Scots Law Defamation on the Internet

A consideration of new issues, problems and solutions for Scots law.

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"because it is my name,
because I cannot have another in my life."
(*The Crucible*, Arthur Miller, 1953)

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ABBREVIATIONS

Cooper - *Defamation and Verbal Injury*, F T Cooper, 2nd ed, Wm Green & Sons, 1906

Erskine - *An Institute of the Law of Scotland*, John Erskine, 8th ed by J Badenach Nicholson, 1870

Lloyd - *Information Technology Law*, Ian Lloyd, Butterworths, 1997

Norrie - *Defamation and Related Actions in Scots Law*, Kenneth McK Norrie, Butterworths, 1995

Stair - *The Instiutions of the Law of Scotland*, Viscount Stair, ed by David M Walker, University Presses of Edinburgh and Glasgow, 1981

Walker - *Delict*, D M Walker, 2nd ed, W Green & Son Ltd, 1981

Introduction

Defamation is potentially one of the largest areas of law which will be affected by the internet revolution as it deals, quite simply, with communication between people. The internet provides a new means to facilitate this communication and so is an ideal forum for free speech, a practice which can often lead to vituperative and contumelious language. The question begs, can Scots law adapt to the new situations presented by advances in technology? It will be argued below that, although a great deal will depend upon a proper understanding of the internet and the resultant legal issues by the courts, advances in technology should not pose too great a problem for defamation in Scots law.

The areas of the internet which will be considered here are e-mail, discussion fora, chat rooms and web pages. Many of the issues, which arise in each category, will apply to another[1] and are dealt with in the category to which it is most relevant.

The Internet or World Wide Web

The US Communications Act 1934[2] provides the following definition of the Internet,

> "The term 'Internet' means the international computer network of [...] interoperable packet switched data networks."[3]

This technical definition may lead to more confusion than enlightenment for Scots lawyers and so, put simply, the Internet is a system linking computers across the world enabling the transmission of information at very high speed. It has many forms, all of which share the common characteristic of facilitating communication with other computers. The growth of the Internet has been phenomenal since it's beginnings as an education and military communication system. In 1995 there were estimated to be only

[1]Notably those of anonymity (considered under e-mail) and the defences to defamation (dealt with under Newsgroups)
[2]As ammended by s.509 of the Communications Decency Act 1996
[3]at s.230

100,000 domain names[4] and while by 1999 there were 7.2 million, the predictions for the future are significantly greater[5]. The UK has the second largest country code top level domain (ccTLD)[6] at present having over 240,000 domain names[7] and with over 6 million homes on the internet at present expected to rise to 8 million in the next three years[8] litigation over internet issues is set to increase in the UK on a greater scale.

The Internet has been heralded as a haven for unrestricted free speech but as with every perceived right, it exists to the extent that it does not infringe upon the rights of others. On the Internet this is often forgotten and in some cases, this modern phenomenon has become a breeding ground for informal language often in the form of insult and abuse. It is the informal nature of the Internet, which will lead to many of the defamation claims, which will arise.

Law and the Internet

At present, there has been only one internet defamation case arising in a UK court, the result of which will be discussed later. In the future, such cases may arise before the Scots courts and when they do, the courts must be ready to interpret them correctly.

Due to similarities between the internet and traditional forms of communication and in the absence of precedent to aid development, there is a tendency by lawyers and by courts to use analogies in order to demonstrate the applicability of existing law. There is much

[4]A domain name is part of the URL (Uniform Resource Locator) which directs a computer towards the location of the server on which the information is contained. e.g. "gla.ac.uk" - Glasgow University
[5]see "Management of Internet Names and Addresses" Graham Wood, Computers & Law, Vol 10 Iss 3 p.29
[6]i.e. .uk - UK, the largest country code is .de - Germany; the US makes use of the 9 generic Top Level Domains (gTLDs) - .com, .net, .org, .mil, .edu, .gov, .int, and more recently, .cc and .to (the latter two were allocated to countries which it was considered were too small to justify being ccTLDs.)
[7]see <http://www.domainstats.com> and also, Nominet.uk Reports and Accounts, 1998 available at <http://www.nominet.co.uk>
[8]BBC News 24, March 2000

that can be gained from this process although it must be remembered that it may not always be advisable to do so and a shrewd judge should be able to recognise such a situation where it arises.

Often in an absence of existing caselaw in a particular jurisdiction, foreign judgments are cited as being examples of how potential cases could be dealt with when they arise. This process of examining foreign judgments in relation to internet law is aided substantially by the existence of the internet itself. Ordinarily, foreign judgments will be of little assistance in a Scots case, but as the internet continues to expand on its already significant global appeal, a universal approach to internet law is clearly desirable. This is not though, it is submitted, to be at the expense of existing domestic law and indeed, it is the end result achieved and not the means of doing so in a foreign jurisdiction to which greater attention should be paid.

Defamation

While Erskine's statement that "Injuries are either verbal or real"[9] is useful in separating actions involving *injuria verbis* from those caused by physical harm, it is not sufficient to define defamation. A statement may result in *injuria verbis* without necessarily being defamatory and the other species of *injuria verbis*, of which there are several, including malicious falsehood[10], *convicium*[11] and slander of title will not be dealt with here. While there are many similarities between the verbal injuries the focus here will be on issues surrounding the action of defamation in Scots Law.

[9] *Erskine* Vol II at p 1217

[10] or "verbal injury", which more recently appears to have acquired a status separate from defamation. The merits of this change will not be considered here, save only to state that the present writer believes defamation is rightly placed as the main type of verbal injury, as was indicated by the Institutional Writers, irrespective of recent artificial classifications.

[11] suggested by *Walker* as a third class of *injuria verbis* at p.736

Before other issues are dealt with, it is important to state briefly the general nature of defamation. To be actionable, a defamatory statement must be false and able to "lower the plaintiff in the estimation of right-thinking members of society",[12] to establish which, generally an objective test is applied. In defamation actions, the law of Scotland will compensate a pursuer where he has suffered injury to his feelings and damage to his "fame, reputation and honour".[13] For the first, he will receive *solatium* and the second, damages for his patrimonial loss.

Communication

Before an action can be founded in a Scots Court, a defamatory statement must be communicated. Communication can be by words, spoken, written or in song, pictures or other images or indeed as *Norrie* points out,

> "Communication sufficient to found an action can be by any means that are effacious in passing from one person to another an idea of and concerning the pursuer."[14]

E-mail

Electronic mail[15] or e-mail is simply data, whether it be text or images sent via an electronic system which performs essentially the same functions as an ordinary postal service. To put it more clearly,

> "E-mail is the day's evolutionary hybrid of traditional telephone line communications and regular postal service mail."[16]

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[12] *Sim v Stretch* [1936] 2 All England Law Reports 1237 per Lord Atkin at p. 1240, although an English case, the test has been held as applicable to Scots law also, see *Steele v Scottish Daily Record and Sunday Mail* 1970 Scots Law Times 53.
[13] *Stair* Title 9, Reparation at p.171
[14] *Norrie* at p 28
[15] Had the mode of communication been named in Britain, it may well have been named e-post.
[16] *Lunney v Prodigy Services Co*. 1999 NY Int. 0165 (Dec 2, 1999) per Rosenblatt, J at p 2

As a consequence, a similar protection which extends to the traditional carriers of such communications will extend to the operators of the computer servers which handle or transmit the e-mail. There are many legal issues which may result from e-mail, some of which have already been dealt with by Scots courts and some which have not.

Communication solely to the pursuer

Scots law defamation does not require that a defamatory statement be communicated to third parties before it is actionable.[17] Communication solely to the victim of a defamatory statement irrespective of whether they are made orally or in writing,[18] can result in that person suffering insult or affront to the remarks for which they will be entitled to at least *solatium* for their injured feeling.[19] As Lord President Inglis in *Mackay v McCkankie*[20] opined, a "statement made in a letter" and also,

> "verbal statements, amounting to slander, made to a man outwith the presence of others will [...] afford a good ground for an action of damages."[21]

There is clearly no possibility of damages for other losses since there will have been no injury to their fame, honour or reputation.[22]

Repetition of the Defamatory Statement

Repetition of a defamatory e-mail would normally occur when the e-mail is 'forwarded' to others to read. When the e-mail is forwarded to others, the original sender will normally[23]

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[17] This is to be contrasted with the position in England, the USA and many other countries.
[18] *John Mackay v James McCankie* 10 Rettie's Session Cases 587
[19] *Ramsay v Maclay* 18 Rettie's Session Cases 130, *Hutchison v Naismith* (1808) Morrison's Appendix Part I, Delinquency No. 4, page 15
[20] *Mackay v McCankie, supra.*
[21] *ibid.* at page 539
[22] *Will v Sneddon, Campbell & Munro* 1931 Sherriff Court Reports 308 and see also later in relation to where the victim gives publicity to the attack himself.
[23] It is possible to set an e-mail to expire after a certain length of time, wich may prevent it from being forwarded.

have no further control over its distribution, which given the ease of use of e-mail, may be great.

By the defender

Should the defender choose to send his defamatory remarks to persons other than the pursuer, damages for economic loss caused by the statement and also for injury to a person's reputation will be available. Furthermore, the greater the circulation by the original defamer, the greater the damages since the pursuer if defamed to many people will suffer more injury than had it been published solely to one person.[24]

The extent of the defender's liability does not end with people who hear the statement directly from them and indeed they may be liable for the natural and foreseeable consequences of the original publication. This raises issues of causation and theoretically, it is a natural consequence of sending an e-mail to someone that they may forward it to someone else, unless a *novus actus interveniens* breaks the chain of causation. It must therefore be vital to try to establish where this liability may end. Existing case law suggests that liability ceases where the repetition is unauthorised[25] and an appropriate statement accompanying an e-mail instructing the recipient not to pass the information on to anyone may suffice.

By the pursuer

Should the pursuer choose to give publicity to the vituperative words, he will be personally barred from claiming losses unrelated to the insult he has felt since further losses will be due to his own actions.[26]

[24] *Gillie v Labno* 1949 CLY 4792
[25] *Weld-Blundell v Stephens* (1920) Appeal Cases 956
[26] *Wallace v Bremner* 1900 16 Sh Ct Rep 308

By third parties

Not only is the repetition of the defamation to others actionable against the original defamer, those who repeat the defamation or similarly distribute it will also be liable.[27] So, by forwarding an e-mail containing contumelious words about another person, a person who is not responsible for the origin of the words can find themselves liable for the e-mail's content.

It follows therefore, that each repetition of a defamatory statement is a new wrong and separate from that committed by the original defamer.[28] While proof that the defender was not the originator of the statement can only serve to mitigate damages,[29] the liability of those who repeat a defamation remains almost the same as that of the original defamer.[30]

E-mail and Innocent Dissemination

The defence of innocent dissemination[31] now contained at section 1 of the Defamation Act 1996 (the 1996 Act) is available to those who are not the author of a defamatory statement[32] but the defence fails where the person did not take "reasonable care in relation to its publication"[33] and cannot prove that they did not know or "had no reason to believe that what he did caused or contributed to the publication of a defamatory statement."[34] It is probable that an attempt to use this defence by a person who has forwarded an e-mail will fail regardless of whether or not they had read the e-mail.

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[27] *Hayford v Forrester-Paton* 1927 Session Cases 740
[28] *Winn v Quillan* (1899) 2 Fraser's Session Cases 322
[29] *Marshall v Renwick* (18735) 12 Shaw's Session Cases 565
[30] *Browne v MacFarlane* (1899) 16 Rettie's Session Cases 368
[31] The defence will be dealt with in much greater depth later in relation to ISPs
[32] s1(1)(a)
[33] s1(1)(b)
[34] s1(1)(c)

The defence of innocent dissemination, initially an English defence available to, among others, carriers, booksellers, libraries[35] and newsagents.[36] In Scotland, the defence was discussed by Lord Moncrieff in *Morrison v Ritchie & Co.*[37] who did not rule out it's application in Scots law. Later cases[38] developed this idea further allowing the defence where a defender could show that they exercise no control over the content of the material they disseminate. In short, their role in the dissemination of the material is innocent. A large degree of editorial control is present in e-mails and although the defence now takes a Statutory form, its purpose remains unchanged. As the courts may consider all the events surrounding the publication,[39] the defence may, be applicable where a disseminator has not read the e-mail under instruction from the author,[40] or where, again unread, the e-mail's subject heading suggested that it was extremely unlikely to contain defamatory material.[41]

A person responsible for forwarding defamatory content[42] by e-mail will be unlikely to have a defence of innocent dissemination save in the special circumstances where the requirements of s1(1) of the Act are met. The analogies with traditional mail must be maintained by the courts for it is very undesirable to allow a defence to allow a defence of innocent dissemination for e-mail and deny it to ordinary mail. Yet, due to the nature of e-mail and the wider implications of the 1996 Act, such an extension may be inevitable.

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[35] *Weldon v Times Book Co. Ltd*. (1911) 28 TLR 143

[36] The Defence of Innocent Dissemination Consultation Paper by the Lord Chancellor's Department, July 1990 at page 2.

[37] (1902) 4 Fraser's Session Cases 645

[38] *McLean v Bernstein* (1900) 8 Scots Law Times 31; *Gibson v National Citizens Council* (1921) Scots Law Times 241

[39] s1(5)(b)

[40] where the author does not know the intended recipient's address but wishes the communication to remain private.

[41] This would possibly satisfy both ss 1(1)(b) and (c)

[42] the requirement of reasonableness at s.1(1)(b) would imply reading of the message and a decision to forward it.

Accidental Communication

In the case of communication both to the pursuer alone and to others, it is not clear whether or not the communication need be deliberate. This is a more pressing issue with regards to e-mail than ever before given the ease with which human error can lead to undesirable results. It is not only possible, but extremely common to send an e-mail to an unintended recipient. The situations which may arise in practice may be separated into three categories, firstly where the author did not intend to communicate the defamatory statement and secondly, where the defamatory statement was communicated to the wrong person and thirdly, where it referred to the wrong person. The internet, it is submitted, is unlikely to affect the existing Scots position of the second two and therefore they will be considered to a lesser extent.

Unintentional Communication

Sending an e-mail by accident, or sending the wrong attachment with an e-mail is a situation experienced by many internet users on a daily basis. This can be due both to unfamiliarity or over-familiarity with the process of sending e-mail. Supposing the e-mail or attachment contained statements which the user had never intended to publish at all, accidental defamation will have taken place, but will they be liable?

Norrie opines that "communication may be made deliberately, recklessly, negligently or inadvertently"[43] *Walker* appears to agree with this statement, believing that the *animus injuriandi* necessary for a defamatory action, "probably refers to the deliberate making of the defamatory statement rather than to its deliberate communication to the pursuer."[44]

The actual writing of the statement will in most cases be *animus injuriandi* but this intention will not always persist after the statement has been written. This leaves us with

[43] at p.28
[44] at p.743

the questionable position that at the moment of communication, there may be no intention to injure the pursuer. Indeed there is caselaw to suggest that an absence of intention to injure will absolve the defender.[45] However, when we consider that a court will presume intention to injure once it is established that a statement is defamatory, the intention to communicate the vituperative words becomes less relevant. It appears on an inspection of the authority here that the presumption of animus injuriandi is now extremely difficult to overcome. As *Walker* indicates, "the allegation of malice has become non-traversable, and an irrebuttable inference from proof of deliberate communication."[46] The position may have already changed.

The definition of "author" in the 1996 Act "does not include a person who did not intend that his statement be published[47] at all."[48] It is difficult not to view this as a re-writing of Scots law but it must be remembered that this is entirely open to judicial interpretation. A person who id not intend that their statement be published must still show that they took reasonable care in relation to its publication, which may very well be lacking in accidentally sent e-mails. Further though, if they are not classed as an "author", they may be caught by the definition of "editor" as "a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it" which is an excellent definition of an "author" also.[49] What is now clear though is that intention to communicate a defamatory statement is now extremely relevant in defamation proceedings in which the defence of innocent dissemination is invoked. The Act may therefore lead to separating the synonymous position which intention to communicate and intention to injure presently share.

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[45] see *Rose v Robertson* (1803) Hume 614; *Gardner v Marshall* (1803) Hume 620

[46] at p.782

[47] For the purposes of this work, "published" will be taken to mean communicated a position which will be clarified later.

[48] at s. 1(2)

[49] whether this flaw will be used by a pursuer in practice remains to be seen.

Communication received by the wrong person

In communicating vituperative words by e-mail to an unintended recipient, there is both the deliberate making of the defamatory statement and a definite intention to send it. Such a practice is indeed one of the most common made by e-mail users and can occur both on a small scale, to one recipient, or on a large scale, by replying 'to all recipients' of a mailing list instead of to one person in particular. The person who receives the e-mail may have good grounds for an action of defamation. These grounds will only exist if there is clear reference to the defender by his e-mail address or other similar reference and the pursuer in this case must show that the e-mail relates to themselves and was understood as referring to him.[50]

Communication referring to the wrong person

This third type may occur not only in relation to e-mails but in relation to newsgroups, bulletin boards, web pages and most internet forum which have a wide circulation. Many of the cases in this area concern newspapers which publish statements referring to an individual, fictitious or real,[51] by name and readers believe or may believe it refers to another who shares the same name.[52] It appears that despite the fact that the defender had no intention of defaming anyone, they will be liable.[53]

It is unlikely that the 1996 Act will provide assistance in this area, since despite lacking intention to defame, they were nonetheless either author, editor or publisher of the defamatory remarks, taking them outside the s.1 defence.

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[50] *Webster v Paterson* 1910 Session Cases 459

[51] *Hulton v Jones* 1910 Appeal Cases 20 where the story was of a ficticious character, "Artemus Jones", whose namesake successfully sued

[52] *Outram v Reid* (1852) 14 Dunlop's Session Cases 577, *Wragg v DC Thomson* (1909) 2 Scots Law Times 315; *Harkness v Daily Record (Glasgow) Ltd* 1924 Scots Law Times 759; *Harper v Provincial Newspapers Ltd* 1937 Scots Law Times 462

[53] *Outram v Reid, supra*.

Online Discussion Fora

Online discussion areas, such as newsgroups[54] and bulletin boards are organised by subject matter which subscribers may read and 'post' messages on. This may appear to be extremely civilised but the reality can be extremely different.

'Flaming' is an internet term used to describe full, frank and unrestricted comments posted on the web which often bear a strong resemblance to insult and abuse. A web page entitled "The Twelve Commandments of Flaming" advises users to "make up things about your opponent" and "when in doubt, insult".[55] It is not uncommon to find a newsgroup which has lost all relevance to its original subject matter and degenerated into a full scale 'flame war'. It must be remembered though that

> "Flames are serious, personal attacks possessing no relation to the spirit of cooperative learning or to active discussion, and they should be treated as such under the law."[56]

This situation is a direct by-product of the origins of the internet, which, when it began in the early 1990s was used predominantly by teenagers, students and academics and was heralded as a paradise for free speech. As such, flaming was encouraged and instead of legal action, the response to flaming was to retort in kind. Such a situation is a breeding ground for potential defamation claims and unsurprisingly, since the rest of the world began to join the internet in the late 1990s, such claims have become increasingly common.

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[54] of which there are some tens of thousands worldwide, are collectively referred to as USENET
[55] Chris Rolleston, 1996 now preserved here: < http://www.laughnet.net/archive/compute/flaming.htm>
[56] James A Inman and Ralph R Inman, Responsibility as an issue in Internet Communication: Reading Flames as Defamation, J TECH L & POL'Y 5 <http://journal.law.ufl.edu/~techlaw/1/inman.html> (1996)

A mailing list is generally not an online discussion but one which operates by e-mail. An e-mail message sent by one member will automatically be re-sent to every member of the list. Such lists will though invariably be affected by the same issues which are considered here as their readership is often large and unknown to the author of a statement.

There have been many cases involving defamatory postings on such discussion fora, one of which, *Rindos v Hardwick*,[57] occurring on a bulletin board concerned with anthropology read by academics in this field across the world. David Rindos successfully sued Gilbert Hardwick[58] over allegations that he had abused young boys and that he lacked academic competence. There is disagreement between commentators on the case as to whether the message was posted on a newsgroup, bulletin board or mailing list. It is criticised for failing to examine the nature of the internet and the trend of using informal language which, it is claimed, must be considered in assessing the circumstances in which the statement was made.[59] This claim would appear to be well-founded as we will see later in relation to the defences.

The grounds for an action in defamation have been discussed at length already and it is necessary to discuss also the defences which are more relevant to such a vituperative and contumelious arena for discussion as exists on the world wide web.

Defences to Defamation

Veritas

It is well settled in Scots law that *veritas convicii excusat*, that is the truth of a statement exonerates the maker from liability. The law will only seek to uphold a person's fame, honour and reputation where such ought to exist. Where the statement has led to

[57]Supreme Court of Western Australia, No. 1994 of 1993 (unreported Judgement 940164)
[58]winning AU $40,000
[59]see "Usenet News and the Law" - Francis Auburn [1995] 1 Web JCLI p.3 <http://webjcli.ncl.ac.uk/articles1/auburn1.html>

patrimonial losses, these must be endured by the pursuer. It follows naturally also that a statement which is true is unlikely to harm a person's feelings and if it does, the law rightly provides no remedy in defamation.

A statement which is defamatory must, as a consequence, be false and once a statement is shown to be defamatory in nature, falsity is presumed and the onus lies with the defender to rebut this presumption. It is this onus which will cause problems for defenders in internet cases. A lack of knowledge of the person defamed and a degree of distance between the parties will hamper any attempts to provide evidence of *veritas* in the statements. This is mentioned as an indication of problems for potential defenders and not as a criticism of the operation of the *veritas* defence.

It is only those statements which materially harm the pursuer which must be proven to be true[60] and in proving the facts, regard must be had to the nature of the statement since different types of remarks will require different levels of proof.[61]

The evidence which will often be available to the defender is that of the pursuer's past actings and communications online, assuming of course that the defender is aware of these. Therefore a person who accuses a priest or person of other such moral standing of being a 'foul mouthed pervert' will be able to make good use of the defence if he can show evidence that the pursuer, most likely in the assumption of anonymity, had a habit of making statements which would justify such an allegation. It is for this reason that users should be conscious of their own actings on the internet in case they one day return to haunt them.

[60]Defamation Act 1952 s.5
[61]For further information see *Norrie*, p.129

Fair Comment

The defence of fair comment provides for the right of freedom of speech for individuals thereby protecting the inherent public interest in expressing one's opinions of public figures, artists, political and legal decisions and the like.[62] In *Archer v Ritchie & Co*[63] the following definition was offered,

> "The expression of an opinion as to a state of facts truly set forth is not actionable, even when that opinion is couched in vituperative or contumelious language."[64]

Insofar as the statement remains an "opinion as to a state of facts", the defence is absolute, provided it is made in fairness.[65] and is relevant to the facts on which the opinion is offered.[66]

The requirement of fairness is not in relation to the *animus injuriandi* or indeed to any harm suffered by the pursuer but instead requires that the comments are relevant to the facts on which the opinion is offered. What is interesting is a comment again by Lord McLaren that,

> "If the facts be correctly stated the reader is in a position to form his own conclusions and the expression of opinion, if unfair, can injure no one but the writer himself."[67]

Facts sufficient for the reader or listener to reach their own opinion must as a consequence be available. To comment in the absence of facts cannot conceivably be deemed to be commenting on the facts and the resultant relevancy of such a statement is

[62]The defence of qualified priviledge is similar and will be discussed later.
[63](1891) 18 Rettie's Session Cases 719
[64]*ibid.* at p.727 per Lord McLaren.
[65]The requirement of malice here is not a part of Scots law, but applies to the defence of qualified privilege, to follow.
[66]*Godfrey v DC Thomson* (1890) 17 Rettie's Session Cases 1108
[67]*Gray v Scottish Society for the Prevention of Cruelty to Animals* (1890) 17 Rettie's Session Cases 1185 at 1200; and see also *Bruce v Ron & Co*. (1901) 4 Fraser's Session Cases 171

questionable at best. It is considerations of this nature which the present writer believes will cause the most problems for internet users.

It is not necessary to set out all the facts commented upon within the statement, and a reference, impliedly[68] or expressly to the facts which are commented upon will suffice.[69] It is important therefore, in internet communications, that such reference occurs and a statement which is made commenting on the actings of others remains as such and does not become a statement of fact.

This defence, on the internet, it is submitted should extend to the actings of ordinarily private individuals, for on the internet, notions of public figures have become distorted. Every user has the potential to become a well-known figure and at the same time, their actings on the internet, no longer private but visible by many thousands of people. Such an extension is natural to Scots law, since the defence does not particularly pertain to public figures, but on the internet, ordinarily private actings will no longer be considered so.

Statements uttered in *rixa*

It is a defence to an action of defamation in Scots law to show that the statement complained of was uttered in *rixa*, that is the words were uttered during the course of

> "a quarrel, strife or dispute between two parties, in the course of which their feelings become excited and their self-control weakened, and they in consequence say things with regard to each other which they would not otherwise have done."[70]

It is this absence of a sense of control and reasoning which negates defamatory content in the statement but more importantly, is whether, objectively, onlookers would understand

[68] *Kemsley v Foot* [1952] Appeal Cases 345
[69] *Wheatley v Anderson & Miller* 1927 Session Cases 133
[70] *Hunter v Sommerville* 1903 11 Scots Law Times 70 at p.71 per Sherriff-Substitute Strachan, Glasgow

the words used as carrying with them a definite statement of fact. If those hearing a statement are unlikely to take it seriously, no harm befall the pursuer.[71]

It has been suggested that words uttered in anger may lack the requisite malice to found an action[72] If this were so, a complicated examination of the intention of the defender would ensue, instead of a simple examination of the circumstances surrounding the attack and the interpretation of the words by other listeners. It is this latter aspect which is believed by the present writer to be the more relevant basis of the defence since words spoken in anger but nonetheless spoken with malice cannot carry the necessary weight to harm a person's reputation in the eyes of others. To apply the defence to the internet though requires greater consideration.

It is frequently asserted, that *rixa* is a defence which is unlikely to relate to written words[73] but this is believed by the present writer to be an unsatisfactory position. When commenting upon the application of the defence of *rixa* to written words, the case of *Angelo Lovi v Thomas Wood*[74] is often cited by writers as authority that it has been found to be applicable.[75] This perception may though be an exaggeration for *Cooper* indicates that

> "The decision seems to have turned partly on the ground that the words were written *in rixa*, partly on the ground, now obsolete, of "*compensatio injuriarum*", and partly on the ground that the whole case was frivolous."[76]

Indeed, on a closer examination of the case, there appears to be no mention of the *rixa* defence at all or any discussion thereof. Furthermore, there appears to be no indication

[71]see in particular, Lord McLaren in *Christie v Robertson, supra*.
[72]described in *Norrie* p.152 who later goes on to disagree with this suggestion
[73]see *Norrie*, p.153, *Walker*, p.793
[74]No. 468 (1802) Hume 613, June 1 1802
[75]see *Norrie* p.153, *Walker* p.793, *Lloyd* p.488, *Stair Memorial Encyclopaedia* Vol 15 p.362 in Para 546
[76]at p.95

that the circumstance in the case are believed by Lord Bannatyne to have amounted to anything more than "part of a correspondence"[77] which as we have seen, would be insufficient to found a defence of *rixa*.

In order to establish whether there has been an argument, or other such heated debate, regard must be had to the "context and the history of the case or "surrounding circumstances"".[78] For instance, where there had been a break in the argument to call witnesses to hear the statement, serious intention behind its making could be inferred.[79]

In the absence of Scots authority, it may seem that rixa is a defence which is inapplicable to written words but this view, though relevant to traditional forms of communication, is not appropriate for the internet. Traditionally, written words have taken longer to communicate than spoken ones and require a degree of deliberation absent in impromptu discussion. It is this lack of fast-moving momentum in an argument written, which precludes it ordinarily from possessing the requisite qualities that ensure it's contents are not taken seriously. It is submitted that this position should remain the same and that its application should be extended to written as well as spoken words.

It would naturally follow that the defence should extend to all forms of written words for given the necessary momentum will be lacking in traditional written words and many forms of internet communication, it will only apply in those circumstances more analogous to conversation. The defence would be unlikely to apply to e-mail or to web pages since such forms require greater deliberation by the author, and there is a longer gap in time between each communication in which to gather one's thoughts and consider a reasoned response. In newsgroups, and chat rooms, the defence may apply where there

[77] *Lovi*, *supra*. at p. 614
[78] *Watson v Duncan* (1890) 17 Rettie's Session Cases 404 at p.408 per Lord McLaren
[79] *Grant v Mackay* 1903 11 Scots Law Times 380 per Lord Justice-Clerk at p.380

is a high speed discussion taking place. Some discussion fora may have a gap of several months between postings whereas others, a gap of seconds and it is this latter category to which the defence would best apply.

There must truly be a quarrel in progress and not simply a discussion and consequently, statements made some time after the quarrel has taken place cannot be part of the same quarrel.[80] It follows naturally that the argument must occur in the same place[81] on the internet, for without this, the statement will appear to be unrelated to any previous discussion, and also, any effort to move the discussion will remove the necessary proximity in time and space to the quarrel. A quarrel which begins on one bulletin board is not the same when it continues later on another.

It is submitted that legislation is not required in order to extend *rixa* to written defamation, rather courts in which the issue arises must consider the true purpose of the *rixa* defence, that is whether the words are capable of being defamatory in the circumstances. Scots authority on the *rixa* defence is sufficient to extend the defence to modern technology and given that such exists today sufficient to facilitate a written argument or quarrel, it is logical and necessary that the defence be applied to written defamation. It is the speed of the argument and not the way in which it takes place which should be relevant.

Vulgar Abuse, Sarcasm and Exaggeration

Aside from *rixa*, there are several defence which relate to the meaning behind statements taking into account the circumstances surrounding their making. These defences, loosely grouped together are descriptive of types of speech which will, by and large, seldom be

[80]see *Grant v Mackay, supra*. where the statement complained of was made nine months after the quarrel had taken place.
[81]see *Grant v Mackay, supra*.

taken seriously, and are incapable of showing any real expression of fact or meaning. They are more relevant today for changes in society have led to a more informal style of speech than ever before. The nature of the internet too makes it more prone to these types of comments which are evident where flaming and other such vulgar abuse is commonplace. If these defences have not served already to lessen the number of defamation cases appearing before the courts, they may well begin to do so now.

It is this modern day informality which may block the majority of internet cases, for example, a statement that a person is a "bastard" bears, in everyday usage, no reflection upon that person's legitimacy. In newsgroups, chat rooms and most other aspects of internet conversation, vulgar abuse is frequently used in the interests of brevity when replying to opinions which a person does not agree with or simply as a joke or means to insult.

It follows also that where a person uses exaggeration for effect, such comments may injure a person's feelings or on a strict interpretation, be defamatory but where it is clear the statement is exaggerated, no listener or reader would be likely to take it seriously. For example, in *Christie v Robertson*[82], where the accusation of "liar" and "bloody liar" were levied against a person, this was held to be nothing more than an "emphatic form of contradiction of the pursuer's assertion as to the disputed ownership of a horse."[83]

Sarcasm[84] may cause a problem for internet users as statements intended to sound sarcastic may not do so when read by the recipient. Sarcasm is difficult to convey when writing a statement which arises where one makes the mistake of failing to read a statement over before sending it, losing the opportunity to realise that it does not make

[82](1899) 7 Scots Law Times 143
[83] *ibid.* at p.143 per Lord McLaren
[84]see *Bell v Haldane* (1894) 2 Scots Law Times 320

sense or has an alternate meaning in the absence of vocal intonations. It will be for the court to decide, having regard to all the circumstances surrounding the statement, whether it is sarcastic or not.

Offer to make Amends

Sections 2 to 4 of the 1996 Act replace section 4 of the Defamation Act 1952 which allowed those who had innocently defamed others to offer to make amends. The new provisions, significantly apply to all regardless of intention to defame. A suitable apology and correction in a reasonable manner must be part of the offer as well as an offer to pay compensation for injury sustained.[85] The making of the offer[86] is a defence to an action of defamation where the maker did not know nor had reason to believe that the statement complained of referred to the pursuer and was false and defamatory.[87]

In the present climate of uncertainty surrounding internet defamation cases, it is extremely likely that this procedure will be used to avoid litigation. Although its predecessor was seldom used, the new provisions significantly extend its application and this may serve to reduce defamation cases which arise in the courts. Indeed, of the many reported internet defamation situations which have arisen in the UK, the vast majority have settled out of court and it remains to be seen if, although it is very probable that, the new provisions will add to this trend.

Remaining Defences

While innocent dissemination is considered throughout this work, the defences of fair retort, absolute privilege and qualified privilege will not be considered. A consideration

[85] s. 2(3)
[86] which must be made prior to serving a defence in defamation proceedings see s.2(5)
[87] s.4(3)

of these defences here would offer nothing more than a restatement of the law as each is unlikely to be greatly affected by the internet.[88]

Chat Rooms

Chat rooms[89] are an internet phenomenon whose closest analogy is to a telephone chat service or even ordinary conversation. It is suggested here that in dealing with chat room defamation, few differences should exist between defamation law in chat rooms and that which would apply in ordinary spoken conversation.

An important consideration in chat rooms is the extremely informal nature and unreliability of the ensuing conversation. Participants will often be a different age or sex from that which they stipulate and it is not uncommon for a conversation to degenerate into meaningless insulting and abusive attacks on other users. As such, a person would possibly be best advised not to believe anything which they read in a chat room. This is enhanced partly by the feeling of anonymity which the web thrives upon and also by the sense of physical distance, real or imagined, between the participants.

It is difficult to see therefore how anything said in a chat room can injure a person's feelings or harm their character or reputation and consequently, comments incapable of being taken seriously by readers would not be defamatory in nature. It is submitted that those who host chat rooms should not be liable for any of the content contained therein. As comments are not available in a permanent form, there is no requirement to remove offending items. There may though be an obligation to bar some users after several complaints have been made against them, but considering that such persons can easily obtain a new identity, failure to do so should not result in liability.

[88]For a guide to each of these defences see *Walker* or *Norrie*
[89]An example can be found at <http://chat.yahoo.com/>

Where a chat room holds itself out to be higher in moral nature than others, liability will more likely exist where steps have been taken to facilitate this claim through screening for offensive language and the like. However, defamatory statements will often not contain offensive language and as such would be hard to screen. A suitable disclaimer could be posted warning of the nature of chat rooms so that new users are not shocked at what they find. This raises more complex issues of consent to defamation and the applicability of the general delictual defence of *volenti non fit injuria*. Consent to physical injury removes the inflictor from civil liability for their actions and it is submitted that it is possible to consent to injuria verbis which would have the same effect. If such is not possible, then a variation thereon should be applied to chat rooms which have indicated fully the risks involved prior to entry. A disclaimer worded strongly enough to indicate entry implies consent to being defamed would make even the most hardened internet users think twice before entering but if worded less harshly, it would still be difficult to claim that they did not accept the risks involved in entering the chat room.

Websites

Individuals now posses a degree of power to publish information which has never before been experience. The same individuals will often lack the same caution which traditional publishers, such as newspapers, operate. In practice, there would appear to the present writer to be two types of website, firstly, a passive website, which "does little more than make information available to those who are interested"[90] and secondly, an interactive website "where a user can exchange information with the host computer."[91] In reality, the degree of control which the owner has over the site's content diminishes as the

[90] *Zippo Mfg. Co. v Zippo Dot Com Inc*. 951 F Supp 1115 (WD Pa 1997)
[91] *ibid.*

contribution from third parties increases. All website owners must be aware of content on their websites and take steps to deal with complaints quickly and efficiently. On a passive website, the owner will be responsible for all material which they have made available to the public.

The question of whether a website owner can be held liable for information contained a another site which they link to is at present uncertain. In Germany, a Hamburg court recently held a webpage owner liable not only for the content of his page but also for the content of pages to which his own linked.[92] Their reason for doing so was that "by including the links, Best had made those statements part of his page".[93]

It is the present writer's view that no liability should exist here even where the author knows of its defamatory content. It is possible to say that an owner ought to know of the content of every site which they link to, but this does not reflect the reality that once a link is added to a website, the author will seldom return to the site to review its content. To make a website owner liable for pages which they link to would severely restrict internet development, since one of the more popular and effective means of doing so is to get other pages to link to it. The *Best* case reached an intolerable result and should not be followed by any Scots court. To suggest that a website owner accepts responsibility to pages that he links to is akin to suggesting that a writer accepts liability for material contained within his bibliography or a newspaper for the content of programs it lists in its TV guide, neither of which can be considered to be part of the author's work.

On an interactive website, where content is provided in part by third parties, the situation is more complex and will be considered later in relation to Internet Service Providers.

[92]Case 312 O 85/98 *Steinhoefel v Michael Best*
[93]"Some You Win, *Somm* You Lose - Recent Cases in ISP Liability" - David Flint 1998 Bus LR 206; The article also refers to other unusual decisions in German courts involving internet liability.

Liability of Internet Service Providers

Internet Service Providers (ISPs) provide access to internet services for their users which will often include newsletters, newsgroups, bulletin boards and other discussion fora which their subscribers may read and post messages on. It is this second aspect of their activities which has led to extensive world-wide litigation against ISPs for material contained on their servers.

Liability of ISPs may stem from the fact that

> "It is a quirk in the law that damages can be obtained for defamation against an entirely innocent defender and that quirk should be limited to situations in which it is essential to give protection to reputation: it is not needed in circumstances in which its only effect is to give the pursuer a choice of defenders."[94]

However, this "quirk" is likely to remain, albeit now lessened by the 1996 Act, for it seems that the significant benefit to the pursuer involved in being able to choose a defender would be extremely difficult to restrict. The reasons whereby such an action would be theoretically justified, such as where the actions of the innocent party have led to a far greater part of the harm felt by the pursuer, may warrant this approach.

ISPs have experience the majority of internet defamation actions to date most of which have arisen in the USA and so that we may better approach such cases should they arise in Scotland, it is best that we consider them in detail first. The initial as well as present US position must be considered in detail for many similarities exist between the initial US position and the present day position in England and Wales. The later US cases offer

[94] *Norrie*, p.89

a glimpse into ways in which Scots courts should interpret any cases which arise before them.

Initial US Position

The majority of internet defamation cases have arisen in the USA and many of these have concerned ISPs which is a good indication that ISP liability will become a heavily contested area in the UK sooner rather than later..

The first major case in the USA was *Cubby Inc & Blanchard v CompuServe Inc and Fitzpatrick*[95] in which it was alleged that a daily newsletter, "Rumorville USA", stored on CompuServe's server, had on several occasions contained "false and defamatory"[96] statements about a competitor, "Skuttlebut" which had been developed by the pursuers. Rumorville was not run by CompuServe, but available as part of its "Journalism Forum", a special interest discussion area comprising "electronic bulletin boards, interactive online conferences and topical databases".[97] The running of this was contracted to a second company which had subcontracted various areas of its operation to others, one of which being the second defendant, Fitzpatrick, responsible for "Rumorsville USA". CompuServe played no part in the content of the newsletter at all which was uploaded onto it's server by Fitzpatrick and immediately disseminated. As a consequence it was held that,

> "CompuServe has no more editorial control over such a publication than does a public library, bookstore, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would for any other distributor to do so."[98]

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[95] 776 F Supp 135 (1991)
[96] *ibid.*
[97] *ibid.*
[98] *ibid.* per Leisure, J

This decision was motivated significantly by CompuServe's lack of knowledge of and control over the content of the publication and also by greater free speech considerations.[99]

While it was believed for a while that this would lead to ISPs having an immunity for the material on their servers provided they had no knowledge of it and no reason to know, the position became somewhat clouded following the ruling of the New York Supreme Court in *Stratton Oakmont Inc and Daniel Porush v Prodigy Services Co & Ors.*[100] In October, 1994, defamatory statements were made about Stratton Oakmont, a New York investment firm by an unidentified user on "Money Talks", a bulletin board on Prodigy's server. The vituperative words in question included the extremely defamatory statement that Stratton Oakmont was a "cult of brokers who either lie for a living or get fired".

The facts of the case, at first glance, appear to be very similar to those in *Cubby* but here, Prodigy's role in relation to the bulletin board was vastly different. Prodigy maintained and actively advertised its own policy of controlling the content of its bulletin boards, implementing this through an automatic software screening program and strict guidelines which were enforced by 'Board Leaders'. The 'Board Leaders' were responsible for the content of the boards under an agreement with Prodigy which went to great pains to stress that they were not to be considered an employee, representative or agent of Prodigy.

The Court held, firstly, that Prodigy was a publisher finding that

> "It is Prodigy's own policies, technology and staffing decisions which have altered the scenario and mandated the finding that it is a publisher."[101]

[99] As a result of the US First Ammendment.
[100] May 24, 1995 WL 323710 NY Sup Ct
[101] *ibid.*

On the separate issue of agency, the court found that the 'Board Leader' was acting as Prodigy's agent for whose actions, Prodigy would in turn be liable.

Whilst *Stratton Oakmont* did not overrule *Cubby*, and indeed agreed with *Cubby*, having been distinguished on the factual grounds outlined above, the resultant situation was undesirable. Both cases appeared to be sound in reasoning and law but the end result proved to be both confusing and undesirable. The situation had arisen whereby an ISP which exercised no control over the content of the material it disseminated would be immune from prosecution, yet one which had taken the seemingly conscientious steps of monitoring and controlling content would be liable for all defamatory content posted. This is concerning when we consider that Prodigy, in 1994 was receiving over 60,000 messages a day, a volume which is impossible to monitor fully and to do so would restrict the benefit of immediate communication inherent on the internet..

Interestingly, the court in *Stratton Oakmont* believed that the decision would not encourage ISPs to abandon all control of the content on their servers as the increased control exercised by Prodigy would be compensated by "the increased exposure" which would result. This position was about to change.

More Recent US Position

In 1996, the Communications Decency Act (CDA), section 509 expressly provided for the liability of ISPs in such a situation stating 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."

Furthermore, no provider or user can now be held civilly liable for removing or restricting access to any material which they believe to be objectionable regardless of whether or not that material is "constitutionally protected".

In 1995, Kenneth Zeran became the victim of a cruel and unusual joke by an unknown user of AOL's bulletin boards. The prankster placed several adverts for T-Shirts and other paraphernalia glorifying the infamous Oklahoma City bombing,[102] leaving Zeran's name and telephone number for further information. Unsurprisingly, Zeran began to receive a torrent of threatening and abusive phone calls from horrified users of the bulletin board. AOL were sued for

> "failing to respond adequately to the bogus notices on its bulletin board after being made aware of their malicious and fraudulent nature."[103]

AOL, it was alleged, had unreasonably delayed in deleting the original message, refused to print a retraction and had allowed similar messages to continue to appear. The main question in the case was whether the CDA pre-empted the common law position laid down in Cubby. It was held that it did and accordingly, Zeran's action failed leading the US to a position whereby ISPs could not be held liable for defamatory material contained on their servers. To do so would have frustrated the objectives of the CDA which were to "encourage that development of technologies, procedures and techniques by which objectionable material could be blocked or deleted".[104] No mention is made though in the case of whether AOL had attempted to achieve this objective.

In a later case, *Blumenthal v Drudge and AOL*[105] the policy of the CDA again was discussed and it while it was indicated that

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[102] in April, 1995 in which 168 people were killed
[103] *Zeran v America Online Inc*, 958 F Supp 1124 (ED Va 96-952-A)
[104] *ibid.*
[105] 969 F Supp 160 (SD NY, 1997)

> "it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store or library, to the liability standards applied to a distributor"[106]

the case failed because

> "Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted."[107]

This would appear to be the present US position which in the present writer's view goes too far, particularly in relation to larger ISPs which as Lloyd points out, "have a user base greater than that of many newspapers or even television or radio stations."[108]

UK Position

It is ironic that as the US prepared legislation to combat the undesirable effect of the *Stratton Oakmont* decision, the UK was preparing legislation which would effectively incorporate a similar undesirable effect into UK law.

In 1999, the UK received its first internet defamation judgment handed down by Justice Morland in the English High Court. The case, *Godfrey v Demon Internet Ltd*,[109] concerned postings on a newsgroup on another ISP which contained offensive statements which purported to be made by Laurence Godfrey. Once posted on the original ISP, the statements, as was the practice, were automatically disseminated to every server which carried the newsgroup,[110] one of which was Demon's server. Godfrey contacted Demon notifying them of its fraudulent and defamatory nature and requesting that it be removed from their Usenet server. Although Demon were able to delete the posting, it remained

[106] *ibid.*
[107] *ibid.*
[108] at p. 494
[109] 1999 4 All England Law Reports 342
[110] soc.culture.thai

on its server until it was automatically removed over a week later and damages were sought from the ISP in respect of the period after notification. It was predominantly this latter fact which led to a finding in favour of Godfrey.[111]

The provisions of s. 1 of the 1996 Act have been considered above in relation to individual liability be e-mail communication but arguably, the most significant application of the Act may be in relation to ISPs. An ISP will, under the Act, although potentially qualifying as an "editor" or "publisher"[112] be able to satisfy the first part of the defence where it shows that it is only involved

"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"[113]

or

"as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control."[114]

While this part of the defence was met in *Godfrey* the remaining two requirements that the ISP had taken reasonable care in relation to the publication[115] and that it did not know nor had any reason to know that what it did led to the defamatory publication[116] were shown to be harder to meet[117] since Demon knew of the defamatory posting from the moment Godfrey notified them and chose to leave it on their server.

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[111] although an indication was given that damages would be very small
[112] s.1(2)
[113] s.1(3)(c)
[114] s.1(3)(e)
[115] s.1(1)(b)
[116] s.1(1)(c)
[117] Morland, J found support for his conclusions in "Reforming Defamation Law and Procedure" consultation on the Draft Bill, Lord Chancellor's Department, July 1995

The case considers in detail the English common law position of "publication" finding that Demon was responsible for "publication" everytime the posting was accessed. Demon apparently "did not play a merely passive role. It chose to receive the 'soc.culture.thai postings to store them, to make them available to accessors and to obliterate them."[118] The comparison was therefore made to booksellers and libraries, all of which had been found to be responsible for "publication" at English common law. If the Act requires, as Justice Morland considered, application of the common law to such a great extent, an ISP will always be liable for content on its servers having chosen to store it in the first place.

This contrasts with the US position in *Lunney v Prodigy Services Co*[119] which found an ISP analogous to that of a telephone company[120] which chooses to allow people to have voice messages accessible through use of its equipment. Here, once Demon accepted the position as a USENET server, it in reality had no control over postings which were stored providing simply a means with which such postings could be accessed and read. Furthermore, once it had been posted, "publication" would have occurred even though notification occurred later.

The decision has been widely criticised[121] by writers but perhaps it's effect should be no greater than to encourage ISPs to act quickly when a complaint is made about material on their servers. This would though lead to a system of partial censorship whereby ISPs fearing litigation will take the steps of deleting automatically all material brought to their attention.

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[118] *Godfrey, supra*. at p.349 per Morland, J
[119] (1998) 250 AD 2d 230, NY SC upheld on appeal
[120] based on US precedent set in *Anderson v New York Telephone Co* (1974) 35 NY 2d 746
[121] It should be noted that it is believed that Demon will appeal.

The existing UK position, it appears has not gone as far as was originally intended, that being, "to provide a defence for those who have unwittingly provided a conduit which has enabled another person to publish defamatory material",[122] and leaves the UK somewhat similar to the US position in *Stratton Oakmont*. This does not appear to be a *de jura* but a *de facto* situation since the legislation seems to be trying to create an ISP defence but in practice has failed to achieve this objective.

ISP Liability in Other Countries

In several troubling internet cases in Germany, ISPs have been found to be liable for all content on their servers, including pages they link to[123] and misleading advertisements by third parties.[124] In France, in a recent case,[125] a court held an ISP to a similar standard of liability in relation to material on a subscriber's homepage.[126] Australia, on the other hand appears to be heading in a different direction, opting for among other things, self-regulatory codes of practice for ISPs to set out steps to be taken to remove unsuitable from their servers once complained of.[127]

Suggested Scots Position

For many years, legal commentators sought to predict English and Scots defamation cases, should they arise, by reference to existing US cases, of which there are now many. The most significant effect of the judgment of Justice Morland in *Godfrey* could be his decision that the US cases provided "only marginal assistance because of the different approach to defamation across the Atlantic"[128] The efforts of past writers may not though

[122]Lord Mackay LC (571 House of Lords Official Report (5th Series) col 214 (1996))
[123]Best, supra.
[124]"see "Shock Decision by German Court against ISP" - MacRoberts Solicitors Press Release, 26/06/98 based on a report of the case in the Sued Deutsche Zeitung on the 24/06/98
[125]09/06/98
[126]see "Quelle Dommage!" - MacRoberts Solicitors Press Release 04/11/98
[127]see "Australia seeks to control the Internet" - MacRoberts Solicitors Press Release - 1999
[128]1999 4 All England Law Reports 342 at p.348 per Morland, J

prove to be entirely in vain as the cases have not yet been distinguished in a Scots court. While the differences in the two legal systems will rightly exclude their direct applicability to Scots law, a Scots judge must examine fully the situations and legal issues which have arisen in the US so as to ensure that the correct approach is adopted at an early stage.

There is a significant problem with the wording of the Act for at s.17(1), it is stated that ""publication" and "publish", in relation to a statement, have the meaning they have for the purposes of the law of defamation generally". The question of whether there has been "publication" is arguably peculiar to English law, and ought not to trouble a Scots court where the question is one of fact.[129] Indeed "publication" arguably has no definition at Scots common law, where the term, "communication" more generally applies. It is unacceptable for an Act which applies to several jurisdictions to use terminology which has relevance in only one. A Scots court would be advised to ignore this flaw in the wording of the Act and instead substitute the words "communication" and "communicate" in place of those used.

Scots courts, in the absence of complex common law analysis of "publication" and being perhaps more reliant on the effects of Statute for its interpretation of innocent dissemination, it is submitted, in relation to ISPs treat the common law as pre-empted by Statute. Failure to do so, particularly in England, would lead to an impossible hurdle for ISPs in mounting a defence. The requirement that "publication" have its common law meaning should therefore apply in Scotland to an examination of whether there has been communication to the pursuer or third parties, allowing this to be overruled where the criteria of the defence are met.

[129] *Evans & Sons v Stein & Co* (1904) 7 Fraser's Session Cases 65

A significant problem with the Act is that In order to satisfy the second requirement of reasonableness, it would appear necessary to exercise a degree of editorial control, such as was used in *Stratton Oakmont*. This editorial control, given the number of daily postings on the newsgroups would be a daunting task to undertake, yet perhaps necessary in order to show that reasonable care has been exercised. However, where such editorial control is exercised, it will be difficult for an ISP to show that the first criteria is met for they will no longer be involved solely in the extremely passive roles outlined in ss.1(3)(c) and (e).[130]

From this point of view, the situation, while similar to the previous position in the US, appears to be far worse, for by controlling content and abandoning a passive role, an ISP becomes liable for material on its servers and for failing to control content and adopting a passive role, liability too exists.

Ideally, reasonable care should be inapplicable to ISPs otherwise the defence may never be satisfied, but such is not entirely possible within the framing of the Act. It would be perhaps far more agreeable to many to treat 'reasonable care' as a reactive rather than preventative measure, applying solely to an ISP's actings once they had been notified of the defamatory nature of the posting. With this in mind, damages should not run from the day of the posting, nor even from the time of notification that a statement is defamatory, but several days later. This would enable ISPs to take a reasonable length of time to consider the nature of the statement rather than blindly obliterate every message.

It should be remembered that to attach "a lower standard of liability to an electronic news distributor [than to a traditional news vendor][...] would impose an undue burden on the

[130]The author has found agreement with this view in "Defamation and the Internet: Name Calling In Cyberspace" - Lillian Edwards <http://www.law.ed.ac.uk/c10_main.htm>

free flow of information."[131] yet to allow an absence of responsibility for ISPs to exist would be alarming to most people.

Responsibility for regulating material on the internet should not lie solely with the courts and Parliament. ISPs must accept a degree of responsibility and it would be advisable for the industry to establish an accepted code of practice, as was indicated in Australia, to govern situations where a dispute arises.

An absolute statutory immunity such as exists in the US would be unacceptable to the public and the contrary to the present legal position but if the industry is regulated too strictly, ISPs in the US will have a huge competitive advantage over UK ISPs.

Anonymity on the Web

The problems which may arise are broad and do not relate solely to e-mail but concern more importantly the problems associated with locating the person responsible for defaming the aggrieved individual. Lawyers in practice must be aware that these situations may arise and be able to identify them when they do.

In an action for defamation, the pursuer must aver and prove that it was in fact the defender who was responsible for the contumelious statement complained of. Indeed in any civil court case, it is vital to know who the defender is and prove on the balance of probabilities that the named defender was responsible for the defamatory remarks. An e-mail address provides essentially, the means to locate the individual responsible for sending the defamatory e-mail, posting, webpage or other similar communication.

[131] Cubby, supra.

It is extremely easy to use fake personal details in order to set up a fake e-mail address or login to online services. To hide one's identity on the web, various means and methods can be used, including providing false details to an internet based e-mail provider[132] and selecting a username unrelated to their real name, hacking into an existing mail server on the user's network,[133] altering the mail preferences in either Netscape Navigator or Internet Explorer so as to hide one's identity. It is also possible to give the impression that another person has in fact distributed the e-mail to others. This could arise where the pursuer was the only recipient of the statement but wishing to receive greater damages, forwards the e-mail on to others whilst pretending to be the defender. In *Lunney v Prodigy Services Co.*[134] an unknown user obtained several fake e-mail accounts in the defender's name and sent abusive and threatening e-mails to another the ISP was found not to be negligent in allowing this to happen and so restrictions on setting up e-mail accounts do not appear to be an option which ISPs will need to pursue, at least in the US.

While 'lying' is not a socially acceptable activity, it is not only acceptable but common among internet users and the average internet user may be forgiven for engaging in such deceitful practices as a result of the huge volume of advice given to new users which will normally stress that a person should avoid transmitting their personal details over the web. The advice is well-founded as the business of selling personal information in a digital format is now an extremely large industry and until recently, scare mongering by the media highlighted the problems with security on the web.

The practice of providing false information may lead to a false sense of security on the internet since internet anonymity is often a myth. Whenever a person connects to a

[132]Such as Hotmail: <http://www.hotmail.com> or Iname: <http://www.iname.com>
[133]A guide to how to hack is contained here: <http://www.tuxedo.org/~esr/faqs/hacker-howto.html> but bear in mind, the Computer Misuse Act 1990, ss1-3
[134]1999 NY Int. 0165 (Dec. 2, 1999)

webpage or accesses a computer system, information about the computer they are using is transmitted to the server they are connecting to.[135] Within this information is the Internet Protocol (IP) address[136] of the server the visitor is using and by using this IP address, it is often possible to get the actual postal address of the ISP which the visitor is using.[137] Assuming the ISP has sufficient methods in place for monitoring the activities of its users, it is possible to find out exactly who was responsible for a defamatory statement. Services are available online which will 'anonymise' a person for a fee[138] but these too may keep records which may identify the user.

In the US, Canada and Australia, the identities of those responsible for defamatory statements have been obtained in cases and given the increasing ISP immunity, this looks set to continue in the future. It is beneficial to ISPs to disclose the identity of those who have posted the material claimed of for, if defenders remain an anonymous, it is harder to justify ISP immunity if this will lead to an absence of a remedy for an aggrieved individual. A potential litigant should not despair therefore when faced with a seemingly anonymous defender in the UK.

Aside from the practical problem of identifying a possible defender, the court must be satisfied that the defender is responsible for the remarks on the balance of probabilities. Extrinsic evidence may be led in order to prove that the writing was in the defender's style,[139] or that they had a motive to defame in such a way.[140]

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[135]An excellent example of the huge information which is transmitted is available at <http://privacy.net/anonymizer/> and an example of this in practice is contained at the site statistics for the Scots Law Online Resource Centre, at <http://v.extreme-dm.com/?login=kiorakc >

[136]For example, the IP address for Glasgow University is 130.209.6.43

[137]By typing the IP address into the following webpage, a full postal address will be displayed <http://network-tools.com/5/>

[138]<http://www.anonymizer.com>

[139]*Menzies v Goodlet* (1835) 13 Shaw's Session Cases 1136, *MacTaggart v MacKillop* (1938) Session Cases 847

[140]*Swan v Bowie* (1948) Session Cases 46

As regards style, the existing caselaw refers more to handwriting, yet in a web context, we would require evidence led that those who knew the defender would recognise his style of writing e-mails. This may though, be extremely difficult to prove and other evidence such as past e-mails or statements to others regarding the pursuer may be more useful. Computer evidence illustrating whether or not the defender had access to a computer terminal at the time that e-mail was sent would be used where the owner of the server they were using keeps records of users logged on at any given time. However, in many offices, 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.

There are clearly no set guidelines to show the types of evidence which should be admissible but any Scots court would be advised to be very broad minded in its approach and at the same time, cautious, possibly inviting expert witnesses to clarify the reliability of the various types of computer evidence. It is interesting to note though that the position is a lot more hopeful for a pursuer dealing with anonymous internet defamation than if they were dealing with defamation in an anonymous letter.

Vicarious Liability of Employers and Universities

In 1997, in an out of court settlement, Western Provident received £450,000 from Norwich Union, a rival private healthcare insurance provider. Western Provident had sued over allegedly defamatory comments about it's financial status which it had discovered were being circulated on Norwich Union's internal e-mail system. The case is not unique[141] and given that it never reached the courts, an opportunity to answer unanswered questions as to what constitutes 'reasonable care' in relation to a publication

[141] Another case which has settled out of court involved defamatory remarks accusing a policeman of fraud, made on the internal e-mail system of Asda Supermarkets in 1995. For Comment, see "Caught in the Net", The Guardian, 25/04/95

was lost. What was clear though was that the information age had placed the ability to communicate in a publishable form at the hands of millions of internet users.

Employers will often be liable for the delictual acts of its employees, not least as the "operator of [...] a communications system by which the defamatory statement is transmitted"[142] but also a common law vicarious liability. The first will operate similarly to that in relation to ISPs, except there will be a greater degree of "effective control"[143] over the maker of the statement which will make the test in s.1(1)(a) harder, if not impossible to satisfy. The second, relates to the common law vicarious liability where an employer's liability ceases when the employee engages in acts outwith the scope of his employment[144] regardless of whether he is using equipment owned by the employer.

It would seem, that liability will be harder to escape under the 1996 Act than previously was the case. While employers will face an uncertain time until the first case is resolved, it will encourage greater control over employees when using computer systems at work. Where a strict employee computer use code is in place, it will be harder to find employees liable by opening up the possibility of meeting the remaining requirements of the Act. Whether this is desirable or not seems irrelevant, as the position would seem to be inevitable as employers do possess far greater control over the users of their computer systems than an ISP would be able to.

Damages

It should be remembered that the number of people who have read a posting may be relevant to the assessment of damages and so on a newsgroup or webpage containing a

[142] 1996 Act s.1(3)(e)
[143] *ibid.*
[144] *Williams v Hemphill* 1966 Session Cases (House of Lords) 31, especially the dicta of Lord Pearce at p.46

defamatory statement, if shown that it has been accessed only once, the damages will be smaller than if accessed by tens of thousands. This aspect is more relevant when showing patrimonial loss, but such loss, it must be remembered, has to be shown. Furthermore, the pursuer's past actings will be relevant in deciding the amount of damages and consequently, where the defamatory statement was provoked[145] or where they lack a good character or reputation initially,[146] damages will be less. Above all, it is advisable that once a defamatory statement has been communicated, an apology and retraction should be sent immediately, such will not exclude the maker from liability but will go some way towards mending the pursuer's hurt feelings and preventing loss, thereby diminishing the size of damages.

Conclusion

Scots law will adapt successfully to internet defamation, assuming of course, the issues raised in a court are dealt with in an open minded manner. Much of the issues dealt with share the notion of informality in communication, a situation which is unlikely to change. That does not mean that an aggrieved individual should have to accept injury to their feelings or reputation, but that a proper consideration of all the relevant factors should take place.

The wording and drafting of the 1996 Act is far from satisfactory, leaving ISPs and employers in a state of confusion as to their potential liability. It has been suggested above that the difficulties presented by the Act can be overcome, but only where a court adopts a more liberal interpretation of its provisions. The American and other World cases offer valuable insights into the end result which the Scots legal system should aim to achieve. It has been submitted that this position should not confer so great an

[145] *Paul v Jackson* (1884) 11 Rettie's Session Cases 460
[146] *C v M* 1923 Session Cases 1

immunity as presently exists in the USA nor so strict a position as in Germany and France, opting for a happy medium between the two whilst erring more towards the US position. ISPs should be liable for the content of their servers, but only in a reactive sense, concerning their ability to respond to defamatory content.

As litigation continues in other jurisdictions and the internet continues to grow, it will not be long before a pursuer chooses to raise a defamation action in the Scots courts. When this occurs, it is hoped the courts will be ready.

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