Defamation by social media

By David Rolph

Internet technology, particularly social media platforms, has transformed the way people communicate. By facilitating the dissemination of user-generated content, social media platforms have exposed a greater number of people to the risk of defamation, both as plaintiffs and defendants, than mainstream media.

By allowing users to engage in instantaneous communication, social media facilitate a level of uninhibited participation, which is not really possible in mainstream media. In addition, some users of social media seem unaware of, or unconcerned by, the legal risks of publishing online. Yet the case law, in Australia, New Zealand and the United Kingdom, clearly demonstrates that social media, just as much as mainstream media, can be the subject of defamation proceedings. Two significant legal issues often arise in defamation proceedings based on publication by social media. The first is that it is not always possible to identify the user responsible for generating the defamatory matter. There are now authorities dealing with anonymous media-users, with courts compelling the disclosure of their identity to enable plaintiffs to sue them for defamation. Even if such users can be identified, they may not be the best defendants for plaintiffs to sue. There is now also a substantial, and growing, case law on the issue of whether internet intermediaries, such as internet service-providers, internet content-hosts, social-media platforms and search engines, can be held liable as publishers of defamatory matter. The trend of these authorities appears, for now, to favour plaintiffs.

RECENT SOCIAL MEDIA DEFAMATION CASES

The publication of defamatory matter by social media is increasingly the subject of litigation. In some cases, social media publications have been sued upon in addition to publications in traditional media.[1] However, there are a growing number of cases in which social media publications are the exclusive basis for complaint. There have been a number of high-profile defamation cases in recent years, arising out of social media usage, particularly involving Twitter. Some of these have been merely threatened, some have been commenced but not pursued, some have been settled and some have been litigated to final judgment.

In 2010, the editor-in-chief of *The Australian* newspaper, Chris Mitchell, threatened to sue University of Canberra journalism lecturer, Julie Posetti, for defamation arising out of a tweet Posetti sent during a conference. The tweet claimed that a journalist from *The Australian*, Asa Wahlquist, told the conference that in the lead-up to the 2010 federal election, Mitchell had increasingly told her what to write. Wahlquist denied saying this and Mitchell rejected the allegation.[2] The release of the audiotape from the conference by the Australian Broadcasting Corporation tended to support Posetti's version of events.[3] The matter does not appear to have been pursued.[4]

In 2011, Melbourne writer and critic, Marieke Hardy, had to pay undisclosed damages and apologise to Joshua Meggitt, a man she incorrectly identified on Twitter as the author of 'hate blogs' directed against her. Notwithstanding his settlement with Hardy, Meggitt indicated his intention to sue Twitter for defamation as well, to seek to hold it liable as a publisher.[5]

Even more recently, Lynton Crosby and Mark Textor sued the Labor member for the federal seat of Eden-Monaro and the Parliamentary Secretary for Agriculture, Fisheries and Forestry, Mike Kelly, for defamation in the Federal Court of Australia. Both applicants have a long-standing association with the Liberal Party: Crosby is a former Federal Director of the Liberal Party and Textor is a former long-serving pollster for it.[6] The proceedings arose out of a tweet Kelly sent, alleging that 'Crosby, Textor, Steal and Gnash' introduced 'push polling' – the marketing practice of attempting to influence or alter voters' views under the guise of conducting an opinion poll – to Australia. Kelly sought to have the originating application set aside on the ground that the Federal Court of Australia lacked jurisdiction to hear the matter. The Full Federal Court found that it did have jurisdiction to hear and determine the matter.[7] Subsequently, the High Court of Australia refused special leave to appeal against the decision.[8] At the time of writing, the matter remains on foot.[9]

Defamation cases involving social media are now not only the subject of trial judgments. They have also been considered by appellate courts. In *Cairns v Modi*,[10] former New Zealand cricket captain, Chris Cairns, sued the chairman and commissioner of the Indian Premier League, Lalit Modi, for defamation in the High Court of Justice of England and Wales. The proceedings arose out of a tweet in which Modi alleged that Cairns was involved in match-fixing. At the time, Cairns was playing in the Indian Premier League.[11] At trial, Modi sought to justify the allegation but >>

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failed to do so.[12] At first instance, Bean J awarded Cairns £90,000 damages, including £15,000 damages.[13] Modi appealed to the Court of Appeal, challenging the award of damages on the ground that it was disproportionate to the harm caused. Although Lord Judge CJ, giving the judgment of the court, accepted that there were only approximately 65 immediate recipients of the tweet, his Lordship accepted that they needed to take into account the likelihood of 'retweeting'. The 'grapevine effect'[14] – the difficulty of 'tracking the scandal', once the original defamatory publication had been made[15] – is a well-recognised feature of the assessment of damages for this cause of action. Lord Judge CJ specifically recognised:

> 'that as a consequence of modern technology and communications systems, any such stories will have the capacity to "go viral" more widely and more quickly than ever before. Indeed it is obvious today, with the ready availability of the world wide web and of social networking sites, the scale of this problem has been immeasurably enhanced.'[16]

This factor, along with the significant international publicity the trial attracted,[17] supported the award of damages made in Cairns' favour.[18]

Damage to a plaintiff's reputation might be inflicted not only by 'retweeting' the same defamatory matter. Different social media users might circulate the same allegation in their own words. If the harm to a plaintiff's reputation is done by individuals using social media independently to publish the same defamatory allegation, a real forensic question arises as to the proper defendant or defendants to sue.

This issue is at the centre of another high-profile Twitter libel trial, which, at the time of writing, is before the English courts. Lord McAlpine is a prominent businessman with a long connection to the Conservative Party. He was a former Deputy Chairman and Treasurer of the Conservative Party, as well as being an adviser to the late Prime Minister, Margaret Thatcher. In November 2012, the BBC current affairs programme, *Newsnight*, broadcast an allegation linking an unnamed senior Conservative Party figure with child sexual abuse in North Wales in the late 1970s and 1980s.

On Twitter and other social media platforms, McAlpine's name was repeatedly linked to these allegations. Unfortunately, the accusation was a case of mistaken identity, with the accuser unreservedly apologising.[19] In the aftermath of the broadcast, the BBC Director-General, George Entwistle, resigned.[20] The BBC was forced to apologise to McAlpine and to pay him £185,000 damages plus costs.[21] Rival network, ITV, had to pay McAlpine £125,000 damages plus costs, for a subsequent broadcast dealing with the alleged involvement of Conservative Party figures in child sexual abuse.[22] McAlpine did not limit seeking legal redress to mainstream media outlets; he also decided to pursue tweeters. Initially, he limited his claim for defamation to 20 high-profile tweeters. Subsequently, he dropped his claim against those tweeters with fewer than 500 followers.[23] He reached settlements with others, such as *The Guardian* columnist, George Monbiot. He continued his proceedings against Sally Bercow, the high-profile wife of the Speaker of the House of Commons. Bercow had tweeted, 'Why is Lord McAlpine trending? *Innocent face*'.[24] Tugendhat J ordered that the issue of defamatory meaning be determined separately.[25] This part of the proceeding was heard in May 2013, with Bercow arguing that the tweet did not convey a defamatory meaning to the ordinary, reasonable reader. At the time of writing, judgment has been reserved. McAlpine's case, though, neatly illustrates the difficulties plaintiffs face in selecting whom to sue for defamation committed by social media, where there are a myriad of unrelated potential defendants.[26]

ANONYMOUS SOCIAL MEDIA USERS AND LIABILITY FOR DEFAMATION

Another problem faced by potential plaintiffs seeking to sue for defamation committed by social media is that the person responsible for the defamatory publication might be anonymous. Although many users of social media platforms use their real names, others use pseudonyms or fake names or no names at all. If a potential plaintiff is unable to identify the defendant, it will be difficult for that plaintiff to sue for defamation.[27]

There are, however, means by which a court can order the disclosure of the identity of an anonymous social media user. Rules of court provide a mechanism, as part of the process of discovery, for a plaintiff to ascertain a prospective defendant's identity or whereabouts.[28] Social media platforms and other internet intermediaries are likely to possess information that would assist plaintiffs in identifying prospective defendants and are therefore liable to be subject to such applications for preliminary discovery.

There have already been instances in Australia where internet intermediaries have been ordered to disclose the identity of anonymous users who have generated allegedly defamatory content. In 2010, the Supreme Court of Western Australia made consent orders against HotCopper Australia. HotCopper operated an internet forum for discussions about publicly listed companies. Datamotion Asia Pacific Ltd and its chairman and managing director, Ronald Moir, claimed that they had been defamed by anonymous postings. The privacy and confidentiality policy of HotCopper prevented it from voluntarily disclosing the identity of the anonymous user. The orders allowed Graeme Gladman to be identified as the person responsible. Proceedings commenced against him were swiftly settled, with Gladman agreeing to pay

$30,000 damages, to apologise and to undertake not to repeat the defamatory matter.[29]

More recently, in 2013, the District Court of South Australia ordered Google to disclose the identity of the persons responsible for websites critical of a former Australian Rules footballer turned businessman, Shane Radbone. After finishing his football career, Radbone worked with Allied Brands, the operators of the Baskin-Robbins ice cream franchise. He later went on to work as a business executive and a motivational speaker. His time at Allied Brands was the subject of five critical websites. He wanted to sue for defamation because the websites alleged that he was an incompetent footballer and businessman. By the time the order had been made, Google had deleted the websites. Nevertheless, Blumberg M ordered Google to make the disclosure.[30]

These issues are not unique to Australia. There is an increasing body of case law in the United Kingdom and the United States to a similar effect.[31] It is highly likely, in the future, that applications of this sort will become more common.

LIABILITY OF INTERNET INTERMEDIARIES FOR DEFAMATION

Even if a prospective plaintiff is not able to identify the actual author of online defamatory content, or does not want to undertake the difficulty of unmasking an anonymous or pseudonymous content creator, he or she may still have a cause of action in defamation against an internet intermediary responsible for the dissemination of defamatory matter. This is an unsettled area of defamation law.

Until recently, a line of authority developed by Eady J suggested that some types of internet intermediaries could avoid liability for defamation on the basis that they were mere passive facilitators, not publishers, of defamatory matter. In *Bunt v Tilley*, his Lordship held that an internet service-provider, which provided access and did not itself host content, was not a publisher for the purposes of defamation law.[32] In *Metropolitan International Schools Ltd v Designtechnica Corporation*, he extended this reasoning to the search engine, Google, given that searches were dependent upon third parties entering material and results were automatically generated by the application of computer programs.[33]

The consequence of finding that an internet intermediary was a mere passive facilitator, rather than a publisher, is that it does not require a defence and cannot be fixed with notice of the presence of defamatory matter so as to impose liability upon it.[34]

More recent decisions in Australia and the United Kingdom have challenged this approach. In *Tamiz v Google Inc*, the English Court of Appeal found that Google could be held liable as a publisher of defamatory matter hosted on a blog created through its Blogger service.[35] Giving the leading judgment on appeal, Richards LJ distinguished *Bunt v Tilley* >>

and *Metropolitan International Schools v Designtechnica*, finding that Google provided a service for designing a blog and a related service to allow for the display of advertisements; that it provided these services on its own terms and could block or remove blogs that did not comply with those terms.[36]

The analogy between the internet service-provider and the search engine in those cases and the technology in this case could not be sustained. Thus, his Lordship concluded that Google could be held liable as a publisher after it had been given notice of the presence of defamatory matter and had not, within a reasonable time, removed it.[37]

The defence of innocent dissemination will provide social media platforms with broad protection, until they are made aware of the presence of defamatory matter.

In *Trkulja v Yahoo! Inc LLC*, the plaintiff was awarded $225,000 damages against Yahoo!7.[38] Third parties who used the Yahoo!7 search engine to search Trkulja's name would be directed, by one of the results, to a website, 'Melbourne Crime', upon which defamatory material about him was hosted.[39]

At trial, no issue was taken as to whether the Yahoo!7 search engine was a publisher for the purposes of defamation law. However, this was a live issue in Trkulja's proceedings against Google. At the trial, the jury found that Google's search engine had published defamatory matter by directing third parties to the website hosting the defamatory matter by virtue of the results generated by a search of the plaintiff's name.[40] Google applied for a verdict in its favour, notwithstanding the jury's verdict,[41] citing the judgments of Eady J in *Metropolitan International Schools v Designtechnica* and at first instance in *Tamiz v Google Inc*.[42] Beach J accepted that the jury could find that Google intended to publish all material generated through its automated systems.[43] His Honour did not accept that Eady J's judgment should be followed in Australia.[44] He did not accept that, as a matter of law, a search engine could not be held liable as a publisher. Beach J suggested that Eady J's reasoning in these cases failed to consider properly the fact that Google's search engine operated precisely in the way in which Google intended.[45] His Honour rejected the distinction between a publisher and a mere passive facilitator as being contrary to principle.[46]

A less emphatic view was expressed more recently by Mansfield J in *Rana v Google Australia Pty Ltd*.[47] The applicant, Ranjit Rana, wanted to sue Google Inc, along with other respondents, for defamation and racial discrimination. In order to proceed against Google Inc, he needed leave to serve the initiating process overseas. This, in turn, required a consideration of whether Rana's claim for defamation had no reasonable prospects of success.[48] In relation to the issue of whether a search engine could be a publisher for the purposes of defamation law, Mansfield J expressed the view that the issue was not settled.[49] Consequently, this was not a sufficient basis upon which to refuse extraterritorial service. There were other unrelated grounds, relating both to the form and substance of the pleading, which led his Honour to refuse to make this order.[50] Nevertheless, it is telling that Mansfield J did not simply follow Beach J's reasoning in *Trkulja v Google Inc* and expressly left the issue open.

Whether an internet intermediary will be able to avoid being held liable as a publisher for the purposes of defamation law will depend upon the particular technology in issue. It might be arguable that social media platforms, like Facebook and Twitter, are mere passive facilitators, rather than publishers. The trend of authority, at present, would seem to make this unlikely. On the other hand, social media platforms are relatively new, as is the legal treatment of their liability for defamation. If social media platforms are held to be publishers, they will have to rely upon other defences to defamation. The defence of innocent dissemination will provide them with broad protection, until they are made aware of the presence of defamatory matter.[51] Social media platforms are under no obligation to monitor the content they host,[52] but they can be exposed to liability for defamation – again, once they have been notified of the presence of defamatory matter on them.[53] The management of their risk of liability for defamation will likely turn upon their responsiveness to requests to take down defamatory material they host.

CONCLUSION

Social media platforms are an integral part of modern communications. Like other media, they carry with them the risk of defamation. Cases based on social media publications are increasingly coming before the courts throughout the common law world, and will continue to do so. Such cases present particular problems: notably, identifying defendants who hide behind anonymity or pseudonymity. Social media platforms, though, will also need to consider how to manage their risk of liability for defamation, as, in many cases, they will be the most attractive defendants for prospective plaintiffs. ■

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Notes: **1** See, for example, *Buswell v Carles [No. 2]* [2013] WASC 54; *Thompson v James* [2013] EWHC 515 (QB); *Wishart v Murray* [2013] NZHC 540. **2** Geoff Elliott, '*The Australian*'s Chris Mitchell to sue Julie Posetti for defamation', *The Australian*, 26 November 2010. **3** Tim Dick, 'The editor and the twitterer', *The Sydney Morning Herald*, 29 November 2010. **4** 'Posetti won't apologise over Twitter comments', *ABC News Online*, 9 December 2010, <http://www.abc.net.au/news/2010-12-09/posetti-wont-apologise-over-twitter-comments/2369080>. **5** Michelle Griffin, 'Man sues Twitter over hate blog', *The Sydney Morning Herald*, 17 February 2012. **6** *Crosby v Kelly* (2012) 203 FCR 451, 453; [2012] FCAFC 96 (Robertson J). **7** *Ibid*. **8** *Kelly v Crosby* [2013] HCATrans 17. **9** Christopher Knaus, 'Pollsters willing to accept Kelly apology, court told', *The Sydney Morning Herald*, 6 May 2013. **10** [2013] 1 WLR 1015; [2012] EWCA Civ 1382 (Lord Judge CJ, Lord Neuberger of

Abbotsbury PSC and Eady J). **11** *Cairns v Modi* [2013] 1 WLR 105, 1019; [2012] EWCA Civ 1382, [4]-[6] (Lord Judge CJ). **12** *Cairns v Modi* [2012] EWHC 756 (QB), [118] (Bean J). **13** *Ibid*, [137]-[138]. **14** *Crampton v Nugawela* (1996) 41 NSWLR 176, 194 (Mahoney ACJ). **15** *Ley v Hamilton* (1935) 153 LT 384, 386 (Lord Atkin). **16** *Cairns v Modi* [2013] 1 WLR 1015, 1024; [2012] EWCA Civ 1382, [27]. **17** *Cairns v Modi* [2013] 1 WLR 1015, 1024-26; [[2012] EWCA Civ 1382, [29]-[33] (Lord Judge CJ). **18** *Cairns v Modi* [2013] 1 WLR 1015, 1027; [2012] EWCA Civ 1382, [41] (Lord Judge CJ). **19** David Leigh, Steven Morris and Bibi van der Zee, '"Mistaken Identity" led to top Tory abuse claim', *The Guardian*, 8 November 2012. **20** David Leigh, 'The Newsnight fiasco that toppled the BBC director-general', *The Observer*, 13 November 2012. **21** 'BBC reaches settlement with Lord McAlpine', *BBC News*, 15 November 2012. **22** Mark Sweney, 'ITV to pay Lord McAlpine £125,000 in damages', *The Guardian*, 22 November 2012. **23** Ben Dowell, 'McAlpine libel: 20 tweeters including Sally Bercow pursued for damages', *The Guardian*, 23 November 2012; Josh Halliday, 'Lord McAlpine drops some Twitter defamation cases', *The Guardian*, 21 February 2013. **24** *McAlpine v Bercow* [2013] EWHC 981 (QB), [9] (Tugendhat J). **25** *McAlpine v Bercow* [2013] EWHC 981 (QB), [49]. **26** For further examples of defamation by social media, see *Karam v Parker* [2012] NZHC 1801; *Cruddas v Adams* [2013] EWHC 145 (QB). **27** Jennifer Ireland, 'Defamation 2.0: Facebook and Twitter' (2012) 17 *Media and Arts Law Review* 53, 63; Mark Pearson, *Blogging & Tweeting Without Getting Sued*, Allen & Unwin, Sydney, 2012, 65-6. **28** See, for example, *Uniform Civil Procedure Rules* 2005 (NSW) Pt 5.2. **29** Tony Wright, 'Cyber poison-penner hunted down and sued', *The Sydney Morning Herald*, 25 February 2010. **30** Sean Fewster, 'SA Court gives Google 28 days to unmask bloggers who allegedly defamed Shane Radbone', *Adelaide Now*, 15 January 2013; AAP, 'Google ordered to reveal bloggers' identities', *Australian Financial Review*, 15 January 2013; Margaret Scheikowski and Miles Godfrey, 'Google ordered to identify bloggers', *The Herald Sun*, 15 January 2013. **31** As to the position in the United Kingdom, see, for example, *Applause Stores Productions Ltd v Raphael* [2008] EWHC 1781 (QB), [10] (Richard Parkes QC); Josh Halliday, 'Facebook forced into revealing identities of cyberbullies', *The Guardian*, 8 June 2012. However, see also *Clift v Clarke* [2011] EWHC 1164 (QB). In the United Kingdom, the relevant order is a *Norwich Pharmacal* order: *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133. See also *G & G v Wikimedia Foundation* [2009] EWHC 3148 (QB). As to the position in the United States, see *Dendrite International Inc v Doe* 775 A 2d 756 (NJ 2001); *Doe v Cahill* 884 A 2d 451 (Del 2005); *Mobilisa Inc v Doe* 170 P 3d 712 (Az 2007); *Cohen v Google Inc* 25 Misc 3d 945, 887 NYS 2d 424 (NY 2009). **32** [2007] 1 WLR 1243, 1252; [2006] EWHC 407 (QB), [36]. See also Matthew Collins, *The Law of Defamation and the Internet*, 3rd edn, Oxford University Press, Oxford, 2010, [15.42]-[15.44]. **33** [2011] 1 WLR 1743, 1757; [2009] EWHC 1765 (QB), [50]-[54]. **34** David Rolph, 'Publication, Innocent Dissemination and the Internet After *Dow Jones & Co Inc v Gutnick*' (2010) 33 *University of New South Wales Law Journal* 562. **35** [2013] EWCA Civ 68, [1] (Richards LJ). **36** *Tamiz v Google Inc* [2013] EWCA Civ 68, [24]. **37** *Tamiz v Google Inc* [2013] EWCA Civ 68, [27]-[34] (Richards LJ). **38** [2012] VSC 88, [63] (Kaye J). **39** *Trkulja v Yahoo! Inc* [2012] VSC 88, [2] (Kaye J). **40** *Trkulja v Google Inc LLC* [2012] VSC 533, [11] (Beach J). **41** *Ibid*, [13] (Beach J). **42** *Ibid*, [15]. **43** *Ibid*, [16], [18]. **44** *Ibid*, [29] (Beach J). **45** *Ibid*, [27]. **46** *Ibid*, [28] (Beach J). **47** [2013] FCA 60. **48** *Rana v Google Australia Pty Ltd* [2013] FCA 60, [49] (Mansfield J). **49** *Ibid*, [50]-[58]. **50** *Ibid*, [80]-[83] (Mansfield J). **51** See *Defamation Act* 2005 (NSW) s32 and analogous provisions in the other states and territories. **52** *Broadcasting Services Act* 1992 (Cth) Sch 5 cl 91(1)(b). **53** *Ibid*, Sch 5 cl 91(1)(a).

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