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Can I Sue Google if it says I'm Gay? The Tales of Internet Defamation in the UK

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As both the Internet and the communication possibilities created by this revolutionary medium continue to grow, so too have the Internet defamation cases that come before the courts. In Australia, the catastrophic fears expressed following the oft-criticised High Court decision *Dow Jones v Gutnick*[1] have not come to pass. Many believed that the *Gutnick* case would have a chilling effect on free speech, but open discussion is still thriving on the Internet and Australian courts have not been flooded with Internet defamation suits. However, in England, the number of Internet defamation cases has grown steadily.

In 2003 the English High Court found that England was an appropriate forum for a defamation action against US publisher Dow Jones.[2] In the 2004 decision *Lewis v King*[3] the English Court of Appeals dealt with an Internet defamation claim brought by boxing heavyweight Don King and in 2005 the English courts finally distanced itself from *Gutnick* when it refused to allow a Saudi businessman to proceed with an Internet defamation action in the UK in *Dow Jones v Jameel*.[4] However, such litigation has not reached the point where English courts have been overrun with angry blog-victims seeking justice.

March 2006, therefore, was an interesting month in that the English High Court delivered two Internet libel judgments. The first, *Keith-Smith v Williams*,[5] involved defamatory comments made on a Yahoo! bulletin board. The second, *Bunt v Tilley*,[6] concerned a defamation claim brought against six defendants, three of whom were Internet service providers. However, the interest generated by these cases has been little in comparison to proceedings that have only just begun. It is this pending litigation that will be considered first.

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The Ashley Cole Litigation

The mention of the name, Ashley Cole, may draw blank faces in Australia, but in the United Kingdom, after 19 February 2006, the name is drawing attention for all the wrong reasons. Cole, a footballer (or, for the purposes of Australians, soccer players) who plays for both England and popular Premiership club Arsenal, is at the centre of a defamation storm that had the nation talking – about him - on the Internet. In the week beginning February 19, UK tabloids *News of the World* and *The Sun* published group photographs containing individuals with digitally blurred faces, alongside headlines and stories concerning "allegedly bisexual but unnamed (English) Premiership players."[7] The articles contained a number of clues as to the identity of these players.

Within hours, football chat rooms and bulletin boards were filled with speculation regarding the identities of these allegedly bisexual players, with Cole being named as the prime suspect on the basis of the clues given by the newspapers.[8] As this allegation spread, it gained credence and a number of newspapers named Cole at the centre of a number of homosexual scandals, without any substantial proof. Shortly after this development, Cole's solicitors commenced legal proceedings against *News of the World* and *The Sun* for libel, harassment and breach of privacy.

From an Internet law perspective, the Ashley Cole litigation is interesting for three reasons. First, Cole is not basing his libel action on any explicit *News of the World* or *The Sun* publication that occurred on the Internet. Rather, Cole's case is unique in that it will involve judicial consideration of whether a newspaper should be prepared, and can be held responsible for the "tittle tattle on Internet chat rooms" that results from one of its stories.[9]

Second, Cole's case is also interesting for the evidentiary tactics being employed by his solicitors. After commencing proceedings, Cole's solicitors set up a web site, www.ashleycolesurvey.com.[10] The site invited respondents "to answer a series of questions about newspaper articles that are of concern."[11] Survey questions included:

- Did you use the Internet to find out more or read about the stories you read?
- Did you contribute to any Internet chat rooms or websites about the stories you read?
- Did you receive any emails or texts about these stories?[12]

Cole's solicitor, Graham Sheer, has stated that the survey was designed to show that readers of the allegedly libellous newspaper articles "concluded that the articles were about Cole even though he was not named."[13] Those who responded to the survey must also have been willing to appear as a witness in the litigation.

The title of this article indicates the final point of interest in the Cole proceedings. Following the newspaper articles, the chat room gossip and the bulletin board speculation, if a Google user were to type the words "Ashley Cole" into the popular search engine, Google would return "See Results For: Ashley Cole *Gay*."[14] As Cole was already suing two newspapers over articles that did not even name him, it is not surprising that this development further infuriated both Cole and his solicitors.

There is debate as to exactly how and why such a result could be generated, with two possibilities emerging. The first is that the search result was innocently generated by a computer on the basis of a number of Google searches.[15] However, Sheer has raised a second and somewhat less innocent, possibility that the search result could have been the result of an "editorial decision."[16] At the time of publication, Sheer had simply asked Google for a "please explain", but did indicate that legal action may be pursued if Google does not.

Any litigation initiated by Cole would add to what has already been a busy year for Google before the courts. On 10 March 2006, the District Court for the Eastern District of Pennsylvania dismissed a number of actions, including copyright infringement, breach of privacy and defamation, brought against the Internet search engine.[17] The plaintiff, Gordon Roy Parker, claimed that Google (and 50,000, unnamed, John Doe defendants who apparently worked for Google) was liable because it "archived defamatory messages posted by USENET users and because of defamatory statements located on a website Parker calls the "RayFAQ website," which was in Google's cache."[18] Thus Parker was attempting to pin liability for the statements of third parties on Google. However, Surrick J found that Google clearly fell under the protection of section 230 of the *Communications Decency Act*, which provides "interactive computer services" cannot be held liable as publishers.[19]

Whether Google would enjoy similar success following any legal action brought against it by Ashley Cole may depend on whether the search results were determined by an editorial decision or a computer. As both the US case *Parker v Google* and the next UK Internet defamation case that will be considered in this article, *Bunt v Tilley*, illustrate that there are legislative safeguards that exist for innocent Internet service providers (ISPs). However, there remains a fundamental difference between these cases and the Cole case. Even if the statement "See Results for: Ashley Cole Gay" was not the result of an editorial decision, but the search engine algorithm, the question must be asked whether Google should be held liable for any defamatory content that it produces as a result. As the next UK case highlights, relief is available for innocent disseminators, but that may not be available in Google's case.

Bunt v Tilley

Bunt v Tilley is the case most worthy of serious consideration for its effects on the growing body of Internet

defamation law – or, more precisely, who can be held liable for such defamatory content. John Bunt sought remedies for defamation against six defendants – three individuals and three ISPs. Bunt alleged that David Tilley, the first defendant, had made a number of libellous comments about Bunt's business and started a discussion thread with Bunt as the subject. Bunt then sent an email under the name of "Dave Null" to the fourth defendant, AOL UK, on 13 February 2005 informing AOL of the comment, alleging it had been made by Tilley and requesting AOL UK to inform him of the procedures to be taken for the release of the contact details of the individual who made the comment.[20] The USENET message board, where the allegedly defamatory statements were posted, were not hosted by the defendants, but by other providers, including Google.[21] AOL UK never admitted to receiving any emails from Bunt.[22]

When the case came before the High Court, AOL UK and the other two ISP defendants, Tiscali UK and British Telecommunications, sought the claims against them to be struck out. In turn, Bunt argued that "this is a truly vast case, the like of which English defamation law has never before seen, because of both the scope and the nature, as well as the medium...it possibly screams out for a trial."[23] Colourful rhetoric aside, Eady J considered whether ISPs can be held "liable in respect of material which is simply communicated via the services which they provide."[24]

Bunt sought to rely on the success of plaintiff Laurence Godfrey in his 1999 action against Demon Internet.[25] In that case, an individual in the United States, posing as Godfrey, posted a number of defamatory comments about Godfrey on a newsgroup carried by the defendant.[26] On 17 January 1997, Godfrey sent a fax to Demon Internet, alerting them of the fact that the posting was a forgery and asking for its removal. The defendants received the fax but failed to remove the posting, even though it was within their power to do so. Shortly after, Godfrey commenced legal proceedings against Demon Internet for the defamation occurring to him after 17 January 1997.

Godfrey succeeded in his case before Justice Morland of the Queen's Bench. In his judgment, Morland J considered Demon Internet's conduct against section 1 of the *Defamation Act 1996* (UK) entitled "Responsibility for Publication", which states:

(1) 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.

Morland J refused to allow the defendant to shield behind this "innocent dissemination" defence, finding that the defendant had published the defamatory statements within the term's common law meaning and was not, as Eady J stated while describing this case in the *Bunt* decision, "merely a passive owner of an electronic device through which the postings were transmitted."[27] Further, after 17 January 1997 Demon Internet also knew about the defamatory posting.[28]

In *Bunt v Tilley*, however, the plaintiff did not enjoy similar success. After considering *Godfrey*, the requirements for publication under common law, and the conduct of each individual ISP defendant, Eady J stated:

> "In the circumstances I am quite prepared to hold that there is no reasonable prospect of the Claimant being able to establish that any of the corporate Defendants, in any meaningful sense, knowingly participated in the relevant publications...More generally, I am also prepared to hold as a matter of law that an ISP which performs no more than a passive role in facilitating postings on the Internet cannot be deemed a to be a publisher at common law."[29]

The three ISP defendants also raised a number of alternative arguments in their defence, including reliance on a number of provisions of the *Electronic Commerce (EC Directive) Regulations 2002* (UK). Regulation 17 provides protection for intermediary service providers that act as "mere conduits" for information. Regulation 18 shields a service provider where the provider simply "caches" information. Further, Regulation 19 states that a service provider will not be liable for damages where the service providers host information and meets a number of criteria, including a lack of knowledge of the offending information. Eady J found that the actions of AOL UK and Tiscali clearly fell under the regulations.[30]

Eady J also considered a second alternative – section 1 of the *Defamation Act 1996*, the same provision Demon Internet had sought to rely on. The three ISPs in *Bunt v Tilley*, however, were more successful. Bunt claimed that his 13 February email had put AOL on notice. However, Eady J found the reverse, stating "the email did not effectively put AOL on notice, and its staff were given no reason to belief that they were causing or contributing to the publication of the postings complained of."[31] Finally, the defendants also sought to rely on the UK Court of Appeal decision *Dow Jones v Jameel*, but in light of his other findings Eady J declined to consider those arguments.

Thus, in this case, the ISPs were able to not only show that each was not a "publisher" under common law, but had a range of alternative arguments to shield behind as well. Thus, if Cole was to bring legal proceedings against Google, it appears the actions of Google may be well protected. However, its success may depend on whether, in the words of Eady J, it played a "passive role." Obviously, it would be unfair to hold a search engine liable for defamatory material where it merely displayed excerpts

from websites containing potentially defamatory content. However, it is that next step that may be caught: the collection of results and their publication under the category "See results for: Ashley Cole *gay*." This may preclude Google from being able to rely on any innocent dissemination defences.

Keith-Smith v Williams

Even after his success in the English High Court, Michael Keith-Smith is not as well known as Ashley Cole, although he has been called a number of names that are unflattering. This case may also hold hope for Cole's success in his action, as it indicates that the English courts are willing to award large amounts of damages for victims of online defamation.

Michael Keith-Smith is a minor politician who was expelled from the Conservative Party in 2002 and ran for the Independence Party at the last UK election.[32] Both Keith-Smith and the defendant, English college lecturer Tracey Williams, were members of a Yahoo! discussion board where talk focussed mainly on the controversial war in Iraq.[33] Keith-Smith's online name was MikeUKPO53EX and, while he did not name his profession on the board, users could discover his identity by clicking on his name.[34] Following a number of differences of opinion, Williams, under the pseudonyms "Gos" or "Gosforth", and another user of the bulletin board, began posting several defamatory comments about Keith-Smith.[35]

These started off as the relatively minor name-calling "Lardarse" and "Lardbrain" but soon escalated into more serious comments. Williams' postings suggested Keith-Smith was "a nonce, a sexual offender, a racist bigot and a Nazi...she also alleged he had sexually harassed a colleague, had been charged with soliciting boys and that he was a sexual deviant of the most perverted kind."[36] When Williams called Keith-Smith's wife a prostitute, he decided to pursue a legal claim for libel against Williams.

Keith-Smith first obtained a court order to force UK telecommunications company NTL to reveal William's personal details.[37] The commencement of legal action against Williams exacerbated the problem and more "frenzied abuse" appeared on the Yahoo! Bulletin board.[38] Keith-Smith then brought the case to the High Court. Williams, who neither appeared in court nor filed a defence, was found to have committed libel against Keith-Smith.

The Times reported that Judge Alistair Macduff admitted that "although the libels were available for the whole world through the Internet, it was likely few people had read them and many of those would have dismissed them as 'ramblings'."[39] MacDuff J awarded Keith-Smith an injunction against Williams and ordered her to pay £10,000 in damages (approximately $AUS24000) and a further £7,500 (approximately $AUS18000) to cover costs.

Are these cases "some tuppeny ha'penny storm in a teacup"?[40]

The Cole, Bunt and Keith-Smith litigation serve to add to the growing body of Internet defamation law that is developing in both individual countries – in this case, the United Kingdom – and globally. Further, the factual situations and legal issues arising in each case indicate the unique nature of the Internet and the extraordinary legal problems arising from conduct that occurs on this medium. The question can be asked whether we are taking these legal problems and litigation too seriously and whether it is really that damaging to a person's reputation if Google returns search results linking a person to the word "gay", or someone makes an angry posting to an online message board.

The day following the handing down of the *Keith-Smith v Williams* judgment, Mark Stephens, head of media law at UK firm Finer Stephens Innocent, wrote that the decision was a "dark day for freedom of speech with broad implications."[41] In an article in the UK newspaper *The Times*, Stephens stated that "the judge has applied the old-fashioned, anachronistic tenets of libel law to the fast-evolving medium of blogging" and that "anyone who reads an abusive web posting will treat it with the weight it deserves: very little."[42] Michael Keith-Smith then responded to this comment with a letter to the same newspaper, asking "since when did the right to free speech imply the right of an anonymous malefactor to engage in a long-term campaign of vile and obscene abuse against an innocent individual?"[43]

The comments made by Stephens are worth consideration for two reasons. First, the question arises of how much credibility people give to information or news that he or she encounters on the Internet. Stephens stated people give "very little" attention to such abuse, and Judge MacDuff, in finding for Keith-Smith, made a similar comment. However, there appears to be a fine line between abuse and defamation on the Internet. Referring to Keith-Smith as a "nonce" can be seen as both an act of abuse or an act of defamation. Where do we draw the line?

Further, anyone who reads an abusive, or defamatory, web posting may treat it as serious, the content of the posting may spread, and it may soon be picked up by sources – for example, a well-reputed website – that gives the defamatory content further credibility. This is clearly evidenced by the Ashley Cole situation. Speculation that Cole could possibly be the "bisexual" soccer player at the centre of the *News of the World* and *The Sun* stories emanated from Internet chat rooms, bulletin boards and text messages. These allegations spread to the point where arguably the world's most popular search engine, Google, was returning as search alternatives *Ashley Cole Gay*.

Second, the comments made by Stephens are hardly original – anyone familiar with the Australian *Gutnick* litigation will remember similar fearful comments were made after the High Court released its verdict in 2002. These fears, including *Gutnick*'s alleged "chilling effect" on free speech on the Internet, appear to have amounted to very little. As David Rolph noted in the context of

the *Gutnick* decision, the "chilling effect" of Internet defamation cases where the plaintiff succeeds is more of a threat "in theory (and) not in practice."[44]

It is the prediction of the author that the number of cases brought before the courts, in the UK, Australia and other jurisdictions, concerning actions on bulletin boards, blogs and search engines will continue to grow. This is not due in any part to the success of Keith-Smith, or the fact that two Internet defamation cases have been handed down in a relatively short period of time. As has been stated, the same fears that these types of cases would have a "chilling effect" on free speech, or open a "floodgates" of litigation were expressed in relation to *Gutnick*, and those fears have not materialised. Further, if actions are brought that are easily dismissed, as in *Bunt v Tilley* and *Parker v Google*, the court will not allow the case to proceed.

Richard Potter has noted that "the unique qualities of the Net, along with the informality of Net culture may extend to a reluctance on the part of Net participants to pursue defamation proceedings."[45] This is true, but as the Ashley Cole case indicates, when rumours have spread so far that even Google is saying you're gay, legal recourse may be the only option left.

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[1] (2002) 194 ALR 433

[2] *Harrods v Dow Jones* [2003] EWHC 1162

[3] [2004] EWCA Civ 1329

[4] *Dow Jones & Co v Yousef Abdul Latif Jameel* [2005] EWCA Civ 75. For a full analysis of this case, see Kylie Howard and Yee Fen Lim, "Defamation and the Internet One More Time: Dow Jones & Co v Yousef Abdul Latif Jameel" (2005) 8(2) *Internet Law Bulletin* 21.

[5] [2006] EWHC 860 (QB) (21 March 2006), 2006 WL 1209027. This case has not been officially reported and can only be accessed for educational purposes via the Westlaw UK legal database. References in this article to this decision are from other sources. See, for example, Philippe Naughton and PA News, "UKIP candidate wins £10,000 for Internet libel", *The Times* (UK), 21st March 2006, <http://www.timesonline.co.uk/article/0,,2-2096902,00.html>, last accessed 19/04/06; Society for Computers & Law – Internet Libel, http://www.scl.org/services/default.asp?test=true&t=nw&p=134&c=-9999&cID=1200000441&ctID=10&pm=1, last accessed 01/05/06.

[6] [2006] EWHC 407 (QB) (10 March 2006)

[7] Benjamin Cohen and Helen Nugent, "Cole tackles Google over gay link", *The Times* (UK), 7th March 2006, <http://www.timesonline.co.uk/article/0,,2-2073055,00.html>, last accessed 31/03/06.

[8] "Footballer Cole sues newspapers", *BBC News* (UK), 3rd March 2006, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/uk/4769776.stm>, last accessed 31/03/06.

[9] Caroline Kean in Ibid.

[10] When the author checked the web site on April 3, 2006, it stated that the survey had now closed and thanks respondents for their time.

[11] Helen Nugent, "Cole's lawyers trawl for libel witnesses on web", *The Times* (UK), 10th March 2006, http://www.timesonline.co.uk/printFriendly/0,,1-61-2078583-61,00.html, last accessed 01/04/06.

[12] Id.

[13] Id.

[14] Id. A screen capture of the offending search can be found at http://blog.searchenginewatch.com/blog/ashley-cole-clustered.gif, last accessed 01/05/06.

[15] Above note 7.

[16] Id.

[17] *Gordon Roy Parker v. Google, Inc*, 2006 U.S. Dist. LEXIS 9860, Case No. 04-CV-3918 (March 10 2006, U.S. District Court for the Eastern District of Pennsylvania)

[18] Ibid at [*17].

[19] Ibid at [*19] - [*20]

[20] [2006] EWHC 407 at [26].

[21] Ibid at [8].

[22] Ibid at [27].

[23] Ibid at [6].

[24] Ibid at [5].

[25] *Godfrey v Demon Internet* (1999) EWHC QB 244 (26 March 1999)

[26] Richard Potter, "Flamers, Trolls and Bloggers – Are ISPs and Webhosts at Risk from Online Anarchy?" September 2004, Issue 57, *Computers & Law*, <http://www.nswscl.org.au/journal/57/Potter.html>, last accessed 19/04/06.

[27] [2006] EWHC 407 at [12].

[28] (1999) EWHC QB 244 at [50].

[29] [2006] EWHC 407 at [36].

[30] Ibid at [53].

[31] Ibid at [61].

[32] Adam Sherwin, "Chat room insults lead to Internet libel victory", *The Times* (UK), 22nd March 2006, <http://www.timesonline.co.uk/article/0,,2-2097470,00.html>, last accessed 31/02/06.

[33] Owen Gibson, "Warning to chat room users after libel award for man labelled a Nazi", *The Guardian* (UK), 23rd March 2006, <http://technology.guardian.co.uk/news/story/0,,1737444,00.html>, last accessed 01/04/06.

[34] Sherwin, above note 32.

[35] Id.

[36] Naughton and PA News, above note 5.

[37] James Sturcke, "Expert warns of more libel chat room awards", *The Guardian* (UK), 22nd March 2006, <http://technology.guardian.co.uk/news/story/0,,1737001,00.html?gusrc=rss>, last accessed 19/04/06.

[38] Naughton and PA News, above note 5.

[39] Id.

[40] Above note 6 at [6]. The author would also like to note the allusion to the Kimberlee Weatherall and David Rolph article, "Dow Jones v Gutnick: 'Sturm und Drang' or Storm in a Teacup? – Part One" (2003) 6(1) *Internet Law Bulletin* 7.

[41] Mark Stephens, "Verdict casts dark cloud over freedom of speech", *The Times* (UK), 22nd March 2006, <http://www.timesonline.co.uk/article/0,,2-2097469,00.html>, last accessed 18/04/06.

[42] Id.

[43] Michael Keith-Smith, Letters to the Editor, *The Times* (UK), 28th March 2006, <http://www.timesonline.co.uk/article/0,559-2106295,00.html>, last accessed 18/04/06.

[44] David Rolph, "Download limits won't cost us free speech", *The Sydney Morning Herald* (Sydney), 12th December 2006, <http://www.smh.com.au/articles/2002/12/11/1039379880891.html>, last accessed 18/04/06.

[45] Potter, above note 26.