

THE LIABILITY OF INTERNET INTERMEDIARIES REGARDING THE DEFAMATION IN CYBERSPACE UNDER THE UK LAW (EARLY LEGISLATION AND CASE LAW)

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Abstract

*The paper discusses the main principles of traditional defamation law of the UK. It also analyses the Section 1 of the Defamation Act 1996 and implication of this section by case law, particularly focusing on *Godfrey v Demon* case. The approach after the adoption of E-commerce Directive also is discussed along with the relevant case law in the last subsection.*

Keywords: *internet intermediaries, defamation, liability of publishers, Defamation Act 1996, cyberspace, freedom of expression, freedom of speech, defamatory statement.*

As it will be discussed below, from the position of the UK regarding the defamation law it is clear to find out that, unlike from the US position, the UK did not give blanket immunity to ISPs. The UK's position has always been heavily weighted in favour of person whose reputation suffered from defamatory statement. The same approach was taken when the Courts made a decision regarding the defamation claims occurred in the online environment. Due to the claimant-friendly approach of the judges, it is not surprisingly that, foreign people who have reputation in the area of the United Kingdom have often sought to bring their lawsuits to the UK courts. As according to the common law, a defamatory statement is regarded as having published at the place where it is read, heard or seen. When considering the global nature of the Internet, it is not so hard to prove that the claimant, suffered from defamatory statement, has a reputation in the UK. The Courts are unlike to decline the jurisdiction, even that person has a stronger reputation, or the publication has occurred to a much greater extent in elsewhere rather than in the UK. Due to the facts stated above, the UK is called a haven for 'libel tourists'.

It is also worth to note that, the first case regarding the liability of intermediaries regarding the defamatory action was in 1999, a few years later than the US. Additionally, it must be noted that, when the first claim regarding the liability of intermediary for defamatory act by the third party brought the court, at that time the Defamation Act 1996 [2] was in force. Therefore the Court applied the provisions of new legislation. That is to say, unlike the US's court practice, in the UK there is no relevant case law before the adoption of legislation that re-evaluated the existing traditional principles. That is why, it is impossible to compare the approaches of the courts before and after the legislation, as it was did in the part regarding the US. On the other hand, it is also important to stress out that, after the adoption of new legislation, the position of the courts on the issue of intermediary liability was clearer compare to the US. All these listed arguments will be discussed below in detail.

This part of the paper is going to firstly discuss the main principles of traditional defamation law. Then, it will analyse the section 1 of the Defamation Act 1996. Furthermore it will look at the implication of the section 1 by case law, particularly focusing on *Godfrey v Demon* [3] case. The approach after the adoption of E-commerce Directive also will be discussed along with the relevant case law in the last subsection.

The liability of publishers under the UK law

According to the UK defamation law, there was no longer existence of old tradition to hold the messenger responsible for message's content. When the Internet became to play an important role in our lives, in the early times, the approach were the same. Until the 1996, the claims were brought to the courts under the Defamation Act 1952. This statute dealt with defamatory state-

ments of those people who have published defamatory material via the TV, radio, magazines or newspapers. According to the defamation law, the publishers of the defamatory material are liable for the defamation. Pursuant to the common law, the publisher of the material is the person who has participated in the publication of the defamatory statement. The definition of ‘publisher’ covers both primary and secondary publishers. Within the context of defamation law who is exercising direct editorial control over the material published, called primary publisher. The authors, editors, publishing houses fall within the definition of ‘primary publisher’. On the other hand, the role of the secondary publisher is just to make the material accessible by third parties. A library or a bookstore can be considered as a secondary publisher within the context of this definition. [6]

Additionally, under the UK law, the plaintiff can generally bring action against the defamation within the one year from the time the cause of action accrued, and each time when such defamatory material is republished; a fresh cause of action arises. This point is important, as due to the nature of the Internet the materials can be stored in online archives and the users can search and access them. This means that, each time the user have an access to the defamatory material, a fresh cause of action arises [5].

That is why, when ISP operating achieves in order to store the information, the must take reasonable care regarding the material they are going to and make accessible by the users.

As noted above, there was not any case until 1999 to deal with the liability of intermediaries regarding the defamation. That is why, until the adoption the Defamation Act, the internet service providers were not in clear position. In other words, even so the case were brought against ISPs, it is hard to guess how the position of the UK courts would be. At this time , the approach in the other side of Atlantic was that , as discussed above, ISPs were ‘common carriers’ like a telephone company, that is why they should not be liable for any defamatory statement transmitted over its wires. Moreover, if there were any case it is hard to guess that the UK would consider the ISPs like a simple postman just delivered libellous letter; or like a secondary publishers such as librarians, booksellers, news agents; or the publishers or printers of the publication which contains defamatory statement. It is not wrong to state that, the establishment of defamation law of the UK begins with two important cases brought by university lecturer and physicist Dr.Laurance Godfrey in 1994 and 1999 respectively. In 1994, Dr.Godfrey alleged that a fellow scientist’s comments, posted on the Usenet public message network about his professional work, were defamatory. This was the first UK case that dealt with the protection of individual’s reputation harmed in the digital environment. However, in this case Dr. Godfrey sued the person who made the defamatory statement, not Usenet network; therefore for the purposes of this paper it is not appropriate to discuss this case in more detail. [4] On the other hand, the second case brought by the same plaintiff is very important as this the first UK case dealing with the issue of liability of internet intermediary regarding the defamation. This case will be discussed after analysing the Defamation Act 1996 in the next subsection.

The adoption of the Defamation Act 1996

In 1996 the Parliament passed legislation and adopted the approach that the ISP should not be treated in the same manner as a traditional publisher. Under the section 1 of the Defamation Act 1996, the ISPs have been provided with a statutory defence of ‘innocent dissemination’. This provision protects them from being liable for the publishing defamatory material in the following circumstances.

Section of the Defamation Act 1996 states:

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.

That is to say, with reference to this legal protection, the ISP would have immunity from liability, firstly, if it 'was not the author, editor or publisher of the statement complained of'.

Within the context of provision, the drafters have also given the definition of all these terms. According to this, person is deemed to be an author if he is the originator of the statement. Additionally, the person is an editor if he has editorial or equivalent responsibility for the content of the statement or the decision to publish it. Moreover, in terms of this Act publisher means, a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.

In addition to this, the Act provides also provisions regarding situations where the person shall not be considered the author, editor or publisher of a defamatory material:

A person shall not be considered the author, editor or publisher of a statement if he is only involved—

(a) in printing, producing, distributing or selling printed material containing the statement;
(b) in processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part I of the **M**1 Copyright, Designs and Patents Act 1988) containing the statement;

(c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;

(d) as the broadcaster of a live programme containing the statement in circumstances in which he has no effective control over the maker of the statement;

(e) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

In a case not within paragraphs (a) to (e) the court may have regard to those provisions by way of analogy in deciding whether a person is to be considered the author, editor or publisher of a statement.

Pursuant to this, if the ISP is only involved (1) in the processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded; (2) as an operator or provider of a system or service by means of which a statement is made available in electron form; (3) as the operator of or a provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control; he will not be considered as an author, editor or publisher.

Furthermore the section states:

In determining for the purposes of this section whether a person took reasonable care, or had reason to believe that what he did caused or contributed to the publication of a defamatory statement, regard shall be had to—

(a) the extent of his responsibility for the content of the statement or the decision to publish it,

(b) the nature or circumstances of the publication, and

(c) the previous conduct or character of the author, editor or publisher.

That is to say, the ISP has a defence if the reasonable care in relation to its publication was taken. Lastly, the ISP did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement it cannot be held liable for the defamation.

Only in 1999, for the first time the borders of this defence was tested. In the following subsection the interpretation of the section 1 of the Defamation Act 1996 by the Court will be analysed.

Godfrey v Demon Internet Service case [3]

According to the facts of the case, the reason of the dispute was defamatory statement made by unknown person using the name of Dr Laurence Godfrey. Mr. Godfrey was a lecturer in physics, mathematics, and computer science in the university located in London. The defamatory statement made using his name was originated in the US.

The nature of the statement was ‘squalid, obscene and defamatory of the Plaintiff’. The defamatory statement was posted to the soc.culture.thai forum hosted by Demon Internet Service. In the forum, in general, the postings were accessible during the fourteen days and then automatically were removed. Mr. Godfrey after being aware of the defamatory posting posted on behalf of his name, he sent a fax and informed Demon about that posting and requested to remove it. However, Demon failed to act promptly, and the statement was accessible by the users until it expired automatically after fortnight. As a result, a defamatory action was raised by Mr. Godfrey against Demon Internet in 1997.

In this claim there was need to address two primary questions. The first was, could Demon Internet be considered as a publisher of the statement? Moreland J, the judge of the Court, answered this question clearly:

‘In my judgment the Defendants were clearly not the publisher of the posting defamatory of the Plaintiff within the meaning of Section 1(2) and 1(3) and incontrovertibly can avail themselves of Section 1(1)(a)’.

The second question was, whether Demon Internet could rely on the defence provided in section 1 of the Defamation Act 1996. The Judge held that:

‘However, the difficulty facing the Defendants is Section 1(1)(b) and 1(1)(c). After the 17th January 1997 after receipt of the Plaintiff’s fax the Defendants knew of the defamatory posting but chose not to remove it from their Usenet news service. In my judgment this places the Defendants in an insuperable difficulty so that they cannot avail themselves of the defence provided by Section 1.’

Godfrey case treated ISPs as akin to distributors. The principle outlined in the case was well established; an ISP could escape from the liability and rely on the defence within the virtue of the section 1 until that point, as it has actual knowledge about the defamatory material. Hence, if information society service provider becomes aware of the defamatory statement, it has to ‘take reasonable care in relation to its publication’. In other words, when an ISP believes that a statement is likely to be a defamatory, it must take necessary steps in order to prevent further publication and distribution. Otherwise, it puts itself at risk of being liable for the defamatory posting.

The E- commerce Directive [8]

In 2000, the European Union by adopting the E-Commerce Directive addressed the questions of ISP liability regarding defamation. The Directive attempted to harmonise the issues surrounding the liability for ISPs for carrying, caching, and hosting defamatory material. Articles 12-14 seek to limit the liability of ISP for the third party content.

First of all, the Article 12 states:

‘Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted.’

This article provides a ‘mere conduit’ defence to the ISPs. Pursuant to the content of the article, if an ISP acts as a provider merely passing the information of third party through its network; does not control the content of transmitted information; does not store the passé information more than necessary to facilitate the transmission, in these situations it has a defence from being liable for passed defamatory information. In other words, a ‘mere conduit’ defence does not allow an ISP, who is just transmitting the data, be liable for the content of data. As in that case, it could not be expected to be aware of the content of the information. This defence is

akin to that provided to the telecommunications company. Hence, in the case if the ISP would originate or modify the content of the data, it cannot rely on this defence.

Furthermore, Article 13 states:

‘Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request.’

This article provides defence for caching in particular situations. In order an ISP to rely on this defence, ‘the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement’.

Again in this defence, similar to previous one, an ISP will lost the immunity if it originates or modifies the content of the data.

Moreover, Article 14 states that:

Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

Thus, Article 14 treats the ISPs which host material as a distributor and provides them with the distributor defence, similar in *Godfrey case*.

The UK, gave effect to the E-commerce Directive in the E-Commerce (EC Directive) Regulations 2002. The Articles 12-14 were implemented to the UK law as regulations 17-19. The Regulations almost repeat the same wording found in the EC Directive. The significant difference between the EC Directive and E-Commerce Regulations is the additional provision found in reg. 22. This regulation addresses the issue regarding what constitutes ‘actual knowledge’ for the purposes of regs 18 and 19.

Pursuant to the reg 22:

In determining whether a service provider has actual knowledge for the purposes of regulations 18(b)(v) and 19(a)(i), a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, among other things, shall have regard to—

(a) whether a service provider has received a notice through a means of contact made available in accordance with regulation 6(1)(c), and

(b) the extent to which any notice includes—

(i) the full name and address of the sender of the notice;

(ii) details of the location of the information in question; and

(iii) details of the unlawful nature of the activity or information in question.

That is to say, the Court when determining whether a service provider has received notice through any means of contact that the service provider has made available, this list of can be considered. To date the regulations have functioned smoothly. Until today, there were only to court case which reviewed the intermediary liability under the E-Commerce Regulations 2002. These cases will be analysed in the next subsection.

Bunt v Tilley & Ors case [1]

In this case, the plaintiff claimed that, Mr. Tilley and other two users had made statement which were defamatory about him using online internet services. Mr. Bunt, the plaintiff wished to bring the claims against the ISPs that used by the defendants to publish their defamatory post-

ings. Mr. Bunt stated that, as the ISPs have provided a connection to the internet, so they had enabled the defendants to publish allegedly defamatory statement. In other words, he wanted from the Court to consider the ISPs as liable for the defamation, just because the material which is simply communicated via the services they provide. The plaintiffs claim was declined and the Court held that the ISPs fell within the definition of ‘information society service’ provider provided in the reg. 2(1) of the E- Commerce Regulations that is why could rely on defences provided by the same legislation.

Metropolitan International Schools Ltd v Designtchnica Corp. [7]

In this case, the plaintiff was a distance learning operator. He claimed that, the defendant hosted some web fora accusing the plaintiff in numerous faults, such as providing poor value of money, exploiting students, and being ‘little more than a scam’. The interesting point regarding this case is that, the plaintiff claimed that Google was also as liable as other defendant, because the defamatory postings were searchable through the Google. It became the first case that addressed the issue of potential liability of search engines for defamatory material. The Judge stated that, Google was not the publisher of the defamatory posting. He held that: ‘A search engine is a different kind of Internet intermediary. It is not possible to draw a complete analogy with a website host. One cannot merely press a button to ensure that the offending words will never reappear on a Google search snippet: there is no control over the search terms typed in by future users. If the words are thrown up in response to a future search, it would by no means follow that the Third Defendant [Google] has authorised and or acquiesced in that process. I believe it is unrealistic to attribute responsibility for publication the third Defendant, whether on the basis of authorship or acquiescence’. That is to say the Judge considered that, the search engine could not be liable for the postings appearing in its search tools.

References:

1. Bunt v Tilley & Ors [2006] EWHC 407 (QB); [2006] 3 All ER 336. <https://www.casemine.com/judgement/uk/5a8ff72060d03e7f57ea814a>
2. Defamation Act 1996/ <https://www.legislation.gov.uk/ukpga/1996/31/contents>
3. Godfrey v Demon Internet Ltd, QBD, [1999] 4 All ER 342/ <https://www.casemine.com/judgement/uk/5a8ff72360d03e7f57ea8590>
4. Godfrey v Hallam-Baker [1994] E.W.J. No. 126
5. Loutchansky v Times Newspapers Ltd (No2) [2001] EWCA Civ 1805, [2002] QB 783. <https://www.casemine.com/judgement/uk/5a8ff7b260d03e7f57eb14e1>
6. M. Butler, E-Commerce and Convergence: A Guide to the Law of Digital Media, Bloomsbury Professional, 4th edn. , 2011. P. 145
7. Metropolitan International Schools Ltd v Designtchnica Corp. [2009] EWHC 1765 (QB)/ <https://www.casemine.com/judgement/uk/5a8ff7bb60d03e7f57eb1a26>
8. The E- commerce Directive 2000. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32000L0031>

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