

# It came from CyberSpace: Defamation Law and the Internet

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## Introduction

Since the Internet came into general use twenty years ago<sup>2</sup>, the response of lawyers and courts has been, if not the terrified reaction of the young lady shown above<sup>3</sup>, at least a general feeling of unease. There is the fear that, as happened in many of those old science fiction films, computers will end up replacing everybody, even lawyers<sup>4</sup>; or that cyber law will replace our humanity<sup>5</sup>; or that the technology is so complex it may overwhelm everybody, even lawyers.<sup>6</sup>

Ambivalent views about technology have been a major theme in science fiction films, television and literature from the earliest stages of this genre. Coming to terms with how technology has transformed the law requires lawyers to understand both the potential and the threat of these changes, so it is not surprising that modern technology's impact continues to be regarded as a mixed blessing. This is particularly

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<sup>2</sup> The first international conference on the World Wide Web, 25 May 1994, is generally regarded as the Internet's starting date: "A brief history of the Internet: how the World Wide Web has changed our lives over the past 20 years", Felicity Sheppard, ABC News, 25 May 2014.

<sup>3</sup> The real name of this film is "It came from Outer Space" (1953), with a screenplay by Ray Bradbury. Although humans were revolted and terrified by the aliens, it turned out they had only landed on earth due to a computer malfunction, which caused them to crash. Here is a trailer:

<https://www.youtube.com/watch?v=ErFsW4-FDWw> .

<sup>4</sup> "Armies of Expensive lawyers, Replaced by Cheaper Software", *New York Times*, March 4, 2011.

<sup>5</sup> Michael Kirby, "Humanity in Step with Technology?", *Lawyers Weekly*, 16 October 2007.

<sup>6</sup> E Zoltan-Ford and A Chapanis, "What Do Professional Persons Think about Computers?" [http://link.springer.com/chapter/10.1007/978-1-4613-8674-2\\_5#page-1](http://link.springer.com/chapter/10.1007/978-1-4613-8674-2_5#page-1) (1982).

the case in defamation law. The Internet makes us all potential publishers, in circumstances where claims are difficult to frame and the ambit of traditional defences uncertain, in proceedings as complex as they are expensive, for plaintiff and defendant alike.

Although the Internet has been with us for only a short while, computers were anticipated in popular culture decades before they were actually invented, as were the profound changes that they would have on society. The term “cyberspace” (from which “cyberlaw” is coined) is a word invented by a science fiction writer, William Gibson, who, in his 1982 short story *Burning Chrome*, gave the name “Cyberspace Seven” to a computer, and went on to give “cyberspace” a complete definition in his 1984 novel *Neuromancer*<sup>7</sup>. (Other neologisms, like “computer viruses”<sup>8</sup> and “worms”<sup>9</sup> similarly have a science fiction origin.) Some science fiction stories even seemed to have guessed the problems defamation lawyers are now dealing with. For example, the unseen monster in the film *Forbidden Planet* turns out to be “monsters from the Id” (i.e. our human subconscious), unleashed to destroy civilisation when a super-computer permits humans to express their deepest, darkest cybertroubling thoughts – just like social media today, some might say. Similarly, in 1960, Clifford Simak wrote an amusing short story about a defamed writer struggling with a computer that was trying to direct human destiny<sup>10</sup>.

### **The issues for discussion**

This discussion paper covers two topics:

- **A general discussion of the problems of pleading and other problems when commencing proceedings for defamation for Internet publications. This is discussed principally from the point of view of the plaintiff.**
- **The implications of the potential explosion in number of electronic defamation actions (for example, on social media or opinions published on review sites such as Tripadvisor<sup>11</sup> or eBay<sup>12</sup>) and what case management or legislative reform may be practicable. This is discussed principally from the point of view of the defendant.**

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<sup>7</sup> William Gibson’s definition was “a consensual hallucination experienced daily by billions of legitimate operators, in every nation, by children being taught mathematical concepts... A graphic representation of data abstracted from the banks of every computer in the human system. Unthinkable complexity. Lines of light ranged in the non space of the mind, clusters and constellations of data. Like city lights, receding...”. Other commonly used words originating from science fiction include “alien” (the 1929 *Science Wonder* story “the Alien intelligence”) and “robot” and “robotics” (created by the famous science fiction writer Isaac Asimov (taken from the Czech word “robota”, meaning “forced feudal labour”). The word “spaceship” first appeared in the 1880 review of Percy Greg’s novel *Across the Zodiac* in the Pall Mall Gazette, although the first appearance of the word is often attributed to the John Jacob Astor IV’s 1894 novel *A Journey in other Worlds*, set in the year 2000, imagining a future with a global telephone network, solar power and air travel, but not computers. The term “science fiction” itself goes back to 1851 when William Wilson published the book *A little Earnest Book upon a Great Old Subject*.

<sup>8</sup> A term first invented by Dave Gerrold in the Star Trek episode “The Trouble with Tribbles”.

<sup>9</sup> The first reference to a self-replicating computer program occurred in John Brunner’s 1975 novel *Shockwave Rider*.

<sup>10</sup> “Final Gentleman”, *Fantasy and Science Fiction*, 1960.

<sup>11</sup> <http://www.sydney.com/sydney-life/things-to-do/top-5-things-to-do-in-sydney-tripadvisor/>.

<sup>12</sup> See for example *Elliot v Tomkins* [2014] NSWDC 55.

Media and Internet Service Providers have their own specialist legal teams but, in a world where anyone can be a publisher, suburban or country lawyers are now just as likely to be consulted by someone who has been sued as well as by a potential plaintiff. The difficulty and expense of defending defamation proceedings is, however, too large a topic for this discussion paper, which will limit comment to the impact of proportionality upon defamation proceedings (*Bleyer v Google Inc* [2014] NSWSC 897). This very recent decision, if it survives appeal, may significantly reduce the number of defamation proceedings brought.

I have divided the discussion paper into three parts:

- **A short history of internet defamation law and a comparison of Internet with non-Internet publications;**
- **Common problems when drafting a statement of claim;**
- **Internet law and the defendant – proportionality and *Bleyer v Google Inc*.**

## **1. A brief history of Internet defamation law**

When the Internet first became widely available, lawyers and academics wrote enthusiastically about the future ability of cyberspace travellers to use computers to communicate globally<sup>13</sup>, through electronic mail<sup>14</sup>, interactive conferencing<sup>15</sup>, and bulletin board postings<sup>16</sup>. What they also foresaw was that the lower cost, ease of communication and anonymity<sup>17</sup> would also spur the growth of computer defamation suits<sup>18</sup>, particularly after the first Internet defamation action went to hearing.

That case was *Rindos v Hardwick* (Supreme Court of Western Australia, Ipp J, 31 March 1994). Professor Rindos was introduced in the kind of insulting fashion during an online anthropology academic forum that is now only too familiar in Internet defamation claims:

“His entire career has been built not on research at all, but on an ability to berate and bully all and sundry. In the local pub, drinking and chain smoking all the while, for that matter.”

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<sup>13</sup> Ethan Katsh, “Law in a Digital World: Computer Networks and Cyberspace” (1993) 38 *Vill. L. Rev.* 403 at 414,

<sup>14</sup> W. John Moore, “Taming Cyberspace” (1992) 24 *Nat'l J.* 745 at 746, defining cyberspace as “an electronic universe unmeasurable and unquantifiable, where digital impulses travel at all most the speed of light”. See also Eric J. McCarthy, “Networking in Cyberspace: Electronic Defamation and the Potential for International Forum Shopping”, (1993) 16 *J. Int'l L.* 527

<sup>15</sup> Loftus E. Becker Jr. “The Liability of Computer Bulletin Board Operators for Defamation Posted By Others”, 22 *Conn. L. Rev.* 203 (1989)

<sup>16</sup> Edward A. Cavazos, Note, “Computer Bulletin Board Systems and the Right of Reply: Redefining Defamation Liability for a New Technology”, (1992) 12 *Rev. Litig.* 231, 232-233

<sup>17</sup> Terri A. Cutrera, “Computer Networks, Libel and the First Amendment”, (1992) 11 *Computer L.J.* 555

<sup>18</sup> *Cubby, Inc. v. CompuServe Inc.* 776 F. Supp. 135 (S.D.N.Y. 1991); Geoff Thompson, “\$40,000 Awarded in First Cyberspace Defamation Case”, (May 1994) *Australian Fin. Rev.* at 41S (discussing the Australian case *Rindos v Hardwick* (No. 1994 of 1993) (Filed 31 March, 1994). Thompson notes that “uninhibited defamation is one of the things that makes cyberspace such a fun place to be”.

There was more of the same. Professor Rindos brought proceedings for defamation. There was, perhaps not surprisingly, no defence. The undefended nature of those proceedings, which resulted in a damages award of \$40,000, means they are of limited assistance in any discussion of pleading and particularisation issues.

It is helpful to note, however, that Professor Hardwick, when he spoke those defamatory words, forgot three things that lawyers need to remind their clients about. The first thing he forgot, while sitting at the virtual podium in that international forum, was that the law in the place where he was sitting at his computer desk was not the same as the law in the places where his audience were downloading that information. The second thing he forgot was that defamatory speech on the Internet, contrary to what many seem to have believed at the time, is just as defamatory in cyberspace as it is anywhere else, and additionally has the advantage of being more permanently recorded than speech. Finally, Professor Hardwick overlooked the fact that words spoken in a small assembly hall audience may attract certain defences which may not be available for worldwide publication of the kind that the Internet provides.

What, exactly, is the Internet? Definitions of “Internet” and the “World Wide Web” were reviewed and analysed by Kirby J in *Dow-Jones and Company v Gutnick* (2002) 210 CLR 575 at [75] – [92]. Kirby J noted the “novel features” of Internet publication but nevertheless considered that there were limits to judicial innovation, and that newfangled ideas such as the single publication rule, or reformulation of the proper law of the tort, were unwarranted.

At least Kirby J was prepared to discuss what the Internet was, and what kind of difference it would make to publication. In their joint judgment, Gleeson CJ, McHugh, Gummow and Hayne JJ referred only in the most general way to “what was said to be the unusual features of publication on the Internet and the World Wide Web”, and that it might help to “say something about what the evidence revealed of those matters” (at [12]). Four short paragraphs summarising the expert evidence then appear, following which their Honours, with admirable understatement, agree (at [38]) that the Internet is “a considerable technological advance” in terms of mass communication, but that they are satisfied that radio and television create “the same kind of problem” (at [38]). Many of the arguments concerning territorial connections were “irrelevant” because of Australian choice of law rules (at [42]); by application of those rules, since defamation should be “located at the place where the damage to reputation occurs” (at [44]), these issues could be readily resolved.

Australian courts have consistently refused, in the face of previous technological innovations such as radio and television, to consider the single publication rule: see the cases collected in *Jones & Anor v TCN Channel Nine Pty Ltd* (1992) 26 NSWLR 732 at 736. The plaintiff in those proceedings sought to recover punitive damages for publication outside New South Wales, arguing that the “flexible exception” in *McKain v R W Miller & Co (South Australia) Limited* (1991) 66 ALJR 189 had accidentally introduced a form of “single publication” rule. Hunt J rejected this submission, noting that any reference to “flexible exception” had been withdrawn, and that *McKain v Miller* was now in the dustbin of history. (*Jones*, however, was soon to join it, as the entitlement of a plaintiff who brought proceedings under the

repealed defamation legislation to claim punitive damages for publications outside New South Wales came to be accepted soon after: see for example *Marsden v Amalgamated Television Services Pty Ltd* [2001] NSWSC 570.)

Brave judges like Kirby J and Hunt J aside, the courts and legislators are still struggling to come to terms with the impact of technological change upon traditional legal precepts. The impact of the absence of a single publication rule, in relation, for example, to issues such as the running of time for limitation periods<sup>19</sup>, is only one problem. The court's early refusal to injunct Internet publications, on the basis that it would impose New South Wales law onto the law of other jurisdictions (*Macquarie Bank Ltd v Berg* (1999) A Def R 53-035; [1999] NSWSC 526), seen as "questionable" even at the time<sup>20</sup>, is another.

The lesson for practitioners is that almost every concept and rule in the field of defamation law needs to be reconsidered in the light of the Internet, as Lord Bingham so presciently pointed out in his Introduction to the first edition of Dr Collins' book.<sup>21</sup> The potential for multi-jurisdictional defamation, the question of what amounts to "publication", the potential for conflicting defences and remedies and enforcement problems are, however, issues that fall outside this brief discussion paper, which notes this troubled background as a precursor to the problems of drafting initiating pleadings.

### **Special pleading problems for defamation proceedings**

Generally speaking, Internet publications differ from newspaper, television and other more traditional means of communication as follows:

#### **1. Downloading as well as reading:**

Publication in the traditional sense is broadly interpreted as any person who takes part in the publication process: *Webb v Bloch* (1928) 41 CLR 331 at 363 – 6. Unless there are extrinsic facts to establish, proof of publication of a book or newspaper is generally unnecessary<sup>22</sup>. However, there is no presumption of law that material published on the Internet has been published: *Jameel v Dow Jones & Co* [2005] QB 946 at [15] – [18]. What must be established is that the material was downloaded, and the place of the download is then the place of publication: *Dow Jones & Co Ltd v Gutnick, supra*, at [44]; *Bleyer v Google Inc* [2014] NSWSC 897 at [16].

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<sup>19</sup> See Matthew Collins, "The Law of Defamation and the Internet", 3<sup>rd</sup> ed., 2010 ("Collins"), at [18.63] – [18.71].

<sup>20</sup> See the case note in Austlii at <http://www.austlii.edu.au/au/journals/PLPR/1999/39.html>. Collins, at [19.23], states that the decision was "founded on the questionable assumption that it is impossible to craft an injunction restraining a foreign defendant from publishing material via the Internet within the geographical jurisdiction of the court" but that Simpson J "can scarcely be criticised for being concerned that the authority of the court might be undermined". However, the Ontario Court of Appeal was prepared to do so in *Barrick Gold Corp v Lopehandia* (2004) 71 OR (3d) 416.

<sup>21</sup> Collins, *supra*, at 3.01.

<sup>22</sup> In *Ahmed v John Fairfax Publications Pty Ltd* [2006] NSWSC 11 at [9], the court was prepared to infer from the nature of the defendant's "newspaper and its business" that not only newspapers but also the Internet version of the newspaper was read.

While the burden of proof has traditionally been discharged (particularly where there are extrinsic facts to be established) by pleading that one person downloaded the matter complained of, that may be a risky procedure if *Bleyer v Google Inc* survives the inevitable appeal (see part 3 of this discussion paper). *Bleyer v Google Inc* is the first case in Australia where a claim has been struck out on the basis of proportionality, on *Jameel* principles. While the fact that a mere three names were given as downloaders of the material was only one of the bases for the proceedings being struck out, it is nevertheless a risk, for any person bringing defamation proceedings for Internet publications, not to have taken this important difference into account: *Elliott v Tomkins (No 3)* [2014] NSWDC 68. See the section below, “Proving Publication Occurred”, for practical comments.

## **2. More informal, less edited content:**

In *Smith v ADVFN* [2008] 1797(QB) Eady J described Internet publications as being the equivalent, not of editorial commentary, but of:

“... contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or ‘give and take’.”

However, the fact that a publication is made on a social media platform in informal language does not mean that it will not be taken seriously, or that it cannot convey defamatory imputations: *Applause Stores Productions Ltd v Raphael* [2008] EWHC 1781. The biggest single area of difficulty, in relation to Internet publications, is the continuing belief that so many members of the public have that they can treat the Internet with the same informality as a conversation in a bar<sup>23</sup> or vulgar abuse (see *Gatley on Libel and Slander* at [3.35]. For a recent consideration of vulgar abuse and *Munday v Askin* [1982] 2 NSWLR 369, see *Polias v Ryall* [2013] NSWSC 1267..

## **3. Hyperlinking, retweeting and other additions**

The matter complained of must be attached to the statement of claim. Traditionally, this was a simple task, but publications on the Internet sometimes do not have a clear beginning or end, or may include material published by others, hyperlinks, or other extraneous material.

Additionally, there are more likely to have been multiple publications of the same matter, each of which is a separate publication: *Dow Jones & Co Inc v Gutnick, supra*, at [44], [64] and [124]. As is set out below, under “Which publications?”, it is important to determine which publications should be the matters complained of and which additional publications should be relied upon in relation to damages issues only.

## **4. International and instantaneous publication**

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<sup>23</sup> *Clift v Clarke* [2011] EWHC 1164 at [36] (“pub talk”); *Sheffield Wednesday Football Club Ltd v Hargreaves* [2007] EWHC 2375 (“saloon-bar moanings”).

The “geographical indeterminacy”<sup>24</sup> of the Internet is one of its most significant features; the recipients of a publication no longer fall within a defined geographical area. Even a simple email may be read by a person anywhere in the world who has access to it. Additionally, such access is instantaneous. Before the Internet, the most immediate form of publication was radio, but even radio had the 7-second delay “dump button” (*Jones v Trad* [2013] NSWCA 389 at [119]). This has had a profound impact on journalism, as the success of Kate McClymont’s regular tweets from the ICAC hearings demonstrate; immediate and in-depth coverage is now far easier, despite the 140-character limit of Twitter. It is also one of the reasons for the rise in number of defamation actions based on social media posts.

## 6. Permanency

Traditionally, material published in a book or newspaper could be expected to “fade with time”, to use the phrase often employed in contempt publications (for example *DPP v Kan Tim Ho* [2009] VSC 394 at [5]). On the Internet, not only can anyone post damaging material, anonymously and instantaneously available everywhere, without the possibility of recall, but it is there forever: “God forgives and forgets, but the Internet never does”<sup>25</sup>. This may partially explain the rise in the number of suppression orders sought, and is also of relevance to damages.

There are two aspects to permanency: on the one hand, retraction of defamatory material in traditional publications such as newspapers or books had to be done by way of apology, whereas requests to take down defamatory material from websites is now possible. As to the question of whether it is ever possible to find and remove all electronic trace of a publication, see a description of the problems Nationwide News had: *XX v Nationwide News Pty Ltd* [2010] NSWDC 147 at [35] – [39]; despite sustained efforts, the offending material was still on several websites.

## 7. “Anonymous” and other slippery defendants

The ability to post material anonymously is a significant problem for both civil and criminal law proceedings. The July 2014 House of Lords<sup>26</sup> report on the adequacy of criminal law to deal with social media offences commented:

“50. The internet readily facilitates its users doing so anonymously. Although it is possible to identify (including retrospectively) which computer in the world was used to post a statement (because each computer has a unique “internet protocol address”), it is not necessarily possible to identify who used that computer to do so.

51. This is in part because many website operators facilitate the anonymous use of their service. There is no consistent attitude taken by website operators: some require the use of real names (Facebook, although they do not actively confirm users’ identities); some allow anonymity but challenge impersonation

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<sup>24</sup> Collins, *loc. cit.*, at [3.02].

<sup>25</sup> Viviane Reding, Vice-President of the European Commission, European Data Protection and Privacy Conference, 30 November 2010, [http://europa.eu/rapid/press-release\\_SPEECH-10-700\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-10-700_en.htm).

<sup>26</sup> House of Lords Select Committee on Communications’ 1<sup>st</sup> Report of Session (29 July 2014).

(Twitter); others allow absolute anonymity. Google+ abandoned its real name policy and apologised for having tried to introduce one.”<sup>27</sup>

As is set out below, greater attention may need to be paid to discovery before action, retaining expert advice and preservation of documents in order to determine that the right defendant has been identified<sup>28</sup>.

Having noted these differences, how should a claim for defamation for Internet publications be pleaded?

## 2. Drafting a claim

The following is a checklist of some of the main issues to consider when drafting a statement of claim.

### **Identification: avatars, nicknames and business names**

Although it may seem so obvious that it need not be said, one of the principal issues for any action for defamation is that the plaintiff is able to be identified by a person who downloaded that information on a particular date and at a particular location. These essential prerequisites to commencing an action, if overlooked, can be fatal.

The identification of any plaintiff in defamation proceedings is an essential prerequisite to action: *Lazarus v Deutsche Lufthansa AG* (1985) 1 NSWLR 188 at 192. This is a particular problem with publications on the Internet, where your client may be conducting business or social media contacts using pseudonyms, business names and other nicknames of a most informal kind.

If a plaintiff is trading under particular name, such as “Achilles Archery” (to quote the business name in *Elliott v Tomkins* [2014] NSWDC 55), he needs to identify not only the persons who downloaded the matter complained of (and where), but particularise that the plaintiff was known to be the person who conducted the business as “Achilles Archery”: *Elliott v Tomkins* [2014] NSWDC 55 and 56; see the relevant principles explained by McCallum J in *Jenman v McIntyre* [2013] NSWSC 1100 at [3].

### **How many publications?**

The biggest single problem with Internet-related problems is their sheer number. For example, in *Ghosh v Ninemsn Pty Ltd & Ors (No 2)* [2013] NSWDC 145, there were 53 publications, including advertisements for the broadcasts, broadcasts on the Internet and the newspaper and television publications.

A large number of publications, multiple defendants and multiple defamation actions can render the conduct of proceedings expensive and unwieldy. For example, in *Dank*

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<sup>27</sup> Loc. cit., at pp. 15 – 16.

<sup>28</sup> *Cao v Liu* [2013] NSWDC 172. Subpoena issued at the trial failed to establish the identity of the person whose email account it was, and the trial judge accepted the evidence of the defendant that she did not understand email, or have an email account, or know that her husband had opened an email account in her name. No expert evidence was called.

*v Whittaker (No 4)* [2014] NSWSC 732, six proceedings were consolidated into three groups. The courts were initially very timid about consolidating proceedings in this way (*Fairfax Media Publications Pty Ltd v Cummings; Fairfax Digital Australia & New Zealand Pty Ltd v Cummings* [2013] ACTCA 37), and McCallum J's preference (in *Dank*) for the dissenting judgment in the ACT Full Court is an interesting example of what may happen to the doctrine of *stare decisis* if courts do not keep up with technological change.

The principle areas of difficulty are publication, proof of identification, choice of cause of action and court, and choice of defendant. Although it is often said that nothing is ever forgotten on the Internet, it is important to preserve material which may be destroyed or difficult to find later in the proceedings. Early discovery and preservation of evidence are essential tools.

### **Yes, but who read it, and where?**

The *Uniform Defamation Act* (“UDA”) overcomes the jurisdictional differences which previously were a feature of Australian Defamation Law, but it should be borne in mind that since publication on the Internet occurs where the matter complained of is downloaded, and many, if not most, Internet publications are available worldwide, that publication may occur in other jurisdictions. This “geographic indeterminacy” (*Collins*, supra, at [3.02]) is the first issue to bear in mind.

The second is that, for there to be a cause of action, material available on the worldwide web is not published simply by some “unilateral act on the part of the publisher” (*Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 600 (“Dow Jones”) in uploading the material. Publication was described in *Dow Jones* as a “bilateral act” in that there must be particulars provided of the downloading of an article by a person who was able to understand it in the language in which it appeared (or alternatively, used the translation button<sup>29</sup>).

### **Different requirements for different kinds of Internet publications**

The most commonly sued upon publications are emails and the Internet versions of television and newspaper articles.

Email publications are straightforward, as the sender, recipients and the recipient's network mail server are relatively easy to identify. Problems may arise in relation to other less straightforward forms of publications:

- Bulletin board and forum postings
- Web pages
- File transfer
- YouTube

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<sup>29</sup> The communication of material on the Internet in non-readable form, such as computer code, will not ordinarily constitute publication: *Collins*, supra, at 5.04.

Videos and audio files posted on YouTube are more likely to be treated in the same way as traditional television and radio programmes.<sup>30</sup> A request for YouTube to take the material down should be undertaken as soon as possible. Ensure that copies of the relevant programmes, including screen shots of comments, are kept.

Even in the case of mass media publications, it is arguable that particulars of downloading should be required, although this requirement will be more likely to be the case if the plaintiff is not identified and particulars of identification must be established: *McDonald v Australian Broadcasting Corporation* (2014) NSWSC 206 at [25]-[28]. There is no presumption of law that material appearing on the Internet has been published: *Al Amoudi v Brisard* (2007) 1 WLR 113 at 35, approving a statement to this effect in *Collins*, supra; see also *Jameel v Dow Jones & Co Inc* (2005) QB 946 at [15]-[18]; *Kaschke v Osler* (2010) EWHC 1075 at [30]; *Belbin v Lower Murray Urban and Rural Water Corporation* (2012) VSC 535 at [30] (but cf *David v Abdishou* (2012) NSWCA 109 at 259).

Inference of publication may be drawn in appropriate cases in the absence of direct evidence, such as the finding in *Ahmed v John Fairfax Publications Pty Ltd* (2006) NSWSC 11 at [9], that from the very nature of the plaintiff's newspaper and business, it was likely that not only hard copies but the Internet edition of a Sydney Morning Herald had been published, not only within but also outside Australia (see also *Gregg v O'Gara* [2008] EWHC 658). Proof of publication in relation to a newspaper generally straightforward, as most major newspapers have audited circulation, but this is insufficient to establish readership (a much larger audience), which is generally the subject of interrogatories.

However, narrower views have been taken elsewhere. In *Nationwide News Ltd v University of Newlands* (2005) NZCA 317, the New Zealand Court of Appeal "seriously doubted" whether it could be assumed that material on The Australian's website had been published in New Zealand, even though there was evidence that the relevant section of the website had an average of 500 hits per month, of which approximately 7 originated from New Zealand. The difficulty in that case was that there was no evidence anyone other than one of the plaintiffs had viewed the allegedly defamatory matter<sup>31</sup>. Nevertheless, where there is evidence of material being immediately accessible by feeding a person's name into a search engine website (as occurred in *Steinberg v Pritchard Englefield* (2005) EWCA Civ 288 at [20]-[21], the Court may conclude that the likelihood of someone having read such a publication is "irresistible".

An easy way to establish that the matter complained of has been read, where there is provision (for example on a bulletin board, forum or YouTube) for comments, is that other persons have commented online: *Katschke v Gray* [2010] EWHC 690 at [95] (but note the comments of Eady J in *Smith v ADVN Plc* [2008] EWHC 1797 at [14], and see *Collins*, supra, at [5.07].) Evidence is generally led of the number of "hits" on a website (*Royal Society for the Prevention of Cruelty to Animals, New South Wales v Davies* [2011] NSWSC 1445) or the number of "likes" on Facebook (*North*

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<sup>30</sup> *Collins*, loc. cit., at [4.37].

<sup>31</sup> That, however, may be sufficient to establish publication: *Trantum v McDowell* (2007) NSWCA 138 at [45]-[59].

*Coast Children's Home Inc. trading as Child & Adolescent Specialist Programs & Accommodation (CASPA) v Martin* [2014] NSWDC 125).

Getting over the hurdle of publication to one or more persons (who, if the plaintiff was not named, were able to identify the plaintiff) is only the first hurdle. The next issue is the degree to which the Courts are prepared to infer that persons outside a particular group would have read the matter complained of. In *Trumm v Norman* (2008) EWHC 116 at [35]-[37] Tugendhat J was prepared to infer that members of a union could access the union's website, where the defamatory matter was published, but declined to infer that this material would have been published to non-union members. This can be important in relation to defences such as qualified privilege.

Publication on the Internet may be in more than one language. For an interesting case where the bane was in Serbian and the antidote in English, see *Djuricanin v Foreign Language Publications* (Supreme Court of NSW, Levine J, 11 March 1994 and 15 May 1995).

### **Defining the borders of the “publication”**

The law in this area is still developing: see *Kermode v Fairfax Media Publications Pty Ltd* [2009] NSWSC 1263 (hyperlink not included) and *Budu v British Broadcasting Corporation* [2010] EWHC 616 (identification not proved by hyperlinked article), but the generally accepted view is now that taken in *Crookes v Wikimedia Foundation Inc* (2011) 337 DLR (4<sup>th</sup>) 1 (SCC), namely that, unless the hyperlink specifically is endorsed by the matter complained of, it will fall outside the publication: see, for example, the agreement to this effect in *Jenman v McIntyre* [2013] NSWSC 1100 at [19]. In *Crookes*, the Supreme Court of Canada, by majority, held that simply linking to another site (without endorsing or otherwise reproducing its contents) did not constitute publication for defamation purposes (at [22] – [25]).

However, the structure of Internet publications means that traditional concepts of publications being linked or unlinked, may not be applicable to Internet publications. For example, in *Australian Broadcasting Corporation v Obeid* (2006) 66 NSWLR 605 the Court held that reasonably minded listeners could consider two broadcasts 25 minutes apart to be self-contained. In an early decision in relation to material published on the Internet, *Buddhist Society Western Australia Inc v Bristle Limited* (2000) WASCA 210, the Full Court of the Western Australian Supreme Court considered that separate letters and other material on the same website constituted separate publications, noting that in each case, the “electronic existence” of the document was essentially a separate file (at [10]).

For an interesting recent decision under the *Anti-Discrimination Act 1977* (NSW) on liability for inserting a hyperlink into a publication, see *Burns v Sunol* [2014] NSWCATAD 62 (discussed in more detail in the section below on alternatives to defamation actions).

### **Republication**

Internet publications, by their very nature, are likely to be republished multiple times. The most common example is the forwarding of emails or bulletin board postings, as well as from material produced in response to searches. In *Budu v British Broadcasting Corporation*, *supra*, the claimant argued that the defendant was liable for those portions of the matter complained of which were included in search results, but held that it would not be appropriate or just to hold the publisher of a web page responsible for such a snippet. Nevertheless, her Honour expressed the view, obiter, that an original publisher may be liable for such a republication (at [70]).

### **Anonymous Publications**

One of the greatest attractions of the Internet is the availability of anonymous publication. Internet users can, if they wish, publish defamatory material with very little risk of being identified or traced.

Where anonymous material has been published, consideration may be given to the bringing of a *Norwich Pharmacal* (*Norwich Pharmacal Co v Commissioners of Customs and Excise* (1974) AC 133) or *Anton Piller* (*Anton Piller KG v Manufacturing Processes Limited* [1976] Ch 55) order, to compel disclosure or to obtain all material where it was feared that the material in question might be destroyed.

*Anton Piller* applications are “a draconian order” (*Celanese Canada Inc v Murray Demolition Corp* (2006) 269 DLR (4<sup>th</sup>) 193 at [1] per Binnie J). I am only aware of its use in two defamation proceedings in Australia. The first is *Sands v South Australia* (2013) SASC 202, where the appellant, who was unsuccessful in an action for defamation, brought an application for a search order against the Commissioner of Police, to obtain evidence which he claimed had been withheld. The application was refused in very sparsely worded, but strong, terms.

The other example of use of the *Anton Piller* procedure occurred in *Megna v Marshall* [2011] NSWSC 52. The judgment of O’Keefe J granting the order has not been published, but in her final judgment, Simpson J noted (at [4]) that the matters complained of were a series of newsletters circulated anonymously in the Drummoyne Municipality between 1998 and 2003 and that the plaintiffs had obtained an *Anton Piller* order and identified the defendants by reason of the documents obtained.

Obtaining a *Norwich Pharmacal* (*Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133) order against the server or social networking site may also be considered. An early example for such an order being sought is *CHC Software Care Ltd v Hopkins & Wood* [1993] FSR 241 (Eng. Ch. D). There was some doubt about its applicability to defamation proceedings; an order was refused in *Kenney v Loewen* [1999] 64 BCLR (3d) 346 (SC). However, in *P v T Ltd* [1997] 4 All E R 200, where the proceedings were brought for both defamation and wrongful dismissal, the plaintiff was successful. Scott VC stated:

“It seems to me that the principles expressed in the *Norwich Pharmacal* case, although they have not previously been applied so far as I know to a case in which the question whether there has been a tort has not clearly been

answered, ought to be applicable in a case such as the present. ...I see no reason why the *Norwich Pharmacal* principle should be regarded as inapplicable to assist a prospective plaintiff to obtain information and documents necessary for the bringing of an action for libel or malicious falsehood in circumstances such as exist in the present case.” [at 208 – 209].

Applications for *Norwich Pharmacal* orders are increasingly common in the United Kingdom. Dr Collins (*Law of Defamation and the Internet, supra*) notes at [5.69] that these have become “a regular feature of the judicial landscape in cases involving allegedly defamatory matter published in emails sent from web based services, bulletin board and foreign postings, special purpose websites and chat rooms”, citing *Sheffield Wednesday Football Club Ltd v Hargraves* (2007) EWHC 2375 as a typical example. (Note, however, that the claimants were ordered to pay the defendants’ reasonable costs of the application and of compliance with the *Norwich Pharmacal* order<sup>32</sup>.)

In *Applause Stall Productions Ltd v Raphael* (2008) EWHC 1781, orders were sought for production of data from Facebook. In *York University v Bell Canada Enterprises* (2009) 31 DLR (4<sup>th</sup>) 755 an order was sought in relation to an anonymous email published on the university website accusing the university president of academic fraud. The court issued a *Norwich* order against Bell Canada for production of the identity of the anonymous authors on the basis that the plaintiffs had established a prima facie case of defamation, that the defendants’ services were used and that reasonable efforts had been made to find the authors, in circumstances where the plaintiff would not otherwise have a remedy.

### **Other means of identifying the anonymous author of a publication on the Internet**

Other approaches include:

- (a) A Court order to retain an expert: In *Takenaka (UK) Ltd v Frankl* (England and Wales High Court (Queen's Bench Division), Allott J, 11 October 2000), the parties agreed to submit to a computer test, which concluded, on the balance of probabilities that the defendant had sent the offending email messages. In *Lakaev v Denny* [2010] NSWSC 1480 the Court ordered the parties to appoint an expert to examine computers and produce a report of his or her findings. Similarly in *Resolute Ltd v Warnes* [2000] WASC 35 orders were sought for the defendant to be examined as to the identity of the author of defamatory statements.
- (b) One or both of the parties retains an expert: This is the standard procedure used.
- (c) Early discovery and/or interrogatories of either the publisher or the text of the publication: see *Dank v Cronulla-Sutherland District Rugby League Football Club Ltd* [2013] NSWSC 1101 and the cases

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<sup>32</sup> See also *Smith v ADVFN Plc* (2008) EWHC 577; (2008) EWCA Civ 518.

discussed in *Stanizzo v Sassu* [2014] NSWDC 90. The procedure was used in defamation proceedings in Ontario: *Latner v John Doe* 2010 ONSC 4989 (Master). It must not be a fishing expedition: *Cummings v 2KY Broadcasters Pty Ltd* [1981] 1 NSWLR 246 at 248 per Hunt J (see also *Redmond v Uebergang* [1984] 1 NSWLR 311 at 315; *Kaiser v George Laurens (NSW) & Song Ltd* [1984] 2 NSWLR 294 at 295; *Aldridge v John Fairfax & Sons Ltd* [1984] 2 NSWLR 544 at 551 – 2. However, these cases deal with pre-Internet issues, not with anonymous publications.

- (d) It has long been the case that the court may order production of a tape or programme of a broadcast (*Oswin v Radio 2UE Sydney Pty Ltd* [1968] 1 NSWLR 461) and by analogy the same sort of order might be sought for production of Internet material, particularly if (as is the case for media defendants) there is a legislative requirement for their retention: *Watt v Herald & Weekly Times Ltd* [1998] 3 VR 740.
- (e) The interesting question, in relation to such production, is when, and in what circumstances, a blogger or blog site may claim to be a journalist, and not obliged to produce such documents. That, however, is a seminar paper topic in itself.

### **Proving nature and extent of publication**

Actions against television and newspaper defendants can generally obtain audited circulation figures, but it may be more difficult to estimate just how many people have seen Internet publications, despite the ability to obtain the number of “hits” the page may have had; a separate “hit” will be recorded each time a person accesses the web page, whether they have accessed it previously or not, and a “hit” may not mean that the person has read it.

Consideration should be given to consulting and retaining expert evidence about such matters as identifying the IP address of the Internet users who have visited the page and the time spent browsing, or other information that will help to develop a profile of the extent to which Internet content has been published. Discovery and interrogatories should be sought, and subpoenae should not be left to the trial, as occurred in *Cao v Liu, supra*, where the plaintiff was unable at trial to prove the defendant sent the email (and appears also to have sued the wrong defendant), thereby losing the case.

A significant issue in relation to discovery of electronically stored information (ESI) is how to deal with claims that records have been erased or destroyed. Claims of destruction in proceedings of this nature may range from the destruction of a mobile phone (*Palavi v Radio 2UE Sydney Pty Ltd* (District Court of New South Wales, Colefax DCJ, 9 November 2010; *Palavi v Queensland Newspapers Pty Ltd* (2012) 84 NSWLR 523); *Palavi v Radio 2UE Sydney Pty Ltd* [2011] NSWCA 264) to the approximately 20 million emails which it was claimed were destroyed in relation to the phone hacking scandal in the United Kingdom.

The phone hacking scandal, and the privacy cases which followed it, are a good example of the need for care in obtaining and preserving electronically generated discovery material. Curiously, none of the legal representatives in the phone hacking proceedings, civil or criminal, seems to have foreseen that shutting down *News of the World* would destroy the electronic evidence trail (although many American legal commentators<sup>33</sup> certainly pointed this out in articles at the time), or sought production of the actual mobile phones (cf *Palavi, supra*), and the plaintiffs even agreed to limit discovery to documents after 2000 (*Various Claimants v News Group Newspapers Ltd & Mulcaire* [2012] EWHC 2692 (Ch). “Enough is enough”, said News Group’s legal advisers and Vos J (at [42], [91], [101] and [103]), even though some of the claimants (such as Dr Shipman’s son and Colin Stagg) had been hacked before this time, and Glen Mulcaire had been working for *News of the World* since 1998. As a result, the pre-2000 material, which may have cast some light on private investigator Jonathan Rees<sup>34</sup> 20-year association with *News of the World*, was never handed over.

### **Choice and location of defendant**

Where a defendant resides overseas, it is important to consider both the jurisdiction of the court before which the application is brought as well as the most effective means of service. In *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268 the Court of appeal disapproved of an order for service by Facebook on an overseas resident about to leave the jurisdiction. The Court’s disapproval, in that appeal, of service by Facebook generally flies in the face of its increasing use in the Supreme Court (*Royal Society for the Prevention of Cruelty to Animals, New South Wales v Davies* [2011] NSWSC 1445, to cite but one example), but the problem of overseas defendants is a significant issue in the District Court.

Is the defendant actually overseas? The defendant may be closer than is claimed. It is possible to make an inquiry for a username (called, for example “JaneDoe007”) with an Internet Protocol Address (for example, “123.123.12.12”) and obtain a range of

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<sup>33</sup> There were many articles as early as July 2011, the month the newspaper was shut down, including Kate Paslin, “*News of the World: Hacking into e-discovery*”, *e-discovery Insight*, 11 July 2011 <http://ediscoveryinsight.com/2011/07/news-of-the-world-hacking-into-ediscovery> ; Dawn Lomer, “E-discovery and cyber-shredding at *News of the World*”, *i-sight*, July 21, 2011 <http://i-sight.com/investigation/e-discovery-and-cyber-shredding-at-news-of-the-world/> ; “The E-Discovery Implications of the *News of the World* phone hacking scandal” *E-Discovery Beat*, 15 July 2011 <http://www.exterro.com/e-discovery-beat/2011/07/15/the-e-discovery-implications-of-the-news-of-the-world-phone-hacking-scandal/> ; to name but a few. My favourite is the very short article: “*News of the World* Buries the E-Discovery Lede: Spoliation” in *e-Discovery Insights*, which notes the description in the *Guardian* that Scotland Yard was investigating claims “millions” of emails had been destroyed to hid phone hacking evidence, which concludes with the author asking despairingly: “I have only one question: when will they ever *learn*?”: <http://www.ediscoverycalifornia.com/insights/2011/07/news-of-the-world-buries-the-ediscovery-lede-spoliation.html> .

<sup>34</sup> Rees carried out investigations for *News of the World* from 1989 to 2008, except for the period 2000 – 2005 when he was serving a prison sentence for conspiracy to pervert the course of justice. In 2002, while serving that sentence he arranged for *News of the World* to carry out surveillance on the police inspector investigating Rees for an unrelated crime, the murder of Rees’ former business associate, Daniel Morgan: <http://www.theguardian.com/media/2011/jul/06/news-of-the-world-rebekah-brooks> . Rees was charged in relation to this murder following his release from gaol in 2005 but continued to work for *News of the World* until bail revoked in 2008. The murder charges were dismissed in 2011, following which Rees’ professional association with *News of the World* was revealed, and the phone hacking scandal became front page news: <http://www.theguardian.com/media/2011/mar/11/news-of-the-world-police-corruption> .

addresses in geographical terms, to determine a general geographical location for a particular IP address. It is simply a matter of sending an “IP Lookup Location” for a particular IP address. It is then possible to obtain a report containing a map for the geographical range for IP addresses which include the one you are looking for. It may be necessary, however, to consider having an expert report to provide this information, as the real question will be whether the person sending the message was actually at the computer console at the time, as opposed to accessing the computer from a remote location. Besides, since such technology has rarely been referred to in court proceedings, it is likely that the court will err on the side of caution and decide that evidence of this kind will require expertise.

### **Other causes of action**

Commencing proceedings for defamation may be of little use if the defendant is unknown, penniless, in another jurisdiction, a dangerous opponent (for example, a cyber bully) or any combination of the above. Consider other causes of actions such as anti-discrimination legislation, other tortious causes of action, and remedies other than damages.

### **Anti-discrimination legislation**

Where there is a series of offensive publications about race, sex or religion, a remedy under the *Anti-Discrimination Act 1977* (NSW) may be of assistance. In *Burns v Sunol* [2014] NSWCATAD 62, the plaintiff obtained an apology, a small amount of damages and take-down orders for a series of publications vilifying homosexuality in general and himself in particular. The Tribunal member rejected a submission that links in the website to videos calling for violent action were not endorsed by the defendant (see [24] – [29]). This was a sensible alternative to defamation in the circumstances, particularly since there was a history of failure to comply with previous court orders to take material down and pay compensation. If the plaintiff had commenced defamation proceedings, he would have received an award for damages only, and one which would have been expensive to enforce.

### **Remedies and Injunctions**

The same tests governing the issuance of injunctions for defamatory comments in other circumstances apply to the enjoining of publications on a website: Professor Brown<sup>35</sup> at [26.3(1)], citing *Canadian National Railways Co v Google Inc* 76 CCLT (3d) 154. In Australia, where the issues of free speech applicable to Canadian decisions are not a factor, such remedies may be appropriate in circumstances where there are a large number of Internet publications of an offensive or bullying nature.

However, there is much to be said, when dealing with publications of this kind, in looking to other causes of action, or even to the obtaining of apprehended violence orders (particularly suitable for “revenge porn” publications, where a former partner is the likely source). This brings me to the issue of cyberbullying, revenge porn and cyber harassment - the unattractive face of Internet publications.

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<sup>35</sup> *Law of Defamation in Canada, United Kingdom, Australia, New Zealand, United States* (2<sup>nd</sup>. ed).

## Defamation-related problems: cyberbullying and harassment

The curious phenomenon which leads many persons sitting in front of a computer to engage in the computer equivalent of road rage has been observed and commented upon in research articles, but no easy solution seems imminent. One of the problems for a victim of cyberbullying has been that the bully may be an adolescent (in circumstances where there is no opportunity to impose tort responsibilities on parents, or the school<sup>36</sup>), or impossible to identify, or someone with no resources whose determination to continue is only deepened by commencement of proceedings. Are there alternatives to obtaining a comparatively useless defamation judgment, at considerable expense to the client, which may do little beyond provoke publicity, the defendant, or both?

The first response to this kind of publication should often be a complaint to the police. However prosecuting authorities, already drowning under the tsunami of Internet child pornography and sexploitation offences, may be reluctant to act unless the nature and extent of these publications is at a sufficiently serious level.

The second kind of response may be to seek orders that the person posting the matter be dealt with for contempt. The plaintiff in *Tate v Duncan-Strelec* [2014] NSWSC 1125 did so, after the defendant, who lost court proceedings and went bankrupt, continued to post defamatory material on a website about the plaintiff. She responded to a request for a retraction and apology by saying:

“My answer is no, no and no. Sue me. I look forward to crossing swords with your client in court. ...By the way, you can't be sued for telling the truth.”

The defendant continued to publish material, including court documents from the earlier proceedings<sup>37</sup>, on the website.

Such an application can be brought whether the other proceedings are still on foot or are concluded: *Tate v Duncan-Strelec* at [105 – [140]; *Gypsy Fire v Truth Newspapers* (1987) 9 NSWLR 382 (refusal of stay of proceedings for defamation despite criminal proceedings for defamation also being brought).

For other cases where similar applications were made, see *Stobart Group Ltd & Ors v Elliott* [2013] EWHC 797; *Dar Al Arkan Real Estate Co & Anor v Al Refai & Ors* [2014] EWCA 715 (where the Court of Appeal considered contempt orders could have extra-territorial effect). For an interesting discussion of the crossover between contempt and defamation see *Halcyon House Ltd v Baines & Ors* [2014] EWHC 2216.

Yes, but what happens if the defendant asserts that defamation covers the field, and such actions should be brought as defamations (especially if the limitation period has expired)? The limitation/defamation argument was not raised in *Tate v Duncan Strelec*, but was raised (unsuccessfully) in *Hannon & Anor v News Group Newspapers Ltd & Anor* [2014] EWHC 1580.

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<sup>36</sup> *Mickle v Farley* [2013] NSWDC 295

<sup>37</sup> It is worth noting that publishing discovery or discovery-related material (e.g. answers to interrogatories) outside the litigation may itself amount to contempt of court, as Bergin CJ in Eq noted at [19], citing *Ainsworth v Hanrahan* (1991) 25 NSWLR 155.

## The “Solicitors from Hell” case

It was because police failed to act after a disgruntled client set up the “Solicitors from Hell” website in the United Kingdom that UK solicitors commenced the six-year marathon of seeking orders from the court to have this website removed: *The Law Society v Kordowski* [2011] EWHC 3185 (QB) (commonly referred to as “the Solicitors from Hell case”). The site was set up by a disgruntled client who, whatever the merits of the complaints about his own solicitors that led to the starting the site, took the art of complaining a step further, by seeking payments from the law firms to have their names removed. Mr Kordowski lost 15 libel cases brought as a result of the postings and went bankrupt, but was able to continue to operate despite his trustee in bankruptcy having control of his assets. Defamation law had won in the courtroom, but failed in cyberspace.

The Law Society of England and Wales then took the unusual step of commencing proceedings on behalf of the profession. Orders were sought pursuant to the *Protection from Harassment Act 1997* (UK) (“PHA”), the *Data Protection Act 1998* (UK) (“DPA”) and injunctions, which created the novel legal remedy to protect groups of businesses or individuals whose reputations are damaged on a consumer protection site.

The case proceeded on the basis that the defendant (who appeared in person) did not defend the proceedings (at [70]), and Tugendhat J was satisfied that no defence in any event would exist, as the course of conduct did not fall within any of the exceptions in s 1(3) of the PHA. The defendant also admitted being the data controller for the purpose of the DPA but gave conflicting evidence as to whether he in fact exercised any such control. He did, however, argue (at [73]) that if the words could be defended as libel they could not also amount to harassment, an interesting but ultimately unsuccessful argument.

The claimants relied upon the fact that there was an existing method for complaint about solicitors, set up by the Solicitors Regulation Authority, which allowed both sides to be heard. By comparison, the Solicitors from Hell website was a one-sided orgy of verbal abuse, and the only way a solicitor could have the content removed was to pay the website a fee to do so.

Although noting (at [138]) that there was “little guidance” on when a perpetual injunction in libel ought to be granted, Tugendhat J made the orders sought. The allegations were not merely false, but harassing. Orders could be made under both the PHA and DPA to prevent further publication (the text of the orders sought is set out at [136]).

Was this a victory for the claimants? It may have been a Pyrrhic victory, in that the site still continued to operate, although largely off the Internet<sup>38</sup>, and the legal costs

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<sup>38</sup> Solicitors were still receiving emails as late as May 2014 (“Society warns of “Solicitors from Hell” email scam”, *Law Society Gazette*, 14 May 2014) warning that adverse reviews will be published on the Internet, with attachments containing viruses. This is the latest in a series of email attacks this year; earlier attacks were in the form of emails purporting to come from the Law Society, according to the *Law Society Gazette*. The Law Society continues to maintain an advice site for legal practitioners. The

involved were considerable, but it was an important step by a group of professionals determined to protect their reputations.

Would this work in Australia? No. First of all, representative actions seeking remedies in relation to defamation are unlikely ever to be permitted in Australia. Secondly, there are significant differences between Australian and UK data protection laws. Thirdly, there is no right to privacy in Australia. Fourthly, companies with more than 10 employees cannot sue for defamation in any event; while an organisation such as the Law Society might be exempt, many incorporated law firms would not be.

Would an organisation such as the ACCC or the TPC consider bringing such an action? The likelihood that government agencies would bring such an application, or be a party to it, seems remote. The Information Commissioner felt unable to intervene (at [93] – [94]). The weakness of the Information Commissioner, in terms of its limited budget for large litigation, was painfully evident in the Leveson Report following the phone hacking scandal.

Publications made on complaints websites such as Solicitors from Hell are generally aimed at businesses. Much more frightening are cases where the Internet is misused to stalk, troll or cyberbully individuals.

### **Cyberstalking legislation**

The first Australian jurisdiction to introduce an offence of “unlawful stalking” was Queensland, in 1993<sup>39</sup>. Other jurisdictions, including New South Wales, (*Crimes Act* 1900 (NSW), s 545AB) introduced similar legislation, and the extension of the offence to cyberstalking by specific reference to “any technology” (*Criminal Code Act* 1899 (Qld) ss 359A – F) or “electronic communication” (*Criminal Code Act*, 1924 (Tas), s 192) is now a feature of the legislation in some States. For some time there was no general stalking provision in the *Criminal Code Act* 1995 (Cth), but amendments in March 1995 to add a new Part 10.6 relating to misuse of telecommunications networks includes use to menace, harass or cause offence (s 474.17). Offensiveness is defined broadly in s 473.4 as including “the general character of the material”.

Where offensive Internet publications are being aimed at an individual (particularly on social media), the first step is generally to contact the ISP to have the offending material removed and/or blocked. Stalking and revenge porn posts are often accompanied by personal intimidation, and defamation proceedings will achieve little beyond giving the stalker the attention he or she craves.

The potential for Internet use to defame or attack others is one of the consequences of the “tidal wave”<sup>40</sup> of Internet publications Bill Gates foresaw in 1995. The other side of the argument is that many of the publications which result in defamation

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Law Society of Scotland issued a similar warning on 26 May 2014 to its members, as well as attempts to obtain financial information from law firm staff by fraudsters. “Solicitors from Hell” still operates in the United States. “Solicitors from Heaven” operates out of an address in St John Street London.

<sup>39</sup> Gregor Urbas, “Look who’s stalking: cyberstalking, online vilification and child grooming offences in Australian legislation”, *Internet Law Bulletin* 2007 Vol 10, No 6.

<sup>40</sup> <http://www.lettersofnote.com/2011/07/internet-tidal-wave.html> .

proceedings are trivial, do not damage reputation and/or are published in circumstances where the plaintiff is identified by only a handful of people. What should happen in relation to those publications? Where does the future of Internet defamations of this kind lie?

### 3. The future of Internet defamation litigation

A feature of defamation claims brought in Australia and litigated to the highest level of our court system is that a surprising number arise from publications to one (*Cush v Dillon*; *Boland v Dillon* (2011) 243 CLR 298) or a handful (*Jones v Sutton (No 2)* [2005] NSWCA 203) of persons. In both these cases, all defences failed for the one or two sentences, spoken in informal circumstances to persons who knew the plaintiff well, which constituted the matters complained of.

It was as a result of a series of cases of this kind in England and Wales that judges in that jurisdiction developed the concept of proportionality (“the *Jameel* principle”: *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75; [2005] QB 946), now contained in s 5 *Defamation Act* 2013 (UK), which has been applied for the first time in Australia: *Bleyer v Google Inc* [2014] NSWSC 897. It is a defence of relevance to Internet proceedings if the identity of the plaintiff and/or seriousness of the imputations are arguably disproportionate to the expense of the litigation process.

Mr Bleyer brought proceedings for defamation for a Google search engine response (“snippets”) to searches for his name which referred to cocaine arrests for a person arrested for this offence in Los Angeles. The plaintiff could only name two persons in Victoria who had seen the publication (prior to Google being notified) and only one person (a NSW resident) who had seen it after Google had been notified<sup>41</sup>. Google Inc asked the court to decline to determine the plaintiff’s claim on the grounds of disproportionality between the cost of doing so and the interest at stake (at [1]).

The first issue was the basis upon which the application should be determined. Mr Smark SC, for the plaintiff, submitted that the current pleadings “do not indicate the outer limits of what may be proved”, citing *Goldsmith v Sandilands* [2002] HCA 31 at [2] per Gleeson CJ. Google Inc responded by saying that the Court of Appeal had rejected that submission in *Younan v Nationwide News Pty Ltd* [2013] NSWCA 335 at [22]. McCallum J resolved this discrepancy by noting that the Court of Appeal in *Younan* had permitted the bringing of further particulars, and that it was on this basis that the appeal was allowed, but proceeded to hear the application on the basis that “the outer limits” were publication to only three persons.

Her Honour then dealt with proportionality under the *Jameel* principles at [32] – [64] by considering the cases to which she had been taken by the parties, which are discussed in more detail below.

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<sup>41</sup> McCallum J’s views on this issue differ from those of Beach J in *Trkjula v Google Inc (No 5)* [2012] VSC 522, as Professor D Rolph notes in his recent summary of *Bleyer v Google Inc* in the *Gazette of Law and Journalism* (18 August 2014). I agree with Professor Rolph that McCallum J’s view is to be preferred.

The first point to note is that McCallum J's judgment does not refer to *Habib v Radio 2UE Pty Ltd* [2009] NSWCA 59, which discusses the *Jameel* principle in detail. Mr Habib had brought, and lost, proceedings in the Supreme Court concerning an article in the *Telegraph* and three asserted republications by radio stations after the jury made findings that the matter complained of in the *Telegraph* did not convey any defamatory imputations (the jury was not asked to rule on the republications, as that was an issue of law for the judge at the s 7A trial). The plaintiff did not pursue any ruling on the republications in the Supreme Court and instead recommenced proceedings in the District Court.

At first instance the proceedings were dismissed as an abuse of process, but the ground that is of most interest here is that there was direct reference at first instance to the Court of Appeal's explanation, in *Dennis v Australian Broadcasting Corporation* [2008] NSWCA 37 at [30], of the interaction between ss 56 – 62 *Civil Procedure Act* with the *Defamation Act*. The matters complained of in *Habib* were evanescent radio broadcasts, made the same day as the newspaper publication upon which they commented, this newspaper being the publication which a jury had found not to be defamatory. The first instance judgment considered it would not be possible, when determining the evidence, to “unscramble the omelette” in relation to whether those who had heard the broadcasts had also read the newspaper, and on this basis (namely the ss 56 – 62 issue), as well as five other bases, the proceedings were dismissed as an abuse of process.

The Court of Appeal set aside the first instance judgment on all the bases upon which the proceedings had been found to be an abuse of process, including the ss 56 – 62 argument, which it dealt with in detail, despite there apparently having been no submissions made on this ground (at [31]). The Court's short answer (at [12]) was that in *Dennis* (where the problem had been multiple causes of action), the proceedings were still allowed to remain on foot. However, the Court went on to deal in detail with a submission based on *Schellenberg v British Broadcasting Commission* [2000] EMLR 296, the landmark case on summary dismissal.

The facts in *Schellenberg* were similar to *Habib*. In both cases, the plaintiff had commenced, and lost, earlier proceedings for defamation for material that was very similar. The court noted (at [156]) that both *Schellenberg* and *Wallis v Valentine* [2002] EWCA Civ 1034 were referred to with approval in *Dow Jones & Co Inc v Jameel* (at [57] – [58]), but distinguished (at [59]), on the basis that in *Jameel* there was no doubt the claimant was seeking vindication. The court therefore concluded (at [210]) that there were no “efficiency reasons” under ss 56 – 59 *Civil Procedure Act* (which, in one of life's ironies, had come into force only three days before publication of the matters complained of) for the proceedings to be dismissed. (According to Caselaw, an application for special leave to the High Court was refused with costs on 23 April 2010).

Although not referred to by the parties in the argument before McCallum J, or in her Honour's judgment, the Court of Appeal could not have spoken more forcefully against any application of ss 56 – 62, or of *Schellenberg/Jameel* proportionality in relation to defamation proceedings, than it did in *Habib*. It took a similar stance in *Bristow v Adams* [2012] NSWCA 166 at [38] – [41]. Basten JA considered the case was not an appropriate vehicle for such an application, because it has to be brought as

a summary argument, and cannot be brought at trial. There is no authority to support the submission to this effect, which Basten JA accepted from counsel appearing before him as being a general practice in the United Kingdom. Such applications have indeed been made at trial: *Miller v Associated Newspapers Ltd* [2012] EWHC at [112] – [119]. In *Miller*, Sharp J considered it should not matter whether the application is made before or at the trial, and went on to reject the submission, based on the evidence of the trial. The common sense of this approach is obvious. If the facts of the trial make the issue of proportion clear, the application may be more (or less) compelling. For example, where the plaintiff fails to prove most of the case on publication, as occurred in the interlocutory stages of *Cush v Dillon; Boland v Dillon, supra*, the utility of a slander to one person about the plaintiffs (which was published in the course of a lengthy discussion, as Heydon J noted, which included other material adverse to Ms Cush) could have been an issue canvassed by the court. By comparison, the defence of unlikelihood of harm failed at the hearing and, since argument on this ground is not referred to in the appeal decision, was clearly considered so hopeless by the Court of Appeal that it was not worth even noting the grounds upon which this part of the appeal was based.

Basten JA's second grounds for rejection related to the issue being "novel"; although McColl JA had extensively reviewed the law in *Habib, supra*, his Honour was not referred to her Honour's careful analysis of these issues even though the same counsel had appeared in that case. His third ground was that it was not raised at the trial, where only a defence of unlikelihood of harm had been raised (which is inconsistent with what his Honour was told about the time at which the application should have been brought). The fourth basis, however, is of interest. Basten JA states:

[41] Fourthly, and related to the last point, had a stay been sought prior to trial, there would have needed to be careful attention to the differences between English and Australian law. For example, although it may be that the powers conferred on a New South Wales court pursuant to ss 56-58 of the *Civil Procedure Act 2005* (NSW) may be no less than the powers conferred on English courts pursuant to the Civil Procedure Rules 1998, r 1.1, the language of the provisions differs. Further, account might need to be taken of the separate defence provided by s 33, described as a defence of "triviality", and its relationship to the power to stay for abuse of process based on a disproportion between the likely costs of the trial and the possible outcome. In addition, reference was made in *Jameel* to the consequences of the *Human Rights Act* in the UK and the relevant protections contained in the European Convention on Human Rights. At least in part, the Convention militated *against* a stay, which would have impinged on the right to a fair and public hearing in relation to an alleged infringement of rights: Convention, Article 6. These issues were not addressed in the submissions on the appeal.

McCallum J interpreted Basten JA's remarks as being directed to the issue of whether a power to stay an action on grounds amounting to a complaint of triviality could comfortably sit alongside a defence of that name. However, the defence of triviality is entirely different to abuse of process based on a disproportion between the likely costs of the trial and the possible outcome; no decision on the defence (which has succeeded only once under the new legislation) has ever suggested that this disproportion is a factor to take into account in relation to the defence of triviality, and

since the *Defamation Act* does not cover the field, they must be taken to coexist. What I suspect that Basten JA means is that the defence of triviality is sufficient for our needs. If so, that is poor comfort in relation to Internet publications which, like media publications, have too wide a circulation for the defence ever to be made out. In addition, his Honour's reference to the European Convention of Human Rights is an unanswerable one. Basten JA makes some important points here, which raise great difficulties for the success of the proportionality argument.

Garling J, in *Barach v University of New South Wales* [2011] NSWSC 431, was similarly stern in his rejection of the *Jameel* principle. The facts in *Barach* have similarities with *Bleyer v Google Inc*, since the matters complained of relevant to this application were an email and a telephone call, each to one person, and each published in Florida, USA (there was an additional telephone call to Israel). Two of the three publications would have been made in the United States, where the party seeking dismissal resided, and where (as was the case in *Bleyer v Google Inc*) enforcement of the judgment was unlikely. In relation to proportion issues, the party seeking the order said he had limited funds and could not travel to Australia for a hearing. Although little was said about the merits of his defence, he made the telephone calls and sent the emails in the course of carrying out his duties as a private investigator hired by the University of New South Wales.

The text of the matters complained of does not indicate why the damages would be so high. The private investigator told these persons:

“I am a private investigator and I represent the University of New South Wales (UNSW) located in Sydney, Australia. I am conducting a background investigation on behalf of the University on Dr Barach due to his recent firing from the institution.”

At [116] – [147], Garling J rejected the argument, although noting (at [147]) that no Reply alleging malice had yet been filed, and that it was inappropriate to deal with the argument “at this stage”. (Given Basten JA's rejection of the bringing of such applications at the trial, it is hard to see when the right time to bring these applications might be!)

McCallum J states (at [47]) that Garling J was influenced by the fact that damages were “substantial”. There were 17 publications and 7 defendants, and the plaintiff clearly sought substantial damages against the university, but the circumstances in which substantial damages could be claimed for three publications to three persons were not explained. Garling J noted also the rejection of the *Jameel* principle in *Manefield v Child Care NSW* but points out that this was a passing comment in proceedings where substantial damages were awarded.

The remaining two bases for the granting of the permanent stay, namely the strength of the defences and the enforcement problems in the United States, are issues that carried no weight before Garling J in *Barach*.

By comparison, as McCallum J also points out, the principles enunciated in *Schellenberg* were endorsed by Brereton J in *Grizonic v Suttor* [2008] NSWSC 914. Mr Grizonic, like Mr Schellenberg, had effectively abandoned proceedings, and the

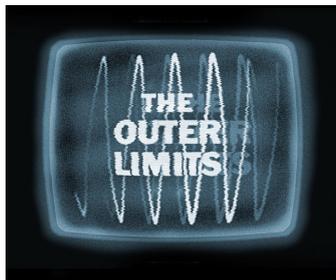
taking of accounts would be an expensive exercise in futility. This is one of a series of farsighted judgments handed down by Brereton J on costs and procedural issues, and it deserves wider recognition.

McCallum J has handed down an important decision, one which reconciles the case management as well as the “big picture” proportionality issues which rarely arose before the “spectre” (at [88]) of international publications. What will happen on appeal?

### **Concluding remarks**

Many judges have commented upon the challenging context that the Internet has placed upon traditional causes of action and defences (most recently, Courtney J in *Karam v Parker* [2014] NZHC 737, concerning its impact upon the defence of innocent dissemination). The purpose of this discussion paper has been to cherry-pick particular issues, of the kind that might concern a practitioner confronted with an upset client waving an Internet article, a statement of claim, or perhaps both.

The *Defamation Act* 2005 (NSW), drafted with scant attention to electronic publication and enacted before the social media phenomenon came into being, offers little guidance to practitioners on many of the issues raised by electronic publishing. Early decisions, such as *Dow-Jones and Company v Gutnick* (2002) 210 CLR 575 at [75] – [92], appear not to have appreciated that the Internet was not just another form of television or radio. More recent decisions, such as *Bleyer v Google Inc* [2014] NSWSC 897, appear to be breaking the rules (including rules of precedent) to attempt to make the law respond constructively to the competing tensions of defamation law. Only time (and the appellate courts) will tell, however, if Justice McCallum’s findings have passed “the outer limits” (*Bleyer v Google Inc* at [21]) by accepting Google’s latest ploy for combating the invaders from cyberspace. Perhaps the most interesting aspect of this judgment is the future of *stare decisis*, rather than the future of her Honour’s proportionality conclusions – but that is another story, for another seminar, far away.



28 August 2014