Defamation, Online Communication and Serious Harm: An Alternate Approach

Tom Davey examines how the law of defamation is challenged in the online space and proposes a solution.

The internet poses significant challenges to the law of defamation. It raises new questions regarding almost all elements of the tort, from liability and identification to publication and meaning. This paper examines how the law is challenged by online communication and proposes a hybrid solution that can protect both publishers and victims online.

The Challenges of Online Communication

Online communication challenges defamation law, particularly the presumption of harm. The difficulty of ascertaining the meaning of material, particularly that authored in small and relatively niche communities, can prejudice both defendants and plaintiffs.

A. Meaning and Computer Mediated Communication

Online communication cannot fully 'replicate face-to-face cues' and thereby increases the 'chances of miscommunication, and in turn, conflict.'[1] The problem is exacerbated when online communities establish their own speech cultures and when the anonymity of online communication fosters 'a sense of impunity, loss of self-awareness, and a likelihood of acting upon normally inhibited impulses.'[2] These circumstances disrupt traditional ideas of politeness and meaning and raise the question: if this is the 'normal' type of behaviour on the internet, should the law not account for it?

B. Interpreting Meaning

What is considered defamatory changes over time. In Australia and the United Kingdom, statutory defamation laws do little to assist judges in determining what meaning is conveyed by a publication. The problem is not just that there is a presumption of damage in the tort of defamation, but that the presumption attaches as soon as the court determines that the publication is capable of containing a defamatory imputation.

Online communications can be made to groups of any size in any location. These communications may occur in the 'public sphere' or in closed groups, inhabited only by members who are aware of the particular speech culture within that group. Any social group is going to have a unique manner of communicating. The difference with online communication is the scale and disparity of cultures. Some cultures have emerged due to the anonymity afforded by the internet, others through a desire to connect with likeminded people across the globe. The impact on defamation law is that *meaning* is obscured and 'acceptable speech' or 'acceptable culture' can no longer be calculated solely in relation to the proximate peers of the defendant, plaintiff or judge.

Arguably the matter is concluded when an online publication, read by an 'ordinary' reader, contains a defamatory imputation. However, this fails to take into account the rational, ordinary reader who, while perhaps offended, will process the communication knowing that they do not understand the culture of the forum. The ordinary person may expect the meaning to evolve quickly on the internet.

Take the device '/s' , for example. These characters are often used on the popular aggregator site Reddit. It means that the preceding statement was intended to be sarcastic. How should the *courts* interpret such a statement? If the intended audience understood its purpose, should the court automatically censor or punish the publication simply because not everyone understands the intended meaning?

If we assume that most people understand sarcasm in person we could also assume that the courts would take the imputation of that comment to be sarcastic. However, in a platform as diverse and disparate as the internet, meaning and understanding is not uniform. Sites like Reddit have large groups of frequent users. Their content, however, is frequently distributed throughout the mainstream media to audiences who have not necessarily been conditioned to the use of a given site's terminology.

Furthermore, messages republished to new audiences are unlikely to be filtered in the same way a message may be filtered or reworded by a newspaper so as not to be defamatory. Online republication is a near zero cost exercise. This is a paradigm shift for publishers, and provides individuals with 'direct and usually unreviewed, means of publication.'[3] Individual publishers are not covered by traditional media guidelines nor do many everyday users have any particular training in language, semantics, publication or meaning. The issue is compounded when the words themselves are not reflective of the intended meaning.

1 Claire Hardaker, 'Trolling in asynchronous computer-mediated communications: from user discussions to academic definitions' (2010) 6 *Journal of Politeness Research* 215, 223.

2 Ibid, 224.

3 Jennifer Ireland, 'Defamation 2.0: Facebook and Twitter' (2012) 17 *Media and Arts Law Review* 53, 55.

C. The Triviality Defence

In New South Wales, the primary defence against defamatory material that is of a less serious character is the triviality defence under section 33 of the *Defamation Act 2005* (NSW). It has been argued that technology neutral laws do not necessarily provide technology-neutral outcomes. The triviality defence has little useful effect in the world of online communication.[4]

Statements on platforms like Facebook are 'developing a certain notoriety for being... [u]ninhibited, casual and ill thought out... [r]ough and ready, rapid fire... [a]kin to everyday expression.'[5] Speech culture on Facebook demonstrates the 'defamatory risk factors' that 'hail from a disinhibition born from an intimate, confidential and safe setting, which users may assume arises on Facebook.'[6] In short, Facebook is a platform conducive to a type of defamation that cannot be captured by the triviality defence. Rather, ''the triviality defence is more likely to succeed when publication is to a limited rather than wide, audience.'[7] This may indeed occur on Facebook, however, the nature of the platform means that any publication – no matter how private or contextualised it was intended to be – can often be seen by a massive audience. Kim Gould has argued that 'conventional wisdom dictates that the wider the potential reach of defamatory material, the greater the potential for harm.'[8] As a result the triviality defence is unlikely to provide much protection for online publishers.

In practice, it appears that in NSW the triviality clause has been rarely argued successfully. Whilst the courts have denied that the clause is redundant,[9] its lack of use suggests that something is amiss.

A Three Step Solution

This paper proposes a three-step solution to address the tension that exists between meaning and protection, online.

A. Serious Harm

Recent reforms to the United Kingdom's *Defamation Act*[10] were influenced by the high costs of defamation action, libel tourism and the impact of the *Human Rights Act 1998* (UK).[11] One of the most significant changes was the introduction of a serious harm test.[12]

At the time of the reforms, the United Kingdom's Justice Minister, Shailesh Vara, said that because of the new laws 'anyone expressing views and engaging in public debate can do so in the knowledge that the law offers them stronger protection against unjust and unfair threats of legal action...to ensure a fair balance is struck between the right to freedom of expression and people's ability to protect their reputation.'[13]

At its core, this is exactly what section 1 of the UK act does. It requires 'proof that the statement complained of did in fact cause serious harm, or is likely to cause serious harm, to the claimant's reputation.'[14] The test 'represents a crucial modernisation of defamation law, giving better regard to free speech considerations and the efficient use of court and party resources.'[15] In contrast, it has been argued that Australia's triviality defence 'is inadequate in protecting defendants, primarily through the onerous burden to disprove the existence of any harm, and the defence's failure to give consideration to pre-litigation dispute resolution.'[16] A serious harm test 'would be a welcome reform in Australia, particularly given its potential utility in addressing challenges associated with online communication.'[17]

However, the UK reforms were developed without extensive consideration of online communication. If Australia were to reform its defamation law in a similar fashion, it would be an ideal opportunity to further refine the law for modern times.

B. Sectional Community Perspectives

A serious harm defence would also provide protection for publishers within small communities from inaccurate interpretations of their content. It would require the plaintiff to prove harm. However, it would also reduce the protection afforded to victims of defamation within those same communities.

A potential solution may be found in the coupling of a more nuanced presumption of harm with a requirement for serious harm. Such a system could provide suitable protection for both publishers and the defamed.

4 Kim Gould, 'The statutory triviality defence and the challenge of discouraging trivial defamation claims on Facebook' (2014) 19 *Media and Arts Law Review* 113.

5 Ibid, 119.

6 Ibid.

7 Ibid, 132.

8 Ibid.

9 *Enders v Erbas & Associates Pty Ltd* [2014] NSWCA 70, [108] (Tobias AJA).

10 *Defamation Act 2013* (UK).

11 Phoebe J Galbally, 'A 'serious' response to trivial defamation claims: An examination of s 1(1) of the Defamation Act 2013 (UK) from an Australian perspective' (2015) 20(3) *Media and Arts Law Review* 213, 215-32.

12 *Defamation Act 2013* (UK) s 1.

13 Galbally, above n 20, 222.

14 Ibid, 229.

15 Ibid, 250.

16 Ibid.

17 Ibid.

Gary Chan examines the divide between defamatory potential determined from 'sectional community perspectives' and 'general societal perspectives.'[18] Existing law adopts the latter, which 'protects the defendant in that the statements he publishes would not be regarded as defamatory unless the right thinking members of society generally or ordinary reasonable persons view them as lowering the reputation of the plaintiff.'[19] What it does not do is 'take into consideration at the time of publication the views of all the disparate sub communities or enclaves to whom the publication is communicated.'[20] This is what Chan calls the 'sectional community' perspective.

Chan acknowledges that 'reputation itself is dependent on social relationships,'[21] and that in society, social relationships are diverse, intertwining and not wholly integrated.[22] He examines the English case of *Arab News Network v Al Khazen*, where a court held that modern society is 'much more diverse than in the past…. The reputation of a person within his own racial or religious community may be damaged by a statement which would not be regarded as damaging by society at large.'[23] Whilst the application was to a relatively large segment of society, the court essentially adopted a sectional community perspective to determine the defamatory meaning of the statement.

The decision in *Arab News Network* is an anomaly but reveals that 'the argument for adopting the sectional community perspective... [remains] as, if not more, relevant today in this internet age.'[24]Such an approach is not wholly out of step with Australian law. Chan notes that already 'the general society perspective does not refer to a consensus view that is shared by all members of the society.'[25] Rather, it looks to the views of a representative few in the form of a jury.

In Australia, the sectional view of the community has been adopted during the calculation of damages. In 2014, in *Nicholas Polias v Tobin Ryall*, Justice Rothman went as far to suggest that the communal and confided nature of the online poker community enhanced the damage to Mr. Polias' reputation.

Chan suggests a three tiered approach to determining whether or not a communication is defamatory. Step one is the default approach used by the law today; step two, adopted if the plaintiff cannot satisfy step one, considers a relevant sectional view; and step three is the application of standards by the courts to curtail the previous two in light of policy considerations.[26]

These tests essentially lower the bar for the plaintiff, allowing them to argue that they were defamed in relation to only a small portion of the community, a portion that the majority of society may not relate too. However, the steps above do not protect defendants whose communications are improperly interpreted. To protect them, a fourth step should be introduced. That is, a requirement that the harm suffered must be serious. Such an approach would rebalance the law. It would protect the publisher from claims where publications have ambiguous meaning, but also provide protection in situations where harm has clearly been caused.

Conclusion

Defamation law is an important protector of human dignity and free speech. It is, however, challenged by modern forms of communication and speech culture. This paper argued that online communities are divergent and disrupt traditional communication norms. It proposed a three step process for filtering potential defamation actions. These steps consider the nature of online communication and the remedial qualities inherent in the internet to provide balanced protection for both publishers and the defamed.

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Editor's Note

Aspects of this article may change as the law develops following the decision of McCallum J in Bleyer v Google Inc [2014] NSWSC 897. As Katherine Giles discusses in the following article, her Honour permanently stayed a defamation claim against Google Inc on the basis that the legal costs and court resources required for the claim to proceed were out of all proportion to the plaintiff's interest at stake. To be clear, the defendant did not rely on the defence of triviality. Rather, it argued that the plaintiff's interest in bringing the claim was trivial, given he acknowledged that any judgment in his favour would not be enforceable against the foreign defendant, and the audience to the publication was limited to three people. Nevertheless, there is a clear relationship between the triviality defence, and the Court's power to stay proceedings as an abuse of process based on the disproportion between the likely costs of the trial and the potential benefit available to the plaintiff.

18 Ibid.
19 Ibid, 62.
20 Ibid.
21 Ibid, 59.
22 Ibid, 59.
23 *Arab News Network v Al Khazen* [2001] EQCA Civ 118, [30].
24 Chan, above n 29, 60.
25 Ibid, 56.
26 See eg,., ibid, 77.