FOCUS ON MEDIA LAW

English decision makes important determinations on Internet liability

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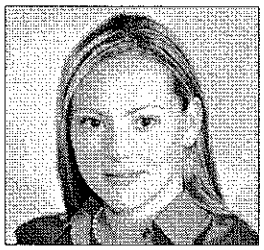

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By David Crerar and Karen Bradley

It is clear that a person who publishes a defamatory statement on a website will be liable just as if the offending words were published in a newspaper. But is the Internet service provider ("ISP"), through the services of which the words or the website is released into cyberspace, also liable?

Under common law, any person who plays a role in writing, publishing or distributing a known defamation can be found liable; in theory, the printer, the paperboy, and the library can be held liable if they know that their labours assisted in circulating the libellous publication. By analogy, is the ISP liable for libel published through its Internet services? As the authors of cyber-defamation tend to be elusive and impecunious, aggrieved plaintiffs might view ISPs such as Bell Canada, Telus Inc., Shaw Communications Inc., Rogers Communications Inc., Aliant Inc., and MTS Communications Inc. as more desirable and deep-pocketed defendants, depending on the judicial determination of these questions.

On March 10, the English High Court of Justice, Queen's Bench, clarified this issue in an important precedent for Internet liability: *Bunt v. Tilley and Ors* (2006) E.W.H.C. 407 (Q.B.). The court found that ISPs that play no more than a passive role in facilitating postings on the Internet cannot be deemed to be "publishers" at common law, and are not liable for defamatory statements that are merely communicated via the services that they provide.

The plaintiff Bunt sued three personal defendants for Internet publications. Bunt also sued the personal defendants' ISPs. Bunt did not plead that any of the ISP defendants had "hosted" any website relevant to the claims; Bunt only alleged that the personal defendants published the libel "via the services provided" by the ISPs. The ISP defendants applied to have the claims against them dismissed. Bunt, a lay litigant, submitted in reply that "[t]his is not some tuppeny ha'penny storm in a teacup, this is a truly vast case ... it positively screams out for a Trial, and one way or another it will have one."

The court disagreed with Bunt, and dismissed the claims against the ISPs. It ruled that ISPs do not participate in the process of publication, but merely act as facilitators in a similar way to the postal services. ISPs provide a means of transmitting communications without in any way participating in that process.

Justice Eady considered the decision in *Godfrey v. Demon Internet Ltd.* [2001] Q.B. 201, upon which Bunt relied. The defendant in *Godfrey* was an ISP that had received and stored on its news server obscene material defamatorily misattributed to the plaintiff. Godfrey requested that the ISP remove the article; the ISP failed to do so. In his pleadings Godfrey limited his claim for damages to the period after which the defendant was put on notice of the defamatory publication. The court ruled that the ISP defendant was not merely a passive owner of an electronic service. Instead, the ISP had actively chosen to receive and store the news group exchanges containing the posting, and had declined to exercise its power to remove the posting. The *Bunt* court distinguished *Godfrey* on the grounds that the *Godfrey* ISP had notice of the defamatory material and failed to do anything about it, while at no time did Bunt request that the material be removed (although he wrote to request from the ISPs the name of the posting party). Thus ultimately the *Bunt* court found that on the facts of the case, there had been no publication at common law by the ISPs. The ISPs were thus protected under s.1 of the *Defamation Act*, 1996: they were not the publisher of the statement complained of, they took reasonable care in relation to its publication, and they did not know, and had no reason to believe, that what they did caused or contributed to the publication of a defamatory statement.

In reaching the conclusion, the court provided persuasive *obiter dicta* that will generally protect ISPs from liability, regardless of whether they are made aware of defamatory publications through their services, and without need to resort to the statutory protection:

"I would not, in the absence of any binding authority, attribute liability at common law to a telephone company or other passive medium of communication, such as an ISP. It is not analogous to someone in the position of a distributor, who might at common law need to prove the absence of negligence ... There a defence is needed because the person is regarded as having 'published'. By contrast, persons who truly fulfill no more than the role of a passive medium for communication cannot be characterized as publishers: thus they do not need a defence."

In this, *Bunt* indicates that in the right factual circumstances, the United Kingdom will take an approach that is more protective of ISPs, in the same manner of protection generally offered under United States law. In *Cubby Inc. v. Compuserve Inc.* 776 F.S. Supp. 135 (S.D.N.Y. 1991), for example, the court stated that "[t]he computer service company was a mere distributor which could not be held liable absent showing that it knew or had reason to know of defamation". Similarly, in *Lunney v. Prodigy Serve Co.* 94 N.Y.2d 242 (1999), the New York Court of Appeal held that an ISP was not liable as a publisher with respect to defamatory statements sent by e-mail through its network and posted on its bulletin boards. With respect to e-mail, the court analogized the ISP to a telephone company "which one neither wants nor expects to superintend the content of its subscriber's conversations." With respect to the bulletin boards, the court held that although the ISP defendant reserved the right to edit messages posted on its boards, it left the vast majority of its millions of messages unscreened, and that it should not be held liable as a publisher.

The current debate in U.S. jurisprudence focuses on whether ISPs in a given situation are protected under the Federal *Communications Decency Act of 1996*, s. 230. Section 230 states that users and providers of computer services cannot be treated as "publishers" of any information provided by another person. But *Grace v. eBay Inc.* 120 Cal. App. 4th 984 (2004); depublished 99 P.3d 2 (Cal. 2004); application for review denied 101 P.3d 509 (Cal.2004), a case arising from unflattering eBay customer feedback, limited this broad statutory protection. The California Court of Appeals disapproved earlier U.S. authorities, and held that ISPs may be held liable for the defamatory statements if they "knew or had reason to know" that the impugned material was defamatory, and they took no corrective action. The court found that while the statute might insulate eBay as a publisher, it did not protect eBay under the common law as a distributor of material that it knows is defamatory.

Conversely, in *Austin v. Crystaltech Web Hosting* 125 P.3d 389 (2005), the Arizona Court of Appeals ruled last December that the intent of the statute was to protect ISP from liability for materials published through their services, whether they are described as "publishers" or "distributors". The ISP cannot be liable merely because defamation is published through its services. The court declined to adopt the analysis in *Grace* as it was under review and had been "depublished". The *Austin* decision must now be considered the leading U.S. case on this issue.

Courts in Canada have not yet ruled on the liability of ISPs for defamation. The closest guidance is found in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers* [2004] 2 S.C.R. 427 at paras. 126-127. The court found that ISPs were not liable for breach of copyright by the mere fact that their services were used to illegally transmit songs. The decision focused on whether the ISPs fell under the express statutory protection of *Copyright Act*, s. 2.4(1)(b), provided to parties that serve as a mere "conduit" of information. In *obiter dicta*, the court noted that whether the ISP has received notice of illegal activity carried out through its services will not necessarily determine liability. In *obiter dicta* in the context of defamation, the British Columbia Court of Appeal, in *Carter v. B.C. Federation of Foster Parents Assn.* [2005] B.C.J. No. 1720, appeared to attach weight to the fact that the defendant website host (not an ISP) had received notice of a defamatory publication on the site yet had not removed the posting.

The decisions in both the U.S. and U.K. will assist in developing the law in Canada. Since much of the jurisprudence in the U.S. focuses on the statutory immunity, Canadian courts will likely look to the U.K. decisions. It is likely that a passive ISP acting merely as a conduit will not be held liable for defamatory statements. An ISP that is informed of defamatory postings on its services but that takes no steps to remove those postings may well face liability, although the comments in *Bunt* will offer some comfort. In light of this lingering uncertainty, and in light of the fact that usually the ISPs are the only deep-pocketed defendants in such cases, it is important that ISPs consider seriously any notice received of defamatory or otherwise actionable material on websites broadcast through their services, and respond accordingly.

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Proposal was not driven by facts

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employee jobs, while the damage amount would not, would that be grounds for relief?

The rule regarding penalty clauses favoured the weaker party; the discretion regarding forfeiture favoured the weaker party, i.e. if the rule erred, it erred in favour of a weaker party. Under the proposed reform, the rule regarding penalty clauses would be replaced by a discretionary remedy that would favour the stronger party and probably deny much of the relief from penalty clauses that would apply under the present rule.

It may be significant that this proposal for reform was not driven by the application of a rule to a factual matrix that exposed a weakness in the rule calling for modification. Nor has there been any call for reform from affected industries in which these clauses are used. The reform appears to be motivated by concerns for rationalization of seemingly disparate principles. At such times it may be well to recall Holmes' insightful observation that the life of the law has not been logic; it has been experience.

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