

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(Handed Down at Leicester Crown Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26th March 1999

B e f o r e :

THE HON MR JUSTICE MORLAND

Laurence Godfrey

Plaintiff

- and -

Demon Internet Limited

Defendant

Mr Justin Rushbrooke (instructed by Bindman & Partners for the Plaintiff)
Mr Manuel Barca (instructed by Messers Olswang for the Defendants)

"Approved by the Court for handing down (Subject to editorial corrections)"

This Judgment may be posted on the Court Service Website.

(The Hon. Mr Justice Morland)

Mr Justice Morland:

JUDGMENT.

1. According to Counsel this is the first defamation action involving the Internet to come up for judicial decision within this jurisdiction. However I had number of American cases cited before me. The United States was in forefront of the early development of the Internet. Care has to be taken before American cases are applied in English defamation cases. The impact of the First Amendment has resulted in a substantial divergence of approach between American and English defamation law. For example in innocent dissemination cases in English law the Defendant publisher has to establish his innocence whereas in American law the Plaintiff who has been libelled has to prove that the publisher was not innocent. Nevertheless the American decisions are educative and instructive as to the workings of the Internet and the problems which arise when defamatory material finds its way onto the Internet.
2. The Plaintiff by his summons (pages 40 and 41 of the Court Bundle) seeks to strike-out parts of the Defence as disclosing no sustainable defence. In short the Defendants' contention is that they were not at common-law the publishers of the Internet posting defamatory of the Plaintiff and that even if they were there is material upon which they can avail themselves of the defence provided by Section 1 of the Defamation Act 1996, "a modern equivalent of the common law defence of innocent dissemination" (See

THE FACTUAL BACKGROUND

3. The Plaintiff is a lecturer in physics, mathematics and computer science resident in England.
4. The Defendant is an Internet Service Provider (I.S.P.) carrying on a business in England and Wales.
5. The Internet is a world wide computer network. Three facilities (amongst others) are provided via the Internet: email, the World Wide Web and Usenet. This case is primarily concerned with Usenet.
6. Email is normally electronic mailing of a message from one sender to one recipient. The sender makes a connection to his own local ISP to whom he transmits his Email message. The sender's ISP transmits the message via the Internet to the recipient's ISP. At the recipient's request his local ISP sends the message to the recipient.
7. The World Wide Web provides a facility for one to many publication. "Web Pages" are held at a particular site (usually operated by an ISP) in such a way that they can be accessed by Internet users world wide. The creator of Web pages sends them to his local ISP who stores them. An Internet user can access and download copies of the pages by connecting to his own local ISP and requesting transmission of those pages via the Internet.
8. Usenet is one to many publication from author to readers round the world. An article (known as a posting) is submitted by its author to the Usenet news-server based at his own local ISP (the originating ISP) who disseminates via the Internet the posting. Ultimately it is distributed and stored on the news-servers of every (or nearly every) ISP in the world that offers Usenet facilities to its customers. Internet users world wide can read and download the posting by connecting to their local ISP's news-servers.
9. "Usenet News" is the name given to the system by which postings are sent by Internet users to forums know as "Newsgroups". A posting is readable anywhere in the world by an Internet user whose own ISP offer access to the Newsgroup in question. Newsgroups are organised into broad subject areas known as "Hierarchies". One such hierarchy is the "SOC" hierarchy which contains Newsgroups in which social issues are discussed for example the Newsgroups "soc.culture.thai" and "soc.culture.british".
10. Postings on Newsgroups can be read by the customers of a particular ISP by accessing that ISP's "news server". In reading a Usenet posting an Internet user requests the posting from the ISP's news server and a copy of the posting is then transmitted by the news server to the user's computer where it can be held in the user's computer for as long as he wishes. A posting may originate from anywhere in the world entering the Internet through the author's own ISP and follow a "path" through a succession of news servers before eventually reaching a particular reader.
11. The Defendant ISP carries the Newsgroup "soc culture thai" and stores postings within that hierarchy for about a fortnight during which time the posting is available to be read by its customers.
12. On the 13th January 1997 someone unknown made a posting in the U.S.A. in the Newsgroup "soc.culture.thai". The posting followed a path from its originating American ISP to the Defendants' news server in England. This posting was squalid, obscene and defamatory of the Plaintiff. It is set out in Tab 1 page 1 of the Court Bundle. It purports to come from the Plaintiff although "Lawrence" is misspelt with a "W". It invites replies by giving the Plaintiff's Email address. It was a forgery.
13. On the 17th January 1997 the Plaintiff sent a letter by "fax" to Mr Stanford, the Defendant's Managing Director, informing him that the posting was a forgery, and that he was not responsible for it and requesting that the Defendants remove the posting from its Usenet news server.
14. Although denying that Mr Stanford personally received the fax, the Defendants admit its receipt and that the posting was not removed as requested but remained available on its news-server until its expiry on about the 27th January 1997. There is no dispute that the Defendants could have obliterated the posting from its news-server after receiving the Plaintiff's request.
15. As is clear from the prayer for relief in the Statement of Claim the Plaintiff only claims damages for libel in respect of the posting after the 17th January 1997 when the Defendants had knowledge it was defamatory.

THE LAW.

16. The governing statute is the Defamation Act 1996. Section 1 is headed "Responsibility for Publication".

17. The relevant words are as follows:-

"1(1) 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."

18. It should be noted that for the defence to succeed (a) and (b) and (c) have to be established by the Defendant.

"1(2) For this purpose....."publisher" have the following meanings, which are further explained in sub-section (3)

"....."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."

"1(3) 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;

(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;

(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."

"1(5) 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."

19. 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).

20. 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 servers. In my judgment this places the Defendants in an insuperable difficulty so that they cannot avail themselves of the defence provided by Section 1.

21. I am fortified in this conclusion by the contents of the Consultation Document issued by the Lord Chancellor's Department in July 1995 and the words of Lord Mackay L.C. during debate on the Defamation Bill on the 2nd April 1996 (see Hansard Col. 214).

22. In the Consultation Document it is said:-

"2.4 The defence of innocent dissemination has never provided an absolute immunity for distributors, however mechanical their contribution. It does not protect those who knew that the material they were handling was defamatory, or who ought to have known of its nature. Those safeguards are preserved, so that the defence is not available to a defendant who knew that his act involved or contributed to publication defamatory of the plaintiff. It is available only if, having taken all reasonable care, the defendant had no reason to suspect that his act had that effect. Sub-sections (5) and (6) describe factors which will be taken into account in determining whether the defendant took all reasonable care.

2.5 Although it has been suggested that the defence should always apply unless the plaintiff is able to show that the defendant did indeed have the disqualifying knowledge or cause for suspicion, only the defendant knows exactly what care he has taken. Accordingly, as in most defences, it is for the defendant to show that the defence applies to him."

23. Lord Mackay L.C. said in moving rejection of an amendment of Lord Lester of Herne Hill:-

"Clause 1 is intended to provide a defence for those who have unwittingly provided a conduit which has enabled another person to publish defamatory material. It is intended to provide a modern equivalent of the common law defence of innocent dissemination, recognising that there may be circumstances in which the unwitting contributor to the process of publication may have had no idea of the defamatory nature of the material he has handled or processed."

"The amendment proposed by the noble Lord would, in effect, create an entirely new defence. It would give a defence to a person who was indeed aware, or on notice that he was contributing to a defamatory publication, but nevertheless chose to do so."

"It is imperative that we do not lose sight of the effect on plaintiffs of giving a defence to those who have in fact been instrumental in bringing material which has defamed the plaintiff to its audience".

"But in my submission it would not be right to deprive a plaintiff of his cause of action against a defendant who was aware that he might be wronging the plaintiff and misjudged the plaintiff's chances of succeeding in a defamation action"

24. Mr Barca, for the Defendants, submitted that at Common Law the Defendants did not publish the defamatory posting and there was no publication.

25. Section 17 of the 1996 Act reads:-

"Publication" and "publish", in relation to a statement, have the meaning they have for the purposes of the law of defamation generally, but "publisher" is specially defined for the purposes of section 1."

26. At Common Law liability for the publication of defamatory material was strict. There was still publication even if the publisher was ignorant of the defamatory material within the document. Once publication was established the publisher was guilty of publishing the libel unless he could establish, and the onus was upon him, that he was an innocent disseminator.

27. An early example of the application of this principle is Day .v. Bream (1837) 2 Moody and Robinson 54.

28. The facts were:-

"The libel complained of was a printed handbill, containing imputations on the plaintiff clearly libellous. The plaintiff lived at Marlborough; the defendant was the porter of the coach-office at that place, and it was his business to carry out and deliver the parcels that came by the different coaches to the office. For the plaintiff it was shewn that the defendant had delivered on the same day papers parcels, tied up, and containing a large quantity of the handbills in question, to two or three inhabitants of the place, to whom the parcels were directed"

29. Patteson J., a great master of Common Law,

"in summing up, left it to the jury to say whether the defendant delivered the parcels in the course of his business without any knowledge of their contents; if so, find for him, observing, that *prima facie* he was answerable, inasmuch as he had in fact delivered and put into publication the libel complained of, and was therefore called upon to shew his ignorance of the contents."

30. In *Pullman .v. Hill & Co* [1891] 1.Q.B. 524 Lord Esher M.R. said at page 527:-

"The first question is, assuming the letter to contain defamatory matter, there has been a publication of it. What is the meaning of "publication"? The making known the defamatory matter after it has been written to some person other than the person of whom it is written"

"If the writer of a letter shews it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is shewing it to a third person; the writer cannot say to the person to whom the letter is addressed, "I have shewn it to you and to no one else". I cannot, therefore, feel any doubt that, if the writer of a letter shews it to any person other than the person to whom it is written, he publishes it. If he wishes not to publish it, he must, so far as he possibly can, keep it to himself, or he must send it himself straight to the person to whom it is written. There was therefore, in this case a publication to the type-writer"

31. The principle in *Day .v. Bream* was applied by the Court of Appeal in *Emmens .v. Pottle* (1885) 16 QBD 354 where Lord Esher M.R. said at page 357

"But the defendants did not compose the libel on the plaintiff, they did not write it or print it; they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel? If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel, and would have been liable for so doing. That, I think, cannot be doubted. But here, upon the findings of the jury, we must take it that the defendants did not know that the paper contained a libel."

32. In the *Golf Club notice board case Byrne .v. Deane* [1937] 1K.B. 818 Greene L.J. said at page 837:-

"Now on the substantial question of publication, publication, of course, is a question of fact, and it must depend on the circumstances in each case whether or not publication has taken place. It is said that as a general proposition where the act of the person alleged to have published a libel has not been any positive act, but has merely been the refraining from doing some act, he cannot be guilty of publication. I am quite unable to accept any such general proposition. It may very well be that in some circumstances a person, by refraining from removing or obliterating the defamatory matter, is not committing any publication at all. In other circumstances he may be doing so. The test it appears to me is this: having regard to all the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?"

33. In my judgment the Defendants, whenever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their ISP who accesses the newsgroup containing that posting. Thus everytime one of the Defendants' customers accesses "soc culture thai" and sees that posting defamatory of the Plaintiff there is a publication to that customer.

34. The situation is analogous to that of the bookseller who sells a book defamatory of the Plaintiff (see *Weldon .v. "The Times" Book Co. Ltd* (1911) 28 T.L.R. 143 the case about the books on Gounod), to that of the circulating library who provided books to subscribers (see *Vizetelly .v. Mudie's Select Library* [1900] 2 Q.B. 170, the case about the book on Stanley's search for Emir Pasha in Africa) (see in particular the judgment of Romer L.J. pages 178-181) and to that of distributors (see *Bottomley .v. F.W. Woolworth* [1932] 48 T.L.R.530, the case about "The detective story magazine" containing the article "Swindlers and Scoundrels. Horatio Bottomley, Editor and Embezzler.") and (See *Sun Life Assurance .v. W.H. Smith* (1934) 150 L.T. 211, the case about newspaper posters announcing "More grave Sun Life of Canada Disclosures").

35. I do not accept Mr Barca's argument that the Defendants were merely owners of an electronic device through which postings were transmitted. The Defendants chose to store "soc.culture.thai" postings within their computers. Such postings could be accessed on that newsgroup. The Defendants could obliterate and indeed did so about a fortnight after receipt.

THE AMERICAN AUTHORITIES

36. In deference to the researches of Mr Barca I refer to them but only shortly because I found them of only marginal assistance because of the different approach to defamation across the Atlantic.
37. Mr Barca prayed in aid Anderson .v. New York Telephone Co. [1974] 35 N.Y. 2d 746 where the New York Court of Appeals held there was no publication by the telephone company in the following circumstances. The Plaintiff was a Bishop. One Jackson broadcast on radio urging his listeners to ring two telephone numbers

"A person calling these numbers would hear accusations against plaintiff involving him in all sorts of scurrilous activities not the least of which was illegitimately fathering children by women and girls in the church.

Jackson's telephones were attached to equipment leased to Jackson by the defendant. This equipment contained the recorded messages which would automatically play upon activation of the telephone by a caller"

38. Gabrielli J. said

"The telephone company's role is merely passive and no different from any company which leases equipment to another for the latter's use"

"In order to be deemed to have published a libel a defendant must have had a direct hand in disseminating the material whether authored by another or not"

"It could not be said, for example, that International Business Machines, Inc, even if it had notice, would be liable were one of its leased typewriters used to publish a libel. Neither would it be said that the Xerox Corporation, even if it had notice, could be held responsible were one of its leased photocopy machines used to multiply a libel many times"

39. In my Judgment Anderson does not assist the Defendants who in the present case did not play a merely passive role. They chose to receive the "soc.culture.thai" postings to store them, to make them available to accessors and to obliterate them.
40. Mr Barca referred me to Cubby .v. CompuServe 776 F.Supp. 135 (S.D.N.Y. 1991) which illustrates clearly the difference in approach between New York and England.
41. The headnote reads:-

"Action was brought against computer service company for its alleged libel, business disparagement, and unfair competition. On company's motion for summary judgment, the District Court, Leisure, J., held that: (1) computer service company that provided its subscribers with access to electronic library of news publications put together by independent third party and loaded onto company's computer banks was mere "distributor" of information, which could not be held liable for defamatory statements made in news publications absent showing that it knew or had reason to know of defamation."

42. Leisure D.J. said:-

"CompuServe develops and provides computer-related products and services, including CompuServe Information Service ("CIS"), an on-line general information service or "electronic library" that subscribers may access from a personal computer or terminal. Subscribers to CIS pay a membership fee and on-line time usage fees, in return for which they have access to the thousands of information sources available on CIS. Subscribers may also obtain access to over 150 special interest "forums" which are comprised of electronic bulletin boards, interactive on-line conferences, and topical databases.

One forum available is the Journalism Forum, which focuses on the journalism industry. Cameron Communications, Inc. ("CCI"), which is independent of CompuServe, has contracted to "manage, review, create, delete, edit and otherwise control the contents" of the Journalism Forum "in accordance with editorial and technical standards and conventions of style as established by CompuServe"

"New York courts have long held that vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation"

"The requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is deeply rooted in the First Amendment, made applicable to the states through the Fourteenth Amendment"

"CompuServe's CIS product is in essence an electronic, for profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications. CompuServe and companies like it are at the forefront of the information industry revolution. High technology has markedly increased the speed with which information is gathered and processed: it is now possible for an individual with a personal computer, modem, and telephone line to have instantaneous access to thousands of news publications from across the world. While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents. This is especially so when CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe"

"CompuServe has no more editorial control over such a publication than does a public library, book store, or newstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so. "First Amendment guarantees have long been recognised as protecting distributors or publications....Obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment"

"Technology is rapidly transforming the information industry. A computerised database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newstand would impose an undue burden on the free flow of information. Given the relevant First Amendment considerations, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory Rumorville statements"

43. Cubby was followed in Stratton Oakmont .v. Prodigy [1995] N.Y. Misc. Lexis 229;23 Media L. Rep 1794, where Ain.J. said:-

"A computerised database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newstand would impose an undue burden [*10] on the free flow of information."

"That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made, does not minimise or eviscerate the simple fact that PRODIGY has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards. Based on the foregoing, this Court is compelled to conclude that for the purposes of plaintiffs' claims in this action, PRODIGY is a publisher rather than a [*11] distributor"

"Let it be clear that this Court is in full agreement with Cubby and Auvil. Computer bulletin boards should generally be regarded in the same context as book-stores, libraries and network affiliates"

"It is Prodigy's own policies, technology and staffing decisions which have altered the scenario and mandated the finding that it is a publisher"

44. Zeran .v. America Online [1997] 129 F3d 327 illustrates how far the United States by statute has sought to protect Internet providers. Wilkinson C.J. said:-

"Section 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, Section 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service providers liable for its exercise of a publisher's traditional editorial functions -- such as deciding whether to publish, withdraw, postpone or alter content -- are barred"

"None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. While Congress acted to keep government regulation of the Internet to a minimum, it also found it to be the policy of the United States "to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer". Congress made a policy choice, however, not to deter harmful on-line speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages"

45. In my judgment the English 1996 Act did not adopt this approach or have this purpose.
46. Lunney .v. Prodigy Services [1998] WL 999836 (NYAD 2 Dept) has factual similarity to the present case.
47. Bracken J.P. stated the facts:-

"Some infantile practical joker with access to a computer sent an offensive electronic message (hereinafter email) to a Boy Scout leader, infusing the text of the message with threats more likely to perplex than actually to intimidate an adult recipient. The intended victim of this prank appears to be less the Boy Scout leader himself than the plaintiff, Alex G. Lunney, who was then a 15 year old prospective Eagle Scout, and whose name appeared as the signatory and author of the e-mail message in question. The charade was, as they say, crude but effective, in that the plaintiff was initially suspected of having sent the threatening piece of electronic correspondence"

In his amended complaint, the plaintiff expanded his factual allegations in order to encompass two "bulletin board" messages posted with the help of Prodigy's service."

48. Bracken J.P. said

"We conclude that Prodigy cannot be held legally responsible for it, nor for the allegedly defamatory bulletin board postings, because (1) Prodigy did not publish the statement, and (2) even if Prodigy could be considered a publisher of the statement, a qualified privilege protects it from any liability given the absence of proof that Prodigy knew such a statement would be false"

"our application of the common-law qualified privilege recognised in Anderson also renders the outcome in this case in complete harmony with current Federal statutory law contained in the Communications Decency Act (47 USC Section 230 et seq")

49. In my judgement at English Common Law Prodigy would clearly have been the publisher of the practical joker's message and therefore Lunney does not assist the Defendants.

CONCLUSION

50. In my judgment the defamatory posting was published by the Defendants and, as from the 17th January 1997 they knew of the defamatory content of the posting, they cannot avail themselves of the protection provided by Section 1 of the Defamation Act 1996 and their defence under Section 1 is in law hopeless. Therefore the Plaintiff's summons to strike-out succeeds.
51. With regard to the Defendants' application to amend the Defence I make no definitive ruling but indicate that it is likely to succeed.
52. It may also be helpful to suggest that on the basis of the proposed Amended Defence any award of damages to the Plaintiff is likely to be very small.