INTERNET DEFAMATION LAW AND PUBLICATION BY OMISSION: A MULTI-JURISDICTIONAL ANALYSIS

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I INTRODUCTION

The liability of internet search engines, social media platforms and online discussion forums for the publication, by omission, of the defamatory publications of others is 'not settled'.[1] This uncertainty has been engendered by the different, and at times contradictory, approaches to internet defamation adopted by courts in Australia, Hong Kong, New Zealand and the United Kingdom.[2] Through a survey of recent case law, this article demonstrates that the meaning of 'publication' on the internet by omission is an area in need of legislative direction due to the difficulty in weighing competing policy arguments. Without clear guidance, entities that use or create internet platforms are unable to implement practices and policies for online publication with certainty as to their protection from defamation claims. This article therefore argues that the creators and operators of online platforms ought to be afforded a statutory defence akin to section 5 of the *Defamation Act 2013* (UK) where they are not the direct or primary publisher of defamatory material.

This study builds on, and draws from, two key texts on internet defamation law. In 2010, Rolph analysed the law of defamation applicable to internet publishers.[3] Rolph focused his analysis on *Godfrey v Demon Internet Ltd*,[4] *Bunt v Tilley*, [5] and *Metropolitan International Schools Ltd v Designtechnica*

* BA (Hons), LLB (Hons) (ANU); Graduate, Gilbert + Tobin. I would like to thank Amy Sinclair for her research assistance; Elouise Fowler and Bronwyn Flowers for their editorial assistance; and the anonymous reviewers for their suggestions and comments. The views expressed in this article and any errors are my own.

1 *Rana v Google Australia Pty Ltd* [2013] FCA 60, [50] (Mansfield J); *Robertson v Dogz Online Pty Ltd* [2010] QCA 295, [1] (De Jersey CJ), [35] (Muir JA), [55] (Cullinane J); *Marshall v Smith* [2013] WASC 451, [50] (Le Miere J).

2 Recent decisions in Canada are beyond this article's scope. See, eg, *Crookes v Newton* [2011] 3 SCR 269, which is analysed in Kim Gould, 'Hyperlinking and Defamatory Publication: A Question of "Trying to Fit a Square Archaic Peg into the Hexagonal Hole of Modernity"?' (2012) 36 *Australian Bar Review* 137.

3 David Rolph, 'Publication, Innocent Dissemination and the Internet after *Dow Jones & Co Inc v Gutnick*' (2010) 33 *University of New South Wales Law Journal* 562, 571–3.

4 [2001] QB 201.

5 [2007] 1 WLR 1243.

Corporation.[6] In that same year, Collins published the third edition of *The Law of Defamation and the Internet*.[7] Since then, however, the law has developed and there is a need for systematic study of changes in the law of defamation. Hence, this article reviews recent decisions on internet defamation law in order to synthesise the competing approaches to the publication of defamatory imputations by omission on the internet, focusing on online platforms such as blogs, internet discussion forums, and social networking sites such as Facebook, MySpace, and Twitter. In doing so, this article sets out an argument for legislative action and a framework for the judicial development of defamation law in the absence of legislative intervention. The significance of this article is, thus, that it evaluates the current state of defamation law in order to demonstrate the necessity of enacting increased protections for internet publishers, and subsequently sets out and analyses the *Defamation Act 2013* (UK) as a model for doing so.

This article is structured in three primary parts. First, this article reviews the rules of publication for the purpose of defamation law, focusing on the liability of entities for the publications of third parties. Second, it reviews recent jurisprudential developments in the laws of online defamation in Australia, New Zealand, the United Kingdom, and Hong Kong. Third, this article analyses the common law and statutory defences to defamation for internet publishers.

II THE 'PUBLICATION' OF DEFAMATORY MATERIAL

Defamation law distinguishes between publication occurring by way of a positive act and publication occurring through omission. In *Frawley v New South Wales*,[8] Berman AJ characterised these two streams of publication as inactive and intentional publication (although the latter is perhaps better termed 'active' publication in order to properly delineate the types).[9] Although both publication by a positive act and publication by omission may give rise to liability for defamation, a different outcome may follow depending on the characterisation of the act as different policy rationales and tests of publication inhere in the different modes of publication. For this reason, the identification and characterisation of the specific act of publication is critical. It is important to emphasise that the only acts which are relevant in determining whether an entity has published by omission or by a positive act, are those occurring at the same time as, or after, an initial act of positive publication. The court is not concerned,

6 [2011] 1 WLR 1743 ('*Metropolitan International Schools*').

7 Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 3rd ed, 2010).

8 [2007] NSWSC 1379.

9 Acting Justice Berman contrasts 'publication through inactivity' with 'a person who does something intentionally lending his or her assistance to the dissemination of material': *Frawley v New South Wales* [2007] NSWSC 1379, [8]–[9].

for example, with the act of an alleged tortfeasor in erecting a noticeboard upon which defamatory material is posted by a third party.

The test of publication by a positive act in Australia is derived from the judgment of Isaacs J in *Webb v Bloch*.[10] In that case, Isaacs J held that defamation requires an intention to assist in publication, stating that '"*if he has intentionally lent his assistance to its existence for the purposes of being published*, his instrumentality is evidence to show a publication by him."'[11] On this definition, a publisher includes any person or entity that intentionally assists in the act of publication. The mental element of the wrong is satisfied by an intention to assist in publication, rather than an intention to publish defamatory material or knowledge of a publication's defamatory content. Accordingly, whether a positive act of publication amounts to publication for the purpose of defamation law is able to be determined according to the test set out in *Webb v Bloch*. This includes, for example, acts such as 'tweeting' or 're-tweeting' a 'tweet' on Twitter,[12] commenting on LinkedIn or a website,[13] uploading a video to YouTube, emailing defamatory material,[14] which *may* all give rise to liability for publication on this basis. Thus, while the particular communicative act is neoteric, departure from longstanding principles of defamation law in such instances is neither mandated nor necessary.[15]

More difficult questions are prompted by internet search engines such as Google.[16] Search engines produce search results in response to a user query by first searching out website content and indexing and storing (or 'caching') the content on its servers. Search results generally comprised of a hyperlink, a snapshot of the website's content, and a title for each search result are then

10 (1928) 41 CLR 331.

11 Ibid 364 (emphasis in original), quoting Henry Coleman Folkard, *The Law of Slander and Libel* (Butterworths, 5th ed, 1891) 439.

12 See, eg, the successful claim for defamation against a Twitter user in *Lord McAlpine v Bercow* [2013] EWHC 1342 (QB). It has become common on Twitter for users to include a disclaimer on their Twitter profile to the effect that re-tweeting does not equate to an endorsement of the tweet. Such a disclaimer will not, however, absolve the Twitter user of liability as a publisher for the purpose of defamation law as a positive act of publication does not require endorsement of the published material. Where the content of the tweet, however, is only a hyperlink, this is unlikely to amount to the publication of defamatory material without more. It is only if the text accompanying the hyperlink also reproduces the defamatory imputations that they may be liable. A majority of the Supreme Court of Canada in *Crookes v Newton* stated: '[o]nly when a hyperlinker presents content from the hyperlinked material in a way that actually repeats the defamatory content, should that content be considered to be "published" by the hyperlinker.': [2011] 3 SCR 269, 292 [42] (Abella J). See also the different formulations of the minority judges: at 317 [106] (Deschamps J), 294 [50] (McLachlin CJ and Fish J).

13 See, eg, *Jeffrey v Giles* [2013] VSC 268.

14 See, eg, *Higgins v Sinclair* [2011] NSWSC 163.

15 See, eg, *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

16 Search engines may be liable as publishers of the defamatory publications of others in four ways: (i) by providing access to a defamatory website: *Trkulja v Google Inc LLC [No 5]* [2012] VSC 533 ('*Trkulja*'); (ii) by displaying defamatory material in the title, URL or snippet of results produced by a search: ibid; (iii) by prompting defamatory searches through the autocomplete function of a search toolbar: ibid; and (iv) through the provision of a discussion forum or other platform such as Blogger.com: *Tamiz v Google Inc* [2013] 1 WLR 2151.

produced according to algorithms that operate without human agency.[17] The automation of these processes, however, engenders uncertainty in categorising the acts of publication. The function of a search engine straddles the divide between publication by omission and a positive act.

Similarly difficult questions are raised by online publishing platforms, such as Wikipedia, that do not attribute published material to individual authors but to the platform as a whole,[18] and by the moderators of online discussion forums. For example, Gibson DCJ has suggested extra-curially that the moderator of an online forum is 'roughly analogous' to the editor of a hard-copy publication 'despite the somewhat greater volume of material, and the speed with which "editorial" decisions need to be made'.[19] However, such an analogy is indeed a rough one. The differences between online moderators and hard-copy editors evidences the analogical difficulties in applying technology-neutral rules – particularly those developed prior to the creation and use of internet technologies – to online publications.

III GENERAL PRINCIPLES OF PUBLICATION BY OMISSION IN DEFAMATION LAW

The rules governing publication by omission are derived, originally, from the English Court of Appeal's decision in *Byrne v Deane*,[20] and in Australia, from the judgment of Hunt J in *Urbanchich v Drummoyne Municipal Council*[21] and the separate interlocutory determinations of Simpson J and Berman AJ in *Frawley v New South Wales*.[22] The foundational test of publication by omission, as expressed by Greene LJ in *Byrne*, is whether:

17 See Viva R Moffat, 'Regulating Search' (2009) 22 *Harvard Journal of Law & Technology* 475, 480–4; James Grimmelmann, 'The Structure of Search Engine Law' (2007) 93 *Iowa Law Review* 1, 7–8.

18 For a useful discussion of the publishing practices and legal protections of Wikipedia under 47 USC § 230(c)(1) (2006), see Ken S Myers, 'Wikimmunity: Fitting the Communications Decency Act to Wikipedia' (2006) 20 *Harvard Journal of Law & Technology* 163.

19 J C Gibson and A J Lawrence, 'New Media and Online' in T K Tobin and M G Sexton (eds), *Australian Defamation Law & Practice* (LexisNexis Australia, 2013) [24.040]. See also *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 419 [169] in which Barker J adopted a similar position to Gibson DCJ, holding that Nationwide News had assumed responsibility for the content of publications to their website, notwithstanding that the website received about 40 000 comments each month. *Contra Oriental Press Group Ltd v Fevaworks Solutions Ltd* [2013] HKCFA 47, [66].

20 [1937] 1 KB 818 ('*Byrne*'). In his judgment, Slesser LJ referred approvingly to *Hird v Wood* (1894) 38 SJ 234 (CA), in which sitting under and pointing at a defamatory sign was held to amount to publication. Such a peripheral involvement in publication suggests that the publication by omission stream may include within its ambit positive acts that are akin to mere facilitation or the advertisement of defamatory material.

21 (1991) Aust Torts Reports ¶81–127 ('*Urbanchich*').

22 *Frawley v New South Wales* [2006] NSWSC 248, [17] (Simpson J); *Frawley v New South Wales* [2007] NSWSC 1379, [6] (Berman AJ) (together, 'the *Frawley* cases').

> having regard to all the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?[23]

This test has subsequently been applied in *Urbanchich* and the *Frawley* cases, and the clear rule to be derived from these authorities is that, without a positive act, knowledge of the existence of a publication is a pre-requisite to the imposition of liability as a publisher by omission.[24] However, as Part IV of this article demonstrates, considerable uncertainty attends the application of these principles to internet publication. Indeed, the Hong Kong Court of Final Appeal in *Oriental Press Group Ltd v Fevaworks Solutions Ltd*[25] rejected the application of these rules to the owner and operator of an online discussion forum.

A *Urbanchich v Drummoyne Municipal Council*

Urbanchich concerned posters that contained a photograph of persons in Nazi uniforms in the company of Adolf Hitler that were glued to bus shelters under the control of the Urban Transport Authority of New South Wales at six locations. The face of one of the men had been circled and was identified as the plaintiff, Lyenko Urbanchich, in the accompanying text, which contained further defamatory imputations including, inter alia, that Urbanchich was a war criminal, that he had collaborated with Adolf Hitler, and that he was encouraging Nazism in the Liberal Party. The plaintiff drew the Authority's attention to the posters and asked that they be removed, but they remained in place for another month.[26]

Justice Hunt held that the Authority was capable of being a publisher for the purpose of defamation law, 'provided that the jury also [drew] the inference … that the [Authority] had in fact accepted a responsibility for the continued publication of those posters'.[27] In reaching this conclusion, his Honour held that the plaintiff

> must establish more than mere knowledge on the part of the defendant of the existence of that statement and the opportunity to remove it. According to the authorities, the plaintiff must establish that the defendant consented to, or approved of, or adopted, or promoted, or in some way ratified, the continued presence of that statement on his property.[28]

On Justice Hunt's reasoning, the overarching test of publication by omission is whether the conduct of the accused equates to ratification of the defamatory imputation. This principle, Hunt J went on to say, extends to persons and entities

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23 *Byrne* [1937] 1 KB 818, 838. *Byrne* is discussed at length in Rolph, above n 3, 569–70. See also the application of *Byrne* in *Bishop v New South Wales* [2000] NSWSC 1042, [12], [17] (Dunford J).

24 Although it is not addressed in this article, an entity that procures or induces a person to publish defamatory material may be accessorily liable where liability for defamation does not otherwise lie: see Joachim Dietrich, 'Clarifying the Meaning of "Publication" of Defamatory Matter in the Age of the Internet' (2013) 18 *Media and Arts Law Review* 88, 93–7; David Lindsay, 'Liability for the Publication of Defamatory Material via the Internet' (Research Paper No 10, University of Melbourne, March 2000) pt 3.

25 [2013] HKCFA 47, [66] ('*Oriental Press Group*').

26 *Urbanchich* (1991) Aust Torts Reports ¶81-127, 69, 191 (Hunt J).

27 Ibid 69, 195.

28 Ibid 69, 193.

whose conduct is of a 'passive nature' where they have knowledge of the defamatory publication.[29] This proposition was approved recently by Mansfield J in *Rana v Google Australia Pty Ltd*,[30] in which his Honour held that '[t]he complainant must establish in one way or another an acceptance by the respondent of some responsibility for the continued publication of that statement.'[31] However, Hunt J repeatedly rejected the imposition of a positive duty on an individual to remove defamatory material, except where they have 'in fact accepted a responsibility for the continued publication of those posters'.[32] Pivotal to the acceptance of responsibility for a publication was actual knowledge of the existence (but not necessarily the defamatory content) of the publication.

Urbanchich gives rise to two implications. First, an entity will only be a publisher by way of omission after they have had a reasonable period, after being notified of the defamatory material (or after they have in some way acquired knowledge of the publication), in which to remove it.[33] Prior to the expiration of a reasonable period after which they have been notified, it is not a reasonable inference to draw that they have ratified or consented to the material. Second, on Justice Hunt's analysis, a court ought to be slow to impose a positive duty on an entity to monitor an online platform for defamatory publications due to their control over, or assumption of responsibility for, the platform.

In *Bishop v New South Wales*,[34] Dunford J applied Justice Hunt's reasoning in *Urbanchich* to allegedly defamatory acts in a high school play. In that case, it was alleged that in failing to stop the play, the school was liable for publication by omission. Justice Dunford held that:

> The plaintiff must show the headmaster had the opportunity and ability to terminate the performance and must show that he failed to do so. Because of the transient nature of the performance there is no question of a reasonable time to stop it, but it must be shown that he had the ability and opportunity to terminate it before its natural conclusion. The jury must also draw the inference that in acting or failing to act as he did the headmaster in fact accepted responsibility for the continuation of the performance.[35]

B *Frawley v New South Wales*

The *Frawley* cases involved allegations that the State had published defamatory imputations in relation to a teacher, Mr Gregory Frawley, by

29 Ibid 69, 194.

30 *Rana v Google Australia Pty Ltd* [2013] FCA 60.

31 Ibid [51], quoting *Urbanchich* (1991) Aust Tort Reports ¶81–127, 69, 193 (Hunt J). *Rana v Google Australia Pty Ltd* concerned interlocutory questions in a defamation and discrimination dispute against Google Australia Pty Ltd and Google Inc, as publishers of the defamatory websites and comments of the second and third respondents.

32 *Urbanchich* (1991) Aust Torts Reports ¶81–127, 69, 195.

33 Ibid 69,194. This principle has implications for the determination of the date on which a cause of action accrues for the purpose of the limitation period: see *Sun v Hojunara International Group* [2013] NSWSC 892, [3] (Campbell J).

34 [2000] NSWSC 1042.

35 Ibid [21].

permitting a website containing the defamatory material to be accessed on computers within the school. The computers were supplied by, and the property of, the State. Mr Frawley informed the principal of the material and asked him to remove the material or prohibit access to the website on school computers. The principal failed to do so and, it was argued, the State was thereby liable.

In an application for summary dismissal, Simpson J reiterated that consent is the overarching test of publication by omission, commenting that:

> it is essential that the plaintiff prove that the defendant ... consented to the publication. This could be inferred from the fact (if it be the fact) that that person has control over the matter complained of but fails to take any steps to prevent the publication, or to prevent the continued publication.[36]

At the hearing of this matter, Berman AJ instructed the jury to consider whether the principal accepted responsibility for the continued publication of the defamatory material after being put on notice of their defamatory content.[37] Subsequently, the jury found that the principal was not a publisher for the purposes of defamation law.[38]

IV INTERNET PUBLICATION IN DEFAMATION LAW

The application of the law of defamation to internet publications involves competing policy considerations and philosophical questions. The appropriate distribution of the cost burden if a risk of defamation culminates in harm is a question of justice and moral responsibility.[39] As a general rule, defamation law protects a person against the loss of their right to, or interest in, their reputation, with the corollary imposition of a duty on others not to infringe that person's right or interest.[40] In this way, an award of damages is a form of 'corrective justice' that remedies harm to reputation.[41] The protection of rights to reputation must, however, be set off against the community's interest in the protection of speech rights. Yet, as the cases discussed throughout this article demonstrate, the unity between legal responsibility and moral fault for the publication of defamatory material may diverge as claimants pursue litigation against corporate entities with peripheral engagement in the act of publication rather than the primary or direct publisher. Accordingly, this article advocates for the tying of

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36 *Frawley v New South Wales* [2006] NSWSC 248, [17]. Leave to appeal refused: *New South Wales v Frawley* [2006] NSWCA 317. Although, notably, Basten JA questioned Justice Simpson's statement of principle at para [17] of the first instance judgment: *New South Wales v Frawley* [2006] NSWCA 317, [8].

37 *Frawley v New South Wales* [2007] NSWSC 1379, [6].

38 Ibid [40].

39 Emmanuel Voyiakis, 'Rights, Social Justice and Responsibility in the Law of Tort' (2012) 35 *University of New South Wales Law Journal* 449, 455.

40 David Rolph, *Reputation, Celebrity and Defamation Law* (Ashgate Publishing, 2008) 1; Eric Descheemaeker, 'Protecting Reputation: Defamation and Negligence' (2009) 29 *Oxford Journal of Legal Studies* 603, 605, 608–10.

41 On the meaning of 'corrective justice', distinguished from 'distributive justice', see Voyiakis, above n 39, 452–3.

liability to an entity's moral responsibility for a defamatory publication through the enactment of a statutory defence for online publishers akin to section 5 of the *Defamation Act 2013* (UK). The upshot of such an approach is that legal responsibility for managing the tension between individuals' rights to reputation and speech is imposed on the primary publisher, who is in the best position to prevent, or refrain from, publication of the defamatory material in the first place.

Disagreement may attend the question of whether the principles of defamation law can, and ought to, be stretched to publication by omission on the internet, or whether the courts ought to develop, or the legislature enact, technology-specific rules. Justice Kirby was alive to this tension in *Dow Jones & Company Inc v Gutnick*,[42] commenting that '[t]here are a number of difficulties that would have to be ironed out before the settled rules of defamation law … could be modified in respect of publication of allegedly defamatory material on the Internet'.[43] *Gutnick*, however, involved an act of publication by the uploading of material to the internet and the High Court applied existing laws of defamation to material published on the internet by a positive act, without necessarily needing to create technology-specific rules.

Subsequently, courts have applied the laws of defamation to internet publication occurring by omission. In doing so, they have reasoned through (and, in *Oriental Press Group*, around) the general principles set out in *Byrne, Urbanchich*, and *Frawley* to the particular characteristics and functions of internet platform providers and operators. Yet, considerable uncertainty remains; indeed, uncertainty has been fostered by these decisions, giving rise to three questions that I have endeavoured to answer in this article. First, whether the relevant test of publication, having regard to the particular act of alleged publication, is to be derived from the publication by omission or publication by a positive act stream of authorities. If it is the former, then second, whether a standard of knowledge less than actual knowledge (such as constructive, inferred or imputed knowledge, or even knowledge founded on willful blindness or recklessness)[44] may found publication by omission. And, third, what is the content of the knowledge requirement – is knowledge that the material is, is likely to be, or may be defamatory required, or is it sufficient that an entity has knowledge of the publication of the material, irrespective of whether they consider it likely or not to be defamatory?

Ultimately, the implication to draw from the precedents discussed in this Part is that practitioners and courts must not approach the question of publication uncritically without considering the strengths, weaknesses, and implications of existing rules. Indeed, this imperative is augmented by the influence that the

42 (2002) 210 CLR 575 ('*Gutnick*').

43 Ibid 632 [129].

44 See, eg, the scale of knowledge derived from *Baden v Sociéte Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509, that is utilised by Australian courts in third party liability proceedings, and which elucidates the different degrees of knowledge: see *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 361–3 [259]–[270] (Finn, Stone and Perram JJ).

meaning of 'publication' for the purpose of internet defamation law has had in other areas of the law, including contempt of court,[45] copyright,[46] and anti-discrimination.[47] This has occurred notwithstanding the different statutory and common law schemes that set defamation apart from other causes of action and render cross-pollination of defamation law principles inappropriate. In particular, the existence of the defence of innocent dissemination in defamation law has allowed for a broader definition of publication, which may not be applicable in different contexts. It is thus vital that the courts and the legislature adopt a coherent and consistent approach to internet defamation.

A *Trkulja v Google Inc LLC [No 5]*

Trkulja[48] concerned a claim of defamation against Google Inc LLC and Google Australia Pty Ltd[49] in respect of material that, through Google Inc's search engine facility, linked Mr Trkulja to organised crime and criminal figures. The material comprised of images (referred to by the Court as 'the images matter') and search results and an article ('the web matter').

On 22 September 2009, Mr Trkulja's solicitors had written to Google Inc, complaining about certain search results and demanding that they be removed by 28 September. On 10 October 2009, Google Inc responded by email that:

> At this time, Google has decided not to take action based on our policies concerning content removal. Please contact the webmaster of the page in question to have your client's name removed from the page.[50]

The jury found that, although Google Inc was a publisher of certain images of the plaintiff and images linked to the plaintiff by the inclusion of his name in the caption, it was an innocent disseminator until 10 October 2009. The jury concluded that on 10 October 2009 Google Inc had knowledge of the defamatory material, and the plaintiff was therefore entitled to an appropriate award of damages (assessed by Beach J to be $200 000) from Google Inc in respect of the period 11 October – 31 December 2009.[51] In respect of the web matter, however, the jury determined that Google Inc was able to avail itself of the defence of

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45 *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd [No 2]* [2011] FCA 74, [33] (Finkelstein J); *R v Harwood* [2012] EW Misc 27 (CC), [25]–[35], [37] (Fulford J).

46 See *Cooper v Universal Music Australia* (2006) 156 FCR 380, 3 [1] (French J, agreeing with Branson and Kenny JJ), 389–90 [41]–[45] (Branson J), 408–9 [136]–[140] (Kenny J).

47 See the contrary approaches adopted in respect of a claim under s 18C of the *Racial Discrimination Act 1975* (Cth) in *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 419–20 [169]–[178] (Barker J); *Silberberg v The Builders Collective of Australia Inc* (2007) 164 FCR 475, 485–6 [34]–[35] (Gyles J). Notably, in these cases Barker and Gyles JJ considered that the assumption of responsibility or possession of control may provide a basis on which an entity is held to be a publisher for imputations published on an online platform.

48 [2012] VSC 533.

49 The plaintiff failed to establish that Google Australia Pty Ltd was involved in the publication of the material; accordingly, the claim against the second defendant failed: ibid [12].

50 Ibid [34] (Beach J).

51 Ibid [11]–[12], [36] (Beach J).

innocent dissemination (a jury finding not the subject of the *non-obstante* application and for which there are, therefore, no judicial reasons).[52]

The case followed an earlier successful defamation claim against Yahoo! 7 Inc by Mr Trkulja in respect of a defamatory article published on the website 'Melbourne Crime', and which was accessed through the Yahoo! 7 internet search engine.[53] In that case, Kaye J held that Yahoo! Inc was liable as a publisher if the plaintiff demonstrated 'that the article had been downloaded and read by at least one person using the Yahoo! 7 internet search service'.[54] However, Yahoo! Inc had conceded that, provided the plaintiff was able to demonstrate that the material had been downloaded and read, it was a publisher of the material.[55] Mr Trkulja was ultimately awarded $225 000 in damages.[56]

In *Trkulja*, counsel for the defendants submitted that Google Inc was not a publisher for the purposes of defamation law, citing a series of judgments by Eady J of the Queen's Bench Division of the High Court of Justice of England and Wales.[57] Justice Beach, however, distinguished the English authorities, considering that:

> While much was made by Google Inc in the present case of Eady J's statements in *Bunt* and *Tamiz* that an internet service provider [('ISP')] who performs no more than a passive role cannot be a publisher, those statements have to be seen in the light of the facts in those cases. To say as a general principle that if an entity's role is a passive one then it cannot be a publisher, would cut across principles which have formed the basis for liability in the newsagent/library type cases and also in those cases where someone with power to remove a defamatory publication chooses not to do so in circumstances where an inference of consent can be drawn.[58]

The passivity principle in *Bunt*, referred to by Beach J, is the rule that 'a telephone company or other passive medium of communication, such as an ISP … who truly fulfil no more than the role of a passive medium for communication cannot be characterised as publishers: thus they do not need a defence.'[59] With

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52 Ibid [11]–[12] (Beach J).

53 *Trkulja v Yahoo! Inc LLC* [2012] VSC 88.

54 Ibid [6]–[7] (Kaye J).

55 Ibid [6] (Kaye J).

56 Ibid [63] (Kaye J). The uniform defamation statutes limit damages for non-economic loss 'in defamation proceedings' to the 'maximum damages amount' (although the Court has a discretion to make an award of damages for non-economic loss above this cap): *Civil Law (Wrongs) Act 2002* (ACT) s 139F; *Defamation Act 2005* (NSW) s 35; *Defamation Act 2006* (NT) s 32; *Defamation Act 2005* (Qld) s 35; *Defamation Act 2005* (SA) s 33; *Defamation Act 2005* (Tas) s 35; *Defamation Act 2005* (Vic) s 35; *Defamation Act 2005* (WA) s 35. By example, the 'maximum damages amount' currently prescribed in NSW is $355 500: Greg Smith, 'Defamation Act 2005' in NSW, *Government Gazette of the State of NSW*, No 65, 31 May 2013, 2307. In addition, it ought to be noted that the damages awarded in these cases were on the high end of the spectrum; cf the table of damages awarded in cases since 2009 in T K Tobin and M G Sexton (eds), *Australian Defamation Law & Practice* (LexisNexis Australia, 2013) [20.105].

57 *Bunt v Tilley* [2007] 1 WLR 1243; *Metropolitan International Schools* [2011] 1 WLR 1743; *Tamiz v Google Inc* [2012] EWHC 449 (QB).

58 *Trkulja* [2012] VSC 533, [28].

59 *Bunt v Tilley* [2007] 1 WLR 1243, 1252 [37] (Eady J).

respect to Beach J, his Honour puts this proposition too broadly.[60] Although his reasoning has been followed and applied subsequently by Courtney J in *Wishart v Murray*,[61] caution is necessary in replicating this idea. Although the passivity principle derived from English precedents may not apply to a search engine,[62] it is the contention of this article that the existence of a passivity principle within Australian defamation law ought not be rejected.

In rejecting the passivity principle, his Honour criticised the English approach to the publication of material by search engines, commenting that Eady J did

> not appear to have given any consideration to the fact that internet search engines, while operating in an automated fashion from the moment a request is typed into them, *operate precisely as intended by those who own them and who provide their services*.[63]

Thus, on Justice Beach's reasoning, the algorithm by which Google Inc's automated search engine generates content 'operate[s] precisely as intended', and thereby satisfies the requirement that an entity intentionally lends its assistance to publication in order to be held responsible for the defamatory material. In reaching this conclusion, Justice Beach implicitly brought Google Inc within the positive act stream of publication. For this reason, Beach J rejected the characterisation of Google Inc as an 'internet intermediary', and held that Google Inc was a publisher for the purpose of defamation law.[64]

Although an entity should not be able to escape liability through the use of an automated system,[65] if Justice Beach's reasoning is accepted, it ought to be construed narrowly and confined to internet intermediaries whose online platforms 'operate precisely as intended' via an automated algorithm. The extension of this principle to creators or moderators of online discussion forums or social media pages, for example, would over-extend the analogy and undercut the rationale for drawing an inference from an automated process (if, indeed, an inference ought to be drawn). Thus, in Justice Beach's statement of law, particular emphasis ought to be imputed to the adjective 'precisely', which

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60 See this article's discussion of *Emmens v Pottle* (1885) 16 QBD 170 in the context of *Wishart v Murray* [2013] NZHC 540 below.

61 [2013] NZHC 540, [115] ('*Wishart*').

62 *Contra Metropolitan International Schools* [2011] 1 WLR 1743, 1760 [64] (Eady J).

63 *Trkulja* [2012] VSC 533, [27] (emphasis added). Indeed, this decision was referred to in argument by counsel and the deviation between Australian and English law, in this respect, was noted by the Court in *Tamiz v Google Inc* [2013] 1 WLR 2151, 2161 [21] (Richards LJ) ('*Tamiz*').

64 *Trkulja* [2012] VSC 533, [29].

65 Computer-generated practices such as automated search engines present new challenges that the law will need to meet. An important development in this respect is the emergence of algorithmic share trading. It not only challenges orthodox conceptualisations of shareholders and their behavior, but provokes difficulties in identifying an intention in specific acts of share trading for the purpose of corporate regulation. Justice Beach's derivation of an intention in *Trkulja* indicates one way in which company law could develop in regulating the conduct of algorithmic share traders: see Michael J McGowan, 'The Rise of Computerized High Frequency Trading: Use and Controversy' (2010) 16 *Duke Law & Technology Review* 1; Mi Hyun Yoon, 'Trading in a Flash: Implications of High-Frequency Trading for Securities Regulators Worldwide' (2010) 24 *Emory International Law Review* 913.

would exclude the creators or moderators of an online forum from the scope of the principle. Yet even on this narrower formulation, Justice Beach's statement would exclude ISPs from the protection of the passivity principle and render the protection almost inutile. That is, through the provision of a telecommunication medium by which defamatory imputations are published, ISPs 'operate precisely as intended' and would be, for Beach J, not a passive actor but a publisher. As a result, liability for publication may be imputed to the hosts of an internet platform where they have facilitated the making of defamatory imputations.

In any event, the persuasiveness of Justice Beach's decision in *Trkulja* is limited. The judgment concerned an application by Google Inc to overturn a jury verdict in favour of a judgment of the Court. Accordingly, Beach J was required to consider whether the jury's verdict was reasonably open to a properly instructed jury, rather than whether Google Inc was a publisher on the balance of probabilities. Saliently, whether a conclusion is open to the reasonable person is a lower standard, warranting caution in applying Justice Beach's finding. The upshot is that, so long as the meaning of publication remains unsettled in Australia, the law may be applied inconsistently in determining whether a conclusion is open to a jury.

B *Wishart v Murray*

Wishart[66] is a first instance judgment of a single judge of the High Court of New Zealand. It involved a strike out application in respect of allegedly defamatory comments made by Christopher Murray on Twitter, on a Facebook page that he had created, and on radio. Kerri Murray had posted similar comments on Facebook. The Facebook page had been 'liked' by 50 000 people before it was closed. Mr Murray monitored and moderated postings on the Facebook page and, for this reason, Courtney J considered that he 'could not … be viewed as a passive instrument'.[67]

Justice Courtney considered that either actual or inferred knowledge of the defamatory imputations was sufficient in order for the host of a Facebook page to be a publisher of the comments of a third party.[68] Her Honour held that:

66 [2013] NZHC 540. Recently, Williams J of the High Court of New Zealand affirmed the judgment of Courtney J in *Wishart* as having 'concisely summarised and synthesised the conflicting lines of authority so well': *Wu v Moncur* [2014] NZHC 391, [8].

67 *Wishart* [2013] NZHC 540, [118].

68 Ibid [83].

> Those who host Facebook pages or similar are not passive instruments or mere conduits of content posted on their Facebook page. They will be regarded as publishers of postings made by anonymous users … if they know of the defamatory statement and fail to remove it within a reasonable time in circumstances that give rise to an inference that they are taking responsibility for it … [or if] they do not know of the defamatory posting but ought, in the circumstances, to know that postings are being made that are likely to be defamatory.[69]

Thus, Courtney J applied the *Byrne* principle to the host of a Facebook page, but broadened it to include a second limb: negligent publication based on the assumption of responsibility and control. Indeed, Courtney J emphasised that liability for publication in *Byrne* was contingent on control of the noticeboard rather than knowledge. On this basis, Courtney J dismissed the application to strike out the statement of claim. However, Justice Courtney's characterisation of the role and function of hosts of online platforms and her formulation of the law is problematic.

In reaching this conclusion Courtney J conflated the positive act and omission streams of defamation law. Although her Honour was conscious of this distinction and extensively discussed *Byrne*, *Urbanchich* and jurisprudence in the United States, her Honour (like Beach J in *Trkulja*) concluded that '[a] test that requires actual knowledge of the defamatory statement would be inconsistent with *Emmens v Pottle*.'[70] Yet, there is a central difference between *Emmens*[71] and the circumstances of an entity publishing the comments of a third party by omission. *Emmens* involved a publication occurring by way of a positive act of distribution, rather than a publication by way of omission, and ought to be confined to the positive act stream of publication. A contrary conclusion would give rise to an unduly broad imposition of liability on internet platform hosts and operators, who would not necessarily be protected by the defence of innocent dissemination.

C *Davison v Habeeb*

Davison v Habeeb[72] involved allegations by Tara Andrea Davison that defamatory imputations were published on a blog owned by Peter Eyre and hosted on Blogger.com. Blogger.com was an online platform hosted by Google Inc, the fifth defendant. Justice Parkes described the characteristics of the platform as follows:

> Blogs created using Blogger.com are estimated to contain more than half a trillion words, with about 250,000 words being added every minute. The service includes design tools to help users create layouts for their blogs, and it permits users who do not have their own URL to use URLs provided by Blogger.com, all of which contain the word 'blogspot'.[73]

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69 Ibid [117]. This passage was subsequently quoted in Australia in *Marshall v Smith* [2013] WASC 451, [52] (Le Miere J). Justice Le Miere did not express a view as to its correctness or utility; however, as this paper demonstrates, *Wishart* should not be followed.

70 Ibid [85].

71 *Emmens v Pottle* (1885) 16 QB 170.

72 [2011] EWHC 3031 (QB) ('*Habeeb*').

73 Ibid [17].

Blogger.com exercised no control over the content of blogs, except to operate a 'contents policy', which established parameters for the content that was able to be displayed on blogs.[74] Justice Parkes considered that the existence of the contents policy suggested that Google Inc had 'assume[d] a degree of responsibility' for the contents of blogs hosted by Blogger.com.[75] However, he reasoned that the scale of the content hosted on the platform precluded the imposition of liability as a publisher prior to notification.[76] Justice Parkes went on to say that even if Google Inc was a passive facilitator, following notification it could have been liable on the basis of the consent principle.[77] In reaching this preliminary conclusion, Parkes J analogised between Blogger.com and 'a gigantic notice board' under the control of Google Inc, thereby bringing Google Inc within the *Byrne* stream of thinking.[78]

Notwithstanding this preliminary conclusion, Parkes J held that Google Inc was unable to determine whether the material was defamatory in the face of competing claims by Mr Eyre and Ms Davison. Regulation 19 of the *Electronic Commerce (EC Directive) Regulations 2002* (UK) stipulates that an 'information society service' provider will not be liable for a pecuniary remedy if:

> (a) the service provider –
>
> (i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or
>
> (ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and
>
> (b) the recipient of the service was not acting under the authority or the control of the service provider.[79]

Justice Parkes considered that the plaintiff was unable to establish that Google Inc had actual knowledge that the material was 'unlawful', and regulation 19 thus operated to exculpate Google Inc of liability for publication.[80] Justice Parkes therefore set aside the order allowing service of the initiating process out of jurisdiction.

D *Tamiz v Google Inc*

Tamiz[81] involved an appeal against the decision of Eady J.[82] At first instance, Eady J held that Google Inc was not a publisher. Rather, his Honour

74 Ibid [18].
75 Ibid [39].
76 Ibid [38].
77 Ibid [47].
78 Ibid [38].
79 *Electronic Commerce (EC Directive) Regulations 2002* (UK) SI 2002/2013, reg 19(a)–(b).
80 *Habeeb* [2011] EWHC 3031 (QB), [68] (Parkes J).
81 [2013] EWCA Civ 68.
82 *Tamiz v Google Inc* [2012] EWHC 449 (QB).

characterised Google as 'a platform provider … a purely passive one'.[83] As a result, Eady J denied the claimant's application for service of the originating process on Google Inc outside of jurisdiction. On appeal, the question for the Court was whether it was arguable that Google Inc was a publisher for the purpose of defamation law so as to warrant an order for service out of jurisdiction. Although the appeal was ultimately unsuccessful, Richards LJ rejected a number of the findings of Eady J.

Google Inc provided a blogging platform (Blogger.com), which allowed users to create a blog. The platform included design tools and provided a Blogger.com URL for users. Defamatory comments were posted on a blog called 'London Muslim', which was hosted on Blogger.com. On the plaintiff's evidence, he notified Google Inc of the defamatory comments on 28 or 29 April 2011 using a 'Report Abuse' function on the blog site.[84] Following written correspondence between Google and the plaintiff, Google forwarded a letter to the blog operator on 11 August 2011 and the comments were removed on 14 August 2011.[85] The claim, as pleaded, pertained only to the period after Google had been notified of the plaintiff's complaint.[86]

Lord Justice Richards considered that Google Inc facilitated publication, but rejected attempts to characterise Google Inc as a primary or secondary publisher of the blogs or a passive facilitator. Yet, unlike Beach J in *Trkulja*, Richards LJ did not reject the passivity principle outright; his Honour only rejected the characterisation of Google Inc as a passive facilitator.[87] At first instance, Eady J had observed that:

> It is no doubt often true that the owner of a wall which has been festooned, overnight, with the defamatory graffiti could acquire scaffolding and have it all deleted with whitewash. That is not necessarily to say, however, that the unfortunate owner must, unless and until this has been accomplished, be classified as a publisher.[88]

However, Richards LJ considered a more appropriate analogy to be the 'gigantic notice board' example used by Parkes J in *Habeeb*.[89] Significantly, the characterisation of Google Inc as a passive facilitator in *Metropolitan International Schools*[90] in respect of its function as a search engine (distinct from its function as a provider of an online blogging platform) remains undisturbed by Lord Justice Richards' judgment.

Notwithstanding his finding that Google Inc was a publisher, Richards LJ held that the defamation was trivial and therefore rejected the appeal. His Honour considered that from the time at which Google Inc could be held to be a publisher

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83 Ibid [39] (Eady J).
84 *Tamiz* [2013] 1 WLR 2151, 2156 [9] (Richards LJ).
85 Ibid [2] (Richards LJ).
86 Ibid [15] (Richards LJ).
87 Ibid [23]. See also *Habeeb* [2011] EWHC 3031, [41] (Parkes J), where his Honour, held that 'it must be at least arguable that [Google Inc was not] … a mere facilitator, playing a passive instrumental role'.
88 *Tamiz v Google Inc* [2012] EWHC 449, [38] (Eady J).
89 *Tamiz* [2013] 1 WLR 2151, 2165 [33].
90 [2011] 1 WLR 1743.

(that is, after a reasonable period from the date on which it was notified of the defamatory material) until the comments were removed, it was unlikely that 'any significant number of readers' would have read the defamatory comments.[91] This was primarily because:

> By the very nature of a blog, [the defamatory comments] will have been followed by numerous other comments in the chain and, whilst still accessible, will have receded into history.[92]

Lord Justice Richards' comment similarly applies to other media platforms such as Facebook and Twitter, indicating the broader significance of the defence of triviality in internet defamation proceedings and the importance of demonstrating to a court the nature of the particular online platform on which the defamatory material is published.[93]

E *Oriental Press Group Ltd v Fevaworks Solutions Ltd*

Oriental Press Group[94] involved multiple libel claims against the providers, administrators and managers of a website, the Hong Kong Golden Forum. The Hong Kong Golden Forum hosted an online discussion forum that was accessible by any person, but only persons who had registered as members and accepted the rules of the forum – which included a prohibition on the publication of defamatory material – could post on the forum. Allegedly libellous statements were posted on the forum by third parties on 27 and 28 March 2007, 24 October 2008 and 21 January 2009. The appellant notified the respondents of the 2007 statements on 10 December 2008, but the comments were not removed for eight months. At first instance, the appellant was awarded $100 000 in respect of the 2007 statements due to the respondents' delay in removing them from the website. This was not challenged on appeal.[95] The 2008 statement was brought to the attention of the respondents on 27 October 2009, and it was removed within 3.5 hours of receiving notice. The 2009 statement was discovered by the respondents and removed within approximately 12 hours and 15 minutes of being published. Both the first instance judge and the Hong Kong Court of Appeal held that the respondents were not the publishers of the 2008 and 2009 statements.[96] Accordingly, the Hong Kong Court of Final Appeal was asked to determine whether the respondents were liable as publishers of the 2008 and 2009 statements.

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91 *Tamiz* [2013] 1 WLR 2151, 2170 [50] (Richards LJ).

92 Ibid.

93 See also *Jameel v Dow Jones & Co Inc* [2005] QB 946, 957 [17], 969–70 [69] (Lord Phillips MR). However, as Gould notes, Australian courts have declined to follow *Jameel*: Gould, above n 2, 144. See *Barach v University of New South Wales* [2011] NSWSC 431; *Calabro v Zappia* [2010] NSWDC 127.

94 [2013] HKCFA 47. For a discussion of *Oriental Press Group*, see Anne S Y Cheung, 'A Study of Online Forum Liabilities for Defamation: Hong Kong Court in Internet Fever' (2013) 18 *Media and Arts Law Review* 382, 382.

95 *Oriental Press Group* [2013] HKCFA 47, [3]–[15].

96 See *Oriental Press Group Ltd v Fevaworks Solutions Ltd* [2012] HKCA 5; *Oriental Press Group Ltd v Fevaworks Solutions Ltd* [2011] HKCFI 212.

Permanent Justice Ribeiro considered that the common law principles of publication by omission were not applicable to online discussion forums:

> The occupiers in the notice board and graffiti cases have not in any sense assisted or participated in the originator's publication of the libel. These are not cases involving anyone who has played a role in a scheme for distributing the offending publication seeking relief from the strict rule. … The provider of a discussion forum is in a wholly different position from that of the occupier of premises who is not in the business of publishing or facilitating publication at all, but who has had imposed on him the defamatory act of a trespasser. The respondents plainly played an active role in encouraging and facilitating the multitude of internet postings by members of their forum. … [T]hey designed the forum with its various channels catering for their users' different interests; they laid down conditions for becoming a member and being permitted to make postings; they provided users browsing their website access to the discussion threads developed on their forum; they employed administrators whose job was to monitor discussions and to delete postings which broke the rules; and they derived income from advertisements placed on their website, a business model which obviously benefits from attracting as many users as possible to the forum.[97]

The judgment of Ribeiro PJ thus diverges from the law as stated in *Tamiz*. However, the effect of Permanent Justice Ribeiro's characterisation of the rule in *Byrne* as applying only to publications that were the 'act of a trespasser' is to extend liability for publication to any entity that procures or facilitates the publication of defamatory material on an internet platform. This may be so even where the defamatory material is contrary to the rules of use of the internet platform.

With all due respect, Permanent Justice Ribeiro's narrow interpretation of *Byrne* is at odds with the longstanding approach to the publication by omission stream of defamation law, which has not been constrained by a requirement that the associated act of intentional publication be a trespass. In *Byrne*, it was only Greene LJ who noted the trespassory character of the publication, writing that:

> the affixing of this notice to the walls of the defendants' property, as it was not authorised by the rules of the club, was in fact a trespass, and they were entitled as proprietors to remove the trespassing article from the walls.[98]

The implication is that a requirement that the act of publication be a trespass did not form part of the *ratio decidendi* (indeed, Lord Justice Greene's statement is a *non sequitur*; the proprietors could remove the publication not because it constituted a trespass but because they were the proprietors). Admittedly, the doctrine of acquiescence to a trespass, which operates to estop an occupier from asserting trespass, may provide an explanation for the reasoning of Greene LJ as well as his use of the language of 'consent'. However, this proposition suffers from the deficiency that an argument of trespass and acquiescence was not

97 *Oriental Press Group* [2013] HKCFA 47, [48], [50]–[51] (Ribeiro PJ). In agreement: at [1] (Ma CJ), [2] (Chan PJ), [123] (Litton NPJ), [133] (Gleeson NPJ).

98 *Byrne* [1937] 1 KB 818, 837.

advanced by the parties (at least insofar as their submissions are recorded), nor were any precedents cited in support of Lord Justice Greene's reasoning.[99]

Moreover, it is not wholly correct to read *Byrne*, as Ribeiro PJ has, as involving an 'occupier of premises who is not in the business of publishing or facilitating publication at all, but who has had imposed on him the defamatory act of a trespasser'.[100] Rather, the club in *Byrne* allowed publication, but subject to a condition. That is, a publication was allowed to be posted on the wall of the club, but subject to the express condition that '"no notice or placard shall be posted in the club premises without the consent of the secretary"'.[101] Thus, *Byrne* is better read as involving an act of publication contrary to guidelines or rules set down for publication, as opposed to an act of publication constituting a trespass. For these reasons, Permanent Justice Ribeiro's analysis of the question of 'publication' in respect of the providers, administrators and managers of a website ought not to be followed.

Although the Court held the respondents to be publishers, they were deemed to have been innocent disseminators as they removed the defamatory postings promptly after they became aware of their existence.[102] Permanent Justice Ribeiro defined 'first or main publisher' as one who:

> (i) … knows or can easily acquire knowledge of the content of the article being published (although not necessarily of its defamatory nature as a matter of law); and (ii) … has a realistic ability to control publication of such content, in other words, editorial control involving the ability and opportunity to prevent publication of such content.[103]

Permanent Justice Ribeiro emphasised that the respondents facilitated 'many-to-many exchanges among users who may post as many as 5000 messages per hour'.[104] In addition, the terms of use of the online platform prohibited the publication of defamatory material.[105] As a result of both the high traffic and, particularly, the disclaimer, the Court was unable to conclude that the respondents authorised the publication of the defamatory material.[106] Thus, the respondents were held to be not liable for the 2008 and 2009 statements.

V CONCLUSIONS ON PUBLICATION

Commentators and judges have warned that liability for the publication by omission of defamatory material may attach to entities that create or operate

99 See, eg, *Russell v Watts* (1883) 25 Ch D 559, 586 (Fry LJ); *Willmott v Barber* (1880) 15 Ch D 96, 105–6 (Fry J). Although, having regard to the rules set out by Fry LJ, the translation of the doctrine of acquiescence into the defamation context is questionable.

100 *Oriental Press Group* [2013] HKCFA 47, [50].

101 *Byrne* [1937] 1 KB 818, 818.

102 *Oriental Press Group* [2013] HKCFA 47, [103] (Ribeiro PJ).

103 Ibid [76].

104 Ibid [66].

105 Ibid.

106 Ibid.

online platforms.[107] The authorities discussed in Part IV of this article support this proposition. The question that they leave unresolved, however, is how the liability of a creator or operator of an online platform for defamation is to be determined, and the circumstances in which they will be liable.

If it is presumed that the imputations pleaded are defamatory, the first question that must be asked is by what act or omission the defendant is alleged to have published. Although the High Court has not previously applied the *Byrne* analysis,[108] this article has critiqued the reasoning of Ribeiro PJ in *Oriental Press Group* in order to demonstrate that *Byrne* is the appropriate common law starting point for online actors who are alleged to have published by omission the publication of another. The second question is therefore on what basis can liability be imputed: inferred knowledge based on control or the assumption of responsibility, or only actual knowledge? Although Courtney J considered in *Wishart* that inferred knowledge may be sufficient, a standard of knowledge short of actual knowledge should not be accepted and, indeed, would not accord with the reasoning in *Urbanchich* or the *Frawley* cases. In order to avoid unduly imposing responsibility on entities for the defamatory publications of others, actual knowledge must operate as a threshold barrier to liability for omission.

In the absence of an authoritative determination or legislative guidance, the courts are left to string together a growing volume of contradictory precedents predominantly decided by single judges in interlocutory hearings. A central difficulty in this area of the law is that there has been no High Court authority, excepting to a limited extent *Gutnick*, that indicates to lower courts and market participants and their legal advisers, how they ought to approach defamation law on the internet generally, and defamation by omission in particular. Hence, so long as the law remains unclear, it remains open to juries to conclude that such parties are publishers or, indeed, to conclude otherwise.

These common law rules, however, may not strike an appropriate balance between individuals' rights to speech and reputation. The United Kingdom's Joint Committee on the Draft Defamation Bill found that:

> As the law stands, far from encouraging service providers to foster legitimate debate in a responsible manner and removing the most extreme material, it encourages them to ignore any dubious material but then to remove it without question following a complaint.[109]

This risk-averse approach to defamation claims results in content that may not be defamatory being removed. Such a state of affairs was rightly described by

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107 See, eg, *Ives v Lim* [2010] WASC 122, [24]; Jennifer Ireland, 'Defamation 2.0: Facebook and Twitter' (2012) 17 *Media & Arts Law Review* 53, 68.

108 The High Court has only applied *Byrne* in respect of the standpoint from which the allegedly defamatory character of imputations is to be assessed: *Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186, 194 n 19 (Kirby J); *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 506 (Brennan J); *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460, 478 n 122 (French CJ, Gummow, Kiefel and Bell JJ).

109 Joint Committee on the Draft Defamation Bill, Draft Defamation Bill, House of Lords Paper No 203, House of Commons Paper No 930–I, Session 2010–12 (2011) 54.

the Committee as 'contrary to the public interest' and 'unacceptable'.[110] Indeed, following *Trkulja* and *Wishart*, it is likely that internet platform providers will adopt an overly cautious approach in removing allegedly defamatory material in order to avoid liability.

VI STATUTORY AND COMMON LAW DEFENCES TO PUBLICATION FOR INTERNET ACTORS

A Innocent Dissemination

Entities that are held to be a publisher of defamatory material may be absolved of liability by the common law and statutory defences of innocent dissemination.[111] In part, the meaning of 'publication' for the purpose of defamation law is broader than its ordinary, non-legal usage due to the existence of the defence of innocent dissemination, which has been codified in the uniform defamation statutes. The uniform defamation Acts provide that:

> It is a defence to the publication of defamatory matter if the defendant proves that:
>
> (a) the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor, and
>
> (b) the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory, and
>
> (c) the defendant's lack of knowledge was not due to any negligence on the part of the defendant.[112]

Thus, if an online publisher is able to prove that they are a 'subordinate distributor', as defined in the Acts, their liability for the publication of defamatory material by omission will turn on their knowledge 'that the matter was defamatory'.

The common law defence of innocent dissemination developed out of the judgment of the Queen's Bench Division in *Emmens*.[113] In *Emmens*, the vendor of a newspaper containing a libel was held to be prima facie liable as a publisher of the libel. However, the Court held that an 'innocent disseminator' or 'innocent carrier' of a libel, being one who did not know, and cannot reasonably be expected to have known, of the libel, will not be liable as a publisher. Lord Esher MR explained that:

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110 Ibid.

111 The uniform defamation Acts expressly preserve the common law defence: *Civil Law (Wrongs) Act 2002* (ACT) s 134(1); *Defamation Act 2005* (NSW) ss 6(2), 24(1); *Defamation Act 2006* (NT) ss 5(2), 21(1); *Defamation Act 2005* (Qld) ss 6(2), 24(1); *Defamation Act 2005* (SA) ss 6(2), 22(1); *Defamation Act 2005* (Tas) ss 6(2), 24(1); *Defamation Act 2005* (Vic) ss 6(2), 24(1); *Defamation Act 2005* (WA) ss 6(2), 24(1).

112 *Defamation Act 2005* (NSW) s 32(1). See also *Civil Law (Wrongs) Act 2002* (ACT) s 139C(1); *Defamation Act 2006* (NT) s 29(1); *Defamation Act 2005* (Qld) s 32(1); *Defamation Act 2005* (SA) s 30(1); *Defamation Act 2005* (Tas) s 32(1); *Defamation Act 2005* (Vic) s 32(1); *Defamation Act 2005* (WA) s 32(1).

113 (1885) 16 QBD 354.

> If [the vendors] were liable the result would be that every common carrier who carries a newspaper which contains a libel would be liable for it, even if the paper were one of which every man in England would say that it was not likely to contain a libel.[114]

Lord Esher MR went on to deduce a defence of innocent dissemination without regard to precedent based on the injustice of a contrary result: 'any proposition the result of which would be to shew that the Common Law of England is wholly unreasonable and unjust, cannot be part of the Common Law of England.'[115] Although Romer LJ remarked in *Vizetelly v Mudie's Select Library Ltd*[116] that the reasoning in *Emmens* was not 'altogether satisfactory' and did not 'very clearly indicate on what principle Courts ought to act in dealing with similar cases in future', he followed the decision.[117] Subsequently, the common law defence of innocent dissemination, though based on judicial conceptions of justice at the outset, has ossified into a black-letter defence at both common law and under statute.

The leading Australian precedent on innocent dissemination is *Thompson v Australian Capital Television Pty Ltd*.[118] In that case, the High Court held that the respondent broadcaster, Channel 7, was liable for publishing defamatory allegations on 'The Today Show'. The television program had been produced by Channel 9 but broadcast almost simultaneously by Channel 7 under a licence agreement in the Australian Capital Territory and parts of New South Wales. The Court unanimously held that the respondent broadcaster was unable to rely on the defence of innocent dissemination.

Chief Justice Brennan and Dawson and Toohey JJ separated the questions of whether the defence was available to the respondent (that is, whether it was a 'subordinate publisher') and whether the defence was made out.[119] They considered that Channel 7 was not 'merely a conduit' because it 'had the ability to control and supervise the material it televised' and '[i]t was Channel 7's decision that the telecast should be near instantaneous'.[120] It was therefore not able to avail itself of the defence of innocent dissemination. Thus, while there is an analogical difficulty in comparing broadcasting on a limited spectrum and internet publishers, the implication is that once the creator or owner of an online platform has actual or inferred knowledge of the publication (including

114 Ibid 357–8. Lord Justice Cotton concurred: at 358. Lord Justice Bowen gave a brief judgment in similar terms: at 358.

115 Ibid 357.

116 [1900] 2 QB 170.

117 Ibid 180.

118 (1996) 186 CLR 574.

119 Ibid 588. The High Court did not address the issue of publication in the positive act/omission framework; publication was only discussed insofar as it was relevant to a determination of whether Channel 7 was a 'subordinate publisher' or 'subordinate distributor'. However, the Court's emphasis on Channel 7's decision to re-broadcast 'The Today Show' almost simultaneously suggests that they proceeded on the assumption that this amounted to a positive act of publication. Arguably, this approach is similar to Justice Beach's derivation of an intention to publish from the operation of Google's search engine 'precisely as intended': *Trkulja* [2012] VSC 533, [27] (Beach J).

120 Ibid 589–90.

knowledge based on a want of care),[121] the statutory and common law defences will not be available to them. Indeed, for Gaudron J, the defence of innocent dissemination was not available to an entity 'who publishes by authorising a communication'.[122] That is to say, on Justice Gaudron's analysis, an entity held to be a publisher by omission according to the rule in *Byrne* cannot be an innocent disseminator.

If the Court were to return to first principles, a tension would emerge between the imputation of liability for defamation to the owners and operators of internet platforms for publication by omission and the justice-based reasoning in *Emmens*. Indeed, the foundation of the defence in *Emmens* points toward adopting a more expansive understanding of innocent dissemination at common law, although this would break the unity that currently exists between the statutory and common law defences. However, the extension of the defence of innocent dissemination (and, indeed, the enactment of a new statutory defence) may not address the existing imbalance in the law. Dietrich has been rightly critical of the breadth of the meaning of 'publication', which weights the cause of action too heavily on the existence of a defence in order to protect those whose participation in the wrong is peripheral.[123] Consequently, defamation law ought to be broken down and reconstructed so that the distinction between publication and innocent dissemination is obliterated. In its place should be a simplified cause of action based on the moral responsibility of an entity for the publication that does not risk peripheral actors being unnecessarily caught in defamation proceedings merely because they were a prima facie publisher.

B Triviality

The uniform defamation Acts contain a defence of triviality for publishers if 'the circumstances of publication were such that the plaintiff was unlikely to sustain any harm'.[124] The statutory defence of triviality has scope for a broader application in the internet defamation context due to the latitude for judicial interpretation of the statutory expressions 'the circumstances of publication' and 'harm'. [125] In *Prefumo v Bradley*, [126] Corboy J noted, in considering the availability of the defence of triviality, that internet communications are of a

121 See ibid 596 (Gaudron J), 619–20 (Gummow J).

122 Ibid 595.

123 Dietrich, above n 24, 89.

124 *Civil Law (Wrongs) Act 2002* (ACT) s 139D; *Defamation Act 2005* (NSW) s 33; *Defamation Act 2006* (NT) s 30; *Defamation Act 2005* (Qld) s 33; *Defamation Act 2005* (SA) s 31; *Defamation Act 2005* (Tas) s 33; *Defamation Act 2005* (Vic) s 33; *Defamation Act 2005* (WA) s 33; *Defamation Act 2006* (NT) s 30; *Civil Law (Wrongs) Act 2002* (ACT) s 139D. On the defence of triviality in Australia, see *King & Mergen Holdings Pty Ltd v McKenzie* (1991) 24 NSWLR 305, 309–11 (Mahoney JA). In agreement: at 318 (Clarke JA), 319 (Meagher JA).

125 See also the requirement in s 1 of the *Defamation Act 2013* (UK) that a claimant demonstrate that they have suffered 'serious harm'. This statutory requirement codified the earlier recognition of a serious harm threshold at common law: *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB).

126 [2011] WASC 251.

different character to other forms of media, lacking 'formality and careful consideration … often in a language that is blunt in its message and attenuated in its form. That will affect both what is regarded as defamatory and the potential for harm'.[127] On this analysis, harm resulting from the publication of defamatory imputations via the internet may be trivial due to the perception of the nature of online media communications as informal and carelessly expressed.

However, the triviality defence provisions are also capable of a converse meaning in internet defamation due to the geographical and temporal reach of internet technologies. As Blair JA stated in *Barrick Gold Corporation v Lopehandia*, '[t]he Internet is one of the most powerful tools of communications ever invented … [I]t is "potentially a medium of virtually limitless international defamation."'[128] This is particularly because search engines are capable of easily retrieving information uploaded to the internet depending on the search terms used. Moreover, internet archiving websites that allow users to view websites at specific dates in the past may preserve defamatory material. As a result of such technology, the scope for harm to reputation is incalculable. The implication is that the availability of a statutory defence of triviality for online publishers will depend upon the particular act of publication and the extent to which it has given rise to harm through the communication of defamatory material to other persons.

C *Broadcasting Services Act 1992* (Cth)

Clause 91(1) of schedule 5 of the *Broadcasting Services Act 1992* (Cth) exempts 'internet content hosts' and 'internet service providers' from liability under any rule of the common law, equity or statute in any state or territory, where they were 'not aware of the nature of the internet content' or the effect of the law would be to require them 'to monitor, make inquiries about, and keep records of, internet content hosted by the host' or 'carried by the provider'.[129] The *Broadcasting Services Act* thus operates as a defence for internet content hosts and service providers who do not have knowledge of a defamatory publication.

The *Broadcasting Services Act* may also alter the course of the common law as a court is unlikely to develop or modify a rule where it would have the effect of enlivening the statutory defence. That is, if the common law were to impose a positive duty on internet platform creators and operators to monitor their platforms for defamatory material, it would prompt the operation of the statutory protection in clause 91 of schedule 5 of the *Broadcasting Services Act*, such that the creator or operator would be freed from liability for defamation. For this reason it is unlikely that a court would impose liability for publication on the basis of a knowledge standard less than actual knowledge; to do otherwise would enliven the defence in clause 91.

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127 Ibid [43].

128 (2004) 71 OR (3d) 416, 441 [62] (Ontario Court of Appeal), citing Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 2001) [24.02].

129 *Broadcasting Services Act 1992* (Cth) sch 5 cl 91(1) ('*Broadcasting Services Act*').

Clause 3 of schedule 5 defines an internet content host as 'a person who hosts internet content in Australia, or who proposes to host internet content in Australia'.[130] In *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim*,[131] Basten JA adopted a definition of 'internet content hosts' that reflects the breadth of the statutory description. 'Internet content hosts', he wrote:

> may include any party in control of a website to which material has been uploaded. Whether it is uploaded by an agent of the party controlling the website, or even that party itself, the party remains a content host.[132]

If Justice of Appeal Basten's reasoning is accepted and owners and operators of internet platforms are therefore considered to be an 'internet content host', they will have a defence to a defamation claim under the *Broadcasting Services Act*. However, Justice of Appeal Basten's reasoning in this respect did not form part of the *ratio decidendi* of the case and he did not draw a final conclusion on this point.[133] Consequently, further judicial consideration will be necessary in order to elucidate the precise scope of this statutory protection and whether it operates so as to exclude liability for publications occurring by omission on the internet.

Significantly, neither limb of the defence is available once an internet content host or service provider has received notice of the defamatory material. In this respect, it does not go as far in protecting internet publishers and rights to speech as the *Defamation Act 2013* (UK). Hence, the question that is prompted by the operation of the *Defamation Act 2013* (UK) is whether, and how, internet actors should be protected from liability for publication by omission where they have received notice of a defamatory publication on a platform that they host?

D *Defamation Act 2013* (UK)

In 2013, the Parliament of the United Kingdom enacted the *Defamation Act 2013* (UK). Section 5(2) of the *Act* provides a defence for 'website operators'[134]

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130 See also *Broadcasting Services Act* sch 5 cl 3 (definitions of 'internet carriage service', 'internet content' and 'data storage device'), sch 5 cl 8 (definition of 'internet service provider').

131 (2012) 83 NSWLR 52.

132 Ibid 76 [90]. In his discussion of the *Broadcasting Services Act*, Basten JA, at 76 [89], considered the High Court judgment in *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42, in which the High Court addressed the question of the liability of an ISP – iiNet Ltd – under s 101(1) of the *Copyright Act 1968* (Cth) for infringements of copyright by subscribers of iiNet's internet service: *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42, 67–8 [65] (French CJ, Crennan and Kiefel JJ), 80–1 [112] (Gummow and Hayne JJ). Noting the High Court's characterisation of the functions and powers of iiNet, it is unlikely that an ISP would, in Australian law, be held liable for the publication of defamatory material by omission, even where it has received notice that one of its subscribers is using the service to publish defamatory material.

133 See *Fairfax Digital Australia & New Zealand Pty Ltd* (2012) 293 ALR 384, 408 [91].

134 Although the meaning of an 'operator of a website' is not clear on the face of the *Act*, it is arguable that it extends to internet platform providers such as Google, Facebook, and the moderators of pages, forums and online profiles. Arguably, 'website operator' has a broader meaning than 'internet content host' under the *Broadcasting Services Act*.

who may be liable as publishers by omission of the defamatory publications of third parties. Section 5 stipulates, inter alia, that:

> (1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.
>
> (2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.
>
> (3) The defence is defeated if the claimant shows that –
>
> (a) it was not possible for the claimant to identify the person who posted the statement,
>
> (b) the claimant gave the operator a notice of complaint in relation to the statement, and
>
> (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.[135]

Section 5 of the *Act* reflected a concern that defamation laws were 'not well suited to dealing with the internet and modern technology', were 'becoming out of date, costly and over-complicated', and that there was a 'risk of damaging freedom of speech without affording proper protection'.[136]

By comparison with the *Broadcasting Services Act* and the defences of innocent dissemination, the *Defamation Act 2013* (UK) and the *Defamation (Operators of Websites) Regulations 2013* (UK)[137] have a broader operation. Whereas, presently, online publishers are encouraged to remove allegedly defamatory material upon receiving notification of a complaint in order to avoid losing any common law and statutory defences, section 5(3) of the *Defamation Act 2013* (UK) prescribes a response or take-down process by which website operators may preserve a statutory defence after receiving notice. In this way, the sub-paragraphs of section 5(3) foster a particularist approach to managing rights to speech and reputation and focus liability on the direct or primary publisher. In order to afford certainty to internet actors and foster internet-based communication, an analogous statutory defence ought to be replicated in Australia.

As a result of section 5(3)(a), website operators have an interest in limiting the ability of third parties to post material on their website unless they have registered with a verified email address or other form of identification that is accessible to other users. If the claimant is able to identify the person who 'posted'[138] defamatory material, the website operator's defence under section 5(2) will be absolute and not able to be defeated by the rebuttal in section 5(3). Section 5(4) clarifies that 'it is possible for a claimant to "identify" a person only

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135 *Defamation Act 2013* (UK) s 5. See also the relevant defence in the United States, 47 USC §230(c)(1) (2006), which provides that '[n]o 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.'

136 United Kingdom, *Parliamentary Debates*, House of Commons, 12 June 2012, vol 546, col 177 (Kenneth Clarke).

137 SI 2013/3028 ('*Defamation (Operators of Websites) Regulations*').

138 Uncertainty may also attend the use of the word 'posted', which has a meaning different to the ordinary non-legal meaning of 'publish': see James Price and Felicity McMahon (eds), *Blackstone's Guide to the Defamation Act 2013* (Oxford University Press, 2013) [6.33].

if the claimant has sufficient information to bring proceedings against the person'.[139]

The precise scope of the section 5(3)(a) requirement remains unclear and, in some circumstances, a system of user registration may be insufficient. For example, where, despite the ability to identify an email or IP address, the underlying user is unable to be determined or is incorrectly determined. Moreover, the use of the past tense ('it was') in section 5(3) engenders uncertainty by incorporating an undefined temporal aspect in the requirement that the claimant has knowledge of the direct publisher's identity. Feasibly, it is open to a court to construe section 5(3)(a) as requiring only that the identity of the direct publisher was, at some earlier stage, unable to be determined (although, in order to avoid such absurdity, a construction that includes within the scope of section 5(3)(a) the entire period prior to a judicial determination of defamation proceedings is to be preferred). The language of possibility in section 5(3)(a) is similarly troubling. Specifically, it is unclear whether the legislature intended that the use of the term 'possible' should be affected by some implied requirement to make reasonable efforts to identify the direct publisher or if the claimant must do all that is possible to identify them.

If defamatory material is published on a website, the website operator will incur obligations upon receipt of a 'notice of complaint'.[140] If the operator can identify the direct publisher, it *may* – depending on the court's construction of section 5(3)(a) – discharge its obligations by informing the claimant of the identity of the publisher and thereby escape liability via section 5(3)(a). If the operator cannot identify the direct publisher, however, it must 'respond to the notice' in order to preserve the statutory defence. The obligation to respond to a notice differs depending on whether the operator does or does not have a means of communicating with the poster by 'private electronic communication'.[141] If the website operator is unable to contact the poster by private electronic communication, it must remove the material complained of within 48 hours.[142]

The prescribed notice and respond or take-down procedure will impose a practical burden on companies whose core business function involves online content delivery, such as search engines, social networking platforms and news media. It will impose a greater burden, however, on companies for whom an internet platform is a minor focus of their business. Indeed, the difficulty for smaller companies may lead to the outsourcing of third party comment quality control in order to avoid liability for defamation, or the closing of online platforms (such as Facebook pages) to third party comments. Perhaps the

139 *Defamation Act 2013* (UK) s 5(4).

140 *Defamation Act 2013* (UK) s 5(2)(c). In addition to any other information required by the regulations in accordance with s 5(7), a notice must include the claimant's name, the defamatory statement, an explanation of why the statement is defamatory, and the location on the website where it was posted: *Defamation Act 2013* (UK) s 5(6). The *Defamation (Operators of Websites) Regulations* reg 2 prescribes the information that a claimant must provide to the operator of the website.

141 *Defamation (Operators of Websites) Regulations* reg 3, sch cl 3(2).

142 *Defamation (Operators of Websites) Regulations* reg 3, sch cl 3(1).

simplest solution is for companies to implement a practice whereby, upon receipt of a notice of complaint in compliance with section 5(3)(b), the defamatory publication is automatically removed. Such a solution, however, does not satisfactorily balance rights to speech and reputation as overly cautious website operators may remove non-defamatory content in response to threats of litigation.

Section 10 of the *Defamation Act 2013* (UK) provides an additional protection to the defence in section 5 that may exclude the creators and operators of online platforms from liability for defamatory material published by third parties. Section 10 contains a defence (constructed as a jurisdictional exemption) for persons who were:

> not the author, editor or publisher of the statement complained of [as defined in section 1 of the *Defamation Act 1996* (UK)] unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.[143]

Section 1(3)(c) of the *Defamation Act 1996* (UK) excludes from the categories of 'author', 'editor' and 'publisher' any person who is:

> only involved … in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form.[144]

In this way, section 10 of the *Defamation Act 2013* (UK) may provide a supplementary defence for the creators and operators of online platforms, provided that proceedings are able to be brought against 'the author, editor or publisher'. At present, the statutory requirement that it is not 'reasonably practicable for an action to be brought against the author, editor or publisher' is unclear due to the ambiguity of the practicability standard.[145] However, the Parliamentary Under-Secretary of State for Justice has noted that the inter-operation of sections 5 and 10 is a matter for the Court to determine.[146]

VII CONCLUDING OBSERVATIONS

Justice McCloskey recently commented of litigation concerning internet-based wrongs that 'the jurisprudence in this sphere is both dynamic and evolving'.[147] The upshot of change and uncertainty, however, is an obligation on practitioners and academics to subject the law to scrutiny and ask whether the law accords with community standards of justice and public policy. For this

143 *Defamation Act 2013* (UK) s 10.

144 *Defamation Act 1996* (UK) s 1(3)(c).

145 The use of the language 'the' (by contrast with 'an') author, editor or publisher in s 10 is interesting (perhaps mind-boggling) because it presupposes that there is a single author, editor, or publisher of the defamatory publication which (noting the common law and statutory definitions of a publisher) is unlikely to be the case.

146 Alexander Horne, '*Defamation Bill* Committee Stage Report' (House of Commons Library Research Paper 12/49, 31 August 2012) 8–9.

147 *HL (A Minor) v Facebook Incorporated* [2013] NIQB 25, [26].

reason, this article has analysed the existing common law and legislative frameworks for internet defamation in Australia. By exploring recent cases and statutory developments in defamation law in the United Kingdom, New Zealand, Hong Kong and Australia, it has endeavoured to set out how the rules for publication on the internet by omission have developed so as to propose a model for legislative reform.

Justice Posner has described the 20th and 21st centuries as 'an age when tort law is dominated by the search for the deep pocket'.[148] The broad definition of 'publication' for the purposes of defamation law facilitates this search for deep pockets. By example, the cases brought by Trkulja against two search engine providers resulted in significant awards of damages.[149] If online actors such as media platform providers are held to be publishers, but not able to avail themselves of a defence, the application of traditional defamation principles to the internet is likely to result in increasing levels of litigation against online media corporations.[150] For these companies, defamation litigation will become a cost of doing business on the internet. Moreover, permitting a claimant to obtain damages for defamation against a platform creator or operator may deter companies, public institutions (such as universities and other education providers),[151] and individuals from establishing online discussion forums due to the risk of liability for the publication by others of defamatory material.

Conversely, it may be argued that the law as set out in *Oriental Press Group* and *Trkulja* encourages (even requires) proactive monitoring and moderation of material posted by third parties on the platform, which may have a beneficial effect on online discourse. Justice Callinan expressed a similar view in *Gutnick*, writing that '[p]ublishers are not obliged to publish on the Internet. If the potential reach is uncontrollable then the greater the need to exercise care in publication'.[152] That is, the creation and operation of an online platform imposes risks on other persons that their reputation may be harmed and ought, therefore, to give rise to a reciprocal duty on internet publishers to prevent harm to the reputations of others on their platforms. Justice Kirby advanced a similar proposition in *Neindorf v Junkovic* in his discussion of the standard of care owed by an occupier, but tied the obligation to exercise care closer to the economic benefit obtained by one party: '[t]hose who invite for economic gain can be

148 Richard A Posner, *Economic Analysis of Law* (Aspen Publishers, 5th ed, 1998) 205.

149 In litigation involving internet-based wrongs, damages against a distributor or non-primary publisher may not be a wholly appropriate remedy. Even if Google and Yahoo were to remove certain defamatory publications from their search results for example, individuals may still access the defamatory websites using other search engines or the website's URL. For a discussion of remedies for internet-based wrongs, see *Eatock v Bolt* (2011) 197 FCR 261, 365 [464] (Bromberg J).

150 See, eg, Josh Robertson, 'Google Sued by Brisbane Businessman Jarrod Sierocki for Defamatory Forum Posts', *The Courier Mail* (online), 11 June 2013 <http://www.couriermail.com.au/news/queensland/google-sued-by-brisbane-businessman-jarrod-sierocki-for-defamatory-forum-posts/story-fnihsrf2-1226661420523>.

151 See Douglas W Vick et al, 'Universities, Defamation and the Internet' (1999) 62 *Modern Law Review* 58.

152 *Gutnick* (2002) 210 CLR 575, 648 [182].

expected, at the very least, to turn their attention to dangers that will be faced by those who accept their invitation'.[153]

The imposition of a duty to monitor and moderate that flows from this argument, however, would require a constant team of editorial staff within companies to respond to complaints and remove material that may be defamatory within a reasonable period after notification. It is for this reason that this article has argued that the law ought not to impose a positive obligation to monitor and moderate content published on the internet on the basis of control over a platform, except in accordance with the rules set down in the *Defamation Act 2013* (UK).

A key benefit of the statutory regime now operating in the United Kingdom is that it incentivises entities that currently allow for third-party publication on their online platform to implement a system by which users are able to be identified by other users so as to entitle them to a defence to defamation. As a result, it facilitates a conversation between the claimant and the primary publisher (the latter having full knowledge of the content and context of the material and who is, therefore, in the best position to determine whether the content ought to be removed). In addition, the prescription of a notice and respond or takedown procedure allows for recourse against distributors of defamatory third party statements by omission outside of actual or threatened defamation litigation. The implication is that rights to speech and reputation will be better managed and protected. Thus, the legislature ought to enact a statutory defence to defamation for the creators and operators of internet platforms who may be liable, by omission, for the publication of defamatory statements of third parties. The adoption of the model contained in section 5 of the *Defamation Act 2013* (UK) would have the effect of focusing internet defamation law on the primary tortfeasor: the primary publisher rather than a secondary publisher.

153 (2005) 222 ALR 631, 648 [65].