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## Setting Parental Controls: Do Parents Have a Duty to Supervise Their Children's Use of the Internet?, 31 J. Marshall J. Info. Tech. & Privacy L. 309 (2014)

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## ARTICLES

# SETTING PARENTAL CONTROLS: DO PARENTS HAVE A DUTY TO SUPERVISE THEIR CHILDREN'S USE OF THE INTERNET?

ALBERTO BERNABE\*

Toward the end of 2014, some in the legal media announced that the Georgia Appellate Court had issued a landmark opinion<sup>1</sup> holding for the first time that parents may be liable for failing to supervise their children's activities on the Internet or for the consequences of their children's comments online. The Wall Street Journal law blog, for example, published a story in which it stated that the court ruled that "[p]arents can be held liable for what their kids post on Facebook"<sup>2</sup> and that the decision "marked a legal precedent on the issue of parental responsibility over their children's online activity."<sup>3</sup> Other outlets stated that this was "a landmark case"<sup>4</sup> and that it was the first to recognize or impose a parental duty to supervise children's use of the Internet.<sup>5</sup> The news seemed to be delivered as a warning to parents that they now needed to be more vigilant about their children's conduct on the Inter-

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1. *Boston v. Athearn*, 764 S.E.2d 582 (Ga. Ct. App. 2014).

2. See Jacob Gershman, *Parents May Be Liable for What Their Kids Post on Facebook, Court Rules*, WALL ST. J. L. BLOG (Oct. 15, 2014, 4:33 PM), <http://blogs.wsj.com/law/2014/10/15/parents-may-be-liable-for-what-their-kids-post-on-facebook-court-rules>.

3. *Id.*

4. John Delaney, *Socially Aware*, JD SUPRA (Oct. 21, 2014), <http://www.jdsupra.com/legalnews/status-updates-october-2014-9-03152>.

5. June Grasso & Michael Beat, *Bloomberg Law: Facebook Posts and Parental Liability*, BLOOMBERG L. (Nov. 3, 2014, 6:21PM), [http://media.bloomberg.com/bb/avfile/v\\_p69nUaWuZw.mp3](http://media.bloomberg.com/bb/avfile/v_p69nUaWuZw.mp3) (stating that parents can be held liable if their children post defamatory statements on the internet).

net lest they face possible liability for their children's conduct.

While this is a very interesting issue, there is a problem: these news stories were wrong. The court did not hold that parents can be held liable for their children's conduct or for the consequences of their children's comments, nor that there is a duty to supervise a child's Internet use. The court only held that parents can be held liable for their own conduct once the parents are on notice that something needs to be done to prevent a foreseeable injury to another. The difference is important. Had the court held the former, it certainly would have been taking a new view on issues of parental responsibility. By holding the latter, on the other hand, it merely applied old principles of tort law to new circumstances. Parents do not need to be more worried than they already are. Supervising their children's activities is never a bad idea, but parents are not exposed to more liability today than they have been in the past.

## I

The facts of the case in question, *Boston v. Athearn*, are relatively straight forward.<sup>6</sup> A boy (Dustin) and a girl (Melissa) decided to have some fun at a classmate's expense. Using a computer supplied by Dustin's parents for his use, Dustin and Melissa created a fake Facebook page in the plaintiff's name where they posted racist and sexually graphic comments, and false information including posts that suggested the plaintiff was a homosexual and a racist, that she took illegal drugs, and that she was on medication for a mental health disorder. Dustin and Melissa also issued invitations to become "Facebook friends" to many of the plaintiff's classmates, teachers, and extended family members. Within a day or two, the account was connected as "Facebook friends" to over 70 other Facebook users.

Suspecting who had created the page, the plaintiff's parents approached the principal of the kids' school. The principal quickly determined who had created the Facebook page and imposed discipline.<sup>7</sup> As a result, Dustin's parents were informed of his conduct. Dustin's parents claimed they disciplined him, but they made no effort to access the Facebook page or to delete it. As a result, the page remained available for almost a year.

The plaintiff sued Dustin and his parents for defamation and intentional infliction of emotional distress. In turn, Dustin's parents moved for a summary judgment, which the lower court granted. On appeal, however, the Court of Appeal reversed in part, agreeing with the plaintiff that there were questions of material fact regarding whether

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6. *Boston v. Athearn*, 764 S.E.2d 582, 583-84 (Ga. Ct. App. 2014).

7. It only took the principal six days from the day the Facebook page was created to identify those responsible for it and to notify their parents. *Id.*

the defendants were negligent in failing to take action to delete the Facebook page once they had been notified of their son's conduct.

As the court explained in its opinion, "liability for the tort of a minor child is not imputed to the child's parents merely on the basis of the parent-child relationship."<sup>8</sup> In other words, there is generally no vicarious liability for the conduct of a minor.<sup>9</sup> Also, courts are reluctant to recognize possible causes of action against parents when doing so could result in the imposition of liability based on a value judgment of the parents' personal decisions involving how to discipline or raise their children.<sup>10</sup>

However, as the court explains, "[p]arents may be held directly liable . . . for their own negligence in failing to supervise or control their child with regard to conduct which poses an unreasonable risk of harming others,"<sup>11</sup> a duty which extends to those plaintiffs whose harm is foreseeable. Thus, again, because the court is saying that the possible liability is direct, as opposed to vicarious, the court is clearly not holding that parents would be liable for their children's conduct on the Internet. Also, even though the court does say that parents may have a duty to supervise their children's conduct on the Internet, the duty depends on whether the child's conduct in using a computer to access the Internet is considered to be "conduct which poses unreasonable risk of harming others."<sup>12</sup>

8. *Id.* at 585.

9. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 41 reporter's note on cmt. d (2012) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 123, at 913 (5th ed. 1984)). On the other hand, it should be noted that some states have enacted statutes that impose vicarious liability on parents in limited circumstances, some limited to wilful and malicious conduct. See, e.g., LA. CIV. CODE ANN. art. 2318 (West 2014); CONN. GEN. STAT. ANN. § 52-572 (West 2015); GA. CODE ANN. § 51-2-2 (West 2015); TEX. FAM. CODE ANN. § 41.001 (West 2013); HAW. REV. STAT. § 577-3 (West 2014); S.D. CODIFIED LAWS § 25-5-15 (2014); WIS. STAT. ANN. § 895.035 (West 2015); FLA. STAT. ANN. § 741.24 (West 2015).

10. See JOHN DIAMOND ET AL., UNDERSTANDING TORTS, 242 (4th ed. 2010) ("the persistence of the parent-child immunity can be explained, in part, by a reluctance to have judicial review over what constitutes acceptable parenting"); *Shoemaker v. Fogel*, 826 S.W.2d 933 (Tex. 1992) (parental immunity is designed to prevent judicial interference with parental discretion).

11. *Athearn*, 764 S.E.2d at 585.

12. Although the court does not discuss it, one basis for this type of potential liability can now be found in section 41(b) of the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM. According to this section, in certain circumstances, an actor in a special relationship with another owes a duty of reasonable care to third parties with regard to risks posed by the other that arise within the scope of the relationship. However, as explained in the Reporter's Note to section 41, "[b]efore liability may be imposed on parents, they must act negligently with regard to risks posed by their minor children [and] . . . [t]here must be a reasonably foreseeable risk of harm." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 41 reporter's note on cmt. d (2012). The Reporter's Note to the section explains that there are cases affirming

It would be a stretch to conclude that simply using a computer to access the Internet creates a foreseeable risk of harm. Something else must happen to create that foreseeability. Therefore, the court's conclusion must be interpreted to be that parents have a duty to act if the parents know, or should know, that their children have engaged, or are engaging, in conduct that can be reasonably expected to cause injury.

The basis for such a duty can be found in section 39 of the RESTATEMENT (THIRD) OF TORTS, which states that “[w]hen an actor's prior conduct . . . creates a continuing risk of physical harm of a type characteristic of the conduct, the actor has a duty to exercise reasonable care to prevent or minimize the harm.”<sup>13</sup> According to this view, in *Boston v. Athearn*, the duty recognized by the court would not have started until after the defendants knew of their son's conduct. Once the parents were informed of their son's conduct, they should have realized the risk, and because they did not take measures to prevent more harm from happening, they could be liable for the injury that resulted. To reiterate this point the court cites a number of cases<sup>14</sup> that discuss the general principle that parents may be liable for negligence in failing to exercise reasonable care to prevent their child from creating an unreasonable risk of harm to third persons if the parents have knowledge of facts from which they should reasonably anticipate that harm will otherwise result.

In sum, the parents did not have a duty to monitor or control their son's use of the Internet. They just had a duty to use reasonable care to act once they were informed their son's conduct was causing harm and could foreseeably continue to cause harm in the future. In so holding, unlike what some of the headlines discussing the case have implied, the court did not create new law. The court simply applied accepted principles of tort law to a new situation.<sup>15</sup>

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the existence of an affirmative duty to third parties based on the parent-child relationship (citing *Parsons v. Smithey*, 504 P.2d 1272 (Ariz. 1973); *Linder v. Bidner*, 270 N.Y.S.2d 427 (Sup. Ct. 1966); *Moore v. Crumpton*, 295 S.E.2d 436 (N.C. 1982); *Isbell v. Ryan*, 983 S.W.2d 335 (Tex. App. 1998); and *Nieuwendorp v. Am. Family Ins. Co.*, 529 N.W.2d 594 (Wis. 1995)). *Id.*

13. RESTATEMENT (THIRD) OF TORTS §39, “Duty Based on Prior Conduct Creating a Risk of Physical Harm.” Also, as the comment to this section explains, “[i]f at the time of the conduct an actor reasonably fails to appreciate the risk, but later appreciates or should appreciate the risk, the actor must employ reasonable care to prevent the harm from occurring.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §39 cmt. a (2012).

14. The court cites *Hill v. Morrison*, 286 S.E.2d 467 (Ga. Ct. App. 1981); *Assurance Co. of Am. v. Bell*, 134 S.E.2d 540, 540-41 (Ga. Ct. App. 1963); *Kitchens v. Harris*, 701 S.E.2d 207, 208-09 (Ga. Ct. App. 2010); *McNamee v. A.J.W.*, 519 S.E.2d 298, 300-01 (Ga. Ct. App. 1999); *Mayer v. Self*, 341 S.E.2d 924, 924-25 (Ga. Ct. App. 1986).

15. See comments by Eugene Volokh during the podcast Facebook Posts and Parental Liability. Grasso & Best, *supra* note 5.

## II

The court's analysis, however, opens the door to a different question: should the use of a computer be considered to be inherently dangerous? As mentioned above, courts would not impose a duty on the parents unless the parents have some knowledge that their negligent supervision would create an unreasonable risk of harm. In most cases, this would require notice of a child's past conduct. However, in cases involving injuries caused by the use of an inherently dangerous instrumentality, some courts have held that the nature of the instrumentality itself provides enough notice to the parents to create a duty to supervise that would otherwise not arise until the parents have notice of prior conduct of the child.<sup>16</sup> Thus, there could be liability if parents negligently allow a child access to a loaded gun, even if the child has never played with the gun or caused an injury to others in the past, because it is reasonably foreseeable that, given the nature of the gun, failing to supervise creates an unreasonable risk of harm to others.<sup>17</sup>

This raises the question of whether a computer with Internet access should be considered to be an inherently dangerous instrumentality. Given its potential to distribute hurtful information by reaching so many people with ease, we can certainly understand how a computer can become a dangerous instrumentality. In fact, we have created a new word to describe the use of the Internet as a dangerous instrumentality: "cyberbullying." And we know of numerous cases where cyberbullying has resulted in injury, even suicide.

However, just like it would be a stretch to conclude that simply using a computer to access the Internet creates a foreseeable risk of harm, it would be a stretch to hold that, in and of itself, a computer with In-

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16. See, e.g., *Hill v. Morrison*, 286 S.E.2d 467, 468-469 (Ga. Ct. App. 1981) (where a person "entrusts another with a dangerous instrument under circumstances that he has reason to know are likely to produce injury, [that person] is liable for the ensuing consequences"); *Muse v. Ozment*, 264 S.E.2d 328, 329 (Ga. Ct. App. 1980) (prohibiting recovery against a parent for a child's tort "where the parent has no special reason to anticipate" that the child may harm another, either because of the child's "known dangerous proclivities" to engage in the conduct that caused the injury or because of the child's "possession of [inherently] dangerous instrumentalities"); *Assurance Co. of Am. v. Bell*, 134 S.E.2d 540, 545 (Ga. Ct. App. 1963) ("[P]arents may be liable where they have entrusted a dangerous instrumentality to their children or have failed to restrain their children who they know possess dangerous tendencies.").

17. *Jacobs v. Tyson*, 407 S.E.2d 62, 64 (Ga. Ct. App. 1991) (A jury could find that a child's parents were on notice of the risk of injury where they kept a pistol in their house loaded and in a location where it was accessible to their 12-year-old while he was present in the home with another child without adult supervision, since, "[u]nlike a butcher knife or a golf club, a loaded firearm may be considered an inherently dangerous instrumentality"); *McBerry v. Ivie*, 159 S.E.2d 108, 110-111 (Ga. Ct. App. 1967) (A jury could find that a child's parents were on notice of the risk of injury from a shotgun "which was a dangerous instrument" furnished to a 13-year-old child by his parents without reasonable instruction and supervision as to its use).

ternet access should be considered to be an inherently dangerous instrumentality. Citing several cases, the court in *Boston v. Athearn* suggests that “an instrumentality is not inherently dangerous if it is not likely to cause serious injury when used in a proper manner and with due care but only becomes dangerous if it is intentionally used to cause injury or is handled in a reckless and dangerous manner.”<sup>18</sup>

This definition should apply to a computer. Even though a computer can be used to cause harm, it is not the nature of the computer itself that creates the risk of harm. A computer can be used for many purposes and in many ways and it is most often not a dangerous object, particularly if used with reasonable care. In fact, you could make the argument that, if there is a problem, the problem is not with the computer, but with “the Internet” which is what allows people to connect and communicate online.

For this reason, as stated above, even though a computer can be used to cause harm, given that it should not be considered to be inherently dangerous, the possible liability for the parents of a child who causes harm using a computer should be limited to cases where the parents know or should know of the child’s past or current harmful conduct, or, at least, of the child’s past propensity for dangerous conduct.

Applied to the facts in *Boston v. Athearn*, the answer to the issue is relatively simple. The parents not only knew of the past conduct and the injury already caused, but also knew or should have known that the information posted on the Internet could cause further injury in the future. For this reason, it can easily be argued they had a duty to take action to eliminate the risk of further injury.

### III

Ultimately, the analysis of the court is correct and the result logical. The court however, does not answer all the important questions. First of all, determining whether the parents exercised reasonable care necessarily depends on the circumstances, and, thus, is generally a question for the jury. The parents have a duty to act like reasonable prudent persons under the circumstances and, given the facts, reasonable people can disagree as to whether they did. Thus, this aspect of the claim was correctly remanded to the trial court.

More importantly, it is not very clear how the decision to recognize possible liability for the parents’ lack of action with respect to the information posted by the child relates to the actual claims alleged in the complaint. First, given that intentional infliction of emotional distress is an intentional tort, the negligence-based analysis related to a duty to prevent further future foreseeable harm is irrelevant. Thus, whether

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18. *Boston v. Athearn*, 764 S.E.2d 582, 585 n.7 (Ga. Ct. App. 2014) (citing *Saenz v. Andrus*, 393 S.E.2d 724, 725-726 (Ga. Ct. App. 1990)).

the plaintiff will be able to support a claim for intentional infliction of emotional distress will not depend on the analysis related to the parents' duty.

That leaves the claim for defamation, and the court's short discussion of one of the most interesting questions raised by the claim: how can the defendants have defamed the plaintiff if they did not make the statements about the plaintiff? Even though it is generally accepted that one who repeats or republishes a defamatory statement commits defamation just as much as the person who made the original statement,<sup>19</sup> in *Boston v. Athearn*, the parents did not repeat or republish the statement. They merely did not act to delete it.

Understanding this problem, the plaintiff tried to argue that, in addition to their legal duty as parents, the defendants had a duty *as landowners* to remove the defamatory content that existed on their property.<sup>20</sup> In other words, they analogized the circumstances to a case where a landowner could be liable for not erasing defamatory graffiti.<sup>21</sup>

The court rejected this argument, however, implying that the analogy is not entirely convincing because it is not clear you can equate a statement placed on the Internet with one physically exhibited on a piece of property.<sup>22</sup> More importantly, the court concluded that the plaintiff did not prove that the defendants had the ability to remove the defamatory statement.

For this reason, the court dismissed the claim based on this theory of recovery, which raises the original question again. If the defendants did not issue the original statement and did not commit defamation by republication either, how can they be liable for defamation at all?

Given the court's analysis, the basis of the defamation claim can only be that the parents did not act reasonably to delete the statement according to the duty the court first recognized in the opinion. But, as discussed above, this duty is based on the notion that when the defendant's conduct "creates a continuing risk of physical harm of a type characteristic of the conduct, the actor has a duty to exercise reasonable care to prevent or minimize the harm."<sup>23</sup> Thus, at least as explained in the Restatement, the possibility of imposing liability for not taking

19. RESTATEMENT (SECOND) OF TORTS § 577(2) (1977) (one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it).

20. *Athearn*, 764 S.E.2d at 587.

21. To support the argument, the plaintiff cited a dissenting opinion in *S. Bell Tel. & Tel. v. Coastal Transmission Serv.*, 307 S.E.2d 83, 92 (Ga. Ct. App. 1983), which cited the RESTATEMENT (SECOND) OF TORTS § 577(2) (1977), which provides that "[o]ne who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication."

22. *Athearn*, 764 S.E.2d at 588.

23. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 39 (2012).



measures to minimize or eliminate foreseeable future harm is based on the possibility of future physical injury while the plaintiff in *Boston v. Athearn* argued that it should be extended to protect from future emotional or dignitary injuries as well.<sup>24</sup>

The court does not address this aspect of the litigation and it is this issue that should have attracted the attention of those who reviewed the case rather than the mistaken view that the case created a duty to supervise a child's computer use or that it recognized a new form of vicarious liability. Implying that the parents can be liable to the plaintiff for a non-physical injury is not problematic if the court is ready to say that a plaintiff should have a cause of action for any injury as long as the plaintiff can show that the injury is a foreseeable consequence of the risk created by the negligent conduct. However, many courts are reluctant to reach this general conclusion if the injury claimed is purely emotional, or dignitary as it is in this case. It remains to be seen if the court will eventually find that the defendant's duty extends to include non-physical injuries. Once this issue is addressed, maybe *Boston v. Athearn* will be a landmark decision after all.

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24. *Athearn*, 764 S.E.2d at 587.