at tests, absenteeism, school aggression, lower academic achievement and not feeling safe.

It is evident that the psychological effects of cyberbullying on its victim is widespread and detrimental to their well beings. It is important at this juncture to discuss the protection offered by current South African law against victims of cyberbullying.

17 Boca-Zamfir 2.

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3 Current legislative frameworks regarding cyberbullying in South Africa and civil remedies

3 1 Legislative framework

3 1 1 Constitution of Republic of South Africa²⁴

It is common cause that rights to dignity and equality are inter-related, these rights are violated in a cyberbullying scenario.²⁵ In terms of section 9 of the Constitution, it protects individuals, no person may discriminate against another person. In addition, section 10 of the Constitution pertains to dignity. Dignity as we are aware gives human life value, it is a person's self-worth. When dealing with cyberbullying, its goal is to negatively impact on the victim's dignity. As many children fall victim to cyberbullying as discussed earlier in the paper, section 28 of the Constitution protects the interests of a child, and this includes protection from harm or abuse. Section 14 encapsulates the right to privacy, and this is related to an individual's identity, in a cyberbullying incident an individual's privacy is invaded when personal details, data, photos were obtained and then shared to shame that person.

3 1 2 Electronic Communications and Transactions Act²⁶

The main intention of this Act is to regulate electronic communication and to prevent the abuse of information systems. Chapter 13, section 86 to 88 deals with cybercrime. Cyberbullying can include the abuse of electronic communications and or information systems to degrade and humiliate another person. A bully can access the data of another person and use this to intimidate, harass or humiliate the victim.²⁷

3 1 3 Cybercrimes Act²⁸

The Cybercrimes Act intention is to criminalise the disclosure of data messages which are harmful and to provide interim protection orders for its victims.²⁹ Section 14 explicitly provides that any person who unlawfully and intentionally broadcasts or distributes through an electronic communication network to another person or the public any message that advocates, promotes, or incites hate, discrimination, or violence against another person is guilty of an offence. In addition, section 15 covers data messages which unlawfully and intentionally

24 Constitution of the Republic of South Africa, 1996.

25 See for example https://www.academia.edu/40335851/CYBER_BULLYING_DILEMMA_A_CASE_FOR_UBUNTU On 15 November 2020 a google search revealed 25 000 results.

26 Electronic Communications and Transactions Act 25 of 2002.

27 S 86 of the Electronic Communications and Transactions Act 25 of 2002.

28 Cybercrimes Act 19 of 2020.

29 S 3 of the Cybercrimes Act 19 of 2020.

threaten a person with damage to his property or violence against that person. A victim is provided with further protection in terms of section 16 where details and images of an intimate nature is disclosed without the victim's consent. If the state on behalf of the victim can successfully prove the criminal elements pertaining to any of these sections, the cyberbully can face conviction in terms of section 19 of the Act. Sentencing can range from a fine or imprisonment ranging from 5, to 15 years. The Act is most certainly a welcome relief for victims of cyberbullying seeking criminal redress.

3 1 4 Promotion of Equality and Prevention of Unfair Discrimination Act³⁰

Section 10 of this Act provides for instances where no person may publish, propagate, or advocate words that have the intention to be hurtful or harmful. In terms of section 21 of the Act it provides for different civil remedies that the court can impose on the offender, one of which being a restraining order.

3 1 5 The Protection from Harassment Act³¹

In terms of this Act, under the definition of harassment it includes bullying as a form of harassment and a victim of any incident of bullying can apply for a protection order against the bully in terms of section 2. In addition, section 2(4) provides that a victim can be assisted by parents but can also apply for the order without assistance. The purpose of the protection order is a remedy to ensure that the victim is not bullied further. In terms of sections 4, 5 and 6 of the Act the court can impose various conditions. In terms of section 4 one of conditions include, requesting an electronic communications service provider to provide details to the court pertaining to the respondent/bully. Moreover, despite a child bully being underage and lacking criminal capacity to be prosecuted, this Act does not preclude a protection order being issued against an underage bully as depicted by the definition of 'respondent' that refers to "any person whom proceedings are instituted."³² The Act is an immediate form of relief to prevent the bully from continuing his/her disruptive and abusive behaviour.

It is undeniable that there are various forms of relief offered in terms of criminal law for a victim of cyberbullying, from seeking a protection order against the bully to him/her being convicted of an offence. However, the criminal law relief cannot provide a system for compensating those who have been wrongfully harmed by the culpable

30 PEPUDA or the Equality Act 4 of 2000.

31 The Protection from Harassment Act 17 of 2011.

32 "respondent" means —

(a) any person against whom proceedings are instituted in terms of this Act; and
(b) for the purposes of S 4, 5 and 6, any person who is reasonably suspected of engaging in or who has engaged in harassment of the complainant or a related person.

conduct of others. Delictual law remedies does this, and it also expresses society's views on what it considers acceptable behaviour and what it does not. At the heart of the delictual principles lie society's legal convictions, or *boni mores*, which include legal and public policy considerations as well as constitutional rights and norms.³⁵ Public policy considerations are not static and continue to develop over time. Cyberbullying as noted is becoming increasing 'popular' and with the heightened times such as COVID-19, public policy considerations will reasonably expect that a victim be provided with additional forms of civil remedies if their case warrants such relief. The current civil remedies available to a victim of cyberbullying is discussed below with focus turning to emotional harm as an additional remedy that should also be considered by the victim.

3 2 Civil remedy

3 2 1 Defamation

The law of defamation is mainly concerned with protecting the *fama* (the good name or reputation) of both natural and juristic persons. In the case of *O' Keffe v Argus Printing and Publishing Co Ltd*:

"A person's reputation is ... that character for moral or social worth to which he is entitled amongst his fellow-men".³⁴

A person's reputation refers to the good name the person enjoys in the estimation of others, that is, what others think of that individual as a person.³⁵ The Constitution protects reputation via the right to dignity, and courts have indicated that the right to dignity includes the right to reputation.³⁶ The law of defamation seeks to protect a person's right to an unimpaired reputation or good name against any unjust attack. In doing so, the right to reputation is often pitted against the right to freedom of speech and expression.³⁷ A victim would have to prove that the defamation was (i) wrongful and (ii) intentional and (iii) publication of (iv) defamatory material that (v) refers to the plaintiff.³⁸

The case of *Le Roux v Dey*³⁹ is the only constitutional court ruling by South African courts involving student's use of cyberspace. In this case, the 1st defendant created a computer image at his home in which the faces of the principal and the deputy principal of his school were superimposed on an image of 2 naked gay bodybuilders sitting in a sexually

33 Jabavu The Law of Delict in South Africa (2018) 3.

34 *O' Keffe v Argus Printing and Publishing Co Ltd* 1954(3) SA 244(C) para 247-248.

35 Jabavu 410.

36 Jabavu 411.

37 Jabavu 422.

38 Jabavu 423.

39 *Le Roux v Dey* (CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) (8 March 2011).

suggestive posture.⁴⁰ The schools crests were super-imposed over the genital areas of the two men in the image. The 1st defendant shared this image with another colleague via his computer. The 2nd and 3rd defendants reproduced the image and circulated it to many other students at the high school.⁴¹ The principal and his deputy were embarrassed. Despite punishment being handed out to the students, the perpetuated untrue rumours still continued at the school and continued to infringe the deputy principal's dignity. The deputy principal instituted action and claimed damages for defamation. The matter eventually reached the constitutional court, where the schoolboys defended their conduct by contending that the picture was not defamatory as it was only a schoolboy prank. The boys alleged that they lacked intention (*animus iniurandi*).⁴² The court did not accept the defendant's defence that they lacked intention. The court accepted that respect for school teachers and the principal is an essential precondition for discipline, that discipline in turn is an essential requirement for the proper functioning of the school systems and there is a growing tendency in South African schools to challenge the status and authority of teachers with a concomitant breakdown in discipline. The court thus confirmed that the manipulated computer image was defamatory and ordered that the students had to apologise and to pay compensation to the plaintiff.⁴³

It follows therefore, that defamatory conduct that infringes the dignity of an educator, a student or anyone for that matter and if it takes the form of cyber-source outside the school, is not only contrary to South African common law but also to the Constitution because it infringes a person's dignity.

Although the civil remedy for defamation is available for some victims of cyberbullying, it can be onerous to prove at times. In addition to proving all the elements of delict, the plaintiff must prove the additional requirement of publication as discussed above. Publication demonstrates that the defamatory statement has reached someone other than the person to whom it refers to.⁴⁴ Reputation involves what others think of someone, a person's right to reputation is factually interfered with only when another person communicates defamatory material referring to that person and makes it known to at least one other person.⁴⁵ The requirement of publication which is a required conduct element in defamation is vital. If nothing has been published, the plaintiff will not succeed in such a claim.⁴⁶ Majority of cyberbullying cases takes place in a private dwelling set up and often, the attack is only between the bully and the victim. In these circumstances it will be impossible for a victim to successfully institute a defamation claim where no publication has

40 *Le Roux v Dey* para 13.

41 *Le Roux v Dey* para 14.

42 *Le Roux v Dey* para 15.

43 *Le Roux v Dey* para 24.

44 Jabavu 423.

45 Jabavu 423.

46 Jabavu 424.

occurred. However, it is not the end of the road for a victim. It is common cause and accepted that delict in South Africa is generic and allows for victims to claim for various forms of damages. In the circumstances this paper seeks to advance the idea that a delictual claim for emotional harm should be explored by a victim of cyberbullying as an additional remedy.

In comparison, in the United States, victims are afforded a civil relief known as intentional infliction of emotional distress (IIED) similar to South Africa's delictual claim for emotional harm and shock. However, in the United States, recognition for IIED claims has included victims of cyberbullying. Such a remedy can be instituted if their case warrants it.⁴⁷ This form of relief offered in the United States is examined below in more detail.

4 Cyberbullying in the United States and civil remedy of Intentional infliction of emotional distress (IIED)

There is a steady rise in cases of cyberbullying in the United States. According to research⁴⁸ cyberbullying is recognised as a critical public health concern in the United States. 92 percent of United States children and adolescents report going online daily, 71 percent use more than one type of social media, which increases their exposure to cyberbullying. According to the Department of Justice, approximately 7 percent of students in the United States public schools nationwide reported being cyberbullied in the last year.⁴⁹ An online survey among 1501 young regular internet users (age: 10-17 years) revealed that 19 percent of adolescents were involved in online aggression.⁵⁰ Despite the alarming rates of cyberbullying in the United States, victims have some comfort in the civil remedies that are afforded to them.

In the United States a tort in common law jurisdiction is a civil wrong that causes a claimant to suffer loss or harm resulting in legal liability for the person who commits the act.⁵¹ It can include intentional infliction of emotional distress (IIED), negligence, financial losses, injuries, invasion of privacy and defamation. IIED is a common law tort in the United States that allows individuals to recover for severe emotional distress caused by another individual who intentionally or recklessly inflicted

47 Espelage D.L., Hong J.S and Valido A. (2018) "Cyberbullying in the United States. In: Baldry A., Blaya C., Farrington D. (eds) *International Perspectives on Cyberbullying*. Palgrave Studies in Cybercrime and Cybersecurity". Palgrave Macmillan, Cham. https://doi.org/10.1007/978-3-319-73263-3_4 (accessed on 2020-11-20).

48 Espelage D.L., Hong J.S and Valido A 42.

49 Espelage D.L; Hong J.S and Valido A 43.

50 Espelage D.L; Hong J.S and Valido A 43.

51 Juan M. Acevedo García, "Intentional Infliction of Emotional Distress Torts as the Best Option for Victims when Cyberbullying Conduct Falls through the Cracks of the U.S. Criminal Law System" 2016 *Revista Juridica* 85.

emotional distress by behaving in an extreme and outrageous way.⁵² There is currently no federal United States law addressing or prohibiting cyberbullying in the United States.⁵³ However, several states have therefore resorted to passing their own laws prohibiting bullying and cyberbullying.⁵⁴ Nonetheless there are civil remedies that are available to a victim, one of which includes a claim for intentional emotional distress.⁵⁵ Similarly, to South Africa, a victim of cyberbullying in the United States can file a defamation case against his/her cyberbully. For a victim to succeed on a defamation claim, the victim must prove four elements:⁵⁶

- a There is a false and defamatory statement concerning the plaintiff;
- b there is an unprivileged publication to a 3rd party;
- c there is fault amounting to at least negligence on the part of the publisher and;
- d there is either actionability of the statement irrespective of special harm caused by the publication.

In addition to the defamation claim as highlighted above, the intentional infliction of emotional distress tort might be the most promising option for victims to find redress against the perpetrators of cyberbullying attack.⁵⁷ Cyberbullying can encompass a great variety of conducts that are not always easily analysed using traditional negligence or defamation theories. Unlike defamation and invasion of privacy law suits a claim for intentional infliction of emotional distress will probably apply in most cyberbullying situations.⁵⁸ For the plaintiff to succeed in an IIED claim, they must establish prima facie four elements:⁵⁹

- a that the defendant intended to inflict emotional distress or knew or should have known that emotional distress was a likely result of their action;
- b that the conduct was extreme and outrageous;
- c that the defendants conduct was the cause of the plaintiffs distress;
- d that the emotional distress sustained by the plaintiff was severe.

Currently all states in the United States recognise IIED as a civil cause of action in one way or another. The IIED tort is an ideal approach for victims to find redress against their cyberbullies because of its ability to cover most, if not all types of online bullying as long as cases warrant

52 Juan M. Acevedo García 86.

53 Juan M. Acevedo García 86.

54 A good example of this last type of cyberbullying statute is the one adopted in 2010 by the Albany County legislature in the state of New York. Albany County, N.Y., Local Law no. 11 (July 12, 2010).

55 Scott D. Camassar, "Cyberbullying and the Law: An Overview of Civil Remedies" 2012 *Sci. & Tech.* 567, 580.

56 Smit, "Cyberbullying in South African and American schools: A legal comparative study" 2015 *The South African Journal of Education* 35.

57 Sapp, "Protecting the victims of cyberbullying: An IDEA" 2013 *Mental Health Law and Policy Journal* 183.

58 Juan M. Acevedo García 160.

59 Juan M. Acevedo García 161.

severe emotional distress.⁶⁰ The only disadvantage, much like civil claim in general, is the difficulty of actually recovering damages.⁶¹ It is possible that a substantial amount of defendants in civil cyberbullying cases will not have the means to pay damages ordered by the court.⁶² Despite the shortcoming, it is still a welcome relief for victims to have such an action available to them.

In South Africa, a plaintiff can institute a claim for emotional harm and shock under the action of *actio iniuriarum*.⁶³ The definition of emotional shock and harm can include various meanings as discussed below. To date in South Africa no claim for emotional harm and shock based on cyberbullying has been instituted. It is submitted that victims should traverse this additional remedy offered if their case warrants it. The emotional harm and shock remedy in South Africa is further discussed below.

5 Emotional harm and shock in South Africa

An example of an instance where a person could suffer “emotional shock” would be as a result of a motor vehicle accident.⁶⁴ The person suffering from the “emotional shock” could either have been directly involved in an accident or a witness to the accident or heard of the consequences of the accident afterwards.⁶⁵ The causing of actual emotional shock is treated in practise as a specific form of delict which may result in patrimonial loss. For non-patrimonial loss suffered due to the infringement of the personality right to physical-mental integrity, so called general damages maybe claimed with the action for pain and suffering or *actio iniuriarum*.⁶⁶ An injury to the brain or nervous system that results from nervous or emotional shock is also a form of physical or bodily injury, because the nervous system is as much a part of the body as bones and muscles.⁶⁷ The landmark decision pertaining to emotional shock was the case of *Bester v Commerical Union*⁶⁸ where the court had to decide the nature of emotional shock because the plaintiffs claim was based on legislation that provided for an award of damages for ‘bodily injury’ caused by, or results from driving a motor vehicle. Since the decision in the *Besters* case, terminology relating to emotional shock has developed and expanded to include: “shock”, “nervous shock”, “psychological lesion”, “psychological trauma”, “psychological disorder”,

60 Juan M. Acevedo García 165.

61 Juan M. Acevedo García 166.

62 Juan M. Acevedo García 166.

63 Ahmed and Steynberg “Claims for ‘Emotional Shock’ Suffered by Primary and Secondary Victims” 2015 *Tydskrif vir Hedendaagse Romeins Hollandse Regl* / *Journal of Contemporary Roman Dutch law* 181

64 Ahmed and Steynberg 181.

65 Ahmed and Steynberg 182.

66 Ahmed and Steynberg 185.

67 Ahmed and Steynberg 182.

68 *Bester v Commerical Union* 1972 ZAENGTR para 1.

and “psychiatric injury”.⁶⁹ In the recent decision of *Swartbooi v RAF*,⁷⁰ emotional shock was described as⁷¹

“shock suffered by a person without necessarily personally sustaining bodily injury. This kind of shock is caused when a third party observes or is mortified by an unpleasant or disturbing event, for example, the killing of a relative or a person with whom the third party had a close relationship.”

5 1 Requirements in respect of a claim for causing emotional shock in South Africa

If the causing of emotional shock should result in a successful delictual claim, all five elements of delict must generally be present, namely conduct, wrongfulness, fault, causation and harm or loss.⁷²

5 1 1 Conduct

The conduct (in the form of an omission or commission) of the wrongdoer would typically lead to the death or injury of the primary victim, which could also result in the primary victim suffering emotional shock.⁷³

5 1 2 Wrongfulness

The conduct must cause harm or prejudice in a legally reprehensible or unreasonable manner to be regarded as wrongful. When someone suffers emotional shock, the wrongfulness would typically lie in the infringement of the plaintiffs right to his or her physical-mental integrity.⁷⁴ The infringement could result in either physical or non-physical injuries (mental or psychological)

5 1 3 Fault

Fault in the form of either negligence or intention is usually required to succeed with a claim for the causing of emotional shock.⁷⁵ In respect of negligence, what must be established is whether the reasonable person in the position of the wrongdoer would have foreseen the reasonable possibility of the conduct causing the emotional shock and would have taken reasonable steps to prevent such harm from occurring, if such wrongdoers failed to take those reasonable preventative steps, his/her conduct is regarded as negligent.⁷⁶ If the psychological harm was caused intentionally one could also bring an action under *action iniuriarum*.

69 Ahmed and Steynberg 185.

70 *Swartbooi v RAF* (20352/2008) [2012] ZAWCHC 29; [2012] 3 All SA 670 (WCC); 2013 (1) SA 30 (WCC) (17 April 2012).

71 *Swartbooi v RAF* para 34F-G.

72 Ahmed and Steynberg 190.

73 Ahmed and Steynberg 190

74 Ahmed and Steynberg 191

75 Ahmed and Steynberg 191

76 Ahmed and Steynberg 191.

Intentional infliction of emotional shock is an *iniuria* actionable under *actio iniuriarum*.⁷⁷ In *Waring and Gillow Ltd v Sheborne*,⁷⁸ the court acknowledged intentional emotional shock and stated:

“It would be different, under certain circumstances, in an *actio iniuriarum* based upon a wilful attack upon or violation of the feelings of another. In such a case, it might be possible to award compensation for the outrage of the feelings or the insult to the honour”.

Principles of *actio iniuriarum* are broad enough to accommodate cases of intentional infliction of emotional shock as well.⁷⁹

5 1 4 Causation

In *Barnard v Santam Bpk*⁸⁰ it was stated that not only must it be proven that the conduct of the wrongdoer was negligent but also that the negligent conduct of the wrongdoer was the legal cause of the harm suffered. Factual and legal causation must be proved. Factual causation must obviously be present, and the question of legal causation is to determine whether the harm or loss suffered is not too remote to be recognised in law.⁸¹ The test to be applied is a flexible one in which factors such as reasonable foreseeability, directness, the absence, or presence of a *novus actus interveniens*, legal policy, reasonableness, fairness and justice all play their part.⁸² In determining legal causation in the case of emotional shock, the flexible approach is applied. In terms of this approach, there is no single criterion for legal causation but what must be determined is whether there is a close enough relationship between the wrongdoers conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness, and justice.⁸³

6 Recommendation and Conclusion

This paper demonstrated the vast psychological effects of cyberbullying suffered by victims worldwide and its staggering statistics. It was noted with the current pandemic that the entire world is experiencing, there will undoubtedly be a further rise in cyberbullying cases. Moreover, this paper sought to highlight and discuss the legislative framework in South Africa and the protection that is afforded to victims of cyberbullying which is promising. The various criminal law remedies available provides much hope and ventilation for such victims. In addition, the implementation of the Cybercrimes Act imposing imprisonment as one

77 Ahmed and Steynberg 191.

78 *Waring and Gillow Ltd v Sheborne* 1904 TS 340 para 348.

79 Ahmed and Steynberg 191.

80 *Barnard v Santam Bpk* (61/97) [1998] ZASCA 84; 1999 (1) SA 202 (SCA); [1998] 4 All SA 403 (A) para D-E.

81 Ahmed and Steynberg 194.

82 Ahmed and Steynberg 195.

83 Ahmed and Steynberg 195.

of the severe forms of punishment is certainly commendable. However, the paper discussed that criminal law remedies cannot offer a victim compensation for the harm that they have suffered as result of the culpable conduct of the bully. The paper turned to the various civil remedies in South Africa, and this was examined and compared to our international counterpart the United States. In respect of one of the current civil remedies that is available to a victim of cyberbullying in South Africa i.e., a claim for defamation under *actio iniuriarum*, one noted here that in certain instances the element of publication which is one of the requirements for such a claim; will prove onerous in circumstances where the attack occurs in a private platform between the bully and the victim. In addition, the paper sought to examine and discuss the current remedy of emotional shock and harm that is available in South Africa, and it proposed that a victim of cyberbullying should consider exploring this accessory remedy under *actio iniuriarum* as well. Undoubtedly the plaintiff would have to successfully prove all the delictual elements on a balance of probabilities. However, the fault element in respect of such a claim is broad enough to accommodate cases in which the conduct is either intentional or negligent. This is promising and provides the plaintiff a better chance of success as compared to United States where the fault requirement is strictly that of intention in respect of the IIED claim.

It is acknowledged that with a claim for emotional shock and harm where there is only psychological harm suffered, there is no closed list of cases and courts can impose liability for any conduct that either intentionally or negligently causes psychological harm. It is submitted further that our courts should be open to hear cases of this nature where the victim of cyberbullying suffers only psychological harm. Undoubtedly the victim of cyberbullying who suffers only psychological harm, must prove a detectable and recognised psychiatric injury or lesion that is not passing or trivial. This secondary recourse will assist a victim in providing him with the necessary psychological help that he will require and more so provide him with the solace that his aggressor would not be let off easily. It will also serve as a deterrent to future aggressors of such offences.