TOP FIVE 2013

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

AB v BRAGG COMMUNICATIONS INC., 2012 SCC 46, [2012] 2 SCR 567.

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http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/10007/index.do

Facts

A.B. was a 15-year-old girl from Nova Scotia. In March 2010, she discovered that someone had posted a fake Facebook profile of her under a slightly different name. The fake profile included her picture, identifying information, negative commentary about her appearance and sexually explicit references.

Facebook disclosed the IP address associated with the fake profile account to A.B. The IP address belonged to an individual who subscribed to internet services through a company owned by Bragg Communications.

Through her father as guardian, A.B. applied to the court to have Bragg reveal the identity of the persons associated with the IP address. A.B. wanted to minimize her chance of suffering further harm from bullying, so she asked to bring her application anonymously. A.B. also asked that the Court impose a publication ban on the contents of the fake Facebook profile, meaning that the media would not be permitted to publish the details contained in the account.

Procedural History

The trial court that heard the application ordered Bragg to disclose the names of the people associated with the IP address. Bragg did not challenge this request. However, the court denied A.B.'s request for anonymity or a publication ban. The court reasoned that there was no evidence that A.B. would be harmed if this information were released.

The Nova Scotia Court of Appeal upheld this decision, deciding that a publication ban was not justified because A.B. did not bring evidence that substantial harm would arise from media reporting, and that public embarrassment is not a sufficient reason to limit the principle of open courts and trials.

Issues

1. Should Bragg Communications be required to release the identity of the person(s) who created the fake Facebook account?
2. Should A.B. be permitted to proceed with her claim anonymously?
3. Should the press be allowed to publish information found in the fake Facebook account?

Decision

The Supreme Court of Canada (SCC) unanimously allowed the appeal, in part. Bragg was ordered to disclose the identity of the person(s) who created the fake Facebook account, and A.B. was allowed to proceed with her claim anonymously. However, the Court did not preclude the press from publishing the non-identifying information found in the fake Facebook profile.

Ratio

The SCC found that while an open court and freedom of the press are central to our court system, protection from cyberbullying can justify restricting them. In future cases, courts must weigh the harm that could result from revealing the identity of a person who seeks to bring their case anonymously against the importance of maintaining an open court.

The Court recognized the inherent vulnerability of children and relied on "logic and reason" to determine that "objectively discernible harm" would arise to A.B. if her identity was revealed. Consequently, in an application involving sexualized cyberbullying, there is no need for a particular child to demonstrate that she or he is personally at-risk for specific and immediate harm.

With regard to the non-identifiable information in the fake Facebook account, the Court held that there was no reason to restrict the publication and media disclosure of these facts. No harm could arise to A.B. from disclosing this information because the information could not lead to A.B.'s identity being revealed.

Reasons

The open court principle is a fundamental democratic principle that requires courts to remain accessible and open to the press and public, and is inextricably tied to freedom of expression. A.B. requested two restrictions on the open court principle: the right to proceed anonymously, and a publication ban on the content of the fake Facebook profile. The other side argued that the open court principle should trump A.B.'s privacy interests, since A.B.'s age alone did not mean that she would face specific harm from disclosing her identity and the contents of the Facebook account.

The SCC reasoned that even without evidence of specific harm, there was reason to believe that objective harm could occur to A.B. First, the court recognized the inherent vulnerability of children. This vulnerability comes from age, not emotional maturity. Second, the court recognized the increased psychological risks that cyberbullying poses for children. Further, the court noted that children rely on anonymity for protection from future bullying, and that without this anonymity children might not bring cases against their bullies. Children may reasonably fear that if their identity is disclosed when they bring cases against their cyberbullies,

they will suffer from further bullying. Thus, anonymity protects a child's access to justice.

Importantly, the Court observed that a claimant's name (identity) is of minimal value to press freedom. After all, even if A.B. pursued her claim anonymously, the press could still report the case without including her name or personal details. Therefore, given A.B.'s age, the nature of cyberbullying, and the risks of disclosing her identity, A.B.'s privacy interest and protection outweighed the open court principle.

However, with regard to the non-identifying content in the Facebook profile, the Court held that this information could not be connected to A.B. and therefore could not harm A.B. Accordingly, the open court principle prevailed, and the publication and disclosure of these facts was not restricted.

DISCUSSION

1. How unusual was A.B.'s situation? Do you know of anyone who has been harassed through social media in this way?

2. Is cyberbullying more or less damaging than in-person bullying? How so? Should different laws be created to regulate these different forms of bullying? Why or why not?

3. Why is it important that the justice system remain highly transparent? Was the "open court principle" correctly balanced with the potential harm to A.B.?

4. Does age matter? Should the courts afford the same protection of anonymity to an applicant that is 30 years old? Explain.

5. If the courts do not protect the identity of those seeking to reveal their cyber bullies, will people stop relying on the courts? Do you think that A.B. would get further bullied if her identity were revealed? If so, what type of risks would she face at school?