Innocent Disseminators On-line

John Corker argues that the 1995 NSW Law Reform Commission on Defamation fails to adequately address on-line issues.

The defence of innocent dissemination is available to republishers of defamatory material who can show that:

- they did not know that the material distributed contained defamatory matter
- they had no grounds to suppose that it was likely to contain defamatory matter; and
- their lack of knowledge was not due to their own negligence.

In Australia, it has been difficult to prove the third of these elements and the defence has been restricted to persons such as newsagents, booksellers and libraries. For instance, printers of defamatory material have not been able to avail themselves of the defence although, following a ruling of NSW Court of Appeal in May 1995, the issue will go to the jury in the case of McPhersons Ltd v Hickie - ('The Gambling Man case) due for hearing in March 1997. The third element of the defence is not new. The 1885 case of *Emmens v Pottle* is often quoted as its source.

In its current form, the defence is going to be very difficult for on-line service providers to plead successfully. In the USA, the recent *Prodigy* case found that a bulletin board operator was responsible for the publication of messages on that Board. On appeal, the Interactive Services Association, in an *amicus* submission have attested that 'the volume of messages posted on electronic bulletin boards by subscribers and the speed with which they are transmitted among subscribers make it literally impossible for an on-line provider or a bulletin board manager to review messages prior to posting, nevertheless, the courts generally have not been sympathetic to these difficulties.

As Greer LJ in the English case of *WH Smith (1993)* said, 'It is not sufficient for the defendants to say that it is inconvenient for them and difficult for them, having regard to their large businesses, to make any other arrangements than the arrangements which they in fact have made. If those arrangements result in a breach of the duty to exercise reasonable care towards persons who may be damaged by defamatory statements, then there is negligence within the rules.'

The NSW Law Reform Commission (NSWLRC) concluded in their 'Report 75 - Defamation' released September 1995 that:

> 'a complete defence should be permitted only where there are clear indications that an injustice would otherwise result' and 'it is appropriate that the development of the law relating to innocent dissemination be left to the courts to determine when those involved in the publication of defamatory matter are to be classified as subordinate publishers and what the effects of that classification should be. This is especially desirable in light of emerging technologies which are constantly revolutionising commercial publishing. In our view any other approach would be likely to stultify the development of the law.'

The reference to emerging technologies in commercial publishing appears to be a reference to the *Gambling Man* case.

The NSWLRC position is likely to be the position that will be adopted in the NSW Defamation Law Reform Bill expected to be introduced into the NSW Parliament later this year.

This article argues that this approach fails to adequately take into account the restrictive nature of the relevant existing case law in Australia, the burgeoning world of on-line services, and fails to remove the impact of the present law which imposes an unnecessary restriction on the freedom of speech. It suggests that the law should be amended so that the plaintiff should be required to prove fault in any action for defamation against a republisher.

Australian case law

An example of how the law operates in Australia can be found in the NSW case of *Urbanchich v Drummoyne Municipal Council (1988)*, where Hunt J held that the Drummoyne Council had failed within a reasonable time (a month after the plaintiff's solicitor notified the Council that they should remove them) to remove defamatory posters from its bus shelters and that this was capable of amounting to publication. The plaintiff pleaded the imputation that the posters depicted him as a Nazi.

Another example of how the law in Australia operates can be seen by comparing the position taken by the Australian and the US courts on the issue of liability of affiliates of television networks for their broadcast of defamatory material which originated with a network.

In *Auvil v 60 Minutes (1992)* a US court held that a CBS television network affiliate could not be held liable for a network program which contained potentially defamatory material just because it could have pre-screened the show.(The affiliate had about an hour to do this before broadcast). The court said:

'To impose such a pre-screening requirement would force the creation of full time editorial boards at local stations throughout the country which possess sufficient knowledge, legal acumen and access to experts to continually monitor incoming transmissions and exercise on-the-spot discretionary calls or face $75 million dollar lawsuits at every turn. That is not realistic.'

However, in the recent case of *Thompson v Australian Capital Television Pty Ltd (Dec. 1994)*, the full court of the Federal Court (Miles J dissenting), held that the defence of innocent dissemination was not open to the defendant. The facts were that the Today Show was produced by the Nine Network and broadcast on Channel Nine in Sydney, from where it was transmitted to Canberra for simultaneous telecasting by the defendant. The broadcast gave rise to the imputation that the plaintiff was guilty of incest.

In rejecting the single judges ruling, the court said the defendant was 'a world away' from being a subordinate distributor. It was an original broadcaster. The majority (Burchett and Ryan JJ) said strong policy considerations militated against the extension of the defence to relayed

television transmissions; in particular, the possibility that the originator of the defamatory material might be insolvent or an overseas entity and so could not be sued readily or at all in Australia.

Burchett and Ryan JJ said, 'If an analogy to a newsagent or a bookshop were to be sought in the electronic field, a shop selling or letting on hire video cassette recordings would be an obvious suggestion'. No mention is made of the on-line electronic field of endeavour.

Miles J (dissenting) said, 'to deny the extension of the principle to television broadcasting would, in my view, be a decision of policy rather than an application of judicial reasoning'.

Thompson is distinguishable from *Auvil* in the sense that Australian Capital Television had no opportunity to vet the Today Show whereas Auvil had at least an hour but this distinction serves to further demonstrate the narrow approach taken to the defence in Australia. The show was occurring live in the Nine studios in Sydney and immediately being relayed to Canberra for re-broadcast. Burchett and Ryan JJ maintain that the interviewer and producer knew what replies they would get to certain questions. On this basis, they said the affiliate should not escape the consequences of the network producer's knowledge.

The case of *Thompson* is presently on appeal to the High Court and was heard in April this year. Judgement is reserved. There is a potential for a reversal of the Full Court decision. However, a reversal will not change the onus that falls on a republisher of disproving their own negligence to avail themselves of this defence.

US position

In the US there are three tiers of publishing each of which is treated differently. A primary (or first) publisher is held liable in circumstances similar to Australia. A secondary publisher is not held liable unless he or she changed the communication and knew or had reason to know of its defamatory nature. This second category of 'publishers' are known as 'distributors'. The third category is 'common carrier' status where the carrier is probably not even liable even if they know the defamatory material is being carried.

The online industry has been arguing that Internet Service Providers fall into the second category although the recent *Prodigy* case found otherwise.

Development of the US law is instructive.

In *Hellar v. Bianco* (1952), the court held that a bar proprietor could be responsible for not removing a libellous message concerning the plaintiff's wife that appeared on the wall of the bar's washroom after having been alerted to the message's existence.

In *Scott v. Hull* (1970), the court found that the building owner and agent who had control over a building's maintenance were not responsible for libel damages for graffiti inscribed by an unknown person on an exterior wall. The court distinguished Hellar by noting that in Hellar the bartender constructively adopted the defamatory writing by delaying in removing it after having been expressly asked to do so.

In *Tackett v. General Motors Corporation* (1987), an employee brought a libel suit against his employer for, *inter alia*, failing to remove allegedly defamatory signs from the interior wall of its manufacturing plant after having notice of their existence. One large sign remained on the wall for two to three days while a smaller one remained visible for seven to eight months. The Court held that the employer was not liable for the larger sign but was for the smaller sign.

In *Stratton Oakmont v Prodigy* (1995), defamatory material was published on a moderated computer bulletin board called 'Money Talk' which was 'allegedly the leading and most widely read financial computer bulletin board in the US'. Prodigy had contracted with a person called Mr Epstein to be the Board Leader. His duties included enforcement of Guidelines which stated 'although Prodigy is committed to open debate and discussion on the bulletin boards, ...this does not mean that anything goes'. Epstein testified that he had a tool as Board leader known as 'emergency delete function' which allowed him to remove a note and send a previously prepared message of explanation including solicitation, bad advice, insulting, wrong topic, off topic, bad taste. The Court ruled that Prodigy was a 'publisher' of statements concerning the plaintiffs on 'Money Talk'.

However, this case is subject to appeal and political support for a change to the law in the US has been high. In a floor amendment to H.R. 1555, the Communications Act of 1995, the House, by an overwhelming vote of 420 to 4, declared that 'on-line providers should not be treated as the publisher or speaker with respect to material originated by third parties, even if an on-line provider also attempts to preclude the dissemination of obscene or other objectionable materials on its system'.

Comparison

In both the US and Australia, the location and length of time that the libel is allowed to appear plays an integral part in determining whether a given defendant has adopted the libel, and thus has published it. It appears from the above cases that the US courts have been more generous to the alleged republisher than the Australian courts. The Australian courts have been more reluctant to move away from a policy which maximises the opportunity of a defamed person to recover damages from a publisher or distributor of that material. In *Thompson* the court seems to be particularly concerned with the ability of the plaintiff to find a defendant that can be sued and is not impecunious.

The statements of the majority and Miles J in *Thompson* highlight the tension between the policies of being able to identify a publisher as liable for the publication of the defamatory material and the policy of not holding someone liable for something which they could not reasonably avoid. Traditionally, a publisher has always been presumed in the law to have a significant degree of control over the published product. To date, one has always to have had some substantial means to be able to publish something to a wide audience. The privilege to publish widely has been reserved to a small number of media proprietors. These proprietors are acutely aware of the law of defamation in the jurisdictions into which they broadcast or publish and have expert resources on hand to provide pre-publication advice.

However, the ability to publish widely is no longer reserved to the well resourced and advised few. Not only can individuals publish widely but Internet Service Providers are becoming increasingly prevalent and the cost of becoming a service provider is rapidly falling. In fact, the whole architecture of the Internet seems to rely on the ease of republication to be able to function

effectively. The law of defamation has not previously been used to a world where information published by millions of persons is immediately available to millions of persons.

To impose a liability on service providers which requires them to check for defamatory material or even to remove it when they become aware, will become increasingly onerous. Often for skilled lawyers, it is difficult to agree on what is an actionable defamation. Will service providers have to seek advice where a potential plaintiff and user defendant disagree on whether a message is an actionable defamation?

ALRC and Press Council

It is worth noting that the Australian Law Reform Commission considered this matter in 1979 and recommended that a complete defence to defamation be introduced to a distributor who is not primarily responsible for the defamation. They recommended that an innocent disseminator be granted protection from action for publishing defamatory matter unless and until a judge grants an injunction against it.

The Australian Press Council in their April 1996 submission to the NSW Attorney-General responding to the NSWLRC's report have gone further and suggested that the plaintiff be required to prove fault in any action for defamation against such a person.

Lord Denning in his dissenting judgment in the UK case of *Goldsmith and Sperring Ltd (1977)*said: 'The distributors of newspapers and periodicals are nothing more than conduit pipes in the channel of distribution.'

Conclusion

The NSWLRC acknowledge that 'it is a question of policy whether the defence of innocent dissemination should generally be extended to deny a plaintiff access to damages, particularly should the primary publisher be insolvent, impecunious or unavailable'.

Further they acknowledge in their discussion paper that the requirement to prove lack of negligence may, 'impose unfair burdens on persons not actually responsible for the harm done to the plaintiff, and may stifle freedom of expression by closing channels of distribution.'

However, their recommendation of leaving the matter to the courts does not seem to have given enough consideration to the changing ways that information is being exchanged, particularly in an on-line environment. It is no longer appropriate to impose a burden on all republishers to disprove their own lack of negligence should defamatory material be found in their environs. The restriction this imposes on the free flow of information is too great when weighed against the policy outcome of a plaintiff being able to find a publisher who has sufficient financial resources to pay out any damages that might be awarded. The liability should be squarely with the initial publisher of such material. It is time that the onus to show fault by a republisher should lie with the person defamed and not the republisher.

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