

# Tamiz v Google – Graffiti on the Wall

A case note on publication liability in UK defamation law for ISPs hosting defamatory content, by Henry Fraser.

## 1. Introduction

### 1.1 Background

*Tamiz v Google* is a UK libel case, decided in March this year.<sup>1</sup> Payam Tamiz, a Tory Muslim Council candidate in the UK, sued both Google Inc (**Google**) and Google UK Ltd (**Google UK**) in relation to eight comments that he claimed were defamatory of him. The comments were posted on Blogger, a blogging site hosted by Google, in response to a blog entry. Mr Tamiz complained to Google, and after a considerable delay, Google passed the complaint on to the author of the blog, who took down the offending material. Mr Tamiz did not sue the author of the original blog, nor did he seek to take action against the anonymous authors of the comments.

This case is factually similar to the current dispute between Joshua Meggitt and Twitter. Mr Meggitt is suing Twitter for publishing defamatory remarks about him. The popular author and television personality, Marieke Hardy, posted a defamatory tweet and a link to a defamatory blog on her Twitter feed. The *Tamiz* case may provide guidance on the question of whether Twitter is a publisher of its users' defamatory comments.

### 1.2 Issues

The decision actually concerned a procedural question: whether an order permitting originating service on Google Inc in the USA should be set aside. It turned on whether there was a real and substantial tort - a libel - from which the plaintiff had incurred damage within the UK jurisdiction. That issue ultimately came down to whether Google Inc could be regarded as the publisher of the libellous comments, and if so, whether it was entitled to any exemption from liability.

This article focuses on the issue of responsibility for publication, rather than on the defences and exemptions to publication liability, which are specific to the UK and EU's statutory context. The latter are considered only briefly.

## 2. Summary and Key points

### 2.1 Summary

Mr Justice Eady, the judge in this case, held that Google Inc was not the publisher of the libellous comments. His Honour also found that, if Google Inc were properly seen as the publisher of the comments, it would still have been exempt from liability either under section 1 of the UK Defamation Act 1996 or under Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002.

### 2.2 Key points

- (a) In the UK the question of whether an ISP should be considered a publisher of defamatory or otherwise unlawful material will be a matter of fact to be decided on a case by case basis.
- (b) In the UK, an ISP that acquiesces in or authorises the publication of defamatory material is likely to be considered a publisher of that material. This is similar to the Australian position that, in defamation law, a person will be treated as a publisher of a defamatory statement if he or she consented to, or approved of, or adopted, or promoted, or in some way ratified, the continued presence of the statement on his or

her property so that persons other than the plaintiff may continue to read it. A plaintiff must establish an acceptance by the defendant of a responsibility for the continued publication of the statement.

- (c) In the UK, even when an ISP has been notified of defamatory material that it hosts, and has the technical capacity to take it down, it is not necessarily considered to have acquiesced in or authorised the publication.

This article offers some analysis of these key issues and their relation to the Australian legal context in section 4 below.

**in defamation law, a person will be treated as a publisher of a defamatory statement if he or she consented to, or approved of, or adopted, or promoted, or in some way ratified, the continued presence of the statement on his or her property so that persons other than the plaintiff may continue to read it.**

## 3. Is Google a publisher?

### 3.1 Google's arguments

Google put forward a number of arguments as to why it should not be considered a publisher. They included the following:

- Google is merely a service provider providing a publishing platform;
- Google does not control what is posted on blogs that it hosts;
- Google has no way of knowing if comments posted on blogs that it hosts are true, or not, or whether they are subject to a legal defence;
- given the volume of material published, Google cannot reasonably be expected to investigate to determine truth or falsity of material published on its platform, or the legal status of the material; and
- Google has a well-known policy that it does not remove offending material, for the reasons above.

### 3.2 Additional considerations

Mr Justice Eady, acknowledged in his reasons the difficulty of tracking down the authors of comments posted on blogs. His Honour also acknowledged how difficult it would be for Google to exercise editorial control over the contents of the blog, given that there are more than half a trillion words published on the blogging platform altogether, with 250,000 words added every day.

<sup>1</sup> *Tamiz v Google Inc Google UK Ltd* [2012] EWHC 449 (QB)

<sup>2</sup> *Davison v Habeeb* [2011] EWHC 3031 (QB); *Godfrey v Demon Internet Ltd* [2001] QB 201.

### 3.3 Cases and comparison

Mr Justice Eady reviewed a number of relevant English cases. This included two cases in which it was held considered that ISPs could be liable for defamatory material that they hosted, at least where the ISPs had been notified of the offending material and asked to remove it.<sup>2</sup>

His Honour also considered two cases where ISPs were absolved of responsibility for publication. In *Bunt v Tilley* [2007] 1 WLR 1243, a claim was struck out against three separate ISPs on the basis that “... persons who truly fulfil no more than the role of a passive medium for communication cannot be characterised as publishers”. Similarly, in *Metropolitan International Schools Ltd v Design Technica Corp*n [2011] 1 WLR 1743 Google was held not to be responsible for the publication of defamatory “snippets” shown on the results page in response to Google searches. The court held that the search process is automated and the searches are framed by those making the enquiry, without any human input from Google. Consequently the court in *Design Technica* held that the mental element in responsibility for publication at common law was absent.

## His Honour drew an analogy between Google and the owner of a wall that had been ‘festooned, overnight, with defamatory graffiti’

### 3.4 Consideration

Mr Justice Eady noted that the role of ISPs in the law of defamation in the UK is not yet settled. His Honour considered that liability of ISPs as publishers of defamatory material may be fact sensitive. It may depend on:

- the extent to which the relevant ISP entity has knowledge of the words complained of, and of their illegality or potential illegality; and
- the extent to which the ISP has control over publication.

In forming a view as to Google’s degree of knowledge and control, his Honour gave weight to Google’s policy not to remove allegedly defamatory material (discussed in 3.1 above). His Honour also noted the undesirability of imposing legal liability in restraint of free speech as enshrined in Art 10 of the European Convention on Human Rights and Fundamental Freedoms. Finally, his Honour observed that the difficulty in identifying anonymous or pseudonymous bloggers is not of itself a reason to attribute to Google the qualities of a publisher of the defamatory material.

### 3.5 Ratio – Publication Liability

Mr Justice Eady concluded that Google should not be seen as the publisher of the defamatory comments on the blog it hosted. His Honour held that Google could not be seen to have authorised, or acquiesced in, publishing the comments.

His Honour drew an analogy between between Google and the owner of a wall that had been ‘festooned, overnight, with defamatory graffiti’. Though the owner of the wall could delete the graffiti with whitewash, that did not mean the owner must be considered a publisher of the graffiti until the wall had been whitewashed. Likewise, Google’s awareness of the defamatory material and technical capacity to take it down did not, in the circumstances, arrogate responsibility for the publication to Google.

### 3.6 Ratio – Defences and Exceptions

Mr Justice Eady also considered whether statutory defences in the UK *Defamation Act 1996* and the *Electronic Commerce (EC Directive) Regulations 2002* would have applied, had he decided that Google was a publisher of the defamatory material.

The *Defamation Act* defence is broadly similar to the statutory and common law innocent dissemination defences in Australian jurisdictions. Section 1 provides a defence where the defendant:

- was not the author, editor or publisher of the statement complained of;
- took reasonable care in relation to its publication; and
- did not know, and had no reason to believe, that what he or she did caused or contributed to the publication of a defamatory statement.

His Honour held that Google would have been able to avail itself of this defence.

Regulation 19 of the Electronic Commerce (EC Directive) Regulations provides a similar exemption for liability for ‘information society services’ who provide store information, and who:

- do not have knowledge of unlawful activity or information; and
- act expeditiously upon obtaining such knowledge to remove or disable access to the relevant information.

An information society service is “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service”.

His Honour held that Google could have relied on this exemption from liability had it been a publisher of the defamatory material. Mr Tamiz’ notice to Google of the allegedly defamatory material was not sufficiently precise or substantial to give Google knowledge of the unlawful activity. Based on the information in Mr Tamiz’ notice, Google would still have had to consider further the validity or strength of any defences to defamation that might apply to the material in question, in order to determine whether the material in question was unlawful or not.

## 4. Analysis – Publication Liability

On the one hand, the ‘bulletin board’ authorities, and the High Court’s approach to authorisation liability in copyright law, suggest that Australian courts might follow *Tamiz* on similar facts. On the other hand, it is conceivable, based on the court’s approach to contempt by publication, and misleading and deceptive conduct in particular, that an Australian court would reach the opposite conclusion, on the same facts. Before embarking on an analysis of the factors weighing in favour of each position, it is pertinent briefly to set out some of the relevant principles of Australian defamation law.

### 4.1 Relevant principles of Australian defamation law

In Australia, as in the UK, the publisher of defamatory material is a joint tortfeasor in respect of the publication along with the writer, printer and distributor.<sup>3</sup>

Two key ‘bulletin board’ cases dealing with publication liability in circumstances referable to those in *Tamiz* are *Byrne v Deane* (an English case) and *Urbanchich v Drummoyne Municipal Council* (1991).<sup>4</sup>

<sup>3</sup> *Thomson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 581.

<sup>4</sup> *Byrne v Deane Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports 81-127; *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports 81-127.

In *Byrne v Deane* an unknown person stuck an allegedly defamatory piece of paper on the wall of a club. The proprietors of the club, knowing of the paper and its contents, and its likely effect on people seeing it, did not remove it. Green LJ (at 838) articulated the test for publication liability as follows: “[H]aving 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?” In this case, the proper inference was that the proprietors made themselves responsible for the continued presence of the defamatory paper.

*Urbanchich v Drummoynne Municipal Council* concerned defamatory posters put up by an unknown person in council controlled bus shelters. The court held that, in order to attribute liability to the council for publication of defamatory posters, it was necessary to show more than ‘mere knowledge’ and the opportunity to remove on the part of the council. The court held that “the plaintiff must establish that the defendant consented to, or approved of, or adopted, or promoted, or in some way ratified, the continued presence of the statement on his property so that persons other than the plaintiff may continue to read it – in other words, the plaintiff must establish in one way or another an acceptance by the defendant of a responsibility for the continued publication of the statement”. Such an acceptance may in some circumstances be established by inference: and what will amount to acceptance is to be decided on a case by case basis.

#### 4.2 Factors indicating that Australian courts would follow *Tamiz*

Mr Justice Eady’s ratio in *Tamiz* is broadly consistent with the principles in *Byrne* and *Urbanchich*. His Honour, in finding that Google did not in the circumstances ‘authorise or acquiesce’ in the publication of the defamatory material, effectively concluded that Google did not consent to, approve of, adopt, promote or ratify the continued presence of the defamatory material on the blog. His Honour was at pains to distinguish between Google’s knowledge of the defamatory material, and technical capacity to take it down, and knowledge and control of the kind that would indicate actual acceptance of responsibility for its continued publication.

Mr Justice Eady’s analogy of the wall covered in graffiti might appear similar to the circumstances in *Byrne*, and thus to require an inference that the owners of the wall (Google) are responsible for the continued presence of the defamatory graffiti. However, there is a key distinction between the defamatory paper in *Byrne* and the wall example (and also the circumstances in *Tamiz* itself). In *Byrne* the defendants had direct control of their premises, and could identify, consider and take down material easily. The defendants had direct knowledge and absolute control. By contrast, deleting defamatory graffiti on a wall would require the application of whitewash. The owner of the wall would have knowledge only when they saw the graffiti, and less control over the defamatory as the defendants in *Byrne* because of the difficulty and expense of removing the material. As for the real facts of *Tamiz*, it would be more onerous still to identify, ascertain the legal status of, and take down defamatory material on a blog site containing billions of words. The extent of control and knowledge is much less than in *Byrne*.

Another reason why Australian courts might follow *Tamiz* is that the decision appears to accord with the Australian High Court’s attitude to ISP liability in copyright law. The High Court’s decision in *Roadshow Films Pty Ltd v iiNet Ltd* bespeaks an unwillingness to impose onerous obligations on ISPs in relation to user generated material over which ISPs do not exercise day to day control. The

court held that iiNet had not ‘authorised’ the copyright infringing acts of its users.<sup>5</sup> Even though iiNet had the capacity to terminate infringing users’ accounts, and had received complaints about infringing material, the court held that it had not failed to take ‘reasonable steps’ to prevent the infringement. It would not have been reasonable for iiNet to go to the difficulty and expense of investigating insufficiently detailed complaints of copyright infringement.

Applying similar reasoning to the Meggit and Twitter dispute in Australia: the difficulty of monitoring and determining the legal status of trillions of words worth of material, and the lack of day to day control of material, would bear against an inference that Twitter accepted responsibility for the publication of defamatory statements on its platform.

These considerations suggest that an Australian court, like Mr Justice Eady, might not infer that Google’s failure to remove the defamatory material amounted to an acceptance of responsibility for the continued publication of it.

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Authorisation of copyright infringement belongs, of course, to a different area of law to defamation. Ultimately, though, both areas of law are faced with similar questions about secondary liability of ISPs for the communication of unlawful material by their users.

#### 4.3 Factors indicating Australian courts would not follow *Tamiz*

There are, however, cogent reasons why Australian courts might take the opposite approach to the question of ISP responsibility for publication of hosted material. A number of cases indicate that courts may attribute responsibility for publication to entities that might at first glance appear to be neutral conduits rather than active publishers.

In *Dow Jones v Gutnick*, the High Court of Australia held that publication occurs when and where the reader or viewer comprehends the contents of the publication.<sup>6</sup> Arguably, that principle opens the door conceptually, to attributing responsibility for publication, to a party whose role in making the contents of the publication comprehensible is at first glance passive.

In *ACCC v Allergy Pathway Pty Ltd and Anor*, Finkelstein J of the Federal Court held that Allergy Pathway’s failure to remove misleading third party posts on its Facebook page meant that it took responsibility for the continued publication of the misleading statements.<sup>7</sup> Allergy Pathways was held to be in contempt of court for breach of a court order not to publish such statements.

The circumstances in *Tamiz*, and in the dispute between Joshua Meggit and Twitter are arguably distinguishable from *Allergy Pathways* because Allergy Pathways was dealing with only a few comments rather than billions of words; and because Allergy Pathways had day to day control over its Facebook page.

5 *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16.

6 *Dow Jones & Company Inc. v Gutnick*, [2002] HCA 56.

7 *ACCC v Allergy Pathway Pty Ltd and Anor* (No 2) [2011] FCA 74

8 *Trkulja v Yahoo! Inc LLC and Yahoo!7 Pty Ltd* [2012] VSC 88.

More directly applicable are cases where responsibility for publication is attributed to entities providing information in response to searches. In *Trkulja v Yahoo!*, Yahoo admitted that it was responsible as a publisher of defamatory material appearing on a web page appearing in the results of a search on its search engine.<sup>9</sup> Since Yahoo admitted publication, the issue did not arise for consideration by the court.

## Tamiz provides a useful and persuasive, though not binding, precedent for Australian courts

A similar issue arose, however, in the context of a misleading and deceptive conduct case. In *ACCC v Google*, the Full Federal Court held that Google was not a mere conduit for misleading statements appearing in sponsored links in Google search results.<sup>9</sup> The court, considering Google's conduct as a whole, held that Google was in fact responsible for the statements. That was because the misleading statements and links appeared in results to a search. The results to a search, the court said, are determined solely by Google, by way of response to the searcher's query, through the algorithms that Google chooses to apply to searches.

The ratio in *ACCC v Google* is basically the opposite of the ratio in *Metropolitan International Schools Ltd v Designtecnica Corpn*: one of the cases that Mr Justice Eady followed in *Tamiz* (discussed in section 3.3 above). In *Designtecnica*, it was held that the Google search process is automated and searches are framed by those making the enquiry, without any human input from Google.

*Trkulja* and *ACCC v Google*, and even *Allergy Pathways*, might suggest that Australian courts could perceive Google's role in hosting material as less neutral than did Mr Justice Eady. If Google is seen,

in the context of misleading and deceptive conduct, as actively responding to searches for information and presenting results, then arguably it is responsible for any defamatory material that appears in response to a search.<sup>10</sup>

## 5. Conclusion

It is not the intention of this article to predict how Australian courts will deal with the liability of ISPs for publication of defamatory (or indeed otherwise unlawful) material on their platforms. It merely explores some of the issues raised by the case.

*Tamiz* provides a useful and persuasive, though not binding, precedent for Australian courts. Regardless of whether Australian courts follow the UK judgment, they are likely to be guided by Mr Justice Eady's reasoning that the liability of ISPs as publishers of defamatory material may be fact sensitive. Since the law in this area is in the early stages of its evolution, bright line rules may not be helpful. Whether an ISP may properly be inferred to have taken responsibility for the publication of material that is available through its service will need to be determined on the facts of each case.

However, *Tamiz* does provide provides guidance by identifying key elements underlying such an inference: the extent to which the relevant ISP entity has knowledge of the words complained of, and of their illegality or potential illegality; the extent to which the ISP has control over publication of the words; and the various aspects of an ISP's service and policies that may bear on the knowledge and control attributable to the ISP.

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<sup>9</sup> *Australian Competition and Consumer Commission v Google Inc* [2012] FCAFC 49.

<sup>10</sup> *Trkulja v Yahoo!Inc LLC and Yahoo!7 Pty Ltd* [2012] VSC 88.



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