

Internet Defamation: Case Update

By Richard Morgan for Technology Law Alliance

Since *Godfrey v Demon Internet Ltd* [2001] QB 201 it has been clear (if there was ever any doubt) that the Internet can be a vehicle for defamation in the same way as paper or other records. The successful Claimant in that case was careful to base his action only on the period after the Defendant knew the words to be defamatory and still failed to remove them.

In the USA the Communications Decency Act 1996 exonerates a provider or user of an Internet service from responsibility for material posted by a third party as the publisher of that material. This is analogous to the "common carrier" argument which is the basis for the immunity granted to the Royal Mail under the Postal Services Act 2000 in respect of defamatory or obscene information sent through the post. However there is an important difference between post and the Internet: it is usually not possible for the Royal Mail to see what they carry; with an Internet service it is in theory possible for the provider to inspect it. So whether a UK ISP or other provider of an Internet facility (such as a chat room) was at the time of *Godfrey* (ie 2001) also liable in respect of the period *before* its defamatory nature has been pointed out to him, was not clear.

Some relief is now provided to ISPs by Regs 17 and 18 of the Electronic Commerce (EC Directive) Regs 2002 (SI 2002 No 2913), which state that where an ISP is "mere conduit" for data or holds it only in cached memory prior to onwards transmission, there is no liability.

A recent case which probes this is *Bunt v Tilley* [2006] EWHC 407 (QB). Three individuals were alleged by the Claimant to have posted defamatory material to the Claimant's own website. The Claimant's action was against those three, but also against their respective ISPs – AOL, Tiscali and BT. The reported case turns solely upon whether the three ISPs have case to answer.

It seems the Claimant contacted the Defendant ISPs by e-mail to ask who had posted some material. The Claimant did not apparently say at the time that he held the defendant ISPs liable for the defamatory words. His first e-mail asked for the name of the alleged libeller (following *Totalise plc v The Motley Fool* [2002] EMLR 358), and when they did not respond he sent a second e-mail threatening "to hardcopy this request and courier it to UK Board Members", though it seems he never carried out this promise. The Defendants alleged that they never received the Claimant's e-mails.

One ISP Defendant (Tiscali) became aware of the matter only when they received the claim form and forthwith suspended the relevant personal Defendant (a Mr Hancox)' Internet access.

Eady J was satisfied that none of the ISP Defendants knew of the defamatory material, and without such knowledge, could in no way be responsible for it.

However he went further. Counsel for the ISP Defendants argued that an ISP is not liable under the Electronic Commerce (EC Directive) Regs 2002 (SI 2002 No 2913) for data, either forwarded unaltered without any storage (“a mere conduit” Reg 17), or temporarily held by them in cached memory for onward transmission (Reg 18), which may be defamatory. The Claimant claimed that they were not exempt since they were not service providers as required by the Regs. The Regs incorporate the definition in the original Directive (Recital 17 of 2000/31/EC) of such services as

“any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service” (Reg 2(1)).

Eady J had no difficulty in accepting that ISPs were covered by this definition.

The second recent case turns on issue of the place of publication. ***Dow Jones & Co Inc v Gutnick* [2002] HCA 56** had established in Australia that the claimant in such actions is not constrained to bring his action in the jurisdiction where the defamatory material originated, nor even in the jurisdiction where he lives. Internet material is available instantly in every jurisdiction, so he can pick and choose a jurisdiction where he thinks he can maximise his entitlement to damages. The applicability of ***Gutnick*** to English law is unknown but as ***Gutnick*** was argued on the basis of English cases such as ***Brunswick (Duke of) v Harmer* [1849] 14 QB 185**, it seemed possible that English Courts would take a similar view to that of the Australian Court.

But in ***Mohammed Hussein Al Amoudi v (1) Jean Charles Brisard (2) JCB Consulting International SARL* [2006] EWHC 1062 (QB); Sol J 30.06.06 p856**, the alleged defamatory material was posted by a French national to a Swiss website and related to an Ethiopian businessman living in Saudi Arabia, though he also had a home in London. The Claimant sought summary judgment on the grounds that defamatory material on the

Defendant’s website was available world-wide. The Defendant followed ***Jameel v Dow Jones Inc* [2005] 2 WLR 1614** where it was argued that a substantial download of defamatory material depended not on its availability (to 5,000 to 10,000 people within the jurisdiction), but on how many people in the jurisdiction actually downloaded it (5 in that case). Defence successfully argued in the instant case that there was no evidence that the material complained of had in fact been downloaded within the jurisdiction of the English Courts, except possibly by the Claimant’s English lawyers in acting for him. The Defendant had apparently lost the original detailed score of hits on the website which might have clarified this point and had only monthly summaries which include hits from countries which were unknown or not recorded. Nevertheless, the Court held that whether the defamatory material has or has not been downloaded and so published in the jurisdiction is a matter of fact, to be determined by the jury. After all the number of persons who had seen the libel would be a factor in determining damages.

The effect of this should be to discourage claimants who are not domiciled in the UK and where the alleged defamatory material is not on a UK website from using the English Courts. But it also means that even if the claimant and/or the defamatory material are UK-based, evidence as to the download should be gathered by the claimant.

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