
GOOD NAME ON THE LINE ONLINE

THE TORT OF DEFAMATION ON THE INTERNET

A Final Year Project



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“Whenever a new idea is recognized, people attempt to fit it into their area of expertise. Business people try to make a profit with it. Salespeople try to sell it. Artists try to express themselves with it. Activists try to sway people with it. Politicians try to tax it. Bureaucrats try to regulate it. And lawyers? Lawyers try to apply laws to it, knowing that only when it is legalized, criminalized, or somehow made a vehicle for liability, can they make a buck off it - law students, of course, write essays about it”

-M. Anne Vespry¹

¹ “Internet Service Providers and Liability for On-line Libel” (available at http://www.law-nerd.org/business.html#N_1_)

~ **AUTHOR'S DECLARATION** ~

*“I certify that this project is entirely my own work
and that it has not been submitted for any other academic award
or part thereof, at this or any other educational institution.”*

Signature: _____

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- European Community Treaty
- Treaty on European Union
- Vienna Convention on the Law of Treaties, 1969

~ I N T R O D U C T I O N ~

“All provisions of existing defamation law shall apply to all electronic communications within the State, including the retention of information electronically.”²

To date, this is the only reference in Irish legislation to the law relating to defamation in cyberspace. Such a situation is unacceptable given that the Internet has been becoming more and more popular in recent times, with the number of potentially defamatory comments being published daily increasing exponentially. The average Internet publisher, by way of email, websites, bulletin boards or newsgroups,³ is an ordinary member of the public who will generally have no knowledge of the law of defamation and will therefore generally take much less care in ensuring their comments do not harm the reputation of others. The number of such publishers (and readers) is now millions, residing in almost⁴ every country in the world.

Given the absence on specific legislation on Internet defamation and the growing potential for its occurrence, the object of this project is to attempt to apply traditional defamation principles in answering the questions arising from this new medium.

Traditionally, most defamation actions would arise from a publication in print media⁵, in which case the publisher would be easily identifiable. In Internet cases, however, there may not necessarily be an easily identifiable, deep-pocketed defendant available and the plaintiff’s choice of defendant is not as clear-cut as with print media or radio and television. Also, the question of whether Internet communications in their various forms will be treated as libel or slander has yet to be definitively ruled on in any court and is still a matter for discussion and speculation. These issues are dealt with in the “General Issues” section.

However, there are two key areas of the law of particular relevance in Internet defamation cases. The first of these is the potential liability of Internet Service Providers

² s23 of the Electronic Commerce Act 2000.

³ See the Glossary of Internet Terms below for explanations of technical terms used throughout the text.

⁴ The Internet has been banned in Afghanistan and North Korea in recent times.

⁵ *Cassidy v. Daily Mirror Newspaper Ltd* [1929] All ER 117, *Reynolds v. Times Newspapers Ltd.* [1998] 3 All ER 961.

(‘ISP’s), who are easy to identify and will generally have greater resources than the original author of the defamatory statement and therefore be a much more attractive target for claims. In other jurisdictions, the courts, in the absence of applicable legislation, have been forced to use analogies with other forms of communication to formulate rules for Internet defamation. Even where such legislation does exist, however, it has been argued that the effects have been far from just and have caused further problems. Such a case has yet to appear in an Irish court, though this is merely a matter of time. When it does occur, the courts will have to decide whether or not to follow precedents in other jurisdictions, particularly the US and the England.

The second key area is that of choice of jurisdiction. Given the unprecedented international nature of the Internet, it is possible (for example) for a French citizen living in Switzerland to defame an Irish national by posting defamatory statements on a US-located server. In such a situation, the plaintiff may have a choice of jurisdictions in which to sue. No Irish court has yet had to decide how to apply the traditional rules of choice of forum in an Internet context. Such an application is object of the ‘Jurisdiction’ section below.

~ GENERAL ISSUES ~

WHICH DEFENDANT?

The obvious party for a defamed plaintiff to pursue for damages is the original author of the defamatory material. This is exactly what happened in the Australian case of *Rindos v. Hardwick*,⁶ where the plaintiff was “well known internationally in academic, anthropological and archaeological circles” and was “a person of high standing in those circles.” He was awarded AUS\$40,000 for defamatory comments posted on the sci.anthropology newsgroup by the defendant. The only Irish Internet libel case to date was also taken against the original author, who had listed a competitor’s name with a website advertising sexual services.⁷

However, suing the original author of the defamatory statement may not be the preferred course of action for most plaintiffs. This is generally the result of one of three factors:

- (i) The original author may not be identifiable.
- (ii) The original author may reside in another jurisdiction where the defamation laws are different, making it easier to sue a local ISP.
- (iii) The author may not possess sufficient funds to satisfy any award of damages made against him.⁸

Identifying the original author has been problematic in a number of high-profile US cases where the plaintiff has sought damages from the ISP instead.⁹ This is largely due to the practice of Internet users’ use of pseudonyms (known as ‘handles’) when posting opinions in newsgroups or on bulletin boards. There is strong feeling in favour of such anonymous

⁶ No. 1994 of 1993, Western Australia Supreme Court, 31 March 1994, unreported.

⁷ *Irish Independent*, 28 March, 2001.

⁸ Kelleher & Murray, *Information Technology Law in Ireland* (Dublin: Butterworths, 1997) at p. 397 and Wick, D., “Universities, Defamation and the Internet” [1999] 62 MLR 58 at pp. 58 -59

⁹ *Stratton Oakmont v. Prodigy*, infra, *Lunney v. Prodigy*, infra, *Zeran v. America Online*, infra.

activity on grounds of privacy.¹⁰ Most Internet-based companies request information about their users such as real names, addresses and telephone numbers.¹¹ In practice, however, there is no way for the computer to ascertain whether or not the user is truthful and thus the only way of tracking a user may be to attempt to discover which computer he used to access the Internet.¹² Even then there may be multiple users of any one computer (e.g. Internet cafés, libraries and even, per Crombie,¹³ many offices where “a person will be logged onto a computer for the majority of the day without necessarily being near the computer for any of that time”) making the author virtually untraceable. In fact the issue of gathering information about Internet users arose in the US case of *Lunney v. Prodigy*,¹⁴ where the plaintiff’s argument that Prodigy was negligent in allowing an anonymous user to open multiple email accounts was rejected. The reasons given were that to allow the argument to succeed “would require an ISP to perform investigations on millions of potential subscribers.” In the court’s eyes, “There is no justification for such a limitless field of liability.”

Even where a user’s details are known by the service provider, they may be unwilling to divulge such information, though it is argued¹⁵ that it may be in the ISP’s best interests to do so, since a refusal may lead to a situation where the original author is unknown and the plaintiff will have no other course of action than to sue the ISP itself. A practice has emerged in the US whereby ISPs have been ordered to reveal the real names of their users,¹⁶ where this is possible, though there is no precedent in this jurisdiction.

¹⁰ Recommendation 3/97 *Anonymity on the Internet*, Adopted by the European Working Party on Data Protection on December 3rd 1997. Also, see generally Murray, K., “Electronic Anonymity”, (1999) 4 Bar Rev 311

¹¹ Examples of this are at <http://www.yahoo.com> and <http://www.hotmail.com>.

¹² Even this may be more problematic than it may seem. In *Kennedy v. Ireland* [1987] IR 587 it was held that a person’s right to privacy includes a right not to have telephone calls monitored. In reality, most Irish people connecting to the Internet from their homes do so via a telephone line and it could be argued that monitoring Internet activity is the same as monitoring telephone calls, though this has yet to come before the courts.

¹³ Crombie, K. F., “Scot’s Law Defamation on the Internet” [1999] 1 SLSJ (available at <http://www.scottishlaw.org.uk/journal/oct2000/def.pdf>) at p. 44.

¹⁴ Court of Appeals decision, *infra*.

¹⁵ Crombie, *supra*. at p. 43.

¹⁶ *Biomatrix Inc. et al. v. Costanzo et al.*, BER-L-670-00 (NJ Super. July 2000), where Yahoo! Inc was ordered by Boggia J to reveal the identities of the defendants. *Dendrite v. Does Nos. 1 through 4*, MRS-C-129-00 (N.J. Super. November 2000), where McKenzie J posted notice of the action on the bulletin board in question to allow the defendants challenge the action. Two of the four availed of the opportunity.

The result is that, in many cases, it is preferable for the injured party to pursue their claim against the ISP, rather than the original author of the defamatory material. The potential liability of ISPs is considered below.

LIBEL OR SLANDER?

Whether messages posted to newsgroups, bulletin boards or websites, or sent by email should be considered libel or slander¹⁷ has been discussed at some length by some commentators, with virtually all, via various arguments, concluding that most forms of Internet defamation should be treated as libel.¹⁸

For websites, bulletin board postings and newsgroup messages, it is most likely that Irish courts will apply libel laws, as has been done in other jurisdictions. In *Godfrey v. Demon Internet*,¹⁹ Morland J, in the Queen's Bench Division in England, considered postings on a newsgroup to be libel. In fact, he uses the term "libel" throughout his judgment without discussing the distinction at all. Given that many commentators have considered this distinction, it is unlikely that the judge considered the point sufficiently unimportant to deal with in his judgement. Perhaps a better explanation would be to suggest that it is obvious that publication in newsgroups is publication in a permanent form. In none of the major US cases was the distinction between libel and slander at issue, with most judges preferring to use the generic term "defamation". In the Australian case of *Rindos v. Hardwick*,²⁰ although he did not specifically address the question, Ipp J seemed to consider bulletin board postings as

¹⁷ Libel is usually in a permanent form and is always actionable *per se* i.e. damage is presumed once the material is shown to be defamatory, whereas slander is generally in a transient form as is rarely actionable *per se* i.e. actual damage to reputation must be proven before any damages are awarded. For a general discussion of the distinction between them see *Gatley on Libel and Slander*, 9th ed. (London: Sweet and Maxwell, 1998) at p. 68 *et. seq.* or Quill, E., *Torts in Ireland* (Dublin: Gill & MacMillan, 1999) pp 287-289.

¹⁸ Akdeniz & Rogers, "Defamation on the Internet" in Akdeniz, Walker & Hall (eds), *The Internet, Law and Society* (London: Longman, 2000), who use the analogy with a film, which was held to be publication in a permanent form at common law in England in *Youssouppoff v. Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, Kelleher & Murray, *Information Technology Law in Ireland*, (Dublin: Butterworths, 1997) at p 396, Arnold-Moore, T., "Legal pitfalls in cyberspace" [1994] 5 J LIS 165.

¹⁹ *Infra.*

²⁰ *Supra.*

being publication in a permanent form, noting that “Items of interest on the bulletin board can be printed on hard copy” and that the messages are generally stored for a time before deletion, depending on storage capacity.²¹

The designation of email, however, is rather more complex. In *Lunney v. Prodigy*, email was described by Rosenblatt J as an “evolutionary hybrid of traditional telephone line communications and regular postal service mail.” Although ordinary paper-based letters are unquestionably libel, the question could be asked if the addition of the telephone element would make email communications different from traditional letters. Arnold-Moore considers the argument that permanent forms of emails may not be retained, as they can easily be instantly deleted. However, he argues that a permanent form exists at the time of communication and therefore, should be considered under the laws of libel. He also notes that even ordinary letters may have no more than a transitory existence, since these too can be destroyed after reading.

There is little commentary available on more temporary forms of Internet communication, such as chat rooms, Internet phone or video teleconferencing. Akdeniz & Rogers believe that such communications would be likely to be considered to be slanderous, rather than libellous “where the data is not stored permanently”. However in Ireland, it has been suggested²² that all Internet communications are at least as permanent as radio or television broadcasts, which, under s15 of the Defamation Act 1961, are treated as permanent forms of publication. Thus, Irish courts are likely to consider Internet defamation cases using the laws of libel.

²¹ It must be noted that this was not a major issue in this case since it related to allegations of professional incompetence, which is one of the few cases where a slander would be actionable *per se*. In Ireland, this would fall under s19 of the Defamation Act 1961.

²² Kelleher & Murray, *supra*.

~ LIABILITY OF ~
~ INTERNET SERVICE PROVIDERS ~

THE DEFENCE OF INNOCENT DISSEMINATION AT COMMON LAW

At common law, each person who communicates a defamatory comment to a person other than the plaintiff is *prima facie* liable for its publication. This is the case whether that person is the original author of the statement or whether they are merely involved in its distribution, in which case they are considered to have republished the statement and can attract liability as a result.²³

A defence is, however, available to a republisher who can show that he played a merely passive role in the distribution of the libel. This defence is generally applicable to bookshops, newsagents and libraries, which have no role in creating the product that they sell.²⁴

The criteria a defendant must meet in order to avail of this defence were set out in *Emmens v. Pottle*²⁵. These rules have since been approved in Ireland and were summarised by Holmes LJ:

“there is authority for holding that newsagents thus carrying on their business are not liable for a libel contained in a newspaper sold by them in the ordinary course of trade, if they did not know of the libel; if their ignorance was not due to negligence on their part; and if they had no ground for supposing that the newspaper was likely to contain libellous matter.”²⁶

The status of Internet Service Providers (ISPs) here is debatable, and has been discussed at length in the US courts, with varying conclusions, as well as arising in England.

²³ *Fitzgibbon v. Eason & Son* (1910) 45 ILTR 91 per Madden J at 91

²⁴ *Thompson v. Lambert* [1938] SCR 253 at 267. Duff CJ rejected an analogy comparing the delivery of newspapers to a seller and the delivery of an article to an editor. “The editor exercises an independent judgement determined by the character of the article . . . A consignment of newspapers is dealt with as a commercial commodity.”

²⁵ (1885) 16 QBD 354

²⁶ *Cooney v. Wilson and Henderson* [1913] 2 IR 402 at 408

US POSITION

The first United States action for damages from an ISP arose in *Cubby v. CompuServe*,²⁷ where the plaintiff sought damages from the ISP for defamatory material stored on its servers. The comments were contained in a publication named ‘Rumorville’, which was available on CompuServe’s Journalism forum. CompuServe were not the authors of Rumorville, nor was there any contractual relationship between them and the authors. Leisure J held:

“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.”²⁸

CompuServe could therefore not attract liability beyond that of a library, bookstore, newsstand, or other distributor and so the question was whether it knew or ought to have known of the libel, which it did not, thereby escaping liability.

In *Stratton Oakmont v. Prodigy*,²⁹ anonymous postings were made on a bulletin board owned by the defendant. Unlike in *Cubby*, where the defendant had argued that it had no control over the impugned article, Prodigy had held itself out as controlling its bulletin board. It exercised this control by employing software screening (to filter profane language) and issuing content guidelines which users were required to adhere to (e.g. refrain from posting ‘insulting’ notes and ‘notes that harass other members or are deemed to be in bad taste or grossly repugnant to community standards, or are deemed harmful to maintaining a harmonious online community’). Board Leaders were appointed to enforce these guidelines and were provided with a tool to delete messages, sending a note to the poster explaining its removal (e.g. that it was an insulting or off-topic message). This led the court to the

²⁷ 776 F.Supp. 135 (SDNY 1991)

²⁸ *Ibid.* at 140

²⁹ 23 Med. L.R. 1794 (NY Supreme Court 24 May 1995)

conclusion that Prodigy had been making decisions as to the content, which, under an earlier US case,³⁰ constituted editorial control, thus making Prodigy a publisher.

The court made it quite clear that they were not disagreeing with the *Cubby* case, accepting that ISPs would generally attract equivalent liability to bookstores or libraries under the common law rules of innocent dissemination. However, Prodigy's control over the contents of their bulletin boards resulted in differing circumstances in the present case.

Edwards argues that this decision effectively encourages a 'head in sand' approach³¹ amongst ISPs, who should make no attempt to monitor their content, in case they are classed as editors, thus losing their defence. This is particularly relevant in the US, where negligence is not an issue. In that jurisdiction, the defence is available 'where he has no knowledge of the defamatory character of the publication and no extraneous facts are known which would serve to have put him on guard.'³² In Ireland and England, however, the question remains as to whether inaction would be considered by the courts to be negligent conduct on the part of the ISPs. There is authority for the proposition that the mere fact that the defendant hasn't examined the contents of the material he distributed is not in itself evidence of negligence.³³ Indeed, in *Trimble v. Central News*,³⁴ the court expressed the view that it would be impossible, from a business point of view, for a seller of periodicals to go through each one in order to ensure that they contained no defamatory matter. Given the much higher volume of material being distributed by ISPs, it is unlikely that the courts will hold them to be negligent for not monitoring their content.

The court in *Stratton Oakmont* realised the possibility of a policy of inactivity being adopted by ISPs but expressed a belief that market conditions would lead to ISPs deciding to

³⁰ *Miami Publishing Co. v. Tornillo* 418 US 241 (USSC 1974)

³¹ Edwards, L. 'Defamation and the Internet: Name Calling in Cyberspace' in Edwards & Waelde (eds) *Law and the Internet: Regulating Cyberspace* (Hart Publishing, Oxford, 1997) (available at http://www.law.ed.ac.uk/it&law/c10_main.htm)

³² 53 C.J.S. Libel and Slander §55

³³ *Weldon v. Times Book Co.* (1911) TLR 143 and *Bottomley v. Woolworth* (1932) 48 TLR 521

³⁴ [1934] AD 43

accept this increased exposure to liability, since adopting such a policy ‘incorrectly presumes that the market will refuse to compensate a network for its increased control and the resulting increased exposure.’”

However, as Potts & Harris³⁵ point out, ‘Internet users generally prefer to communicate in an uncensored environment. The most popular bulletin boards tend to be those in which subscribers may speak freely’, a view which directly contradicts that of the court in *Stratton Oakmont*. The court failed to realise that the Internet is very different from more traditional communication markets and media (as many dotcom businesses have discovered to their detriment). Most revenue from such services is earned through advertising and even the time lag involved for monitoring to take place will drive away users. Subscription-based services are also unlikely to bear fruit online, given the combination of the reluctance of Internet users to part with money online and the myriad of free, efficient alternatives in existence. This leads to the conclusion that, under the rule in *Stratton Oakmont*, the preferable approach for ISPs, from both a legal-liability and market-compensation approach, is for them to adopt a policy of not monitoring the content of their servers. The reasoning of the court can, in this light, only be described as flawed.

This decision was criticised in the case of *Lunney v. Prodigy Services Co.*³⁶, where Bracken JP, giving the judgement of the Appellate Division, was of the opinion that ‘The rule of law . . . discourages the very conduct which the plaintiff . . . argued should be encouraged.’ He also rejected the argument that computer software screening could constitute editorial control in this context, since such control requires the ‘use of judgement’, which software cannot provide. This is in sharp contrast with the decision in *Stratton Oakmont*, where the software that monitored board content for profane language was considered to be doing exactly the opposite. The court rejected the argument that since Prodigy reserved the right to

³⁵ Potts & Harris, ‘Defamation on the Internet’, Canadian Institute Conference May 14th 1996 (available at <http://www.cyberlibel.com/defnet.html>)

³⁶ 683 NYS 2d 557 (1998) (Appellate Division); 701 NYS 2d 684 (1999) (Court of Appeals).

edit messages on its bulletin board, it exercised editorial control. Even if such control was executed by Prodigy on a few messages, this would not change its passive treatment of “the millions of other messages in whose transmission it did not participate.” The Court of Appeal also believed that no editing of messages would create an obligation to screen the other messages for potential defamation.

It is clear that the use of common law rules in Internet libel cases was causing problems in the US, as highlighted by the court in *Lunney*. In response to this, Congress made provision to absolve ISPs from liability arising from statements of which they were not the authors in the Communications Decency Act 1996. This immunity was contained in §230 of the Act, which provided (in part) that

“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

This Act was enacted during the period of limbo existing after *Stratton Oakmont*, when it appeared that inertia was the best defence for an American ISP. Although passed before the *Lunney* case, it could not be relied on as the defamatory statements in question had been made before its enactment.

Although the 1996 Act served to bring certainty to the law relating to ISPs, later cases have shown that total immunity may not necessarily be a desirable consequence. In *Zeran v. America Online Inc.*,³⁷ the defendant had been made aware of the defamatory postings on its bulletin board, yet refused to remove them. Such a situation has also arisen in England³⁸, as we shall see. Wilkinson CJ in *Zeran* held that the defendant could not be held liable for the defamatory postings since Congress had created a “federal immunity,”³⁹ thereby rendering the defendants free from any liability, as they were not the original authors.

³⁷ 129 F 3d 327 (4th Cir. 1997)

³⁸ *Godfrey v. Demon Internet Ltd, infra.*

³⁹ 129 F 3d 327 (4th Cir. 1997) at 330

In *Blumenthal v. Drudge and America Online Inc.*,⁴⁰ the defamatory statement in question was contained in the ‘Drudge Report’, an online gossip periodical. Matt Drudge, the author of the Report, had entered into a contractual agreement with America Online (AOL) whereby he would make the Drudge Report available to all users of AOL’s Internet service in return for a ‘royalty payment’ of \$3,000 per month, at a time when Drudge had no other income. Under the agreement, AOL also reserved the right to ‘remove content that AOL reasonably determine[s] to violate AOL’ s then standard terms of service.’ This was different to the editorial rights reserved by the defendant in *Stratton Oakmont*, since in this case the Report was submitted via email to AOL, who then posted it on the servers themselves. Because of this reservation of control and the fact that AOL actively promoted the Report as a new source of instant gossip on their service, Friedman J held that AOL should, under common law rules, be considered a publisher rather than a distributor, and therefore be held liable for the defamatory statements made in the Report. However, due to the immunity noted by Wilkinson CJ in *Zeran*, AOL was effectively being ‘permitted to tout someone as a gossip columnist or rumor monger who will make such rumors and gossip ‘instantly accessible’ to AOL subscribers, and then claim immunity when that person, as might be anticipated, defames another.’⁴¹

This is clearly an unacceptable situation with AOL’s role being very similar to that of a newspaper editor, who receives articles from journalists and allows their publishing in the newspaper after reviewing them. In fact, such a situation was foreseen in the *Zeran* case, where Wilkinson CJ recognised that:

‘[L]awsuits seeking to hold a service provider liable for its exercise of a publisher’ s traditional editorial functions - such as deciding whether to publish, withdraw, postpone or alter content - are barred.’⁴²

⁴⁰ 992 F Supp 44 (US District Ct, DC 1998)

⁴¹ *Ibid* at 51.

⁴² 129 F 3d 327 (4th Cir. 1997) at 330

It can therefore be concluded that the US legislation has gone too far in the protection of ISPs to the extent that it appears that they can make available *any* content so long as they are not the original authors, even where the original author is paid by the ISP for providing that content.

ENGLISH POSITION

The English legislation on this matter was enacted before it became an issue in its courts. The relevant statute is the Defamation Act 1996, whose application was considered in *Godfrey v. Demon Internet Ltd*⁴³. The Act allows a defence to a defamation action if:

- (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.”⁴⁴

In this case, however, Demon failed the test in s1(c), since they had been notified of the libel and therefore the common law rules of innocent dissemination (which apply in Ireland) were applied.

After applying these rules, Morland J (in the Queen’s Bench Division) concluded that, since the defendant knew of the defamatory material held on its servers, they could be held liable for publication of the libel. One argument raised by the defence was that Demon was “merely the owner of an electronic device through which postings were transmitted.” They cited the US case of *Anderson v. New York Telephone Co*,⁴⁵ which had been relied on in the *Lunney* case as an analogy with email transmission. In that case, the owner of leased telephone equipment that had been used to store libellous allegations was held to merely have had a “passive role” by Gabrielli J in the New York Court of Appeals. It was argued that Demon’s hosting of the soc.culture.thai newsgroup on its servers was analogous to the New

⁴³ [1999] 4 All ER 342

⁴⁴ s1, Defamation Act 1996

⁴⁵ 320 NE 2d 647 (NYCA 1974)

York's company's ownership of the machines storing the libel in that case. This argument was rejected by Morland J, who held that since Demon "chose to receive the 'soc.culture.thai' postings to store them, to make them available to accessors and to obliterate them"⁴⁶, they did not play a merely passive role in the publication of the libel. The use of the word "chose" by the judge is misleading. Although Demon did decide to host the messages, once this decision was made, they would have had no more control over the content of the messages than the phone company leasing the recording equipment in *Anderson*. This fact had already been recognised by Leisure J in the *Cubby v. CompuServe*⁴⁷ case. Thus the key difference between the cases seems to have been Demon's ability to delete messages from its server. Once Demon became aware of the defamatory posting, under English common law, they made themselves liable for the continued presence of the material on their server, since they were in a position to remove it.⁴⁸

ANALYSIS AND POSSIBLE IRISH SOLUTIONS

At common law, as we have seen, a distributor who 'knew that his act involved or contributed to publication defamatory of the plaintiff'⁴⁹ will be held liable for publication. The defence of innocent dissemination is only available to those who 'having taken reasonable care . . . had no reason to suspect that his act had that effect.'⁵⁰ This rule has been removed in the US for Internet Service Providers under the Communications Decency Act 1996, where the ISP cannot be held liable unless it was the original author, although the English Defamation Act 1996 effectively preserves it. The question is whether it is desirable for the Irish legislature to preserve or remove such a rule. The Electronic Commerce Act 2000

⁴⁶ *Ibid.* at 348

⁴⁷ *Supra.*

⁴⁸ *Byrne v. Deane* [1937] 2 All ER 204

⁴⁹ Lord Chancellor's Department *Reforming Defamation Law and Procedure: Consultation on Draft Bill* (July 1995)

⁵⁰ *Ibid.*

expressly preserves “existing provisions of defamation law,”⁵¹ though it would appear that more specific provisions are required.

The UK Act largely follows the existing common law, while adding some extra defences for those “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”⁵² and those who are “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”⁵³ who cannot be held to be an author, editor or publisher. However, such parties can only use this defence under section 1(1) of the Act (the relevant parts of which are quoted above), where they must also show that they took reasonable care and that they were unaware or had no reason to believe that they had contributed to the publication.

This position is, in effect, notice-based liability, i.e. that a service provider can be held liable once they are made aware of their contribution to the publication, even when they are not the author, editor or publisher of the statement, as occurred in *Godfrey*.

Such a position was emphatically rejected in the US courts, when the plaintiff in *Zeran v. America Online*⁵⁴ argued that the defendant should be found liable for a message it left on its servers after receiving notice of its defamatory nature.⁵⁵ Wilkinson CJ rejected this argument, commenting that the plaintiff “fails . . . to understand the practical implications of notice liability in the interactive computer service context.” He argues that an ISP would be open to potential liability every time they received notice about any message from any person. This would require them to undertake a rapid investigation into the background of the

⁵¹ s23 of the Electronic Commerce Act 2000

⁵² s1(3)(c) Defamation Act 1996

⁵³ s1(3)(e) Defamation Act 1996

⁵⁴ *Supra*.

⁵⁵ These facts are almost identical to those of *Godfrey v. Demon Internet, supra*.

message, followed by a legal judgement as to the message's defamatory content and an editorial decision to delete the message or not. He recognises that although such a situation might be manageable for a "traditional print publisher", it would cause an "impossible burden" to be placed on the ISP, given the sheer number of messages it would receive daily.⁵⁶ Notice-based liability would also, he argues, have a "chilling effect on free speech"⁵⁷ since it would be tempting for the ISP to attempt to avoid all liability by deleting all postings about which they receive complaints. In addition, such a system would be open to abuse by users who would then have a no-cost method of creating future lawsuits, merely by alleging that certain messages are defamatory. Any attempt to compel the ISP to monitor all the material they transmit:

"would mean only limited services being offered to Internet users and would greatly reduce the availability and variety of content."⁵⁸

Imposing a higher standard of care on this side of the Atlantic could also lead to local ISPs being at a competitive disadvantage when compared to their US counterparts.⁵⁹

A balance must be struck here between, on one hand, the huge burden on ISPs and, on the other hand, the fact that the plaintiff may find himself without any action if the original author cannot be identified. Certainly, any company with as much editorial control as a newspaper (as in the *Blumenthal* case) should be liable for the publication of the libel.

Perhaps the best situation would be some level of self-regulation amongst ISPs, as has already happened in Canada,⁶⁰ where the CAIP (Canadian Association of Internet Providers) have introduced a code of conduct which their members are requested to adhere to, on a

⁵⁶ He also cites *Auivil v. CBS 60 Minutes* 800 F.Supp. 928 (USSC 1996), which considered such a burden to be unfeasible even to a local television station, which should not be required to "monitor incoming transmissions and exercise on-the-spot discretionary calls". Such a service provider would have much fewer such decisions to make than those involved in the Internet.

⁵⁷ A concept which is, admittedly, more important in US libel law than that of Ireland or England.

⁵⁸ David Furniss, Director of Scottish Telecom's Internet Services, parent company of Demon Internet Services, quoted in Ingram, M, "UK Internet Libel case could set dangerous precedent" (available at <http://www.wsws.org/articles/1999/apr1999/int-a16.shtml>). Furniss also provides the most extreme analysis of the *Godfrey* case, comparing the newsgroup to a public forum such as a restaurant.

⁵⁹ Crombie, *supra*.

⁶⁰ See <http://www.caip.ca/issues/selfreg/code-of-conduct/code.htm>

voluntary basis, including procedures for investigating complaints relating to the contents of their servers. This procedure adopts a complaints-driven process but, rather than accepting liability for defamatory material as soon as they are notified of its nature, they undertake to make a ‘reasonable effort to investigate legitimate complaints’⁶¹ and take appropriate action. Such a solution could be argued to remove the possibility of ill-advised and hasty censorship decisions being made from a fear of lawsuits while allowing the defamed party a remedy without having to turn to the courts.

Certainly some action should be taken in this jurisdiction to avoid the problems which others have encountered, whether by means of legislation or otherwise. It may be advisable for the principal Irish ISPs⁶² to collaborate in formulating a code of conduct similar to that of their Canadian counterparts. Certainly this should be taken as a first step, though legislative intervention is necessary. In drafting such legislation, the Oireachtas should recognise the different set of circumstances the Internet provides and not apply the same liability as traditional bookshop and newsagents to ISPs since, as Gatley notes:

‘The volume of data is so great that it would be impossible to treat it like conventional publication’.⁶³

⁶¹ Principle 6 of the code.

⁶² E.g. eircom.ie and esatfusion.com (esatfusion also owns oceanfree.net and iol.ie).

⁶³ *Gatley on Libel and Slander* 9th ed. (Sweet & Maxwell, London, 1998) at p. 147.

~ JURISDICTION ~

ACTIONS TAKEN AGAINST EUROPEAN UNION DEFENDANTS

Background: -

“The object of the convention . . . is to provide for the allocation of jurisdictions and the enforcement of judgments in actions which have an inter-state dimension and thus avoid multiplicity of proceedings and the risk of inconsistent judgments in member states.”⁶⁴

The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, (Brussels Convention) was brought into Irish law by the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988.⁶⁵ The Convention was based on the aspirational provisions of Art 220⁶⁶ of the European Community Treaty and has effect in all the Member States of the European Union. An almost identical convention, known as the Lugano Convention, was entered into in 1988 by the European Union states plus Switzerland, Liechtenstein, Norway and Iceland, with Poland joining in 1999. In 2001, the Conventions were revised by the Council of the European Union,⁶⁷ however none of the provisions likely to be relevant to jurisdiction to hear Internet defamation cases were altered by the Regulation and therefore the existing case law clarifying certain provisions of the Conventions are still relevant. This will avoid confusion in some cases, as the Brussels and Lugano Conventions are still the applicable law in some jurisdictions.⁶⁸

⁶⁴ *Ewins v. Carlton* [1997] 2 ILRM 223 per Barr J. at 227

⁶⁵ The Jurisdiction of Courts and Enforcement of Judgments Act, 1998 replaced the 1988 Act and its amendments to consolidate the provisions of the Conventions, however this has been superseded by the 2001 Regulation.

⁶⁶ This was renumbered Art 293 by the Treaty on European Union. It reads (in part):

“Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:
- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.”

⁶⁷ Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

⁶⁸ The Regulation was brought into domestic law by way of the direct applicability rule, which does not apply to non-EU Member States meaning that the Lugano Convention is still the applicable law in Switzerland, Norway, Liechtenstein, Iceland and Poland. Denmark did not participate in the Regulation (in accordance with Arts. 1 & 2 of the Protocol on the position of Denmark) and therefore it does not apply there either. Thus the Convention is still the applicable law in Denmark.

O. 11A of the Rules of the Superior Courts, 1986⁶⁹ (inserted by the Rules of the Superior Courts (No. 1) 1989⁷⁰) allows service outside the jurisdiction without requiring the permission of the courts where the claim is being made under the Regulation.⁷¹

The general rule under Art. 2:-

The general rule in the Regulation⁷² is that ‘persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’⁷³ There are, however, a number of exceptions where a defendant can be sued in another Member State. In order to invoke one of these exceptions, the onus is on the plaintiff to prove that he falls under it.⁷⁴

The most relevant of these to the tort of defamation is Art 5(3), which allows a plaintiff to sue ‘in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur.’

The concept of a ‘tort, *delict* or *quasi-delict*’ arose in *Kalfelis v. Bankhaus Schroder Munchmayer, Hengst and Co.*,⁷⁵ where the European Court of Justice defined it as:

‘any actions which seek to establish the liability of a defendant and which are not related to contract within the meaning of Art. 5(1).’

Clearly, defamation claims fall under this ‘astonishingly broad’⁷⁶ rule and therefore Art 5(3) is applicable to them.

The rather vague concept of a ‘harmful event’ was the subject of judicial clarification in *Handelskwerkerij G.J. Bier B.V. & Another v. Mines de Potasse d’Alsace S.A.*,⁷⁷ where the

⁶⁹ S.I. No. 15 of 1986

⁷⁰ S.I. No. 14 of 1989

⁷¹ The provision actually refers to the Convention, however under Art 68(2) of the Regulation, references to the Convention are understood as references to the Regulation.

⁷² *AUTHOR’S NOTE:* In the interests of consistency and readability, references to the Conventions in cases or articles are recorded as references to the Regulation. The wording of the Regulation is identical to that of the Conventions in all the Articles discussed in this project.

⁷³ Art. 2(1)

⁷⁴ *Kafelis v. Bankhaus Schroder, Munchmeyer, Hengst & Co.* [1988] ECR 5565, which was followed by the Irish Supreme Court in *Handbridge Ltd. v. British Aerospace Communications Ltd.* [1993] 3 IR 342 (per Finlay CJ at 358)

⁷⁵ *Supra.*

⁷⁶ Harris, J ‘Choice of Law in Tort—Blending in with the Landscape of the Conflict of Laws’ (1998) 61 MLR 33

European Court of Justice held that the Article gave the plaintiff an “option to commence proceedings either in the place where the damage occurred or at the place of the event giving rise to it.”⁷⁸

The facts in that case involved a Dutch plaintiff who had suffered damage as a result of the defendant’s pollution of the Rhine in France. Therefore, all the actions of the defendant were done in one jurisdiction, while all the damage suffered by the plaintiff occurred in another. Such a straightforward scenario is unlikely to arise in cross-border defamation cases and the *Handelskwekerij* judgment “did not resolve the difficulty of multi-jurisdictional torts.”⁷⁹ Applying this interpretation strictly in either the courts of England or Ireland would appear to have curious results, given that damage is presumed where the plaintiff is defamed by a libel or by a slander that is actionable *per se*.⁸⁰ A plaintiff could invoke an exception to the general rule in Art. 2, thereby removing the defendant from his home jurisdiction to Ireland or England without actually suffering any harm in that jurisdiction.

This exact scenario arose in *Shevill v. Presse Alliance*⁸¹, where a British domiciled plaintiff sued the publisher of a French newspaper for damage to her reputation suffered in the UK in an English court. The newspaper in question had a circulation of just 230 in the entire country and just 5 in Yorkshire, where she lived, so any actual damage would have been minimal, if any existed at all. The case was referred to the European Court of Justice for a preliminary ruling. The court emphasised that the object of the Regulation was “not to unify

⁷⁷ [1976] ECR 1735

⁷⁸ *Ibid.* at 1747. Some commentators (See Carter, P.B., “Defamation” in McLachlan & Nygh (eds), *Transnational Tort Litigation* (Oxford: Clarendon Press, 1996) at p.106) fail to distinguish between the place where the damage occurs and the place where it is suffered. This distinction was emphasised by the European Court of Justice in *Dumez France and Tracoba v. Hessische Landesbank* [1990] 1 ECR 49 and *Marinari v. Lloyds Bank plc* [1995] 1 ECR 2719. To allow the plaintiff to sue where the damage was suffered would result in him taking action in the place of his domicile, which will always be the place where he will suffer the damage. This would be contrary to the express object of the Convention contained in Art. 2. The place where the damage occurred will, in contrast, be the place where the defamatory material was read by third parties, thus causing damage to the plaintiff’s reputation in that country.

⁷⁹ Reed, A., “Jurisdiction and choice of law in a borderless electronic environment” in Akdeniz, Walker and Wall (eds) *The Internet, Law and Society* (London: Longman, 2000) at p. 88

⁸⁰ An example of this principle is found in *Kerr v. Kennedy* [1942] 1 KB 409, where the plaintiff’s claim hinged on the judge holding that an imputation of lesbianism was actionable *per se* (per Asquith J. at 413), rather than having to prove that she had suffered any actual damage to her reputation as a result of the imputation.

⁸¹ [1995] 2 AC 18 (European Court of Justice), [1996] 3 All ER 929 (House of Lords)

the rules of substantive law . . . but to determine which court has jurisdiction.”⁸² The court went on to hold:

“[The Regulation] does not, however, specify the circumstances in which the event giving rise to the harm may be considered to be harmful to the victim, or the evidence which the plaintiff must adduce before the court seized to enable it to rule on the merits of the case. Those questions must therefore be settled solely by the national court seized, applying the substantive law determined by its national conflict of laws rules, provided that the effectiveness of the [Regulation] is not thereby impaired. The fact that under the national law . . . damage is presumed in libel actions . . . does not, therefore, preclude the application of article 5(3).”⁸³

Reed argues:

“It would have been ludicrous if the Court of Justice had allowed any of the national courts where damage occurred to adjudicate on the whole loss.”⁸⁴

This danger was particularly relevant to the *Shevill* case, where the jurisdiction was one in which damage could be presumed even though no actual damage was suffered, a fact which the Court of Justice appeared to recognise in their answer to the House of Lords.⁸⁵

The “place of the event giving rise to the damage” was defined as the “place where the publisher of the newspaper in question is established.”⁸⁶ As with the *Handelskwekerij* judgment, in *Shevill*, the plaintiff was held to be entitled to sue in that jurisdiction in respect of “all the harm caused by the defamation.”⁸⁷

It has been argued that, in an Internet context, the place where the publisher is established is the location of the web server.⁸⁸ However this is not necessarily the “place where the harmful event originated”,⁸⁹ which the Court of Justice saw to be the key to the interpretation. In *Hunter v. Gerald Duckworth & Co. Ltd.*⁹⁰, Kelly J in the High Court held that even though the only publication by the defendant was when he handed the manuscript to

⁸² [1995] 2 AC 18 at 63

⁸³ *Ibid.* at 63.

⁸⁴ Reed, *Supra.* at p. 88

⁸⁵ It must be noted that the court specifically refers to “the case of a libel by a newspaper article” and therefore there is no guarantee that the interpretation of Art. 5(3) in this case will be applied in an Internet context. However this is the only authority available of the interpretation of Art 5(3) in defamation cases and it is likely that the court’s application of it in Internet cases will not differ significantly from that in *Shevill*.

⁸⁶ [1995] 2 AC 18 at 62.

⁸⁷ [1995] 2 AC 18 at 62.

⁸⁸ Reed *supra.* at p. 85

⁸⁹ [1995] 2 AC 18 at 62

⁹⁰ [2000] 1 IR 510

the printer in London, he was liable for the publication. Thus the origin of that libel was not it being put into general circulation but the original publication to the party who made it available worldwide. This interpretation utilises the common law rule under *Speight v. Gosnay*,⁹¹ which states that the original publisher is liable for the republication of the defamatory material by another where it is the natural and probable result of the original publication. In *Hunter*, Kelly J held that

‘I cannot believe that the [Regulation] seeks to depart from the notion that the original publisher of defamatory matter will be liable for republications which are the natural and probable consequences of such publication.’⁹²

Clearly, the natural and probable consequence of uploading material to the Internet is that it will be read by Internet users all over the world and so the original publisher will be liable for worldwide damage to the plaintiff’s reputation.

It appears that a better interpretation than that of Reed would be that even when the server the original publisher uploads the material to is in another country, the ‘place of the event giving rise to the damage’ will be the place where the original publisher is located when he uploads the material to the Internet server, with the ‘natural and probable’ consequence that it will then be made available worldwide. This interpretation is also consistent with the court’s observation that ‘that forum will generally coincide with the head of jurisdiction set out in . . . article 2 of the [Regulation].’⁹³

The second possible forum is the ‘place where the damage occurred,’ which is the place where the ‘event giving rise to the damage . . . produced its harmful effects on the victim.’⁹⁴ In that forum, the plaintiff is entitled to sue ‘solely in respect of the harm caused in the state of the court seised.’⁹⁵ This rule avoids the forum-shopping potential of the *Handelskwekerij* judgment, while at the same time declining to interfere with the substantive law of the contracting states, which is not the object of the Regulation. In *Murray v. Times*

⁹¹ (1891) 60 LJQB 231.

⁹² [2000] 1 IR 510 at 519. This rule was also applied in the context of the Convention in *Ewins v. Carlton supra*.

⁹³ *Ibid*.

⁹⁴ *Ibid*.

⁹⁵ *Ibid* at 63.

*Newspapers*⁹⁶, Barron J in the High Court applied *Shevill* in holding that the plaintiff's claim for damage arising in the UK from the publication of an English newspaper did not come within the scope of Art 5(3).⁹⁷

As we have seen, the Court of Justice left it up to the national court to decide how the libel may be considered to have been harmful to the victim. In exercising this discretion, the House of Lords held that the common law rule of presumption of damage was appropriate in cases brought under the Regulation. Similarly, in Ireland, it was held by Keane J. in *Ewins v. Carlton* that the Regulation did not depart from the common law rule and that "no authorities have been cited to support this view."⁹⁸ The effect of this is that when the plaintiff is claiming in respect of damage occurring in Ireland alone, the presumption of damage rule will only apply to that damage. However when an Irish publisher is sued here for worldwide damage, the presumption is applicable to all of that damage, whether the action is taken under Art. 2 or Art. 5(3).

Under the common law rule of *Bata v. Bata*,⁹⁹ publication of a defamatory statement occurs where it is seen or received by another person and per Morland J in *Godfrey v. Demon Internet*, "every time one of the defendant's customers accesses [the defamatory material] and sees the posting defamatory of the plaintiff there is a publication to that customer."¹⁰⁰ Just as the damage done to reputation by a newspaper article can be estimated by considering the newspaper's circulation in certain areas, in applying these rules in an Internet context we can conclude that the harm caused by an Internet posting will be that which is associated with the number of times that posting was accessed from within this jurisdiction.

The impact of this judgment on an Irish plaintiff wishing to protect his reputation is that when he wishes sue for damage to his reputation in Ireland alone, he may bring the action

⁹⁶ [1995] 3 IR 244

⁹⁷ However in that case the defendant had entered an unconditional appearance and therefore, under Art. 18 of the Regulation removes the limiting nature of Art. 5(3) by giving full jurisdiction to the court.

⁹⁸ *Supra* at 519.

⁹⁹ [1948] WN 366

¹⁰⁰ [1999] 4 All ER 342 at 347

in the Irish courts. However, many Internet users may have an international reputation they may wish to protect,¹⁰¹ in which case, any action taken under Article 5(3) will have to be taken in the courts of the Member State where the original publication occurred, which will generally be the same as his entitlement under Art. 2.

ACTIONS TAKEN AGAINST NON-EUROPEAN UNION DEFENDANTS

Where the publisher of a defamatory statement resides in a country which is not a member of the European Union and is not a party to the Lugano Convention, “the jurisdiction of the courts of each Member State shall . . . be determined by the law of that Member State.”¹⁰² As stated by Barr J. in the High Court in *The Marshal Gelovani*:¹⁰³

“It is a long established principle in [public international law], which is enshrined in the Vienna Convention on the Law of Treaties, 1969, that any state which is not a party to an international treaty or convention cannot be bound by it.”

Unlike an action taken under the Regulation, in order to serve notice of a summons outside the jurisdiction, permission must be obtained from the court. The circumstances where the court will grant such permission are laid out in Order 11 of the Rules of the Superior Courts 1986, of which one rule is particularly relevant to defamation proceedings. These rules correspond closely with the provisions of the Regulation, in application if not in wording, and there appears to be a conscious effort on the part of the Irish judiciary to harmonise the interpretation of the relevant rules.

Order 11 r. 1(f): -

O. 11, r. 1(f) of the Rules of the Superior Courts, 1986 allows service outside the jurisdiction where “The action is founded on a tort committed within the jurisdiction.”

¹⁰¹ In fact this reputation is likely to have been created via the Internet. Such an example is the plaintiff in the Australian *Rindos v. Hardwick* case, *supra*, who was “well known internationally.”

¹⁰² Art. 4(1) of the Regulation

¹⁰³ [1995] 1 IR 159 at 163, a decision approved by the Supreme Court in *The Kapitan Labunets* [1995] 1 IR 164

The authoritative case on the interpretation of this rule is that of *Grehan v. Medical Incorporated*,¹⁰⁴ where Walsh J gave the judgment of the Supreme Court. In his judgment, he considered a number of approaches to the interpretation of the rule, all of which appeared to have found judicial approval in the past. The two principal approaches rejected by Walsh J were the “place of acting” approach and the “last event” approach.

The key to the judgment is the desire to achieve flexibility. The “place of acting” approach essentially seeks to impose liability on the defendant in the jurisdiction where he committed the act that gave rise to the action. This had been utilised in a number of past cases but had been losing favour and had effectively been rejected by Barrington J in *O’Daly v. Gulf Oil Terminals (Ireland) Ltd.*¹⁰⁵ It was also rejected by Walsh J in *Grehan* because:

“The reasoning behind these judgments appears to be that the defendant is entitled to be judged in accordance with the standard under which he acted. That appears to overlook the fact that the plaintiff also has a right to be judged according to the law under which he is living when injured.”¹⁰⁶

The “last event” approach (which essentially seeks to impose liability in the jurisdiction in which the last event in the chain, usually the suffering of the damage, occurs) was similarly rejected as being too rigid in its application. Walsh J preferred to use the more flexible “elective” approach, which “permits the plaintiff to select from the relevant legal systems the one that is most favourable to him”¹⁰⁷:

“Any approach which insists on any one constituent element of the commission of the tort occurring within the jurisdiction can only give rise to difficulty . . . It seems to me sufficient if *any* significant element has occurred within the jurisdiction”

In accepting this approach, he followed the European Court of Justice’s decision in *Handelskwekerij G.J. Bier BV v. Mines de Potasse d’Alsace SA*,¹⁰⁸ where the court, in an Art. 5(3) application gave the plaintiff the “option to commence proceedings wither in the place where the damage occurred or at the place of the event giving rise to it.”¹⁰⁹ This seems to be

¹⁰⁴ [1986] IR 528.

¹⁰⁵ [1983] ILRM 163.

¹⁰⁶ [1986] IR 528 at 535.

¹⁰⁷ Binchy, W. “Irish Conflicts of Law” (Dublin: Butterworths, 1988) at p. 51.

¹⁰⁸ *Supra*.

¹⁰⁹ *Ibid.* at 1747.

an effort on the Irish judiciary's part to bring the interpretation of the local provisions in the Rules of the Superior Courts closer to the interpretation of the equivalent European provisions, despite the difference in wording between the two provisions and the difference in the circumstances in which they apply. Such a move can only be to the benefit of consistency and fairness, if not ease of application, as noted by Binchy:

“an inflexible rule may be easier to apply but its results would be less fair.”¹¹⁰

The elective approach of Walsh J was also used in *Short and others v. Ireland, the Attorney General and British Nuclear Fuels plc*,¹¹¹ where, even though the actions of the third defendant occurred in the UK, the plaintiffs chose not to rely on the Regulation because the case also involved issues of administrative law, which are outside the scope of the Regulation.¹¹² O'Hanlon J, citing the *Handelskwekerij* case, held that:

“[T]here is . . . ample authority for the proposition that a tort may be regarded as having been committed within the jurisdiction if any significant element occurs within the jurisdiction.”¹¹³

The significant element of a libel is its publication. As already demonstrated, there are two significant publications of an Internet libel. The first is the uploading of the material to the server. Under O'Hanlon J's interpretation, if this event occurred in Ireland, the plaintiff can sue for the damage associated with that action in the Irish courts. The other significant publication is the publication of the material to third parties, whose reading of it will damage the plaintiff's reputation. If the Irish courts continue this trend of relying on European case law in interpreting O. 11 r. 1(f), they will apply the judgment in *Shevill v. Presse Alliance*¹¹⁴ and allow the plaintiff to sue here only in respect of the damage to his reputation suffered here.

¹¹⁰ *Supra.* at p. 153.

¹¹¹ [1996] 2 IR 188.

¹¹² Art. 1(1).

¹¹³ [1996] 2 IR 188 at 201

¹¹⁴ *Supra.*

Reliance on European case law in a non-European defamation case has already occurred in England, where the House of Lords in *Berezovsky v. Michaels and Others*¹¹⁵ rejected the defendants' arguments that there is only one jurisdiction where the action for worldwide damage should be heard and that only one action should be taken in respect of any one libel. Lord Steyn held that it is "a long established principle of English libel law that each publication is a separate tort."¹¹⁶

"Moreover, [this argument] is inconsistent with the policy underlying the acceptance by the Court of Justice of the European Communities in *Shevill v. Presse Alliance SA* . . . , admittedly in a convention case, that separate actions in each relevant jurisdiction are in principle permissible."¹¹⁷

He went on to discuss whether or not an action may be taken in England, deciding that:

"the constituent elements of the torts occurred in England. The distribution in England or the defamatory material was significant. And the plaintiffs have reputations in England to protect."¹¹⁸

Thus the plaintiffs were allowed sue in England for damage done to their reputation in England as a result of publication there.

Such an approach should also be adopted in Ireland, allowing plaintiffs to sue here only in respect of the damage to their reputations occurring here. Even if they do not, it is unlikely that they will allow a plaintiff to take action here for harm occurring abroad if both the original publication and the specific republication to a third party occurred outside this jurisdiction. Publication to Irish third parties is not material to damage occurring abroad and should, as in *Berezovsky*, be considered a separate tort. It would be overly harsh on the defendant for the Irish courts to assume jurisdiction over damage arising in other countries simply because there was also publication here, as is inevitable for Internet material.

This leads to a conclusion that the result of the court's application of the *Grehan* and *Short* judgments to defamation cases would logically and justly yield the same results whether

¹¹⁵ [2000] 2 All ER 986

¹¹⁶ *Ibid.* at 993.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.* at 994.

or not they continued their reliance on European case law as persuasive authority. Therefore it would appear to be more beneficial if they were to expressly follow *Shevill* in the interests of certainty and consistency.

This would mean that in any cross-border Internet libel case, whether with a European dimension or not, the likely approach of the Irish courts will be that an action may be brought in Ireland for damage to the plaintiff's reputation in Ireland, or take a single case in the country of residence of the original publisher for damage to his reputation worldwide.

FORUM NON CONVENIENS

The doctrine of *forum non conveniens* originates in Scottish law and generally, it “seeks to determine which is the more appropriate forum in the light of the administration of justice.”¹¹⁹ It operates on a basis whereby the defendant will apply to the court to stay the proceedings in this country in order to have them heard in another, more appropriate, forum.

The circumstances where an Irish court will grant a stay were discussed by the Supreme Court in *Intermetal Group Ltd. v. Worslade Trading Ltd.*¹²⁰ Murphy J declined to follow the rules that had prevailed in Ireland up until then.¹²¹ Instead, he applied the more recent English decision in *In re Harrods (Buenos Aires) Ltd.*¹²²

“first, that the substantial cause of action may require to be identified before considering the forum with which it is most closely connected, and secondly, that justice for the parties requires that the remedy available for the plaintiff in the jurisdiction in which he is required to bring his proceedings must provide him with substantial justice”¹²³

The concept of the substantial cause of action is distinct from the legal form. In defamation cases, the substance of the action is always that the plaintiff is claiming damage to

¹¹⁹ Binchy, *supra* at p 165

¹²⁰ [1998] 2 IR 1

¹²¹ *Joseph Murphy Structural Engineers Ltd. v. Manitowoc (UK) Ltd.* (Unreported, Supreme Court, 30th July 1985)

¹²² [1992] Ch 72.

¹²³ [1998] 2 IR 1 at 35

his reputation as a result of material published by the defendant. In deciding which forum an action is “most closely connected,” the courts will take into account such factors as convenience, expense and the availability of witnesses. It must also be noted that the essence of the second prong of the test is not whether the remedy available to the plaintiff in another jurisdiction is identical or even equivalent but that there are a sufficient substitute remedies available there.¹²⁴

The applicability of the *forum non conveniens* doctrine to actions taken under the Brussels Convention is not clear. Barr J in the High Court in *Ewins v. Carlton* stated:

“In the context of the [Regulation], it appears that if the plaintiffs can establish that they are within the ambit of the exception contained in article 5(3) to the general rule as to jurisdiction, then the court has no power to refuse jurisdiction on the ground of *forum non conveniens*. However, there is a substantial argument in favour of the proposition that . . . the court has an inherent jurisdiction to grant a stay of proceedings to prevent injustice.”¹²⁵

However Murphy J in obiter in *Intermetal Group Ltd. v. Worlslade Trading Ltd.* stated his belief that the effect of the Regulation on the doctrine of *forum non conveniens* would likely necessitate a preliminary ruling from the European Court of Justice.¹²⁶

¹²⁴ Whether to grant a stay or not is decided on a case-by-case basis. The above is a general view of the factors taken into account by the courts in deciding whether or not to do so.

¹²⁵ [1997] 2 ILRM 223 at 231.

¹²⁶ *Supra*. at 40.

~ CONCLUSION ~

Internet libel (as it is likely to be classified) adds a new dimension to the existing defamation laws. As we have seen, the rules on cross-border torts, particularly defamation, are now more certain than they have ever been and the likely approach of the Irish courts is relatively predictable, giving victims of libel a sufficient right of action to defend their good names. Unfortunately, identifying the publishers of defamatory statements is likely to be problematic, leading to a search for appropriate deep-pocketed, easily identifiable defendants. ISPs have already been used in such a capacity in the US and this situation will inevitably arise in Ireland within the next few years.

Although it is possible for a court to apply traditional rules of defamation to the new medium of the Internet and the problems arising because of it, some careful consideration will have to be made in considering various possible analogies. However, one of the key requirements of any legal system is that the people subject to it, both natural and legal, can operate in an environment of certainty as regards the possible consequences of their actions. Thus, particularly in the light of the Internet's "Corporate Revolution" in recent years,¹²⁷ legislation would be much more desirable than judges attempting to apply existing rules to a new medium which had not even been contemplated at the time most of those rules were formulated.

With regard to the potential liability of ISPs, the Irish legislature must take into account the experiences of the US and England and formulate a set of principles which will sufficiently balance the rights of the plaintiff with the rights of the ISP itself and resist the temptation to create a legal "fall guy" for all Internet libel cases.

¹²⁷ The first commercial provider of dial-up access to the Internet was launched in 1990. The first online pizza-delivery service was launched by Pizza Hut in 1994 and advertising was first seen there in that year also. Since then there has been a huge upsurge in companies attempting to exploit the revenue-earning capacity of the Internet. (see Zakon, Robert H., *Hobbes' Internet Timeline* v5.5 (available at <http://www.zakon.org/robert/internet/timeline>).

In October of 2001, Fine Gael submitted their proposals to the government regarding a ‘thorough overhaul’ of the Irish defamation laws.¹²⁸ Incredibly, their recommendations contained no mention of the growing issue of the possibility of actions for defamation arising from online publications. The political parties cannot ignore the fact that the number of www sites has grown from 130 in June of 1993 to 36,276,252 in December 2001¹²⁹ and that it is become ever easier for users to obtain free hosting for their sites¹³⁰ and so-called WYSIWYG (What You See Is What You Get) editors,¹³¹ which assist the creating of web pages without requiring any programming knowledge whatsoever. It is not just by email or newsgroups that ordinary people are communicating and their websites will appear in any ordinary search engine, making it easier not just to publish defamatory statements but also to reach a wider audience than ever before.

It is only a matter of time before Irish courts will have to deal with this issue and it would be desirable that there are legislative guidelines in place by the time that happens. Unfortunately, as demonstrated by the Fine Gael proposals, it appears that such legislative intervention is not a high priority for our political parties at present.

¹²⁸ *Press for Change – a thorough overhaul of the laws of libel* (available at <http://www.finegaele.ie/policydocs/pressforchange.htm>).

¹²⁹ Hobbes’ Internet Timeline.

¹³⁰ e.g. <http://www.geocities.com>, <http://www.f2s.com>.

¹³¹ e.g. Microsoft Frontpage.

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~ GLOSSARY OF INTERNET TERMS ~

Bulletin Board:	These are similar to ordinary bulletin boards, where users can post messages and reply to others.
Chat Room:	This is a real-time system whereby users post temporary messages that appear on the screens of all the other users in the chat room instantaneously.
Email:	The system of sending electronic messages to one or more recipients personally.
Newsgroup:	An area on a computer network, especially the Internet, devoted to the discussion of a specified topic. Messages are then readable by any interested party.
Upload:	This describes the process of saving information on a server, thus making it available to all Internet users.
Servers:	Computers connected to the Internet that stores the information that Internet users access.
World Wide Web (www):	This is what many people refer (incorrectly) to as the "Internet". It is the collective term for web sites generally. These are static pages, the content of which is entirely at the discretion of the author. Unlike with newsgroups, bulletin boards and email, there is no opportunity for other Internet users to reply to comments made in www sites unless they create one themselves.
