

Hong Kong Judicial Colloquium 2015

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Defamation and Internet Intermediaries

A. *Publication and innocent dissemination*

1. A defamation is constituted by the publication of a statement which injures another person's reputation. To "publish" is to convey to the mind of another the defamatory sense contained in the statement.² Where the publication has a single originator, such as a newspaper or a radio or television station, the liability of the main publisher or publishers for defamation is straightforward. Such publishers, for example the journalist who authored the article and the editor who decided to publish it, will ordinarily know (or be able easily to ascertain) the content of the words to be published and will exercise editorial control over its dissemination. It is unobjectionable that such a publisher has traditionally been held strictly liable, whether or not he or she actually knew that the article contained those words.³
2. However, the act of "publication" was given an extremely wide meaning. It was held to extend to an act of any description which could be said to have assisted in the process of conveying the defamatory words to a third party, regardless of whether the person acting knew that the article contained those words. Thus, apart from the journalist and the editor, persons who would be held strictly liable for a defamatory publication included the printer, the wholesale distributor, newsagents and (vicariously) the newspaper's proprietor even though none of them were aware of the defamatory material being disseminated.

¹ Permanent Judge of the Hong Kong Court of Final Appeal. I would like to thank Ms Lillian Li and Mr Thomas Wong Ka-ho, Judicial Assistants to the Court of Final Appeal, for their invaluable assistance in the preparation of this Paper.

² *Webb v Bloch* (1928) 41 CLR 331, 363 per Isaacs J.

³ *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170, 179; *Godfrey v Demon Internet Ltd* [2001] QB 201, 207; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, §25.

3. It was to mitigate the harshness of this strict rule that the common law evolved the defence of innocent dissemination. In 1886, in *Emmens v Pottle*,⁴ Lord Esher MR robustly refused to hold newsvendors liable merely because they had sold a newspaper containing a libel which they did not know of and had no reason to suppose existed. In *Vizetelly v Mudie's Select Library Limited*,⁵ a case decided in 1900, Romer LJ formulated the requirements of the defence – made available only to persons other than the “first or main publisher”⁶ of a work containing a libel – as follows:

“...if he succeeds in shewing (1) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (2) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (3) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was prima facie publication of it, he may nevertheless, on proof of the before-mentioned facts, be held not to have published it. But the onus of proving such facts lies on him, and the question of publication or non-publication is in such a case one for the jury.”

4. Although Romer LJ stated that the defence results in the defendant being deemed not to have published the libel at all, the modern and better view, as indicated by Brennan CJ, Dawson and Toohey JJ in their joint judgment in *Thompson v Australian Capital TV Ltd*,⁷ is that:

“... it would be more accurate to say that any disseminator of a libel publishes the libel but, if he can establish the defence of innocent dissemination, he will not be responsible for that publication.”

5. This is so since, as was pointed out in *Oriental Press Group Ltd v Fevaworks Solutions Ltd*:⁸

⁴ (1885–86) LR 16 QBD 354.

⁵ [1900] 2 QB 170 at 180.

⁶ His Lordship also excluded printers from the defence. That is unsurprising given that the way type was then set meant that they would know the defamatory words being published. However, since *Thompson v Australia Capital TV Pty Ltd* (1996) 186 CLR 574 at 586-587; such exclusion has been questioned and is best seen to have been superseded. See *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at §§79-80.

⁷ (1996) 186 CLR 574 at 586, citing Duncan & Neill on Defamation, 2nd Ed, at 110, fn 3.

⁸ (2013) 16 HKCFAR 366 at §32.

“The rule that persons relying on the defence are liable unless they discharge the onus of proving lack of knowledge and the absence of negligence indicates that they must in principle be publishers, albeit in a subordinate role, for otherwise they could not be held liable at all since a fundamental constituent of the tort would be missing.”

6. This defence, developed in the era of mass communications in the print medium, has assumed renewed relevance in the internet age. It gives subordinate publishers or disseminators⁹ (as opposed to “first or main publishers”) of a libellous work a defence if they prove that they did not know and would not have known by the exercise of reasonable care that the article contained defamatory material.
7. In the *Fevaworks* case,¹⁰ the Hong Kong Court held that what distinguishes a main publisher from a subordinate publisher is that the former knows or can easily acquire knowledge of the content being published (although not necessarily of its defamatory nature as a matter of law); and that he has a realistic ability to control publication.
8. In many jurisdictions (although not in Hong Kong), a statutory version of the defence of innocent dissemination has been enacted. Thus, in New Zealand, section 21 of the Defamation Act 1992 provides:

“In any proceedings for defamation against any person who has published the matter that is the subject of the proceedings solely in the capacity of, or as the employee or agent of, a processor or a distributor, it is a defence if that person alleges and proves—

- (a) that that person did not know that the matter contained the material that is alleged to be defamatory; and
- (b) that that person did not know that the matter was of a character likely to contain material of a defamatory nature; and
- (c) that that person’s lack of knowledge was not due to any negligence on that person’s part.”

9. Similar provisions have been enacted in each of the Australian States and Territories¹¹ and in section 1(1) of the UK’s Defamation Act 1996.¹²

⁹ Including persons like wholesalers, distributors, booksellers, librarians, newsagents and archivists.

¹⁰ *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at §§74-88. Provisions to like effect have been enacted in the Australian States and Territories, see for instance, Defamation Act 2005 (NSW) section 32(2)(c).

¹¹ Civil Law (Wrongs) Act 2002, section 139C (ACT); Defamation Act 2005, section 32 (NSW); Defamation Act 2006, section 29 (NT); Defamation Act 2005, section 32; Defamation Act 2005,

B. *Publication and the Internet*

10. Publications on the Internet are qualitatively different, involving interactive and user-generated communications on a vast and ever-growing scale, conducted at lightning speed. New actors and functions (often wholly or partly automated) fulfil different roles in the publication process and pose challenges for legal policy and analysis.

11. As Professor Jack M Balkin¹³ explained:

“Mid-twentieth century mass media – newspapers, television, cable and satellite – were broadcasters, with one entity speaking to many people, and little opportunity to speak back. Twenty first century mass media, the so-called ‘new intermediaries’, are conduits, platforms, and services. They do not necessarily broadcast but facilitate the speech of others, and instead of being a one-to-many, there are many-to-many forms of communication. ... These online service providers offer platforms through which people can find content, create new content, transform existing content and broadcast the content to others ... These new intermediaries are conduits for other people’s speech and communications. ... their business models depend on user-generated content ...”

12. The fundamental importance of the Internet as a tool for freedom of expression – the right to seek, impart and receive information – hardly needs to be stated. It greatly enhances those rights for every individual who goes online, providing direct access to information and a public space for interactive comment, opinion and debate; and providing platforms for political, educational, cultural and artistic exchanges as well as entertainment and commercial activity. Advocates of freedom of expression argue powerfully for the law to:

“... facilitate and encourage such advances, not attempt to restrict or impede them by inconsistent and ineffective, or only partly effective, interventions, for fear of interrupting the benefit that the Internet has already brought and the greater benefits that its continued expansion promises.”¹⁴

section 30 (SA); Tasmania: Defamation Act 2005, section 32; Defamation Act 2005, section 32 (Vic); Defamation Act 2005, section 32 (WA).

¹² “In defamation proceedings a person has a defence if he shows that (a) he was not the author, editor or publisher of the statement complained of, (b) he took reasonable care in relation to its publication, and (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.”

¹³ Knight Professor of Constitutional Law and the First Amendment, Yale Law School. Paper prepared for the Global Constitutionalism Seminar, 2010, Yale Law School, adapted from Jack M Balkin, *Media Access: A Question of Design*, 76 *George Washington L Rev* 933 (2008).

¹⁴ Kirby J in *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at §88, referring to counsel’s argument.

13. At the same time, the same processes can cause greatly magnified and persistent harm to persons with countervailing rights and interests. This obviously applies to the right to reputation being discussed. Other rights requiring legitimate limits to be placed on freedom of expression include rights to respect for private and family life; against misuse of personal data; to be presumed innocent and to a fair trial; to protection against hate speech, incitement to violence and discrimination; to security against radicalisation and recruitment to terrorist causes; to protection against harassment, bullying, intimidation and stalking; to protection of children and other vulnerable persons against sexual and other exploitation; and to protection of intellectual property and other economic rights.
14. Courts and legislatures must endeavour to find ways of balancing these rights and interests. The Committee of Ministers of the Council of Europe, by their Recommendation¹⁵ adopted on 21 September 2011, urged member states to recognize that:

“A differentiated and graduated approach requires that each actor whose services are identified as media or as an intermediary or auxiliary activity benefit from both the appropriate form (differentiated) and the appropriate level (graduated) of protection and that responsibility also be delimited in conformity with Article 10 of the European Convention on Human Rights and other relevant standards developed by the Council of Europe.”¹⁶
15. The approach of identifying the precise functions of relevant actors and devising a differentiated and graduated approach to legal claims against them, provides a useful framework for assessing the judicial and legislative measures adopted. In the present paper, I focus on how claims by plaintiffs alleging infringement of their rights to reputation by internet intermediaries and search engine operators are dealt with.

C. Internet intermediaries

C.1 Internet Service Providers

16. One differentiation which has commonly been made is between service providers which act as “mere conduits” or “passive facilitators” on the one hand, and intermediaries who deal in some way with the content being published, on the other.

¹⁵ CM/Rec(2011)7.

¹⁶ Appendix to Recommendation, §7.

Internet Service Providers (“ISPs”) whose only role is to afford users a connection to the internet have, by analogy with the postal service and telephone carriers, generally been regarded as “mere conduits” and not publishers at all. Thus, in *Bunt v Tilley*,¹⁷ Eady J struck out an action for defamation brought against three ISPs¹⁸ on this basis, holding that “there must be knowing involvement¹⁹ in the process of publication of the relevant words” and that “[it] is not enough that a person merely plays a passive instrumental role in the process”.

17. Since ISPs in fact assist in the process of conveying the defamatory words to a third party, it may be thought that they should be regarded as subordinate publishers who need to rely on the innocent dissemination defence,²⁰ but the authorities have tended to favour differentiating them from publishers altogether.²¹ The English case-law is no doubt influenced by the EU’s Directive on Electronic Commerce²² which, since August 2002, has conferred on service providers which act as mere conduits for transmissions in a communication network protection against legal liability.²³

C.2 Platform providers

18. More controversial has been the treatment of claims brought against internet intermediaries for defamatory statements published by third parties on platforms hosted by the intermediaries. Different approaches are illustrated in four recent

¹⁷ [2007] 1 WLR 1243 at §23.

¹⁸ AOL UK Ltd, Tiscali UK Ltd and British Telecommunications plc.

¹⁹ As indicated later in this paper, the suggested requirement of “knowing involvement” needs qualification in relation to automated processes which generate content.

²⁰ E.g., Gatley on Libel and Slander (12th Ed, 2013) §6.27. This view is also advocated, e.g., by Jan Oster, “Communication, defamation and liability of intermediaries” *Legal Studies*, Vol 35, No 2, 2015, p 348 at p 357.

²¹ *Godfrey v Demon Internet Ltd* [2001] QB 201 at 209-210; *Tsichlas v Touch Line Media Pty Ltd* 2004 (2) SA 112 at 123; *Crookes v Newton* [2011] 3 SCR 269 at §21; *Tamiz v Google Inc* [2013] EMLR 14 (CA) at §23; *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at §54; *Murray v Wishart* [2014] 3 NZLR 722 at §116.

²² Directive 2000/31/EC implemented by the UK’s Electronic Commerce (EC Directive) Regulations 2002.

²³ Regulation 17, provides a safe harbour from pecuniary remedies and criminal sanctions where the service provider did not initiate the transmission, select its receiver and did not select or modify the information contained in the transmission. Regulation 18 provides similar protection for service providers who merely cache data. Regulation 19, which deals with internet hosts, is dealt with below.

appellate decisions in England and Wales,²⁴ Hong Kong,²⁵ New Zealand²⁶ and the European Court of Human Rights.²⁷

(a) *The Fevaworks case*²⁸ in Hong Kong

19. The respondent, Fevaworks, hosted a discussion forum on which traffic was voluminous, often having 30,000 users online and 5,000 posts per hour. No attempt was made to edit posts before they appeared on the forum, but two administrators were employed to monitor discussions for six to eight hours per day, tasked with removing objectionable content and fielding complaints. A user who frequently broke the rules could be suspended or have his account and ability to post messages on the forum terminated.
20. Two discussion threads appearing in 2008 and 2009 were highly defamatory of the appellants.²⁹ They complained to Fevaworks about the 2008 statements three days after they had been posted and this led to the statements being taken down within 3 ½ hours of notification. Fevaworks itself discovered the 2009 statements some 12 hours after their posting and immediately took them down. The plaintiffs sued for libel, the central issue being whether Fevaworks should be held liable for the defamatory statements posted by third parties on its forum. The actions were dismissed at first instance³⁰ and the plaintiffs also failed in the Court of Appeal.³¹
21. The Court of Final Appeal considered Fevaworks's position before and after it became aware of the defamatory posts. It held that in the pre-notice period, Fevaworks was not a main or principal publisher: It did not know of, nor could it easily have ascertained, the content of the posts. Nor did it exercise editorial control

²⁴ *Tamiz v Google Inc* [2013] 1 WLR 2151 (CA).

²⁵ *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366.

²⁶ *Murray v Wishart* [2014] 3 NZLR 722 (CA).

²⁷ *Delfi AS v Estonia ECHR Grand Chamber (Application no. 64569/09) 16 June 2015.*

²⁸ *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366.

²⁹ Alleging their involvement in the drug trade, money laundering and even in murder. A settlement was reached regarding certain 2007 statements which require no further discussion.

³⁰ Chung J, HCA 2140/2008 and HCA 597/2009, 25 February 2011.

³¹ [2012] 1 HKLRD 848.

over their publication.³² But *Fevaworks* was held to be a subordinate publisher since it had actively provided a discussion platform, invited participation, set forum rules and earned advertising revenue related to the volume of traffic.³³ Since there was no realistic means of vetting the 5,000 or so messages posted every hour, the Court was satisfied that *Fevaworks* did not know and, without negligence on its part, did not have any reason to suppose that the libels had been posted. *Fevaworks* was therefore held entitled to the defence of innocent dissemination in the period prior to notification.³⁴

22. That defence has traditionally been concerned with completed publications: in *Emmens v Pottle*, the newsagent had sold the paper and in *Vizetelly*, the lending library had lent out the book. However, in internet cases, especially involving busy websites, “hits” accessing the objectionable material are very likely to occur between receipt of the complaint and removal of the offending material. Each “hit” represents a fresh publication since internet material is published when and where it is accessed or downloaded in comprehensible form.³⁵ What then is the post-notice position involving the innocent dissemination defence?
23. The Court held in *Fevaworks* that the defence did not instantly evaporate upon notification. It remained available provided that upon learning of the defamatory posts, the forum provider took them down as soon as reasonably practicable. The standard of reasonableness was therefore applied to the periods both before and after notice. This involved a development of the traditional defence.

(b) *Tamiz v Google Inc*³⁶ in England and Wales

24. *Tamiz* was decided by the English Court of Appeal some five months before *Fevaworks*. It was an interlocutory appeal against the lower court’s decision to set

³² *OPG v Fevaworks* at §§74-76.

³³ *Ibid*, §§50, 51 and 89.

³⁴ *Ibid*,

³⁵ *Godfrey v Demon Internet Ltd* [2001] QB 201 at 208-209; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at §§14-16, 44; *Loutchansky v Times Newspapers Ltd (Nos. 2-5)* [2002] QB 783 at §58.

³⁶ *Tamiz v Google Inc* [2013] 1 WLR 2151 (CA).

aside leave to serve Google Inc out of the jurisdiction³⁷ in respect of a libel allegedly committed on the plaintiff by a blogger. The blog was published on an internet platform called Blogger.com provided by Google Inc to enable users to host their own blogs. It was immensely popular and the blogs it carried contained in aggregate more than half a trillion words, with 250,000 words added every minute.

25. The objectionable content was posted in April 2011, the plaintiff complained to Google Inc in July and, following correspondence, it was taken down by the blogger in August, about 5 weeks after notice was received by Google Inc.
26. The English Court of Appeal rejected the suggestion that in providing the blogging platform, Google Inc should be equated with a “mere conduit” like an ISP. It was not “purely passive” but provided the tools for setting up individual blogs and permitted bloggers to gain advertising revenue and to share such income with Google Inc. The Court of Appeal also held that, pre-notice, Google Inc was not a main or primary publisher since it had no prior knowledge or effective control over content.
27. However, the Court of Appeal also rejected the conclusion that Google Inc was a subordinate publisher stating:

“There is a long established line of authority that a person involved only in dissemination is not to be treated as a publisher unless he knew or ought by the exercise of reasonable care to have known that the publication was likely to be defamatory.”³⁸

28. With respect, it would have been more accurate to state that a person is not to be treated as a “*first or main* publisher” unless he knew or ought to have known the specified matters. Richards LJ continued, stating:

“Since it cannot be said that Google Inc either knew or ought reasonably to have known of the defamatory comments prior to notification of the claimant’s complaint, that line of authority tells against viewing Google Inc as a secondary publisher prior to such notification.”³⁹

29. That statement appears inconsistent with the doctrine of innocent dissemination. It is a defence that relieves against the strict liability previously imposed on those playing

³⁷ Google Inc being a Delaware corporation with its principal place of business in California.

³⁸ At §26, citing *Emmens v Pottle* (1885–86) LR 16 QBD 354; and *Vizetelly v Mudie’s Select Library Limited* [1900] 2 QB 170.

³⁹ *Ibid.*

a subsidiary role in the publication process, and is available to those who are not the first or main publishers provided that they do not know and would not, by using reasonable care have known, that the article contained the defamatory material. Far from negating the status of subordinate publisher, it was *only if* “...it [could not] be said that Google Inc either knew or ought reasonably to have known of the defamatory comments prior to notification of the appellant’s complaint” that Google Inc could have qualified as a subordinate publisher eligible to rely on innocent dissemination.

30. It was on the aforesaid footing that the Court of Appeal in *Tamiz* decided that Google Inc was not a publisher at all in the pre-notice period. The *Byrne v Deane* line of cases was then adopted as the basis for dealing with Google Inc’s liability after notice of the defamatory blog was received.
31. The principles derived from that line of cases have often been illustrated by reference to three reported decisions. The English decision in *Byrne v Deane*,⁴⁰ involved the proprietors of a golf club who were sued regarding an allegedly defamatory notice pinned anonymously onto the club’s notice board which the club secretary became aware of but did not remove for some time. The second is the Californian decision in *Isabelle Hellar v Joe Bianco*⁴¹ where the owner of a bar was sued in respect of a statement casting defamatory aspersions on a woman’s morals, anonymously scrawled as a graffito on the wall of the men’s lavatory. The third is the New South Wales decision in *Urbanich v Drummoyne Municipal Council*,⁴² where the Urban Transit Authority was sued for libel because posters bearing photographs of the plaintiff – a member of an extreme right wing party – purporting to show him in the company of Adolf Hitler and others in Nazi uniforms had been glued onto bus shelters controlled by the Authority. Each of those acts was done without the knowledge or consent of the relevant occupiers.
32. As indicated in *Fevaworks*, those cases support the following propositions:

⁴⁰ [1937] 1 KB 818.

⁴¹ (1952) 244 P 2d 757.

⁴² (1991) Aust Torts Reports §81-127.

- (a) Where a third person writes or affixes a statement defamatory of the plaintiff on the occupier's property without the occupier's knowledge, the occupier is not treated as a publisher of that statement prior to his becoming aware of it.
 - (b) Once the occupier discovers its existence, he may be treated as a publisher but only if, having the power to do so, he does not remove or obliterate the offending statement in circumstances which justify inferring as a matter of fact that by his inaction he has consented to or ratified its continued publication.
 - (c) Where removal or obliteration would be very difficult or expensive, failure to expunge the defamatory statement may well not justify the inference that it remains in place with the occupier's approval.
33. Richards LJ, adopting the *Byrne v Deane* approach regarding the post-notice position, held that Google Inc, as host of Blogger.com, was like a person maintaining a giant notice board. It was held to be arguable that by allowing the defamatory blog to remain in place for over five weeks after being notified of its existence, Google Inc had adopted and made itself responsible for that blog. The Court of Appeal therefore refused to set aside the grant of leave summarily on the *Byrne v Deane* analysis. It decided, however, to uphold Eady J's decision to set leave aside applying *Jameel (Yousef) v Dow Jones & Co Inc*,⁴³ finding that the insignificant number of readers of the blog and the short duration of its existence meant that any damage suffered by the plaintiff was trivial so that the bringing of an action was wholly disproportionate and an abuse of process.
- (c) *Murray v Wishart in New Zealand*

⁴³ [2005] QB 946. The doctrine, as a matter of common law, has been controversial and unevenly applied in England and Wales (where the position is now likely to be dealt with applying the serious harm threshold laid down by section 1 of the Defamation Act 2013): *Steinberg v Pritchard Englefield* [2005] EWCA Civ 288; *Mardas v New York Times Co* [2009] EMLR 8; *Davison v Habeeb* [2012] 3 CMLR 6; in Ontario: *Goldhar v Haaretz.com* [2015] ONSC 1128; in New South Wales: *Barach v University of New South Wales* [2011] NSWSC 431; *Bristow v Adams* [2012] NSWCA 166; *Bleyer v Google Inc LLC* (2014) 311 ALR 529; in New Zealand: *Deliu v Hong* [2013] NZHC 735; *Moodie v Strachan* [2013] NZHC 1394; and in Hong Kong: *Wong Wing Ho v Chong Lai Wah* (unrep) CACV 212/2007, 13.2.2008; *Jotron AS v Stanley Chang* (unrep) HCA 378/2010, 20.5.2011; and *Dr Yeung Sau Shing Albert v Google Inc (No 2)* [2015] 1 HKLRD 26.

34. Mr Murray created a Facebook page as part of his campaign to boycott a newly-published book which had been co-authored by the mother of twins who had died of non-accidental injuries in controversial circumstances. He was sued for libel by Mr Wishart, the other author, regarding third party defamatory statements published on his Facebook page. Mr Murray applied to strike out the action arguing that he was not the publisher of those statements. He had sought to remove abusive and defamatory statements and had banned 50 users but became overwhelmed by the 250,000 comments which his Facebook page attracted. He decided to go offline after about two months.
35. The New Zealand Court of Appeal applied *Byrne v Deane*, holding that Mr Murray could not be held liable as a publisher of the third party statements unless he was shown actually to have known of those statements and to have failed to remove them within a reasonable time in circumstances giving rise to an inference that he was taking responsibility for them. The action was not struck out, the plaintiff being given a chance to re-plead the case on the actual knowledge basis.

(d) *An evaluation of the two approaches*

36. Of the two approaches to intermediary liability canvassed in the abovementioned decisions, one favouring application of the innocent dissemination defence and the other, application of the *Byrne v Deane* line of cases, the innocent dissemination approach seems preferable to me for the following reasons.
- (a) As the editors of *Gatley on Libel and Slander*⁴⁴ note, the occupiers in the *Byrne v Deane* line of cases were “not in the business of publishing or facilitating publication at all, but ... had imposed on [them] the defamatory act of a trespasser”. The occupiers only turned themselves into publishers if the plaintiff shows that they have acted (or failed to act) in circumstances justifying the inference that they had adopted or ratified the defamation. Such persons are thus in a very different position from providers of platforms designed to encourage and facilitate publication of content by third parties and the applicability of *Byrne v Deane* to such intermediaries is highly

⁴⁴ 12th Ed (2013), §6.26.

questionable. Such intermediaries ought normally to bear the burden of establishing innocent dissemination.

(b) Secondly, to hold on the basis of *Byrne v Deane* that such intermediaries cannot be regarded as publishers at all until they have actual knowledge of the defamatory posts is to relieve them of any pre-notice obligations. The innocent dissemination approach is more graduated. If the platform provider has been alerted to the likelihood of defamatory attacks on particular individuals, for example, because of known repeated past attacks or because the user is known to be mounting a campaign which inherently encourages such attacks, greater pre-notice precautions (such as putting enhanced alert measures in place) might be required of the platform provider in order to satisfy the standard of reasonableness.

37. These are, however, minor quibbles. Significantly all three jurisdictions have adopted a “notice and take down” approach to liability. They recognize that the speed and ever-growing volume of platform traffic will often make it impossible for the intermediary to prevent publication of offensive content by third party users. They have not attempted to lay down any preventive obligation. Nor have they sought to place a general duty of monitoring each post once it appears. The courts have generally considered it sufficient if the platform provider, upon becoming aware of the offensive material, expeditiously removes it and disables access. That is where the balance has been struck.

(e) *Delfi AS v Estonia*⁴⁵ in the *European Court of Human Rights* (“ECtHR”)

38. The recent decision of the Grand Chamber is out of step. The Estonian Supreme Court upheld the lower courts’ finding that Delfi AS, an internet news portal, was liable for defamatory and offensive comments (some involving hate speech and incitements to violence) posted by third parties in the “Comments” space provided for readers’ reactions to a news article published by Delfi. The article itself was held to be balanced and lawful. The offending comments, which were uploaded automatically without editing by Delfi, were taken down on the day that complaint

⁴⁵ *Delfi AS v Estonia ECHR Grand Chamber (Application no. 64569/09) 16 June 2015.*

was received, some six weeks after they had first appeared. Delfi was publishing about 330 news articles and receiving about 10,000 readers' comments daily. The plaintiffs sought damages of 500,000 Estonian kroons (approximately €32,000) but were awarded only €320. Delfi brought proceedings in the ECtHR contending that the Estonian courts' finding of liability constituted a violation of its right to freedom of expression under Article 10 of the European Convention on Human Rights.

39. The Estonian Supreme Court had held that it was insufficient that Delfi had immediately taken down the offensive comments. Even though Delfi did not know of them prior to receiving complaints, the Court treated the authors as having disclosed the comments to Delfi and held that under the domestic Obligations Act, Delfi should have removed them from the portal on its own initiative. Its inactivity was deemed unlawful as it had not "proved the absence of culpability" under the Act. The Grand Chamber of the ECtHR upheld that decision. It did not consider the imposition on Delfi of an obligation to remove, without delay and on its own initiative, comments that were "clearly unlawful on their face" a disproportionate interference with its freedom of expression and found that Article 10 had not been infringed.⁴⁶
40. This approach attracted trenchant criticism in the dissenting joint opinion of Judges Andr ́ Saj ́o and Nona Tsotsoria,⁴⁷ who pointed out that:

"In the overwhelming majority of the member States of the Council of Europe, and also in genuine democracies all over the world, the regulatory system (in conformity with the expectations of the rule of law) is based on the concept of actual knowledge. A safe harbour is provided by the rule of notice and action (primarily 'notice and take down')."⁴⁸

41. In consequence, the dissenters contend :

"The duty to remove offensive comments without actual knowledge of their existence and immediately after they are published means that the active intermediary has to provide supervision 24/7. For all practical purposes, this is absolute and strict liability, which is in no sense different from blanket prior restraint. No reasons are given as to why only this level of liability satisfies the protection of the relevant interests."⁴⁹

⁴⁶ At §153.

⁴⁷ The Hungarian and Georgian members of the Court.

⁴⁸ Dissent at §7.

⁴⁹ Dissent at §35.

42. Certainly, the EU's Electronic Commerce Directive⁵⁰ has, since 2000, provided certain service providers with a safe harbour activated by actual notice and expeditious removal. This is a good policy since an enormous burden would be placed on intermediaries if they were required to employ trained moderators to patrol each message board and to form a judgment on whether they should, on their own initiative, remove particular content. Some posts will obviously involve hate speech and incitement to violence, but often the intermediary will be ill-placed to judge whether a post is defamatory or otherwise unlawful. It makes sense to leave it to the offended person to complain before a failure to take down the third party's post raises any question of intermediary liability. Otherwise the cost of monitoring might drive intermediaries to suppress readers' comments and similar features, impoverishing freedom of expression on matters which may well be of public interest. The "notice and take down" balance is likely, in most cases, to be more suitable as a graduated legal response.

(f) *Statutory intervention*

43. There is, however, only so much that a court can achieve applying common law methods or interpreting human rights instruments. The legislature is far better equipped to map out a differentiated and graduated scheme for striking a proper balance. An interesting example is presented by the schemes laid down by sections 5 and 10 of the Defamation Act 2013 in England and Wales. Section 5 conditionally gives a website operator a defence if it shows that it did not post the relevant statement. Where the claimant cannot identify the person who did the posting, he can serve on the operator a notice stating inter alia why the specified statement is defamatory of him and where it is posted on the website, requiring a proper response as prescribed in accompanying Regulations⁵¹. In order to benefit from the defence the website operator must, within 48 hours of receiving a notice of complaint, either notify the originator of the complaint (if the originator can be contacted) or remove the statement (if he or she cannot be contacted). However, section 10 of the Act

⁵⁰ Directive 2000/31/EC, given effect in the UK by the Electronic Commerce (EC Directive) Regulations 2002. See especially Regulation 19's notice and take down provisions.

⁵¹ The Defamation (Operators of Websites) Regulations 2013.

requires the claimant, whenever possible, to pursue the “author, editor or publisher”⁵² instead of other persons involved in the publication and deprives the court of jurisdiction to entertain actions against such other persons unless “it is not reasonably practicable for an action to be brought against the author, editor or publisher”.

C.3 *Internet search engines*

44. Operators of internet search engines represent a special kind of intermediary. A search engine like Google functions by compiling its own index of content on the Web, using “web crawling” algorithms which function without human input.⁵³ When a user makes a Google search, that index is examined and a list of web pages determined by the programme to be relevant is exhibited, displaying “snippets” from the located websites to help the user decide whether those are the sites he wants to visit.⁵⁴ Such snippets may consist of a text excerpt, an image or a snapshot of the site.
45. Two of the problems which have arisen involve (i) the situation where the snippets, produced without any human intervention, are themselves defamatory; and (ii) the situation where the search takes the user to a website which is defamatory. Should the search engine operator be liable in either case?

(a) *Snippets themselves defamatory*

46. There are cases where only the snippet, and not the underlying website, carries a defamatory meaning. An example is *O’Kroley v Fastcase Inc.*,⁵⁵ where Mr O’Kroley did a Google search on his own name and was horrified to find that it produced a snippet showing “his name in a sentence fragment separated by an ellipsis from another sentence fragment including the words ‘indecent with a child’”. The located web page was not defamatory, but the algorithm had captured Mr O’Kroley’s name which appeared at the start of an innocuous entry in a digest of legal cases, together

⁵² As defined in section 1(2) of the Defamation Act 1996.

⁵³ It has been reported that “As of 2014 Google has indexed 200 Terabytes (TB) of data. ... 1 TB is equivalent to 1024 Gigabytes (GB). However, Google’s 200 TB is just an estimated 0.004 percent of the total Internet.” See: <http://www.websitemagazine.com> on the size of the internet.

⁵⁴ See Eady J’s description of the process in *Metropolitan International Schools Ltd v Designtech Corp* [2011] 1 WLR 1743 at §§11-12.

⁵⁵ 2014 WL 2197029 (M D Tenn) in the United States District Court in Tennessee.

with the words at the tail-end of the preceding entry which referred to a child indecency case.⁵⁶

47. Two approaches to such a situation have emerged in the case-law. The first that of Eady J in *Metropolitan International Schools Ltd v Designtecnica Corpn*,⁵⁷ where his Lordship treated Google as a mere conduit or facilitator akin to an ISP and not a publisher, stressing the absence of human intervention in producing the search result. This was also the approach adopted by L Fenlon J in the British Columbia Supreme Court in *Niemela v Malamas* [2015] BCJ No 1250. The second approach is found in the decision of Beach J in *Trkulja v Google (No 5)*⁵⁸ where His Honour decided that while internet search engines operate in an automated fashion, they “operate precisely as intended by those who own them and who provide their services” and so should, in principle, be liable as publishers. Mansfield J in *Rana v Google Australia Pty Ltd*⁵⁹ held that whether or not a search engine can be considered a publisher of defamatory material “is not settled in Australia”. However, Eady J’s approach has found support in New South Wales in *Bleyer v Google Inc*⁶⁰ while Associate Judge Abbott in *A v Google New Zealand Ltd*,⁶¹ considered it reasonably arguable that the search engine was liable as a publisher. That was also the approach taken by Deputy High Court Judge Marlene Ng in *Dr Yeung Sau Shing Albert v Google Inc (No 2)*.⁶²
48. In my view, neither approach is wholly satisfactory. Eady J’s decision to give search engine providers immunity (presumably both pre- and post-notice)⁶³ is not very

⁵⁶ Mr O’Kroley failed in his action because of the sweeping immunity given by section 230 of the Communications Decency Act 1996 in the United States to internet intermediaries against being treated as publishers of content created by someone else.

⁵⁷ [2011] 1 WLR 1743 at §§50-51, where both the snippet and the underlying website were said to have defamed the plaintiff.

⁵⁸ [2012] VSC 533 at §27, in the Supreme Court of Victoria.

⁵⁹ [2013] FCA 60 at §58, in the Australian Federal Court.

⁶⁰ [2014] NSWSC 897, per McCallum J at §83.

⁶¹ [2012] NZHC 2352 at §71.

⁶² [2014] 4 HKLRD 493: A case involving defamatory content generated by the “Autocomplete and Related Search” functions which provide predictive and related search suggestions which the user may choose as the search query is being typed. Leave to appeal to the Court of Appeal has been granted: [2015] 1 HKLRD 26.

⁶³ In *Niemela v Malamas*, the question of whether Google could be a publisher of snippets and search results after notice of defamatory content was not decided: §108.

convincing since, unlike such mere conduits, they *do* deal with content, crawling and indexing the web by content and generating snippets of content suggesting websites of likely interest to the user. Indeed, in a case like *O’Kroley v Fastcase Inc*, the web page itself is inoffensive and it is only because of the content of the snippet that the plaintiff’s reputation suffers. The publisher of the injurious material can only be the search engine operator.

49. At the same time, Beach J seems to me to overstate the case by suggesting that the search engine provider’s intentional use of pre-programmed algorithms should be equated with an intention to publish the defamatory content in a snippet. If that were the case, the operator would be held strictly liable as a primary publisher, which would plainly be unwarranted.
50. I would prefer instead to turn again to the defence of innocent dissemination. A reasonable balance is struck by a scheme for notice and expeditious take down. The snippet having been generated without human knowledge and without negligence on the operator’s part, the operator may be taken at the pre-notice stage to be a subordinate publisher able to rely on innocent dissemination. Post-notice, it comes under an obligation expeditiously to remove and disable access to the offending snippet. In reaching his decision Eady J was impressed by the technical difficulties of suppressing objectionable search results. However, as indicated below, there has been significant progress in resolving those difficulties.

(b) *Search engine leading user to defamatory website*

51. There is more to be said in favour of Eady J’s approach in cases where the snippet is innocuous but the located website contains defamatory matter. In such cases, it is convincingly arguable that the search engine has not participated in the publication of any defamatory content but has merely acted as a signpost or conduit to a website which is the publisher.
52. An analogy can be drawn with the decision of the Supreme Court of Canada in *Crookes v Newton*,⁶⁴ where an author embedded a hyperlink in his article which, when clicked on, took the reader to another author’s article which contained

⁶⁴ [2011] 3 SCR 269.

defamatory content. It was held that creating the hyperlink does not, without more, make the first author a publisher of the objectionable material in the second article. Abella J⁶⁵ likened such a hyperlink to a footnote reference which tells us that something exists but not its content. Her Honour acknowledged however that :

“...individuals may attract liability for hyperlinking if the manner in which they have referred to content conveys defamatory meaning; not because they have created a reference, but because, understood in context, they have actually *expressed* something defamatory ... This might be found to occur, for example, where a person places a reference in a text that repeats defamatory content from a secondary source...”⁶⁶

53. Similarly, while agreeing with the main judgment in general, McLachlin CJ and Fish J stressed that :

“... the combined text and hyperlink may amount to publication of defamatory material in the hyperlink in some circumstances. Publication of a defamatory statement via a hyperlink should be found if the text indicates *adoption or endorsement of the content of the hyperlinked text*. If the text communicates agreement with the content linked to, then the hyperlinker should be liable for the defamatory content. The defendant must adopt or endorse the defamatory words or material; a mere general reference to a web site is not enough.”⁶⁷

54. This approach appears appropriate for dealing with a search engine which merely refers a user to a website containing libellous content. It was on this basis that in the British Columbia case of *Niemela v Malamas*,⁶⁸ an action against Google as alleged publisher of the text of the websites found by the search was struck out. However, the position has been thrown somewhat in doubt by the decision of the Court of Justice of the European Union (“CJEU”) in the *Google Spain* case.⁶⁹ It is a case about personal data privacy and not a defamation case, but one which has obvious implications for search engine liability.

55. In November 2009, Mr González made a Google search for his own name and found himself referred to in the electronic version of a newspaper published more than 10 years earlier, advertising an auction of property he had owned which had been

⁶⁵ At §30, Binnie, LeBel, Charron, Rothstein and Cromwell JJ concurring.

⁶⁶ At §40.

⁶⁷ At §48. Italics in the original.

⁶⁸ [2015] BCJ No 1250 at §§56-60.

⁶⁹ *Google Spain SL, Google Inc v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* 13 May 2014, Case C-131/12.

attached in proceedings against him for recovery of social security debts. There was nothing false or inaccurate about the matter displayed. Indeed, the advertisements had been placed by the lawful order of the Ministry of Labour and Social Affairs, so his claim against the newspaper to take down those web pages failed.

56. However, with the support of the Spanish Data Protection Agency, Mr González persuaded the CJEU (acting contrary to the opinion of its Advocate General⁷⁰) to make the search engine provider liable. It held that a user had the right to require Google to remove from search results relating to his name, links to a third party's web pages containing information regarding him which is "inadequate, irrelevant or excessive in relation to the purposes of the [data] processing [concerned]".⁷¹ The Court did, however, acknowledge that this "right to be forgotten" could be overridden in cases where "the preponderant interest of the general public" supported retention of the relevant information in the search results.⁷²
57. This is likely to lead to the argument that search engines should be ordered to exclude from search results websites containing libellous matter. Since the CJEU recognized such a duty even where the located material had lawfully been posted, it could no doubt be contended that it is all the more appropriate to impose such an obligation where the website contains defamatory matter.
58. Since *Google Spain*, the European Parliament has issued a draft General Data Protection Regulation containing proposals for developing the "right to be forgotten" – referred to as the "right to erasure" – to be implemented by member states. The proposal is highly controversial and has attracted much criticism from, amongst others, the House of Lords European Union Committee in the UK.⁷³ The Committee criticises the tendency for the private citizen's interests to override the public interest; the creation of different levels of access to information, so that the EU would be denied access to information freely available via search engines in the rest of the

⁷⁰ Advocate General Jääskinen, Case C 131/12 (25 June 2013).

⁷¹ Judgment at §92.

⁷² Judgment at §§81, 97 and 99.

⁷³ 2nd Report of Session 2014–15 (30 July 2014).

world;⁷⁴ the imposition of onerous burdens on service providers which could result in cutting down freedom of expression and putting the survival of smaller search engines at risk; the danger of leaving censorship to private search engine operators; and a lack of clarity and objective criteria for dealing with erasure requests. Strong arguments certainly exist against introducing such a right to erasure.

59. After *Google Spain* was decided, Google launched an erasure request process. Its Transparency Report indicates that between 29 May 2014 (when the process began) and the beginning of July 2015, it received 279,766 removal requests and had had to evaluate 1,017,557 URLs⁷⁵ for removal. It agreed to erasure in 58.7% of cases and refused 41.3% of the time. It agreed to removal, for example, in instances involving (i) a record of conviction of serious crime later quashed on appeal; (ii) a political activist stabbed at a protest; (iii) a teacher convicted of a minor crime over 10 years ago; (iv) a woman whose name was mentioned in a decades old article about the murder of her husband; (v) a named victim of rape; (vi) a report of conviction which was “spent” under the UK’s Rehabilitation of Offenders Act. It refused removal, for instance, in relation to (i) a high-ranking official’s decades old conviction; (ii) a prominent businessman’s lawsuit against a newspaper; (iii) a priest convicted of child sex abuse imagery; (iv) a couple accused of business fraud; (v) sexual crimes committed on the job; and (vi) abusing social welfare.
60. Common law jurisdictions have not so far embraced the *Google Spain* approach. It certainly sets a very different balance between freedom of expression and personal reputation or data privacy.⁷⁶ Technological developments have made it possible for

⁷⁴ If, alternatively, the Court were to order a global delisting of a given search (and not just erasure from nationally directed search services), problems involving extra-territorial orders potentially conflicting with foreign freedom of expression protections are likely to arise. See, e.g.: *Yahoo! Inc v La Ligue Contre Le Racisme et L’Antisemitisme and L’Union Des Étudiants Juifs de France* 433 F3d 1199 (9th Cir 2006) consequent upon the decision of the Tribunal de Grande Instance de Paris in *LICRA et UEJF contre Yahoo! et Yahoo France* (Ordonance de R é é érendue le 22 mai 2000); and *Equustek Solutions Inc v Google Inc*, Court of Appeal for British Columbia, 2015 BCAA 265 (June 11, 2015). The British Columbia Supreme Court in *Niemela v Malamas* [2015] BCJ No 1250, where Google had voluntarily blocked searches via Google.ca, refused to grant an injunction compelling Google to block relevant searches from its worldwide websites, partly on the ground that such an order would fall foul of the US Constitution’s First Amendment, would not be enforced by US courts and could not be complied with by Google in such a jurisdiction.

⁷⁵ “Uniform Resource Locator”, a reference (an address) to a resource on the Internet.

⁷⁶ See David Erdos, *Data Protection and the Right to Reputation: Filling the ‘Gaps’ after the Defamation Act 2013* [2014] CLJ 536 on the increasing scope of data protection .

well-resourced actors like Google to respond in ways previously thought impossible. As indicated in the Google Transparency Report, erasure may certainly be a properly warranted remedy in certain cases. However, well-founded concerns about potentially damaging consequences of recognizing “a right to be forgotten” have already been mentioned. A further note of caution should be sounded. As the Committee of Ministers of the Council of Europe noted: “Editorial processes may ... be automated (for example in the case of algorithms *ex ante* selecting content or comparing content with copyrighted material).” This was expanded upon by Susan Corbett in a recent article:⁷⁷

“... computer-driven textual analysis of big data sets is now possible and is highly efficient. For practical examples we can look to the field of digital humanities, in which dedicated content analysis programs are now used to identify subtleties such as themes, rhetorical strategies, irony and gender issues across thousands of texts. Content analysis is a research technique focused on the content and internal features of media. It is used to determine the presence of certain words, concepts, themes, phrases, characters or sentences within texts or sets of texts, and to quantify this presence in an objective manner. ... Once potentially defamatory material is identified by the text analysis program, it could be automatically removed from the search results. Alternatively, the search engine’s legal team would be required to make a decision whether to include identified material in the search results.”

61. If internet intermediaries are pressed by the law to assume responsibility for the content generated by users hosted on their platforms, a risk exists that they may look to automated measures to censor potentially troublesome content. This would pose a serious threat to freedom of expression involving private censorship by algorithms in automated processes without any human intervention. Cases deserving of erasure plainly exist, as demonstrated by some of the examples where erasure was agreed to by Google. But clear and transparent criteria for removal and sensitive assessment are required. Careful legislation would be needed and, pending legislation, it is an area in which the courts must tread most carefully, aiming to preserve a proper balance between countervailing rights.

⁷⁷ ‘Search engines and the automated process: Is a search engine provider ‘a publisher’ of defamatory material?’ (2014) 20 NZBLQ 200 at 215 (20th August 2014).