Facebook and defamation – Publishers' Path to Liability

In *Wishart v Murray*,[1] which concerned a strike-out application in the High Court, Courtney J held that a host of a Facebook page was prima facie liable as a publisher of defamatory comments posted on that page by other users. In reaching her decision, the Judge assessed a number of competing defamation principles across English, Australian and United States authorities, but because of space constraints this article will comment only on the main points of the decision.

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Facts

In 2011, Ian Wishart wrote and published *Breaking Silence*, a book about the deaths of the three-month-old Kahui twins in 2006. In writing the book, Mr Wishart collaborated with the twins' mother, Macsyna King. Chris Kahui, the twins' father, had suggested at the trial in which he was acquitted of the twins' murder that King had inflicted the fatal injuries. Although a coroner later found the twins died while in Mr Kahui's sole care, Ms King's role in the twins' death has remained a subject of public debate.

Christopher Murray, upon learning of the book's impending release, created a Facebook page entitled "Boycott the Macsyna King Book". Mr Murray used Twitter to publicise the page, and he, along with his wife and other unidentified people, posted critical comments about King and Wishart on the Facebook page. The substantive hearing will raise a number of potentially defamatory comments made on and off the Facebook page, but this article is only interested in whether it was tenable that Mr Murray could be considered a "publisher" of others' potentially defamatory comments.

Law

Courtney J summarised the law as: "A person who participates in or contributes to the publication of another's defamatory statement is, prima facie, liable as a publisher, subject to the defence of innocent dissemination."[2] Stated briefly, innocent dissemination, enshrined by s 21 of the Defamation Act 1992, provides a defence to certain conduits of defamatory material.

This defence has traditionally been applied to librarians, booksellers and newspaper vendors, and now seemingly includes internet service providers (ISPs) and search engines, too. Such conduits of defamatory material must allege and prove three elements: that they didn't know a matter contained defamatory material; that they didn't know it was of a character likely to contain defamatory material; and that their lack of knowledge of the defamatory material did not stem from their own negligence.

Thus, while a defendant may be held prima facie liable as a publisher for others' defamatory statements, he or she can be absolved of liability by satisfying the s 21 defence. In distinguishing Mr Murray's position from ISPs and search engines, the Judge remarked that those who hosted Facebook or similar pages were not "passive instruments" or "mere conduits" of content posted on their Facebook pages.[3]

It is important to note that, to establish prima facie liability, the absence of actual knowledge by the defendant of the defamatory material published will not, in itself, be a decisive factor. As Hunt J explained in *Urbanchich v Drummoyne Municipal Council*,[4] it is sufficient to prove a mere inference that the defendant in some way ratified the defamatory statement:[5]

> The plaintiff must establish that the defendant consented to, or approved, or adopted, or promoted … the continued presence of that statement on his property so that persons other than the plaintiff may continue to read it — in other words, the plaintiff must establish in one way or another an acceptance by the defendant of a responsibility for the continued publication of that statement.

[1] *Wishart v Murray* [2013] NZHC 540.
[2] At [82].
[3] At [117].
[4] *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports 69.
[5] At [190].

Source: www.switched.com

In pre-Internet cases, what amounted to a sufficient inference of ratification was more straightforward. In *Byrne v Deane*,[6] the defendants were held to be liable for publication of an anonymous notice posted on the notice board of a golf club. The English Court of Appeal held that it could be inferred that the defendants, the club's proprietors, had accepted responsibility for the publication of the notice because the club's rules prohibited notices posted without the secretary's consent, and the defendants failed to remove the notice. Similarly, the defendants in *Urbanchich* were held to be publishers of defamatory posters glued by others to bus shelters under the defendants' control. In this case, the defendants had been asked to remove the posters and failed to do so.

In the online environment, courts have been reluctant to find individuals liable for hosting websites where others have published defamatory remarks.[7] However, Courtney J was of the view that the threshold for establishing a prima facie case against a publisher should not to be set too high because truly innocent disseminators could rely on the s 21 defence.[8] The Judge described the two circumstances in which online hosts would be liable as publishers of postings made by anonymous users:[9]

> The first is if they know of the defamatory statement and fail to remove it within a reasonable time in circumstances that give rise to an inference that they are taking responsibility for it. A request by the person affected is not necessary. The second is where they do not know of the defamatory posting but ought, in the circumstances, to know that postings are being made that are likely to be defamatory.

Ultimately, Courtney J found that that Mr Murray was a publisher liable for defamatory content on his Facebook page. Mr Murray had given evidence that, in the two months during which the page was active, he had deleted certain defamatory postings and blocked various users (including Mr Wishart). In these circumstances, Courtney J held that Mr Murray's ability to exercise considerable control over the publication of comments on his Facebook page showed that he was more than a passive instrument or facilitator. Therefore, it was tenable that he was a publisher of the anonymous statements.

Conclusion

It seems unlikely that, at the substantive hearing, Mr Murray will be able to satisfy the s 21 defence. It would be hard to argue that Mr Murray did not know the page was of a character likely to contain defamatory material, given he had actual knowledge of previous defamatory statements published. The lesson, then, is that if you are a host of a Facebook page (or a blog or a forum message board), and you are deemed to have ratified potentially defamatory posts, you may be prima facie liable as a publisher. Ratification may be inferred by your failure to take steps to remove defamatory material in circumstances where you either have actual knowledge of it, or should have known about it. Further, as an individual (as opposed to, say, an ISP), if you meet the publisher threshold for others' defamatory posts, it seems unlikely you would escape liability as an innocent disseminator. Website hosts, beware!

[6] *Byrne v Deane* [1937] 1 KB 818 (CA).
[7] See, for instance, *Sadiq v Baycorp (NZ) Ltd* HC Auckland CIV-2007-404-6421, 31 March 2008.
[8] At [90].
[9] At [117].