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FACEBOOK HOSTS AND THIRD PARTY POSTS:  
DEFAMATION IN THE INTERNET AGE

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## INTRODUCTION

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Chris and Cru Kahui were three-month old twins who died in Auckland in 2006. They died from non-accidental injuries.<sup>1</sup> Their father, Chris Kahui, was tried and acquitted of their murder. During his trial he suggested the twins' mother, Macsyna King, had inflicted the fatal injuries.<sup>2</sup> This suggestion "retained some currency in the public arena".<sup>3</sup> Ian Wishart is an investigative journalist. Following the inquest into the twins' deaths, he collaborated with Macsyna King to produce a 'tell-all' book called *Breaking Silence*.<sup>4</sup> In response to the book's impending release, Christopher Murray established a Facebook page called 'Boycott the Macsyna King Book' in June 2011.<sup>5</sup> The page peaked at around 50,000 'likes' before being taken down by Mr Murray.<sup>6</sup> Mr Wishart filed proceedings in the High Court against Mr Murray (along with his wife, Kerri Murray), alleging, *inter alia*, that comments from third parties posted on the Facebook page defamed him.<sup>7</sup> Mr Murray sought to strike out Mr Wishart's proceedings, and the High Court largely dismissed that application in March 2013.<sup>8</sup> Mr Murray appealed against that decision, and the Court of Appeal released its judgment in September 2014.<sup>9</sup>

These proceedings bring into focus the challenges involved in applying the defamation tort to the internet, a medium which it was patently never intended to cover.<sup>10</sup> My dissertation explores these challenges. The specific legal question at the heart of my dissertation is this: *what is the appropriate legal test for determining when the host of a Facebook page will become the publisher of a third party's defamatory statement posted on that page?* While interesting in itself, this rather narrow legal question begets larger questions about the future of the defamation tort, and about the best approach to regulating the internet. My dissertation attempts to address both classes of question.

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<sup>1</sup> *Wishart v Murray* [2013] NZHC 540 at [1].

<sup>2</sup> At [1].

<sup>3</sup> At [1].

<sup>4</sup> At [2].

<sup>5</sup> At [2].

<sup>6</sup> At [14], [80].

<sup>7</sup> At [3]; the claim relating to posts made by third parties on the Facebook page was in fact the fourth of four alleged causes of action.

<sup>8</sup> *Wishart v Murray*, above n 1.

<sup>9</sup> *Murray v Wishart* [2014] NZCA 461.

<sup>10</sup> See 1.1 below.

It is in five parts. Part I sets out the defamation tort in general terms. In particular, I emphasise that there are two methods by which a publisher can become liable: by action, and by omission. Part II considers the nature of the internet as a medium of communication, and how its innovations have created challenges for the defamation tort. It also examines how Facebook pages operate in practice. Part III critically examines the High Court and Court of Appeal's rulings in *Murray v Wishart*. I focus especially on the decision to apply a test of liability by *omission*. Part IV situates the proceedings within the broader common law landscape, and examines the alternative presented by a case that applied a test of liability by *action*. I conclude that none of the approaches used in the common law are perfect, making legislative intervention more attractive. Part V discusses the merits of legislative intervention, both from a general perspective, and in terms of the Harmful Digital Communications Act 2015. Ultimately I conclude that while it is not without fault, the Harmful Digital Communications Act makes a welcome complement to the defamation tort for striking the appropriate balance between protecting the rights to reputation and freedom of expression online.

## PART I: THE DEFAMATION TORT

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This part introduces the tort of defamation. I discuss, in turn, the origins of defamation law, its ideological underpinnings, how it functions in practice, and the Defamation Act 1992.

### 1.1 Origins of the defamation tort

The law of defamation is essentially aimed at the prohibition of the publication of injurious false statements.<sup>11</sup> Such an action can be traced, in general terms, back to the Bible, the Mosaic Code, and the Talmud.<sup>12</sup> However, the outlines of the modern law of defamation emerged during the 16<sup>th</sup> and 17<sup>th</sup> centuries.<sup>13</sup> It is essentially a product of the advent of the printing press,<sup>14</sup> the common law courts' desire to expand their jurisdiction,<sup>15</sup> and the Star Chamber's efforts to eradicate duelling.<sup>16</sup> The English law of defamation thus has, in the words of one commentator, a "variegated history", from which New Zealand's law of defamation has developed.<sup>17</sup>

### 1.2 Ideological underpinnings: freedom of expression and protection of reputation

The defamation tort aims to protect the individual's reputation without intruding too far into the right to freedom of expression. The nature of defamation law means that these two values are inevitably opposed.<sup>18</sup> Thus the key challenge is in shaping the boundaries of the tort such that the conflict between these two interests is minimised. This challenge is especially present when the law is confronted with novel situations, like those thrown up by new technology.

Freedom of expression is an essential foundation of a democratic society.<sup>19</sup> In particular, it is conducive to the healthy operation of democratic institutions.<sup>20</sup> It is also fundamental to the

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<sup>11</sup> *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 at [140].

<sup>12</sup> Peter F Carter-Ruck, Richard Walker, and Harvey NA Starte *Carter-Ruck on Libel and Slander* (4<sup>th</sup> ed, Butterworths, London, 1992) at 17.

<sup>13</sup> William Holdsworth *History of English Law* (7<sup>th</sup> ed, Methuen, London, 1972) at 378.

<sup>14</sup> At 378.

<sup>15</sup> At 378.

<sup>16</sup> *Hill v Church of Scientology of Toronto*, above n 11, at [116].

<sup>17</sup> David Rolph *Reputation, Celebrity and Defamation Law* (Ashgate, Aldershot, 2008) at 58.

<sup>18</sup> Matthew Collins *The Law of Defamation and the Internet* (3<sup>rd</sup> ed, Oxford University Press, Oxford, 2010) at 4.

<sup>19</sup> *Handyside v United Kingdom* (1976) 1 EHRR 737 at 754, cited with approval in *Living World Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570; (2000) 6 HRNZ 28 (CA) at 44 per Richardson P.

<sup>20</sup> *Hill v Church of Scientology of Toronto*, above n 11, at [104].

dignity of the individual, as its inclusion in the New Zealand Bill of Rights Act 1990 demonstrates.<sup>21</sup>

However, as Elias CJ noted in *Brooker v Police*, the right to freedom of expression is not absolute.<sup>22</sup> The defamation tort is one example of where the right is seen to be circumscribed by a legitimate competing interest. Indeed, defamatory expression sits at odds with the values underlying the right to freedom of expression. False and injurious forms of expression are “inimical to the search for truth”, and “harmful to the interests of a free and democratic society”.<sup>23</sup>

Unlike the right to freedom of expression, there is no right protecting an individual’s reputation in the New Zealand Bill of Rights Act. However there are compelling reasons for the existence of a tort that addresses the effect of injurious false statements. A good reputation is closely related to an individual’s sense of self-worth and dignity.<sup>24</sup> Once a reputation has been tarnished by defamation, it will “seldom regain its former lustre”.<sup>25</sup>

### 1.3 The tort

Defamation is the communication of a false statement about a person that harms that person’s reputation. The defamation tort aims to vindicate the plaintiff’s reputation and provide compensation for the grief and distress caused by injury to reputation.<sup>26</sup> It does so by providing remedies in the form of damages, as well as injunctions and retractions.

A successful defamation action requires the plaintiff to make out that the defendant has communicated a defamatory statement to someone other than the plaintiff.<sup>27</sup> A statement will be defamatory if, in the famous formulation of Lord Atkin, it tends to lower the individual

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<sup>21</sup> Section 14: Freedom of expression: Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

<sup>22</sup> *Brooker v Police* [2007] NZSC 30 at [3]-[4]; Chief Justice Elias noted that the s 14 right draws on art 19 of the International Covenant on Civil and Political Rights. Article 19(3)(a) provides that the right to freedom of expression is subject to certain restrictions, including when necessary to protect the “rights or reputations of others”.

<sup>23</sup> *Hill v Church of Scientology of Toronto*, above n 11, at [109].

<sup>24</sup> At [110].

<sup>25</sup> At [111].

<sup>26</sup> *Television New Zealand Ltd v Keith* [1994] 2 NZLR 84 (CA) at 86.

<sup>27</sup> Patrick Milmo and WVH Rogers *Gatley on Libel and Slander* (10<sup>th</sup> ed, Sweet & Maxwell, London, 2004) at [1.3].



concerned “in the estimation of right-thinking members of society generally”.<sup>28</sup> A statement may also be defamatory if it tends to cause the person to be shunned or avoided,<sup>29</sup> or tends to cause the person to be exposed to hatred, contempt or ridicule,<sup>30</sup> or if it is a false statement about a person to his or her discredit.<sup>31</sup> A statement is not just something written or oral, but may take the form of visual images, sounds, gestures, or other means of signifying meaning.<sup>32</sup>

### 1.3.1 Publication generally

A person will be liable for a defamatory statement when they are deemed to have published the statement.

Generally, ‘publication’ occurs when a person intentionally or negligently takes part in, or authorises, the communication of defamatory material to someone other than the plaintiff.<sup>33</sup> There is no publication, and therefore no cause of action, if the material is communicated only to the plaintiff.<sup>34</sup> In an internet context, publication is usually deemed to occur when material is downloaded or accessed (rather than uploaded) from a web server.<sup>35</sup> The defamation tort deems each communication of defamatory material to be a separate publication.<sup>36</sup> Defamatory material on a webpage is thus usually ‘published’ for the purposes of defamation each time it receives a ‘hit’ from an internet user.<sup>37</sup> Moreover, every person who knowingly takes part in the communication of defamatory material is *prima facie* liable.<sup>38</sup> The original author is plainly liable, but equally is anyone who takes part in, or authorises, the publication of another’s defamatory material.<sup>39</sup> This wide ambit of potential

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<sup>28</sup> *Sim v Stretch* (1936) 52 TLR 669 (HL) at 671.

<sup>29</sup> *Youssouf v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581 (CA) at 587.

<sup>30</sup> *Parmiter v Coupland* (1840) 6 M&W 105 at 108.

<sup>31</sup> *Scott v Sampson* (1882) 8 QBD 491 at 503.

<sup>32</sup> *Monson v Tussauds Ltd* [1894] 1 QB 671 at 692.

<sup>33</sup> Collins, above n 18, at 67.

<sup>34</sup> Brian Neill, Richard Rampton, Heather Rogers, Timothy Atkinson and Aidan Eardley *Duncan and Neill on Defamation* (3<sup>rd</sup> ed, LexisNexis, London, 2009) at [8.01]; *Pullman v Walter Hill & Co* [1891] 1 QB 524 at 527.

<sup>35</sup> *Godfrey v Demon Internet Ltd* [2001] QB 201 at 208; *Dow Jones & Co Inc v Gutnick* [2002] HCA 56; (2002) 210 CLR 575 at [137].

<sup>36</sup> Neill, Rampton, Rogers, Atkinson and Eardley, above n 34, at [8.07].

<sup>37</sup> At [8.07]. This rule has been mitigated in the United Kingdom by the ‘single publication rule’ in s 8 of the Defamation Act 2013 (UK), which deems that subsequent publications of substantially the same statement will not be considered new publications, such that the one year limitation period does not reset every time a website is accessed.

<sup>38</sup> Collins, above n 18, at 67.

<sup>39</sup> At 101.

liability is subject to the defence of innocent dissemination, which I discuss below.<sup>40</sup> The person who publishes the defamatory material need not know that what they are publishing contains defamatory material, rather it is the simple act of communication that gives rise to liability.<sup>41</sup>

### **1.3.2 The first line of authority: publication by omission**

Liability may arise both by action and omission. The leading authority on publication by *omission* is a case called *Byrne v Deane*.<sup>42</sup> In this case the proprietors of a golf club were held responsible for the publication of an allegedly defamatory notice posted, without permission, on a wall of the golf club. The King's Bench held that because the proprietors were aware of the notice and could have easily removed it, but did not do so, they were liable as publishers. In the words of Greene LJ, the test for liability by omission was:

“...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?”<sup>43</sup>

Thus publication by omission occurs when the defendant somehow ratifies or acquiesces in the original publication. For the sake of clarity and consistency I will refer to these principles, and their attendant line of authority, as ‘the *Byrne v Deane* line’. Subsequent cases have applied the *Byrne v Deane* line to various contexts,<sup>44</sup> and more recently, and with mixed success, courts have applied the *Byrne v Deane* line to publication on the internet.<sup>45</sup>

### **1.3.3 The second line of authority: publication by action (mitigated by the innocent dissemination defence)**

The *Byrne v Deane* line of authority stands in contrast to the line of authority that deals with publication by positive action. Instead of focusing on the conditions by which omission can lead to liability, this line concerns situations where the defendant is actively involved in the

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<sup>40</sup> At 1.3.3.

<sup>41</sup> Milmo and Rogers, above n 27, at [6.17].

<sup>42</sup> *Byrne v Deane* [1937] 1 KB 818.

<sup>43</sup> At 838.

<sup>44</sup> For example *Isabelle Hellar v Joe Bianco* (1952) 244 P 2d 757; *Urbanchich v Drummoyne Municipal Council* (1991) Aust Tort Reports 81-127 (NSW SC).

<sup>45</sup> For example *Godfrey v Demon Internet Ltd*, above n 35; *Davison v Habeeb* [2011] EWHC 3031 (QB); *Tamiz v Google Inc* [2012] EWHC 449 (QB); [2013] EWCA Civ 68.

act of publication. Every person who takes part in the chain of publication is held *prima facie* liable as a publisher.<sup>46</sup>

However, the breadth of activity captured by the traditional publication rule is vast,<sup>47</sup> and the strictness of this rule is mitigated by the ‘innocent dissemination defence’. The leading case in this line is *Emmens v Pottle*,<sup>48</sup> which, along with *Vizetelly v Mudie’s Select Library*,<sup>49</sup> gave rise to what eventually became known as the defence of ‘innocent dissemination’.<sup>50</sup>

Traditionally, the common law grants protection to a person who published defamatory material, but was not that material’s author, printer, or first publisher, and had only taken a “subordinate part in disseminating it”.<sup>51</sup> Lord Justice Romer’s original statement of the defence required that the person seeking to rely on the defence: (1) did not know the work contained the libel<sup>52</sup> complained of; (2) did not know the work was of a character likely to contain a libel; and (3) that such lack of knowledge was not due to any negligence by that person.<sup>53</sup> The onus to make out the defence lies with the defendant, and the question of liability is one for the jury.<sup>54</sup>

For the sake of clarity and consistency I will refer to this line of authority, where publication is *prima facie* deemed to have occurred, but the innocent dissemination defence may be made out, as the ‘*Emmens v Pottle* line’.

#### 1.4 The Defamation Act 1992

The Defamation Act 1992 partially codified the law of defamation in New Zealand.

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<sup>46</sup> Collins, above n 18, at 101.

<sup>47</sup> *Crookes v Newton* [2011] 3 SCR 269 at [18].

<sup>48</sup> *Emmens v Pottle* (1885) 16 QBD 354.

<sup>49</sup> *Vizetelly v Mudie’s Select Library Limited* [1900] 2 QB 170.

<sup>50</sup> Robert Ribeiro “Defamation on the Internet” (paper presented to Obligations VII Conference, Hong Kong, July 2014) at [13].

<sup>51</sup> Milmo and Rogers, above n 27, at [6.18], from *Vizetelly v Mudie’s Select Library Limited*, above n 49, at 180.

<sup>52</sup> ‘Libel’ is the traditional common law term for defamation in written form. Historically, the common law treated libel slightly differently to slander (oral forms of defamation), with libel actionable *per se* but slander requiring proof of actual damage. This distinction was collapsed by s 4 of the Defamation Act 1992.

<sup>53</sup> Summarised from *Vizetelly v Mudie’s Select Library Limited*, above n 49, at 180.

<sup>54</sup> At 180.

Its substance is much older than its year of enactment suggests. It is the result of the 1977 commission of a government-appointed committee to investigate the state of defamation law in New Zealand.<sup>55</sup> In 1997, Sir Geoffrey Palmer explained the difficult passage of the Defamation Bill:

“The Muldoon Government would not do anything on the [committee’s report]; they did not touch it. Put it on a shelf and forgot about it but, when the Labour Party got in, as Minister of Justice I was keen to advance the reform. We finally got a Defamation Bill in but it was not easy because Members of Parliament do not like reforming the law of defamation. They think that the law of defamation is a useful thing with which to beat the media, and many of them regarded it as quite inappropriate that the law should be changed. I had a lot of trouble with that Bill as a result. It was not passed while I was in Parliament, it was not passed until 1992.”<sup>56</sup>

It would reasonably be thought that legislation enacted in 1992 would have contemplated the internet, and the possible issues it might create. But the substance of the Act actually dates from the late 1970s, and thus did not – indeed, could not – have done so.

#### 1.4.1 Codification of the innocent dissemination defence

Section 21 of the Defamation Act codified the innocent dissemination defence in New Zealand:

**21 Innocent dissemination**

In any proceedings for defamation against any person who has published the matter that is the subject of the proceedings solely in the capacity of, or as the employee or agent of, a **processor** or a **distributor**, it is a defence if that person alleges and proves—

- (a) that that person did not know that the matter contained the material that is alleged to be defamatory; and
- (b) that that person did not know that the matter was of a character likely to contain material of a defamatory nature; and
- (c) that that person's lack of knowledge was not due to any negligence on that person's part.

...

**2 Interpretation**

...  
**distributor** includes—

- (a) a bookseller; and
- (b) a librarian

...  
**processor** means a person who prints or reproduces, or plays a role in printing or reproducing, any matter

...

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<sup>55</sup> Ursula Cheer “Defamation in New Zealand and Its Effects on the Media – Self-Censorship or Occupational Hazard?” (2006) NZ L Rev 467 at 468, n 3.

<sup>56</sup> Geoffrey Palmer *Constitutional Conversations: Geoffrey Palmer talks to Kim Hill on National Radio* (Victoria University Press, Wellington, 2002) at 175.

An important feature of the defence is that it only applies to processors and distributors (or their agents and employees). Whether this includes internet media is unclear. In other jurisdictions, where the defence has not been codified, it is typically available to a person who played a “subordinate part in disseminating” the defamatory material in the ordinary course of business.<sup>57</sup> This more generic formulation would seem to more readily cover internet media. Nevertheless it could still apply to internet media in New Zealand.<sup>58</sup>

## 1.5 Conclusion

This part has outlined the defamation tort. Importantly, there are two ways publication can occur – through action, and through omission – both of which have attendant lines of authority. This dynamic begs two questions in relation to third party publication on Facebook. First, does the Facebook host become liable by action or omission? Second, if by omission, what standard of knowledge will found publication – actual knowledge, or something less?

The New Zealand High Court and Court of Appeal had to answer these questions in the *Murray v Wishart* proceedings, and I examine their handling of them in Part III. Part IV will address these questions more directly. Now, however, it is useful to examine the medium in question. This is the task of Part II.

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<sup>57</sup> *Vizetelly v Mudie’s Select Library Limited*, above n 49, at 180.

<sup>58</sup> See 3.3.2(e) below for a fuller discussion of this point in light of the Court of Appeal’s position in *Murray v Wishart*.

## PART II: THE INTERNET

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The differences between the internet and traditional print media are significant. This part considers how the internet has changed how society communicates, and the challenges these changes pose to the defamation tort. I begin by examining how the particular medium at issue in this dissertation – the Facebook page – operates in practice. I then compare the internet to traditional print media, focusing particularly on the increased transmissibility and accessibility of online material, and the ease with which it can be disseminated anonymously.

### 2.1 Social Media

The term ‘social media’ refers to a group of internet-based applications that harness the power of the internet to encourage the creation and exchange of user-generated content.<sup>59</sup>

Traditionally, mass media adopted a ‘one-to-many’ form of communication.<sup>60</sup> This means that information originates from a single source, and is published to many recipients. The original publisher has editorial control over the content, and the ability to choose what is and is not published.

Social media platforms are distinctive because they are a type of ‘many-to-many’ communication: from the people, to the people.<sup>61</sup> The operators of social media platforms do not necessarily broadcast themselves, but instead facilitate the speech of others.<sup>62</sup> Their business models depend on providing widespread and democratised access to media and encouraging participation from users.<sup>63</sup>

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<sup>59</sup> For a fuller discussion of the term see Andreas M Kaplan and Michael Haenlein “Users of the world, unite! The challenges and opportunities of social media” (2010) 53 *Business Horizons* 59 at 61.

<sup>60</sup> Ribeiro, above n 50, at [5].

<sup>61</sup> Jack Balkin “Media Access: A Question of Design” (paper presented to the Global Constitutionalism Seminar, Yale Law School, 2010) at 1813.

<sup>62</sup> At 1813.

<sup>63</sup> At 1813.

### 2.1.1 Facebook: Profiles, Pages, Groups, and Events

Facebook is a social media platform launched in 2004. Since then its use has grown significantly. In June 2015, Facebook reported an average of 968 million daily active users and 1.49 billion monthly active users.<sup>64</sup>

Facebook users begin by creating a 'Profile'. The Profile may include a profile picture, contact information, and other personal information. Users can then interact with other users by 'friending', sending private or public messages, and sharing content.<sup>65</sup>

The Profile essentially operates as an online persona for a user.<sup>66</sup> But it is not the only type of Facebook page. Once a user has created a Profile, he or she can then use it to create a 'Page', 'Group', or 'Event'.

A 'Page' is usually based around an interest, hobby, organisation, brand or cause. Other users can elect to 'like' the Page to receive updates from it. There is a huge range of Pages on Facebook, from the predictable – Portuguese footballer Cristiano Ronaldo has the largest individual following with 106.7 million likes – to the obscure – the 'I Will Go Slightly Out of My Way To Step On A Crunchy-Looking Leaf' Page has attracted 1.7 million likes.<sup>67</sup>

Pages are the most commercialised type of Facebook page and therefore have the most complicated administrative structure. There are five different types of role for people who manage Pages.<sup>68</sup> 'Admins', 'Editors', and 'Moderators' can all delete posts and ban users from accessing the Page.<sup>69</sup>

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<sup>64</sup> Facebook Newsroom <<http://newsroom.fb.com/company-info>> accessed 5 October 2015.

<sup>65</sup> Facebook Help Center: How to Post & Share <[www.facebook.com/help/333140160100643/](http://www.facebook.com/help/333140160100643/)> accessed 9 September 2015.

<sup>66</sup> Facebook Help Center: Pages Basic <[www.facebook.com/help/217671661585622/](http://www.facebook.com/help/217671661585622/)> accessed 9 September 2015.

<sup>67</sup> <[www.facebook.com/Cristiano](http://www.facebook.com/Cristiano)>; <[www.facebook.com/pages/I-Will-Go-Slightly-Out-of-My-Way-To-Step-On-A-Crunchy-Looking-Leaf/128579817570](http://www.facebook.com/pages/I-Will-Go-Slightly-Out-of-My-Way-To-Step-On-A-Crunchy-Looking-Leaf/128579817570)> accessed 2 October 2015.

<sup>68</sup> Facebook Help Center: Page Roles <[www.facebook.com/help/323502271070625/](http://www.facebook.com/help/323502271070625/)> accessed 9 September 2015.

<sup>69</sup> Facebook Help Center: Page Roles, above n 68, accessed 9 September 2015; see Fig. 1.

A ‘Group’ is a dedicated space where members can share content and message other members.<sup>70</sup> Some Groups are ‘secret’, which means only members invited into the Group by the Group’s creator can see that it exists or access it. Other Groups are ‘closed’, meaning non-members can see that the group exists but only access some of its content. Others still are ‘open’, meaning anyone can view and post in the Group.<sup>71</sup> The creator of the Group is automatically made an ‘Admin’, with the power to remove members, edit the Group’s settings, and make other members Admins.<sup>72</sup>

<b>Page roles</b>	Admin	Editor	Moderator	Advertiser	Analyst
Manage Page roles and settings	✓				
Edit the Page and add apps	✓	✓			
Create and delete posts as the Page	✓	✓			
Send messages as the Page	✓	✓	✓		
Respond to and delete comments and posts to the Page	✓	✓	✓		
Remove and ban people from the Page	✓	✓	✓		
Create ads	✓	✓	✓	✓	
View insights	✓	✓	✓	✓	✓
See who published as the Page	✓	✓	✓	✓	✓

*Figure 1: Five different types of Page role<sup>73</sup>*

An ‘Event’ is a page usually dedicated to some real world event such as a social gathering or promotion. Like Groups, Events have different levels of privacy: some can be accessed only by those who have been invited by a Host, while others are accessible to anyone on the internet.<sup>74</sup> In the same way that Groups can have multiple ‘Admins’, Events can have multiple ‘Hosts’.<sup>75</sup>

<sup>70</sup> Facebook Help Center: Group Basics <[www.facebook.com/help/162866443847527/](http://www.facebook.com/help/162866443847527/)> accessed 9 September 2015.

<sup>71</sup> Facebook Help Center: Group Basics, above n 70, accessed 9 September 2015.

<sup>72</sup> Facebook Help Center: Group Admin Basics <[www.facebook.com/help/418065968237061/](http://www.facebook.com/help/418065968237061/)> accessed 9 September 2015.

<sup>73</sup> Facebook Help Center: Page Roles, above n 68, accessed 9 September 2015.

<sup>74</sup> Facebook Help Center: Events Privacy <[www.facebook.com/help/216355421820757/](http://www.facebook.com/help/216355421820757/)> accessed 9 September 2015.

<sup>75</sup> Facebook Help Center: Creating & Editing Events <[www.facebook.com/help/131325477007622/](http://www.facebook.com/help/131325477007622/)> accessed 9 September 2015.



### 2.1.2 Facebook: the role of the host

The different types of Facebook page have subtly different rules around who can view, post and moderate content. The Admin of a Page is essentially the same as the Admin of a Group and the Host of an Event. However, the position becomes more complicated when there is more than one Admin or Host, or when there is one Admin and a team of Moderators.<sup>76</sup>

This dissertation contemplates the situation where there is a single host, as was the case in *Murray v Wishart*.<sup>77</sup> For the sake of simplicity, I use the label ‘host’ to refer to the individual who created the page and continues to have ultimate control over its content. Likewise I use the term ‘page’ as an umbrella term covering Profiles, Pages, Groups and Events. I use the term ‘third party liability’ to refer to the Facebook host’s liability for posts that were made to his or her page by someone else.

When the host creates a page, the content posted on the page is stored on a server maintained by Facebook.<sup>78</sup> As such the host of a page does not actually host the content *per se*, rather he or she gains certain abilities in relation to controlling and moderating the page. The host can delete other users’ posts, prevent posts containing certain words from being posted, and remove or ban users from the page.<sup>79</sup>

Who can view the page’s content depends on what type of page it is. All types of page have a range of privacy settings that the host can change. Profiles are usually private, with most information available only to ‘Friends’ of the host, although it is possible to make information publicly available.<sup>80</sup> Pages (with a capital ‘P’) are generally intended to be public, so are typically accessible by everyone, although the host can set age and country restrictions, and can proactively moderate content by blocking words or setting a profanity filter.<sup>81</sup> Groups and Events have varying degrees of privacy that the host can choose. They

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<sup>76</sup> See Fig. 1 above at 2.1.1.

<sup>77</sup> *Murray v Wishart*, above n 9.

<sup>78</sup> Collins, above n 18, at 29.

<sup>79</sup> Facebook Help Center: Managing a Page: Moderation <[www.facebook.com/help/329858980428740/](http://www.facebook.com/help/329858980428740/)> accessed 11 August 2015.

<sup>80</sup> Facebook Help Center: How to Post & Share, above n 65, accessed 9 September 2015.

<sup>81</sup> Facebook Help Center: Managing a Page <[www.facebook.com/help/255700674532721/](http://www.facebook.com/help/255700674532721/)> accessed 9 September 2015.

may require invitation to the Group or Event to access content, or the content may be publicly available.<sup>82</sup>

One of the great complications around the intersection of the defamation tort with Facebook is the range of different types of Facebook page. Pages differ immensely in both their purpose and reach. While their fundamental technical aspects are largely the same, they can differ vastly in tenor and function.

This means that when it comes to regulating Facebook hosts, someone who checks their Facebook Profile once a month, and someone who is commercially employed to moderate a fan Page, will in theory be subject to the same rule. The differences in the type and volume of material that pages attract means the moderating responsibilities of a host can vary hugely. Thus in deciding when a Facebook host becomes a publisher of someone else's statement posted on his or her page, it is desirable that the legal test takes into account the existence of this spectrum.

## **2.2 Differences in internet communication**

The modern law of defamation grew out of the advent of the printing press,<sup>83</sup> and the tort of defamation is traditionally geared towards written and oral communications. But the internet has radically changed – and continues to change – the way in which humans interact and communicate. As Matthew Collins puts it, the internet “has already displaced, or is in the process of displacing, to a greater or lesser degree, every form of written communication”.<sup>84</sup>

It seems then that the tort of defamation is being applied to forms of communication for which it was patently not conceived. I turn now to discuss the novelties in these new forms of communication, and the challenges they create for the defamation tort.

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<sup>82</sup> Facebook Help Center: Group Admin Basics, above n 72; Facebook Help Center: Events Privacy, above n 74, accessed 9 September 2015.

<sup>83</sup> See 1.1 above.

<sup>84</sup> Collins, above n 18, at 33.

### 2.2.1 Transmissibility

Publishing something online is much easier than publishing something in print. The Law Commission recognised this in 1999.<sup>85</sup> Instead of having to print and physically distribute something, a Facebook account can be used to reach hundreds of people in seconds. The internet has reduced the cost of publication to virtually zero. In the words of Mark Tushnet:

“In a world in which libelous statements can be distributed only through a newspaper, there will be fewer such statements than in a world where they can be distributed via the Internet, simply because it is cheaper to log on to the Internet than to purchase a newspaper.”<sup>86</sup>

Online media also make it much easier to *re*-publish. If a message or image is sufficiently interesting or scandalous its republication can accelerate rapidly, in a phenomenon well known as ‘going viral’. This means the potential for defamation to spread is greatly amplified in online media, both in terms of the material’s reach and the speed with which it is republished. In the words of one commentator, the “extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that ‘the truth rarely catches up with a lie’ ”.<sup>87</sup>

This feature of the internet has also been noted in a judicial context. In *Cairns v Modi* Lord Judge CJ, in the course of justifying a large award of damages, recognised that

“as a consequence of modern technology and communications systems, any such stories will have the capacity to “go viral” more widely and more quickly than ever before. Indeed it is obvious today, with the ready availability of the world wide web and of social networking sites, the scale of this problem has been immeasurably enhanced.”<sup>88</sup>

### 2.2.2 Accessibility

A second defining feature of material posted on the internet is that it can remain accessible indefinitely, and can be accessed by people all over the world. As Cardozo J observed about the difference between oral and written material:

“What gives the sting to writing is its permanence in form. The spoken word dissolves, but the written one abides and perpetuates the scandal.”<sup>89</sup>

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<sup>85</sup> Law Commission *Electronic Commerce Part 2: A basic legal framework* (NZLC: R58, 1999) at [262].

<sup>86</sup> Mark Tushnet “Internet Exceptionalism: An Overview From General Constitutional Law” (2015) 56 *Wm and Mary L Rev* 1637 at 1655.

<sup>87</sup> Lyrissa Barnett Lidsky “Silencing John Doe: Defamation & Discourse in Cyberspace” (2000) 49 *Duke LJ* 855 at 863-64.

<sup>88</sup> *Cairns v Modi* [2013] 1 *WLR* 1015; [2012] *EWCA Civ* 1382 at [27].

<sup>89</sup> *Ostrowe v Lee* 256 *NY 36* (NY Ct App 1931) at 39.

The internet gives the written word an additional level of permanence. While oral gossip tarnishes a reputation, its effect fades over time. But the internet makes gossip a permanent reputational stain: “one that never fades”.<sup>90</sup>

The problem of online material being accessible indefinitely is compounded by the development of increasingly intelligent search engines.<sup>91</sup> Instead of having to manually trawl through old newspapers or records, search engines can sift through vast amounts of data in seconds. Jack Balkin argues that the internet operating in this way evokes a “Nietzschean image of persistent memory... of eternal return”.<sup>92</sup>

It should be noted that this may not continue to be true. A recent decision of the Court of Justice of the European Union affirmed the existence in the EU of a so-called ‘right to be forgotten’ – specifically, the right to have personal data deleted from search engines on request.<sup>93</sup> This is a developing area of law, but there is nothing to indicate that a similar right will be recognised in New Zealand any time soon.

It seems that – the possible development of ‘right to be forgotten’ jurisprudence aside – searchable digital records of our lives, accessible from anywhere and by anyone, are simply a feature of modern life.

### 2.2.3 Anonymity

The internet also makes it much easier to publish a statement *anonymously*.<sup>94</sup> Internet users are able to conceal their identity relatively easily behind “an impenetrable cloak of anonymity”.<sup>95</sup> If an individual does not fear being held responsible for publishing something

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<sup>90</sup> Daniel J Solove *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Yale University Press, New Haven, 2007) at 33.

<sup>91</sup> Ryan J Turner “Internet Defamation Law and Publication by Omission: A Multi-Jurisdictional Analysis” (2014) 37 UNSWLJ 34 at 56.

<sup>92</sup> Balkin, above n 61, at 1813. Nietzsche posited the idea of “eternal return”: that the universe has been recurring, and will continue to recur an infinite number of times: see Friedrich Nietzsche *The Gay Science* (Cambridge University Press, Cambridge, 2001).

<sup>93</sup> Case C-131/12 *Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* OJ 2014/C 212/04; for commentary on the impact of this decision see Eleni Frantziou “Further Developments in the Right to be Forgotten: The European Court of Justice’s Judgment in Case C-131/12, *Google Spain, SL, Google Inc v Agencia Española de Protección de Datos*” (2014) 14 HRL Rev 761.

<sup>94</sup> Law Commission, above n 85, at [262]; David Rolph “Defamation by social media” (2013) 117 Precedent 16 at 18.

<sup>95</sup> Collins, above n 18, at 21.

that could be defamatory, he or she will be more willing to publish it. Whereas in the past publishing something anonymously took a great deal of effort, the internet has made it virtually effortless.<sup>96</sup>

This means that the Facebook host – or indeed anyone who has the ability to moderate an online forum – may have to contend with anonymous users. Although Facebook requires the registration of some personal details on the Profile page, there is nothing to ensure these details are accurate. And while tracking someone through their internet protocol (‘IP’) address is sometimes possible, it is complex.<sup>97</sup> Accordingly, in some situations the Facebook host stands to become responsible for comments of third parties where the originator of the post cannot be traced.

### **2.3 Conclusion**

If the defamation tort is to be applied to the internet, the fundamental challenge is working out how the tort can continue to effectively protect reputation without crushing the great potential of the internet as a medium for public expression. But publication on the internet is significantly different to publication via traditional print media. Compared to print media, publication on the internet is characterised by the ease with which material can be published, the increase in the material’s longevity, and the ability to publish anonymously.

This set of challenging conditions amounts to a new paradigm of publication for the defamation tort. Indeed, if the changes wrought by the internet can rightly be called “revolutionary”,<sup>98</sup> then it must be considered whether instead of a clumsy attempt to apply the principles of defamation to internet media, it could be more desirable to implement technology-specific rules governing malicious falsehoods online.

I will return to this question in due course, but turn now to examine the *Murray v Wishart* proceedings.

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<sup>96</sup> Tushnet, above n 86, at 1645.

<sup>97</sup> H Brian Holland “In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism” (2007) 56 U Kan L Rev 369 at 393: “Advances in technology are making it increasingly possible to locate and identify bad actors online, such that online anonymity is difficult to maintain”.

<sup>98</sup> Solove, above n 90, at 17.

## PART III: THE PROCEEDINGS

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This part focuses on the *Murray v Wishart* proceedings.<sup>99</sup> The proceedings bring into sharp relief the conflict of principles outlined in Part I and the technological realities discussed in Part II.

### 3.1 Facts

Chris and Cru Kahui were three-month old twins who died in Auckland in 2006. They died from non-accidental injuries, and their deaths generated a significant amount of public interest.<sup>100</sup> Their father, Chris Kahui, was tried and acquitted of their murder. During his trial he suggested the twins' mother, Macsyna King, had inflicted the fatal injuries.<sup>101</sup> This suggestion "retained some currency in the public arena".<sup>102</sup>

The plaintiff, Ian Wishart, was an investigative journalist. Following the inquest, he collaborated with Macsyna King to produce a 'tell-all' book called *Breaking Silence*.<sup>103</sup>

In response to the book's impending release, the first defendant, Christopher Murray, established a Facebook page called 'Boycott the Macsyna King Book' in late June 2011 ('the Facebook page').<sup>104</sup> The page peaked at around 50,000 'likes' before being taken down by Mr Murray on or around 13 August 2011.<sup>105</sup> It was a 'Page', meaning that it was publicly accessible.<sup>106</sup>

Mr Wishart filed proceedings against Mr Murray, alleging, *inter alia*, that comments from third parties posted on the Facebook page defamed him.<sup>107</sup> Mr Murray sought to strike out Mr Wishart's proceedings.<sup>108</sup>

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<sup>99</sup> *Murray v Wishart*, above n 9; *Wishart v Murray*, above n 1.

<sup>100</sup> *Wishart v Murray*, above n 1, at [1].

<sup>101</sup> At [1].

<sup>102</sup> At [1].

<sup>103</sup> At [2].

<sup>104</sup> At [2].

<sup>105</sup> At [14], [80].

<sup>106</sup> See 2.1.1 above for an explanation of the different types of Facebook page and their respective characteristics.

<sup>107</sup> At [3]; the claim relating to posts made by third parties on the Facebook page was in fact the fourth of four alleged causes of action.

### 3.2 *Wishart v Murray* in the High Court

It is appropriate to repeat the questions posed at the end of Part I: first, does the Facebook host become liable by action or omission? Second, if by omission, what standard of knowledge will found publication – actual knowledge, or something less?

Justice Courtney found that Mr Murray could become liable for publication by omission under the *Byrne v Deane* line of authority.<sup>109</sup> She held that either actual or constructive knowledge could found publication.

#### 3.2.1 A two-limbed test for third party liability on Facebook

Justice Courtney held that the host of a Facebook page is regarded as a publisher of posts made by third parties to that page in two situations. The first is if he or she knows of the defamatory statement and fails to remove it within a reasonable time, in circumstances that give rise to an inference that he or she is taking responsibility for the statement (the ‘actual knowledge’ test).<sup>110</sup> The second situation is where he or she does not know of the defamatory statement but ought, in the circumstances, to know that third parties are making posts that are likely to be defamatory (the ‘ought to know’ test).<sup>111</sup>

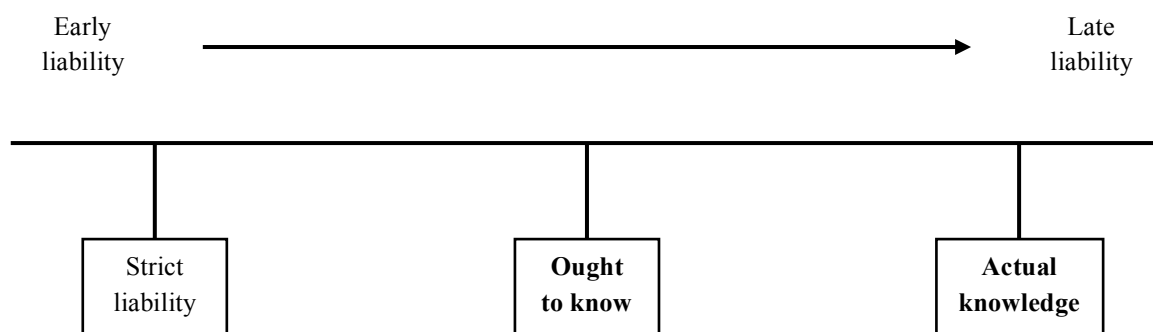


Figure 2: High Court held ought to know and actual knowledge tests apply

<sup>108</sup> At [4]: the strike out application was made on two grounds: that the statements in issue were not capable of bearing the pleaded meanings, and that the statement of claim is prolix and oppressive and contains material that is scandalous and/or irrelevant.

<sup>109</sup> See 1.3.2 above.

<sup>110</sup> At [117].

<sup>111</sup> At [117].

### 3.2.2 The High Court’s confused application of both lines of authority

Justice Courtney arrived at this outcome following an examination of case law from several jurisdictions and from both lines of authority. While Courtney J held the appropriate test for publication was to be found in the *Byrne v Deane* line (publication by omission), she emphasised the ratio in *Emmens v Pottle*.<sup>112</sup> In doing so she conflated the two lines of authority that deal with publication by action and publication by omission, treating *Emmens v Pottle* as if it were part of the *Byrne v Deane* line of authority.<sup>113</sup> As the Court of Appeal recognised on appeal:

“we think the better view is that [*Emmens v Pottle*] is about innocent dissemination and therefore is not authority for the proposition that a person may be found to have published a defamatory statement on the ground that they ought to have known of its existence”.<sup>114</sup>

Interestingly, some of Courtney J’s analysis indicates she was alive to the distinction. She employed the *Emmens v Pottle* ratio correctly in analysing one of the few relevant New Zealand authorities, *Sadiq v Baycorp*.<sup>115</sup> In *Sadiq* the plaintiff complained about defamatory statements concerning his creditworthiness on a debt collector’s website which had been placed online by the website’s previous owner. Justice Courtney held that the defendant should have been considered a publisher in the first instance, with the real issue then being the availability of the innocent dissemination defence.<sup>116</sup> Unfortunately, Justice Courtney’s appropriate use of the *Emmens v Pottle* authority in analysing *Sadiq* was obscured by her treatment of the authority elsewhere.

### 3.2.3 The High Court’s use of analogies

Justice Courtney approved of the ‘noticeboard analogy’ that was made in *Davison v Habeeb*<sup>117</sup> and approved by the English Court of Appeal in the *Tamiz* appeal.<sup>118</sup> This analogy compared the intermediary (in both *Davison* and *Tamiz* it was the Google blogging service ‘Blogger.com’) to a

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<sup>112</sup> At [85].

<sup>113</sup> At [85]; see 1.3.2 and 1.3.3 above for explanations of the two lines of authority.

<sup>114</sup> *Murray v Wishart*, above n 9, at [96].

<sup>115</sup> *Sadiq v Baycorp (NZ) Ltd* HC Auckland CIV-2007-404-6421, 31 March 2008; *Wishart v Murray*, above n 1, at [89]-[90].

<sup>116</sup> At [90].

<sup>117</sup> *Davison v Habeeb*, above n 45, at [38].

<sup>118</sup> *Wishart v Murray*, above n 1, at [116]; *Tamiz v Google Inc*, above n 45.



“giant noticeboard ... in the sense that [Google] provides the noticeboard for users to post their notices on, and it can take the notices down (like the club secretary in *Byrne v Deane*) if they are pointed out to it”.<sup>119</sup>

The comparison between Google (or the Facebook host) and the club secretary in *Byrne v Deane* is undermined by the fact that, in *Byrne v Deane*, rather than soliciting notices, it was against the club rules to post notices without the proprietors’ approval.<sup>120</sup> This distinction, between solicitation and trespass, is an important one, as it counts towards the solicitor (or Facebook host) being considered a publisher at first instance, instead of applying the *Byrne v Deane* line of authority relating to publication by omission.<sup>121</sup>

This is nearly but not quite the conclusion Courtney J came to. She found that those who host Facebook pages “are not passive instruments”.<sup>122</sup> However, this did not justify treating them as *prima facie* publishers (with the possibility of making out a defence). Instead, Courtney J saw this fact as relevant to the standard of knowledge requirement, leading her to conclude that constructive knowledge was sufficient to found publication by omission.

Justice Courtney found there was at least a tenable case on the facts that Mr Murray was a publisher of the third party posts.<sup>123</sup> She also considered that it was open to him to avail himself of the innocent dissemination defence.<sup>124</sup>

### **3.3 *Murray v Wishart* in the Court of Appeal**

Mr Murray appealed Courtney J’s ruling on several grounds. Important for present purposes is the Court of Appeal’s treatment of the appeal as it related to the legal test for determining whether the host of a Facebook page is the publisher of statements posted on it by third parties. President O’Regan and Ellen France J, delivering the judgment for the Court,<sup>125</sup> held the appropriate legal test solely consisted of the actual knowledge test and not, contrary to the High Court’s decision, the actual knowledge test as well as the ought to know test.<sup>126</sup> In so

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<sup>119</sup> *Davison v Habeeb*, above n 45, at [38].

<sup>120</sup> *Byrne v Deane*, above n 42, at 837.

<sup>121</sup> See 4.1 below for more on the implications of this distinction.

<sup>122</sup> *Wishart v Murray*, above n 1, at [117].

<sup>123</sup> At [122].

<sup>124</sup> At [122].

<sup>125</sup> Justice French concurred.

<sup>126</sup> *Murray v Wishart*, above n 9, at [144].

doing they, like Courtney J, applied *Byrne v Deane* principles relating to publication by omission.

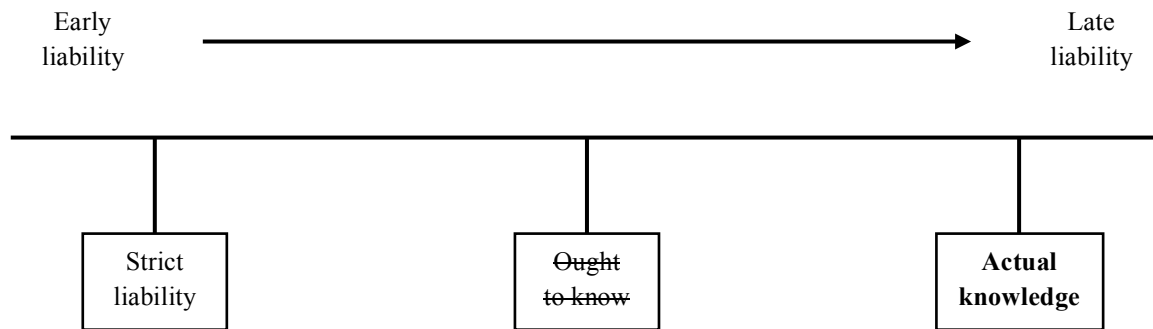


Figure 3: Court of Appeal held only actual knowledge test applies

The Court of Appeal saw “the authorities evaluated by Courtney J and cited to us as providing limited guidance”.<sup>127</sup> Instead the Court emphasised the importance of focusing on the particular factual situation, noting that the different roles taken by the various alleged publishers in each of the authorities gave rise to different outcomes.<sup>128</sup> The Court ultimately found there was “no precedent requiring us to adopt the ought to know test”,<sup>129</sup> and abandoned the test based on several “concerns”.<sup>130</sup> In applying the law to the facts, the Court discussed the merits of several analogies from the authorities.<sup>131</sup>

### 3.3.1 The Court of Appeal’s use of analogies

Following an acknowledgment that “analogies are only analogies”, the Court of Appeal examined three analogies that could be made to the Facebook host.<sup>132</sup> The three analogies were:

- (a) the posting of a notice on a **notice board** (or a wall on which notices can be affixed) without the knowledge of the owner of the notice board/wall; [the *Byrne v Deane* situation]
- (b) the writing of a defamatory statement on a wall of a building without the knowledge of the building owner; [the **graffiti** situation] and/or
- (c) a defamatory comment made at a **public meeting** without the prior knowledge or subsequent endorsement or adoption by the organiser of the meeting.<sup>133</sup> [emphasis added]

<sup>127</sup> At [125].

<sup>128</sup> At [125].

<sup>129</sup> At [136].

<sup>130</sup> At [136]ff.

<sup>131</sup> At [125]ff.

<sup>132</sup> At [126].

<sup>133</sup> At [126].

The Court considered that the notice board analogy was at least somewhat appropriate, although it noted that in *Byrne v Deane* the board had been posted on in trespass, whereas a Facebook host solicits posts.<sup>134</sup> The Court found a second difference between the notice board and the Facebook host was that the post to the notice board was “truly anonymous”, whereas many of the people posting on the Facebook page were identifiable.<sup>135</sup> While this may have been true in the case of Mr Murray’s Facebook page, it will not always be so. Fake or anonymous Facebook profiles are easily created.<sup>136</sup>

The Court did not consider the graffiti analogy as particularly helpful, essentially for the same trespass point as the notice board analogy.<sup>137</sup>

The Court considered the public meeting analogy most useful.<sup>138</sup> Its attraction appeared to lie in illustrating a situation where “even if a person incites defamation, he or she will not necessarily be liable for defamatory statements made by others”.<sup>139</sup> The Court acknowledged that the analogy is not perfect, as statements at a meeting would be oral and therefore ephemeral, unlike the written comments on a Facebook page.<sup>140</sup> This is a significant difference, but the Court of Appeal did not appear to accord it much weight.<sup>141</sup>

### **3.3.2 The Court of Appeal’s concerns with the ought to know test**

The Court listed five concerns with the ought to know test.<sup>142</sup>

#### *(a) A Facebook host who does not know about a defamatory post is worse off*

The first concern was that the ought to know test puts the Facebook host who does not know about a defamatory post to his or her page in a worse position than a host who does know about it.<sup>143</sup> The reason given for this was that the Facebook host who ought to have known about the defamatory post will never have an opportunity to avoid liability by the timely

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<sup>134</sup> At [129]; see 4.1 below.

<sup>135</sup> At [130].

<sup>136</sup> See 2.2.3 above.

<sup>137</sup> At [131].

<sup>138</sup> At [132].

<sup>139</sup> At [134].

<sup>140</sup> At [133].

<sup>141</sup> See 2.2.2 above; also see 4.4 below for a discussion of the use of analogies in legal reasoning generally.

<sup>142</sup> At [136]ff.

<sup>143</sup> At [137].

removal of the post. But under the actual knowledge test, the host is allowed a reasonable time to remove the post.

In finding that a host has constructive knowledge, a court is assessing when it is reasonable to deem that the host ought to have known that defamatory comments were likely to be made to the page. It seems at least theoretically possible to also give the host who has constructive knowledge the benefit of a reasonable time to remove the comments.

*(b) Strict liability is contrary to the intentional nature of the tort*

The second concern was that the ought to know test would make the host liable on a strict liability basis, or on the basis of negligence, and to do so would be contrary to the “well-understood nature of the tort of defamation as an intentional tort”.<sup>144</sup> This concern was not explained in depth, and would have benefited from greater analysis.

The case cited as authority for the proposition that defamation is an intentional tort, *Bell-Booth Group Ltd v Attorney-General*, dealt with an attempt to argue for a new duty of care to not injure someone’s reputation by true statements.<sup>145</sup> The Court of Appeal in this case rejected all of the appellant’s arguments, and so while the case does seem to stand against the bleeding of negligence into defamation law, it was decided in the context of a duty not to injure by *true* statements.

The sense in which the traditional rule requires publication to be ‘intentional’ is generally directed at situations where the defendant who authored the defamation does not intend its publication to a third person, but where publication takes place without negligence on his or her part.<sup>146</sup> An example, given by Lord Esher MR, is where “the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes its contents known”.<sup>147</sup> The requirement of ‘intention’ deems that in situations like this the writer is not a publisher. Thus it is difficult to see how the ‘intentional nature’ of the tort

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<sup>144</sup> At [140].

<sup>145</sup> *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 (CA) at 156.

<sup>146</sup> *Oriental Press Group Ltd v Fevaworks Solutions Ltd* [2013] HKCFA 47 at [21].

<sup>147</sup> *Pullman v Walter Hill & Co*, above n 34, at 527.

would be at odds with the imposition of strict liability or liability through negligence. Indeed, this is what the traditional publication rule achieves.<sup>148</sup>

*(c) Conflict with the right to freedom of expression*

The third concern was a bald assertion that the ought to know test conflicts with the right to freedom of expression affirmed in s 14 of the New Zealand Bill of Rights Act 1990.<sup>149</sup> The Court of Appeal asserted that the ought to know test unduly favours the interests of a person whose reputation is damaged over the right to freedom of expression.<sup>150</sup> It did not explain why.

*(d) Uncertainty in application*

The fourth concern was that the ought to know test is uncertain in its application.<sup>151</sup> This is a legitimate concern. Given the ubiquity of Facebook in the modern age, it is certainly desirable that the law provides clear boundaries for liability. This is the strongest argument in favour of an actual knowledge test.

*(e) The innocent dissemination defence would not apply to a Facebook host*

The fifth concern was that the innocent dissemination defence would not apply to a Facebook host.<sup>152</sup> The Court of Appeal held that the defence, now statutorily provided for in s 21 of the Defamation Act 1992,<sup>153</sup> was unlikely to be available to a Facebook host.

The Court of Appeal considered the language of s 21 “aimed at old media” and “inapplicable to internet publishers”.<sup>154</sup> However the terms ‘processor’ and ‘distributor’ are at least somewhat open ended in their definitions.<sup>155</sup> Distributor merely *includes* booksellers and

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<sup>148</sup> The rule is often described as imposing strict liability: see, for example, *Panday v Gordon* [2006] 1 AC 427 at 436 per Lord Nicholls of Birkenhead: “The basic position at which the common law holds this balance is to impose strict liability for defamatory statements in the absence of justification”. That publication can occur through negligence is also relatively uncontroversial: see, for example, Collins, above n 18, at 67; Joachim Dietrich “Clarifying the meaning of ‘publication’ of defamatory matter in the age of the internet” (2013) 18 Media and Arts Law Review 88 at 89.

<sup>149</sup> *Murray v Wishart*, above n 9, at [141].

<sup>150</sup> At [141].

<sup>151</sup> At [142].

<sup>152</sup> At [143].

<sup>153</sup> See 1.4.1 above.

<sup>154</sup> At [143].

<sup>155</sup> See 1.3.3 above for full definitions.

librarians.<sup>156</sup> Processors are not only those who print, but also those who reproduce, “any matter”.<sup>157</sup> It seems at least *open* to a court to include internet publishers under s 21.

In support of the unavailability of the innocent dissemination defence, the Court of Appeal cited the Law Commission’s recommendation that the defence be statutorily amended to extend to ISPs (Internet Service Providers, such as Spark or Vodafone).<sup>158</sup> The Court implied that the Law Commission’s position was that the defence would not apply to internet publishers. In fact, the Law Commission is less clear:

“While, in ECom 1, we indicated that an ISP would probably fall within the definition of “processor” and “distributor”, on reflection we tend to the view that the law should be amended to remove any residual doubt.”<sup>159</sup>

It should also be noted that ISPs have a different function to Facebook hosts in terms of the role they play in publication. The Law Commission’s position on the innocent dissemination defence thus offers, at best, weak support for the Court of Appeal’s assessment of its unavailability. It remains open to the Court to take the view that the innocent dissemination defence could, in the appropriate circumstances, apply to Facebook hosts. A similar view was reached by the Hong Kong Court of Final Appeal in *Oriental Press* in relation to the host of an internet discussion forum.<sup>160</sup> However, the Court of Appeal has demonstrated its reluctance to take this position with its ruling in *Murray v Wishart*.<sup>161</sup>

### 3.4 Conclusion

Both the High Court and the Court of Appeal applied *Byrne v Deane* publication by omission principles to assess the Facebook host’s liability for third party content. They differed in terms of the standard of knowledge required to found such liability, with the Court of Appeal ruling that only actual knowledge will suffice. Part IV will situate these positions within their broader common law context, beginning with an exploration of a case that found that publication by *action* was the appropriate approach to assessing third party liability for an online content host.<sup>162</sup>

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<sup>156</sup> Defamation Act 1992, s 2.

<sup>157</sup> Section 2.

<sup>158</sup> At [143].

<sup>159</sup> Law Commission, above n 85, at [269].

<sup>160</sup> *Oriental Press Group Ltd v Fevaworks Solutions Ltd*, above n 146; see 4.1 below.

<sup>161</sup> At [143].

<sup>162</sup> *Oriental Press Group Ltd v Fevaworks Solutions Ltd*, above n 146.

## PART IV: THE COMMON LAW

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This part surveys the legal landscape around the *Murray v Wishart* proceedings. It begins by analysing two alternatives to the approaches taken in those proceedings. The first is found in a decision that rejected the *Byrne v Deane* approach and instead adopted publication by action principles (the *Emmens v Pottle* line) to assess third party liability online.<sup>163</sup> The second is found in a decision that applied both lines of authority.<sup>164</sup> This part then evaluates the respective merits of both alternatives presented in these cases, as well as the approaches taken by the High Court and Court of Appeal.<sup>165</sup> It ends with a brief note on the limitations of using analogies in legal reasoning.

### 4.1 *Oriental Press*: publication by action

In *Oriental Press*, the Hong Kong Court of Final Appeal held that the providers of an online discussion forum – the ‘Hong Kong Golden Forum’ – were publishers of defamatory material posted on the forum by third parties but were entitled to rely on the defence of innocent dissemination.<sup>166</sup> The leading judgment, delivered by Ribeiro PJ, found that the relevant question in determining the forum providers’ liability for third party material was not whether the forum providers had become publishers of the material, but whether they could rely on the innocent dissemination defence.<sup>167</sup>

Permanent Justice Ribeiro emphasised that there are important differences between the principles that make up the two lines of authority.<sup>168</sup> The innocent dissemination defence provides relief to subordinate publishers who knowingly participate in the process of disseminating defamatory material.<sup>169</sup> In contrast, occupiers in the *Byrne v Deane* line of authority did not assist or participate in the originator’s publication.<sup>170</sup> The *Byrne v Deane* line of authority instead deals with “the conditions which must be satisfied before the occupier can be regarded as having turned himself into a publisher”.<sup>171</sup>

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<sup>163</sup> *Oriental Press Group Ltd v Fevaworks Solutions Ltd*, above n 146.

<sup>164</sup> *Tamiz v Google Inc*, above n 45.

<sup>165</sup> *Murray v Wishart*, above n 9; *Wishart v Murray*, above n 1.

<sup>166</sup> *Oriental Press Group Ltd v Fevaworks Solutions Ltd*, above n 146.

<sup>167</sup> At [52].

<sup>168</sup> At [46]; see 1.3.2 and 1.3.3 above for the two lines of authority.

<sup>169</sup> At [47].

<sup>170</sup> At [48].

<sup>171</sup> At [48].

As Ribeiro PJ noted (extra-judicially), the *Byrne v Deane* authorities tend to concern acts of trespass.<sup>172</sup> In the original case, the offending verse was posted without the golf club proprietors' permission.<sup>173</sup> *Isabelle Hellar v Joe Bianco* concerned defamatory graffiti on the wall of the men's bathroom in a bar.<sup>174</sup> *Urbanchich v Drummoyne Municipal Council* concerned defamatory posters glued onto several bus shelters.<sup>175</sup>

Because of this feature of trespass, Ribeiro PJ held in *Oriental Press* that it was inappropriate to apply the *Byrne v Deane* principles to internet platform providers:

“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.”<sup>176</sup>

In contrast, the forum providers played an “active role” in encouraging and facilitating the posts made by members of their forum, making them clear participants in the publication “from the outset”.<sup>177</sup> This distinction, between trespass and solicitation, is central to the *Oriental Press* ruling. The forum providers' solicitation of posts was the key reason why the Court found that instead of falling under the *Byrne v Deane* line of authority, the forum providers were *prima facie* publishers under the *Emmens v Pottle* line.<sup>178</sup>

#### **4.2 *Tamiz*: the mixed approach**

In *Tamiz* the English Court of Appeal found that Google was potentially liable in defamation for failing to take down allegedly defamatory content. In assessing Google's liability, the Court of Appeal applied both lines of authority relating to publication: publication by action principles for the period before receiving notice of complaint about the content, and publication by omission principles for after that period.<sup>179</sup>

The plaintiff complained that a blogger had defamed him on Blogger.com, a blogging platform provided by Google.<sup>180</sup> Google forwarded his complaints to the blogger, who

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<sup>172</sup> Ribeiro, above n 50, at [30].

<sup>173</sup> *Byrne v Deane*, above n 42, at 837.

<sup>174</sup> *Isabelle Hellar v Joe Bianco*, above n 44.

<sup>175</sup> *Urbanchich v Drummoyne Municipal Council*, above n 44.

<sup>176</sup> At [50].

<sup>177</sup> At [51]-[52].

<sup>178</sup> At [51]-[52].

<sup>179</sup> *Tamiz v Google Inc*, above n 45, at [25]-[36].

<sup>180</sup> At [2].



removed the offending content three and a half months after the original complaint was laid (but only five weeks after Google was deemed to have *received* notice of complaint).<sup>181</sup> Mr Tamiz sued Google in respect of the period before the content was removed.<sup>182</sup>

The Court of Appeal held that Google was not a primary publisher because it did not have any prior knowledge of, or control over, the content of the blog.<sup>183</sup> Lord Justice Richards, delivering the judgment for the Court, doubted whether Google was even a subordinate publisher, but nevertheless held that *before* receiving Mr Tamiz’s complaint, Google had a defence because it did not know and would not, by exercising reasonable care, have known that the publication was defamatory.<sup>184</sup> Though the words ‘innocent dissemination’ were not used, it is clear that this is what Richards LJ was referring to, as he cited both *Emmens v Pottle* and *Vizetelly v Mudie’s Select Library*.<sup>185</sup>

However, in deciding the nature of *post*-notification liability, Richards LJ applied *Byrne v Deane* principles.<sup>186</sup> The five week period that elapsed between notification and removal was held to be “sufficiently long to leave room for an inference adverse to Google Inc on *Byrne v Deane* principles”.<sup>187</sup>

Notwithstanding his finding that Google was a publisher on this basis, Richards LJ held the defamation in question was trivial and therefore dismissed the appeal.<sup>188</sup>

#### **4.3 Options for determining liability**

*Oriental Press* and *Tamiz* illustrate that there are (at least) three distinct methods of determining the third party liability of a Facebook host. The more straightforward approach taken by the cases so far is to apply the *Byrne v Deane* (publication by omission) line of authority, as was adopted in the *Murray v Wishart* proceedings by both the High Court and

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<sup>181</sup> At [2] and [9]; while Mr Tamiz first notified his complaint on 28 or 29 April 2011, Google was deemed to have *received* notice of complaint sometime in July, making the relevant period between notification and removal “over five weeks” (at [35]).

<sup>182</sup> At [3].

<sup>183</sup> At [25].

<sup>184</sup> At [26].

<sup>185</sup> At [26]: *Emmens v Pottle*, above n 48; *Vizetelly v Mudie’s Select Library Limited*, above n 49; see 1.3.3 above.

<sup>186</sup> At [27]-[36].

<sup>187</sup> At [35].

<sup>188</sup> At [50].

Court of Appeal. The second option, taken in *Oriental Press* by the Hong Kong Court of Final Appeal, is to apply the *Emmens v Pottle* (publication by action) line of authority, which makes the defendant *prima facie* liable but with the benefit of the defence of innocent dissemination. The third option is to take the *Tamiz* approach, and apply *Emmens v Pottle* principles to the period before notification, and *Byrne v Deane* principles to the period after.

#### 4.3.1 ‘Mixed’ liability

As Ribeiro PJ (who delivered the leading judgment in *Oriental Press*) noted extra-judicially, the English Court of Appeal in *Tamiz* appears to have considered it possible to adopt both the innocent dissemination defence, and the *Byrne v Deane* approach.<sup>189</sup> The substance of the innocent dissemination defence – whether the defendant ought to have known about the defamatory statement and took reasonable care – is similar to that of the *Byrne v Deane* approach – whether the defendant deliberately or negligently failed to remove defamatory material after being put on notice. However, the principles underlying each approach do not sit comfortably together in concert: “They address different issues; apply different standards in judging the defendant’s conduct, and impose different burdens of proof.”<sup>190</sup>

It is important that the courts adopt a coherent and consistent approach to defamation on the internet.<sup>191</sup> The mixed approach taken in *Tamiz* undermines this goal, and risks engendering confusion by introducing a complicated double standard into the law.

#### 4.3.2 Liability by action

The *Oriental Press* approach has some appeal. It imposes a strong standard of liability on content hosts, with the onus of proof on the host to make out a defence.<sup>192</sup> Making the defendant *prima facie* liable in this way increases the standard of liability that he or she is held to. Matthew Collins has contended that the practical differences stemming from this reversal of onus would likely be insignificant.<sup>193</sup> However, the principled distinction is important. If the Facebook host can rightly be said to be a participant in the chain of

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<sup>189</sup> Ribeiro, above n 50, at [31].

<sup>190</sup> Ribeiro, above n 50, at [31].

<sup>191</sup> Turner, above n 91, at 42.

<sup>192</sup> *Vizetelly v Mudie’s Select Library Limited*, above n 49, at 180.

<sup>193</sup> Collins, above n 18, at 117.

publication, then under the traditional publication rule, this is the position that sits most comfortably with the existing body of defamation law.

However, applying the *Oriental Press* approach to Facebook hosts is potentially problematic for two reasons.

*(a) Facebook hosts are arguably materially different to forum providers*

There are significant differences between a Facebook host and the providers of an online forum. Forum providers like those in *Oriental Press* play a highly active role:

“...they designed the forum ...; they laid down conditions for becoming a member ...; 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.”<sup>194</sup>

Comparing forum providers to Facebook hosts is complicated by the different types of Facebook page.<sup>195</sup> Some pages are maintained, like the ‘Hong Kong Golden Forum’, for commercial benefit.<sup>196</sup> But others, like Mr Murray’s ‘Boycott the Macsyna King Book’ page, are motivated by non-commercial public causes or interests. Others still do not aspire to attract public exposure at all.

It makes sense to hold a commercial entity that derives income from the provision of a service to a higher standard of liability than an individual who may run a blog or a Facebook page on a casual basis. Commercial entities are more likely to have the resources necessary to effectively moderate online fora. If they aspire to profit from providing a medium for public discourse, it follows that they should internalise the cost of moderating that medium.

However, in general, Facebook hosts are much more hands-off than the forum providers in *Oriental Press*. The degree of effort the forum providers expended in soliciting third party content was central to Ribeiro PJ’s ruling in *Oriental Press*, as it meant the forum providers could not say they were not part of the chain of publication. This factor is greatly reduced in the case of a Facebook host. To deem the Facebook host part of the chain of publication on the basis that he or she solicits posts to his or her page is potentially problematic. While the

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<sup>194</sup> *Oriental Press Group Ltd v Fevaworks Solutions Ltd*, above n 146, at [51].

<sup>195</sup> See 2.1.1 above.

<sup>196</sup> *Oriental Press Group Ltd v Fevaworks Solutions Ltd*, above n 146, at [51].

solicitation is often present, it is far less obvious, and the Facebook host is typically far more passive than the forum providers in *Oriental Press*.

This nuance was overlooked by Courtney J, who found in *Wishart v Murray* that it was implicit in the decision in *Tamiz* that individuals who create and control blogs should be regarded as essentially in the same position as Google (who provided the blogging platform).<sup>197</sup> This proposition is questionable, both in terms of whether it is legitimately implicit in the *Tamiz* ruling, and in its factual accuracy generally.

Lord Justice Richards did rule that Google's role in respect of Blogger blogs was not a purely passive one.<sup>198</sup> But the basis on which this could be extended to blog hosts (or Facebook hosts) is unclear. Importantly, Google operates the Blogger service as a commercial activity.<sup>199</sup> This is true also of the operation of Facebook, and of the forum providers in *Oriental Press*.

There is also a considerable difference between forum providers who have to monitor thousands of threads, and most Facebook hosts who are usually responsible for one, or at most a handful, of pages.<sup>200</sup> Although especially popular Facebook pages may attract a huge volume of material, even such that a legitimate comparison to the 'Hong Kong Golden Forum' might be made, this type of page represents a small fraction of the pages on Facebook.<sup>201</sup>

Thus while Courtney J is likely correct that Facebook hosts "are not passive instruments",<sup>202</sup> nor can they rightly be said to be directly analogous to commercial entities who provide social media platforms.

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<sup>197</sup> *Wishart v Murray*, above n 1, at [114]; *Tamiz v Google Inc*, above n 45; see 4.2 above for analysis of *Tamiz* and 3.2 above for Courtney J's ruling.

<sup>198</sup> *Tamiz v Google Inc*, above n 45, at [23].

<sup>199</sup> At [24].

<sup>200</sup> *Oriental Press Group Ltd v Fevaworks Solutions Ltd*, above n 146, at [92].

<sup>201</sup> In 2012, when Facebook had 526 million active daily users, there were only 42 million Pages with 10 or more likes: Brian Honigman "100 Fascinating Social Media Facts and Figures From 2012" <[www.huffingtonpost.com/brian-honigman/100-fascinating-social-me\\_b\\_2185281.html](http://www.huffingtonpost.com/brian-honigman/100-fascinating-social-me_b_2185281.html)>

<sup>202</sup> *Wishart v Murray*, above n 1, at [117].

*(b) The innocent dissemination defence may not apply to Facebook hosts*

It was a central feature of the *Oriental Press* decision that the Court considered that the innocent dissemination defence was available to the forum providers.<sup>203</sup> However it is unclear whether the New Zealand courts consider it appropriate to apply the innocent dissemination defence to internet media.

The Court of Appeal indicated in *Murray v Wishart* that the innocent dissemination defence “would be difficult to apply” to a Facebook host.<sup>204</sup> While I suggested above that it was open to the Court to take the position that the defence could be available,<sup>205</sup> following *Murray v Wishart* this would require somewhat of a judicial about-turn.

The essential difficulty appears to arise from the decision to codify the defence in s 21 of the Defamation Act.<sup>206</sup> The Court of Appeal identified that the “language of the section and the defined terms used in it” meant that it appeared inapplicable to internet publishers.<sup>207</sup> The common law defence left in generic terms appears more amenable to application to internet media than the codified form of the defence in s 21. Notably, Hong Kong does not have a codified defence and Ribeiro PJ’s analysis of the availability of the defence was based on its common law form.<sup>208</sup>

The effect of the codification of the defence in New Zealand is ossification. The common law is often lauded for its ability to adapt to reflect the progression of society and development of technology.<sup>209</sup> It is tempting then to lament the decision to codify the defence as short-sighted. Whether Parliament’s intention in codifying the defence was to limit it to traditional print forms of media is unclear, but regardless this appears to be what it has achieved.<sup>210</sup>

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<sup>203</sup> *Oriental Press Group Ltd v Fevaworks Solutions Ltd*, above n 146, at [89].

<sup>204</sup> *Murray v Wishart*, above n 9, at [143].

<sup>205</sup> At 3.3.2(e).

<sup>206</sup> See 1.4.1 above.

<sup>207</sup> *Murray v Wishart*, above n 9, at [143].

<sup>208</sup> *Oriental Press Group Ltd v Fevaworks Solutions Ltd*, above n 146, at [30].

<sup>209</sup> For example *Home Office v Harman* [1983] 1 AC 280 at 320 per Lord Roskill: “New situations regularly arise in the practice of the law which require previously held and sometimes generally accepted views to be reviewed and if necessary to be revised in the light of that new situation. Indeed, the evolution of the common law of this country to meet the changing needs of contemporary society and its adaptability to change owes much to judicial acceptance of this philosophy.”

<sup>210</sup> In fact, when the Defamation Act was drafted Parliament likely did not even know what the internet was, much less consider the impact of codifying the defence on internet media. The Defamation Act’s year of enactment is 1992, but its substance is actually much older: see 1.4 above.

If the Court of Appeal is correct that the innocent dissemination defence is unavailable to internet media, the result would be a broad imposition of liability under the traditional publication rule. A Facebook host would effectively become strictly liable for anything posted on his or her page. This does not alone constitute sufficient grounds for rejecting the *Emmens v Pottle* publication by action line of authority, but negative consequences could result from such a broad imposition of liability.

Ryan J Turner argues that litigation against internet hosts, especially internet media corporations, is likely to increase substantially.<sup>211</sup> He cites Richard Posner as describing this and last century as “an age when tort law is dominated by the search for the deep pocket”.<sup>212</sup> If this is true, the cost of defamation litigation may simply become a business expense for internet media. Related to this is the concern that an expansive test for liability risks deterring companies, public institutions (including universities) and individuals from establishing online discussion fora because of the risk of liability for defamatory material posted on that forum.<sup>213</sup> While arguably this is appropriate in the case of commercial entities that can internalise the costs of moderation,<sup>214</sup> it is important to consider the possible chilling effect on freedom of expression. In seeking to protect reputation without unjustifiably intruding into the right to freedom of expression, the defamation tort is inevitably engaged in a balancing act – one which risks being upset if individuals and institutions are deterred from creating online fora for public discourse.<sup>215</sup>

Thus while there is certainly merit in the *Oriental Press* approach, especially in terms of its principled coherence with existing defamation law, it is also seriously problematic in several respects in the New Zealand context.

#### **4.3.3 Liability by omission**

It seems then that the *Byrne v Deane* principles must provide the legal framework for determining liability.<sup>216</sup> In examining the merits of applying the *Byrne v Deane* line, it is first

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<sup>211</sup> Turner, above n 91, at 61.

<sup>212</sup> Turner, above n 91, at 205.

<sup>213</sup> Turner, above n 91, at 61.

<sup>214</sup> See 4.3.2(a) above.

<sup>215</sup> See 1.2 above.

<sup>216</sup> *Murray v Wishart*, above n 9; *Wishart v Murray*, above n 1; see 1.3.2 above.

necessary to address Ribeiro PJ's contention in *Oriental Press* that it only applies to situations of trespass. The content of the knowledge requirement must also be considered, and the more fundamental question of whether it is valid to compare the *Byrne v Deane* situation to the case of a Facebook host.

*(a) The Byrne v Deane line may only apply to situations of trespass*

Implicit in Ribeiro PJ's decision in *Oriental Press* is that it would be inappropriate to apply the *Byrne v Deane* line to situations not involving trespass.<sup>217</sup> However his characterisation of the *Byrne v Deane* line as necessarily involving acts of trespass is open to debate. Turner argues that such a requirement is "at odds" with the approach of the publication by omission line of authority, which he contends has not been constrained by such a requirement.<sup>218</sup> He suggests that *Byrne v Deane* is better read as:

"involving an act of publication contrary to guidelines or rules set down for publication [no posting on the walls of the club without consent], as opposed to an act of publication constituting a trespass".<sup>219</sup>

As explored above, the *Byrne v Deane* line of authority does *tend* to involve acts of trespass.<sup>220</sup> However this is not always the case. Notably, several of the cases that apply *Byrne v Deane* principles to publication online do not involve trespass.<sup>221</sup> Of course this does not settle the question of whether trespass was – or should be – part of the *Byrne v Deane* ratio. The issue of trespass is really about whether it makes sense to characterise the person in question as part of the chain of publication. Where the original publication was made in trespass (the classic example being graffiti),<sup>222</sup> this counts against deeming the proprietor (or Facebook host) a publisher. However, where the publication is not technically a trespass, but still, for example (as in Turner's characterisation of *Byrne v Deane* above) in breach of a particular guideline or rule, this fact still counts against deeming the proprietor a publisher, because it tends to reduce the blameworthiness of the proprietor for the act of publication. It is a false binary to say that anything posted in trespass falls outside the publication rule, and anything short of trespass falls within.

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<sup>217</sup> *Oriental Press Group Ltd v Fevaworks Solutions Ltd*, above n 146, at [50].

<sup>218</sup> Turner, above n 91, at 50.

<sup>219</sup> Turner, above n 91, at 51.

<sup>220</sup> At 4.1.

<sup>221</sup> See, for example, *Godfrey v Demon Internet Ltd*, above n 35; *Davison v Habeeb*, above n 45; *Tamiz v Google Inc*, above n 45.

<sup>222</sup> See 3.3.1 above.

While Turner is probably correct that the *Byrne v Deane* line is not restricted to situations of trespass, the circumstances around publication, including whether the original publication was in breach of any rules (or laws) must still be an important consideration in an assessment of third party liability. The characterisation of the publication in *Byrne v Deane* as in breach of club rules instead of a trespass does little to reduce the force of the fundamental point that it is unfair to hold the proprietors liable for someone else's illegal (or prohibited) act.

Thus the *Byrne v Deane* line should not be rejected in the context of Facebook hosts simply because someone posting to a Facebook page does not do so in trespass.

*(b) The content of the knowledge requirement*

Interestingly, the Hong Kong Court of Final Appeal briefly discussed Courtney J's ruling<sup>223</sup> in the *Oriental Press* case (the appeal not having been heard at that time).<sup>224</sup> Permanent Justice Ribeiro referred to the case in the context of discussing what conditions are needed to satisfy the standard of reasonable care for the innocent dissemination defence.<sup>225</sup> *Wishart v Murray* was considered to highlight the "potential need for particular care in certain cases" when individuals "mounted campaigns against targeted persons".<sup>226</sup> Most interestingly for present purposes, Ribeiro PJ held:

"Unlike the hosts of a discussion forum involving many thousands of discussion threads, the creators of such a blog or Facebook page have a relatively narrow horizon to monitor and, given that their express purpose is to mount a campaign critical of others, they might reasonably be expected to exercise *particular care* in respect of potentially defamatory comments posted at their invitation."<sup>227</sup> [emphasis added]

Permanent Justice Ribeiro held that when someone has created a blog or Facebook page expressly for the purpose of criticising someone, this could elevate what constitutes reasonable care in the circumstances. This is an intuitively appealing point: such a page is clearly more likely to attract defamatory content.

Here an important consequence to the distinction between the actual knowledge and constructive knowledge tests is brought into focus.<sup>228</sup> Taking into account the purpose of the

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<sup>223</sup> *Wishart v Murray*, above n 1.

<sup>224</sup> *Oriental Press Group Ltd v Fevaworks Solutions Ltd*, above n 146, at [92].

<sup>225</sup> At [92].

<sup>226</sup> At [91]-[99].

<sup>227</sup> At [92].

<sup>228</sup> See 3.2 and 3.3 above.



page is possible under the publication by action line (through the innocent dissemination defence, which is the context in which Ribeiro PJ discussed *Wishart v Murray*), and also under Courtney J's 'ought to know' test.<sup>229</sup> However, this consideration would not be relevant under the Court of Appeal's 'actual knowledge' test, which is concerned simply with whether or not the Facebook host knew the defamatory content had been posted.<sup>230</sup> The actual knowledge test sacrifices flexibility for certainty. It seems the Court of Appeal valued the latter over the former.<sup>231</sup>

This is probably justifiable. Certainty is important in the law, and arguably especially so in the case of the Facebook host given the near ubiquity of Facebook in New Zealand.<sup>232</sup> The potential for defamation on Facebook is truly vast, so it is desirable to have a simple rule governing when the Facebook host will become liable for a third party's statement. An actual knowledge test would be easier for a layperson to understand than the more opaque ought to know test, or the approach of *prima facie* liability mitigated by the innocent dissemination defence.

*(c) Facebook hosts are arguably materially different to golf club proprietors*

However, if the *Byrne v Deane* principles are going to be applied, it is important to examine the validity of equating Facebook hosts with golf club proprietors.

A Facebook page is fundamentally unlike a golf club notice board because it is an internet medium. I have explored above at some length the paradigm shift that publication online represents.<sup>233</sup> While a golf club notice board (or bathroom graffiti) has a relatively restricted potential audience, the capacity for defamation to spread on Facebook is virtually boundless. Moreover, the Facebook host – albeit to varying extents, but certainly in the case of those

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<sup>229</sup> *Wishart v Murray*, above n 1, at [117]; see 3.2.1 above.

<sup>230</sup> *Murray v Wishart*, above n 9, at [144]; see 3.3 above.

<sup>231</sup> At [142].

<sup>232</sup> According to one source New Zealand in fact has the "number one usage of social networks in the world": Jo Brothers "A Social Media Breakfast with Teddy Goff and Ross Dawson" *The Huffington Post* (online ed, 3 April 2013) <[www.huffingtonpost.com/jo-brothers/a-social-media-breakfast-\\_b\\_2703179.html](http://www.huffingtonpost.com/jo-brothers/a-social-media-breakfast-_b_2703179.html)>. Another source puts the number of New Zealanders aged 20-24 on Facebook at nearly 90%: <[www.firstdigital.co.nz/blog/2014/09/10/facebook-demographics-new-zealand-age-distribution-gender/](http://www.firstdigital.co.nz/blog/2014/09/10/facebook-demographics-new-zealand-age-distribution-gender/)> accessed 3 October 2015. Also see 2.1.1 above.

<sup>233</sup> At 2.2.

who are promoting a cause, such as Mr Murray<sup>234</sup> – solicits and encourages others to post to the page. In contrast, the golf club proprietors prohibited posting to the notice board without permission.<sup>235</sup> Arguably then the key principle in *Byrne v Deane* – that the defendant becomes liable only after somehow ratifying or taking responsibility for the original publication – is inappropriate under this different set of conditions. Where there is such a greater potential for defamatory content to go viral, and the Facebook host has (at least to some degree) solicited the defamatory content, a stricter test for liability may be warranted.

Thus while I have argued above that there are material differences between a Facebook host and the providers of an online forum,<sup>236</sup> so too are there significant differences between a Facebook host and the proprietors of a golf club. This is probably inevitable, and reflects the inherently imperfect nature of reasoning by analogy.<sup>237</sup>

#### **4.4 The use of analogies in legal reasoning**

Part of the difficulty in determining the correct legal test for third party publication on the internet comes from the existing common law authorities dealing with substantially different situations. In spite of this, the courts employed reasoning by analogy in an attempt to stretch the existing principles to an online context. It is appropriate to comment briefly on the limitations of reasoning by analogy.

On one view, analogical reasoning is simply part of the inherent nature of reasoning under the common law. As Ribeiro PJ noted extra-judicially, “it is a hallmark of the common law that the courts seek to adapt established principles to solve novel problems”.<sup>238</sup> Indeed, some theorists regard analogies as the cornerstone of common law reasoning.<sup>239</sup>

However, reasoning by analogy also has staunch critics. Richard Posner argues that analogies have no real normative force, rather:

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<sup>234</sup> *Murray v Wishart*, above n 9; see 3.1 above.

<sup>235</sup> *Byrne v Deane*, above n 42, at 837.

<sup>236</sup> See 4.3.2(a) above.

<sup>237</sup> See 4.4 below.

<sup>238</sup> Ribeiro, above n 50, at [31]; Ribeiro acknowledges in the same paragraph that it “may seem odd that [the courts] have had recourse to centuries-old cases and have considered the possible value as precedents, of such matters as graffiti on lavatory walls and versified notices pinned onto golf club notice boards”.

<sup>239</sup> See, for example, EH Levi *An Introduction To Legal Reasoning* (University of Chicago Press, Chicago, 1948) at 1-3.

“Reasoning by analogy tends to obscure the policy grounds that determine the outcome of a case, because it directs the reader’s attention to the cases that are being compared with each other rather than to the policy considerations that connect or separate the cases. ... There is no such thing as an “analogical argument” in any but a rhetorical sense; you need *reasons* to determine whether one case should be thought relevantly similar to another.”<sup>240</sup>

Perhaps the courts’ strained use of analogies reflects something in the nature of the defamation tort. Joachim Dietrich argues that the courts’ difficulties in applying the principles of publication to internet media really stem from “conceptual uncertainties” that are pre-existing in the defamation tort.<sup>241</sup> In his analysis, the inconsistent application of the law in the cases concerning internet media reflects a fundamental instability in the underlying legal doctrine, rather than the novel nature of publication on the internet.<sup>242</sup>

It is important to note that the courts are not blind to the limitations of reasoning by analogy. The Court of Appeal in *Murray v Wishart* recognised that:

“Many of the decisions show an effort by the relevant Court to reach a conclusion by reference to an analogy in a non-internet circumstance. We agree that is a helpful form of reasoning, but it must be acknowledged that the analogies are only analogies, and there is room for debate about their appropriateness in particular cases.”<sup>243</sup>

The Court of Appeal was clearly aware that reliance on analogies could only prove so useful, and its scepticism is healthy.<sup>244</sup> However, it still ultimately applied principles from the *Byrne v Deane* line of authority to decide the case.<sup>245</sup>

#### 4.5 Conclusion

This part has evaluated various options presented by the common law for determining third party liability for Facebook hosts. I have characterised the two key alternatives as liability through action along *Oriental Press* lines, and liability through omission under *Byrne v*

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<sup>240</sup> Richard A Posner “Book Review: Reasoning By Analogy” (2006) 91 Cornell L Rev 761 at 765 and 768.

<sup>241</sup> Dietrich, above n 148, at 88.

<sup>242</sup> Dietrich, above n 148, at 88. One of the uncertainties Dietrich explored is whether knowledge of the (defamatory) nature of the content is relevant to the question of publication: while the orthodox view is that knowledge of the nature of the content of the publication goes only to defences, some commentators have argued that where knowledge is absent, publication has not occurred – see, for example, *Clerk & Lindsell on Torts* (21<sup>st</sup> ed, Sweet & Maxwell, London, 2014) at [22-57].

<sup>243</sup> *Murray v Wishart*, above n 9, at [126]; and earlier, at [99]: “The analysis of the cases requires the Court to apply reasoning by strained analogy, because the old cases do not, of course, deal with publication on the internet. There is a question of the extent to which these analogies are helpful.”

<sup>244</sup> Grant Lamond “Analogical Reasoning in the Common Law” (2014) 34 Oxford Journal of Legal Studies 567 at 587: “distant analogies have serious limitations, and a moderate scepticism about their use is not out of place”.

<sup>245</sup> See 3.3 above.

*Deane* principles. The Court of Appeal and High Court in the *Murray v Wishart* proceedings took the latter approach, differing in their approaches to the requirements for knowledge.<sup>246</sup>

None of the approaches is perfect. Given the statutory construction of the innocent dissemination defence in New Zealand, the *Oriental Press* approach would likely lead to an undesirably strict standard of liability.<sup>247</sup> It seems then that the *Byrne v Deane* line must provide the appropriate legal framework. If so, the next question relates to the content of the knowledge requirement. While a test based on constructive knowledge allows for a more nuanced application of *Byrne v Deane* principles, a test based on actual knowledge provides a more certain basis for assessing liability.

Ultimately the question of what is the appropriate legal test, and the difficulties therein, give way to a larger question. If the attempt to apply the principles of defamation law to internet media is inevitably going to be clumsy, could a better course be to implement technology-specific rules governing malicious falsehoods online? Part V attempts to answer this question.

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<sup>246</sup> See 3.2 and 3.3 above.

<sup>247</sup> See 1.4.1 and 4.3.2(b) above.

## PART V: LEGISLATIVE INTERVENTION

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The alternative to applying the existing principles of defamation law to internet media is the introduction of technology-specific rules governing defamation-type situations online. This part considers such an alternative course. It begins by examining the regulation of the internet in general terms. It then considers the recently enacted Harmful Digital Communications Act 2015, which affects the liability of an internet content host for third party content, and compares this new statute to its equivalent in the United Kingdom.

### 5.1 ‘Regulatability’ of the internet

Early discussions about regulating the internet were dominated by optimism that the internet was in fact ‘unregulatable’. This sentiment possibly reached its zenith in John Perry Barlow’s declaration of the independence of cyberspace in 1996:

“Governments of the Industrial World. ... You have no sovereignty where we gather. ... I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. ...”<sup>248</sup>

The idea that the internet could be conceptualised as a ‘state of being’ which had naturally evolved apart and distinct from terrestrial space, was known as ‘exceptionalism’.<sup>249</sup> In the early 1990s, a vision of the online environment emerged which advocated and defended internet exceptionalism, known as ‘cyberlibertarianism’.<sup>250</sup> Cyberlibertarians envisioned cyberspace as a distinct sphere, separate from physical space, which was, and should continue to be, naturally self-regulating.<sup>251</sup>

This early period of cyberlibertarianism coincided with the enactment of the Communications Decency Act 1996 in the United States.<sup>252</sup> Section 230 of this Act provides exceptionalist<sup>253</sup>

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<sup>248</sup> John Perry Barlow “A Declaration of the Independence of Cyberspace” <<https://projects.eff.org/~barlow/Declaration-Final.html>> accessed 29 September 2015.

<sup>249</sup> Holland, above n 97, at 108.

<sup>250</sup> Holland, above n 97, at 109.

<sup>251</sup> Holland, above n 97, at 110.

<sup>252</sup> 47 USC § 230(1): “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

<sup>253</sup> Exceptionalist in the sense that it provides greater protection for online providers than offline publishers who publish the same content.

protection from liability for providers of an “interactive computer service” who publish information provided by others.<sup>254</sup>

Not all commentators shared the cyberlibertarians’ enthusiasm however. Frank Easterbrook famously compared the ‘law of cyberspace’ to the “law of the Horse”:

“Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on “The Law of the Horse” is doomed to be shallow and to miss unifying principles.”<sup>255</sup>

He argued that it is wrong to conceive of the law of cyberspace as somehow distinctive or worthy of special treatment. To do so risked “multidisciplinary dilettantism”.<sup>256</sup>

Lawrence Lessig responded directly to Easterbrook’s criticism, arguing that the study of regulation online can shed light on legal issues that are relevant to the law *generally*.<sup>257</sup> He cautioned that the ‘architecture’ of the internet – those structural features that constrain behaviour – is a highly pervasive, and unobserved, agent of regulation.<sup>258</sup> Lessig’s influence on this area of scholarship was (and continues to be) substantial.<sup>259</sup> The idea that the internet is beyond the reach of real-space regulation is now much less popular; in Lessig’s own words: “The confidence of the Internet exceptionalists has faded”.<sup>260</sup>

## 5.2 Regulatory approaches to new technology

The growing acceptance that the internet is amenable to real-space regulation has been mirrored by the actual enactment of internet-specific legislation. However before I examine two incidences of this, from New Zealand and the United Kingdom, it is worthwhile to consider regulatory approaches to new technology generally.

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<sup>254</sup> Holland, above n 97, at 102. Holland describes § 230 as a “modified, less demanding form of cyberlibertarian exceptionalism” that was “generally intended to provide online service providers and bulletin board hosts with immunity from tort liability from the defamatory acts of their users” (at 104).

<sup>255</sup> Frank H Easterbrook “Cyberspace and the Law of the Horse” (1996) U Chi Legal F 207 at 207.

<sup>256</sup> At 207.

<sup>257</sup> Lawrence Lessig “The Law of the Horse: What Cyberlaw Might Teach” (1999) 113 Harv L Rev 501 at 503; see also Lawrence Lessig *Code and Other Laws of Cyberspace* (Basic Books, New York, 1999).

<sup>258</sup> At 511; ‘architecture’ in the sense that some areas of cyberspace require passwords to be accessed, or that some areas of the internet allow encryption but others do not.

<sup>259</sup> Lessig was the 9<sup>th</sup> most cited legal academic in the United States in the period 2009-2013: Brian Leiter “Ten most cited law faculty in the U.S. 2009 through 2013” <<http://leiterlawschool.typepad.com/leiter/2014/06/ten-most-cited-law-faculty-in-the-us-from-2009-through-2013.html>> accessed 29 September 2015.

<sup>260</sup> Lawrence Lessig *Code Version 2.0* (2006) <<http://codev2.cc/download+remix/>> downloaded 29 September 2015.

Mark Tushnet identifies two strategies that courts and legislatures have used to deal with technological innovations: “one allowing legislative experimentation until experience accumulates, the other imposing existing doctrine from the outset”.<sup>261</sup> The first strategy implies exceptionalism, at least for a period of time until judges and legislators begin to understand the new technology.<sup>262</sup> However, the second doctrine holds that judges and legislators accumulate knowledge *across* technologies, meaning it would be legitimate to make conclusions about the internet based on existing knowledge of – for example – film, television and radio.<sup>263</sup>

Under the first doctrine, where the legislature does not intervene, there is a risk of disconnection between law and technology. Judges are left to do their best to reason, often by analogy, from the common law.<sup>264</sup> This risk of disconnection has not gone unnoticed in the cases that apply tortious defamation principles to internet media. Turner notes that Kirby J was clearly alive to this tension in *Gutnick*:

“there 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”.<sup>265</sup>

But Roger Brownsword points out that the risk of disconnection is inevitable with any new technology:

“If connection is a generic challenge, we can assume that each technology will be developing at a rate that threatens disconnection. To be sure, some technologies will develop even more quickly than others; but, generally, this will not be where the relevant difference is to be found.”<sup>266</sup>

His point is a challenging one. The *speed* with which the internet has transformed so many aspects of modern life is remarkable, and it is tempting to enlist this fact in support of the proposition that the internet warrants an exceptional regulatory response. But even if we cannot, the internet is so exceptionally different to print media that it represents an entirely different paradigm.<sup>267</sup> The cost of publication (and re-publication) has reduced to virtually

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<sup>261</sup> Tushnet, above n 86, at 1639.

<sup>262</sup> At 1644.

<sup>263</sup> At 1645.

<sup>264</sup> See 4.4 above on the use of analogies in legal reasoning.

<sup>265</sup> Turner, above n 91, at 41; citing *Dow Jones & Company Inc v Gutnick*, above n 35, at 632.

<sup>266</sup> Roger Brownsword and Morag Goodwin *Law and the Technologies of the Twenty-First Century* (Cambridge University Press, Cambridge, 2012) at 31.

<sup>267</sup> See 2.2 above.

nothing.<sup>268</sup> Content is easily accessible via sophisticated search engines, and, once published, remains retrievable indefinitely.<sup>269</sup> These features amount to a sea change in the conditions faced by the defamation tort.

Admittedly, whether this new paradigm of online publication is so different that it warrants legislative intervention is a different question, one whose answer depends to a large extent on the form such intervention would take. However, given the authorities thus far constitute a “growing volume of contradictory precedents”,<sup>270</sup> legislative intervention is an attractive option.

### **5.3 The Harmful Digital Communications Act: safe harbour provisions**

The legislature has in fact already enacted internet-specific rules, in the Harmful Digital Communications Act (‘the HDCA’). The HDCA was enacted on 2 July 2015 in response to concerns over cyber-bullying.<sup>271</sup> It has a significant potential effect on the third party liability of Facebook hosts for defamation.

The HDCA created a new offence of posting a digital communication intending to cause harm.<sup>272</sup> However, the HDCA also sets out ‘safe harbour’ provisions, which, if followed, protect an online content host against most forms of liability for content posted on his or her page by others.<sup>273</sup> This includes protection against liability for defamation.<sup>274</sup>

An ‘online content host’ is defined in the HDCA as:

“the person who has control over the part of the electronic retrieval system, such as a website or an online application, on which the communication is posted and accessible by the user”.<sup>275</sup>

This will almost certainly include Facebook hosts, as the courts are likely to deem them to have ‘control’ over their Facebook page. Crucially, Facebook hosts have the power both to block users and remove content.<sup>276</sup> Moreover, the Court of Appeal appeared to accept that a

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<sup>268</sup> See 2.2.1 above.

<sup>269</sup> See 2.2.2 above.

<sup>270</sup> Turner, above n 91, at 52.

<sup>271</sup> (30 June 2015) 706 NZPD 4850.

<sup>272</sup> Section 22.

<sup>273</sup> Sections 23-35.

<sup>274</sup> Section 24(1).

<sup>275</sup> Section 4.

<sup>276</sup> See 2.1.2 above.



person “in Mr Murray’s shoes” (a Facebook host) would have been protected by the equivalent, very similar, piece of legislation in the United Kingdom.<sup>277</sup>

If the Facebook host receives a notice of complaint about content on his or her page, and responds in accordance with s 24 of the HDCA, he or she will be protected against almost all forms of liability (there are some limited exceptions, but defamation is not amongst them).<sup>278</sup> Section 24 requires that upon receiving a valid notice of complaint the host must take all reasonable steps to contact the author of the content in question within 48 hours.<sup>279</sup> If the author consents, the host must take down the relevant content.<sup>280</sup> If the author does not consent, the host must leave the content online, notify the complainant, and, if the author consents, provide the complainant with the author’s personal details.<sup>281</sup>

This bolsters the protection afforded to online hosts by the Court of Appeal’s narrowing of the legal test for third party publication on Facebook.<sup>282</sup> Even where the Facebook host does have actual knowledge of the defamatory material, he or she will be protected from liability if he or she follows the procedure provided by s 24. And, importantly, following (or attempting to follow) the s 24 procedure does not prevent the Facebook host from arguing that he or she was not a publisher of the content in the first place, as s 23 preserves any defences that might be otherwise available.<sup>283</sup>

One advantage of the safe harbour provisions is that they clarify the responsibility of the author of the publication. Once a complaint has been made to the host, provided the host follows the s 24 procedure (which he or she must, to rely on the defence), there are two possible outcomes. The content may be taken down – if the host cannot contact the author, the author fails to respond to the host, or the author consents to the content’s removal.<sup>284</sup> Alternatively, the content may not be removed, but in this case the author will have had to effectively take responsibility for the content by sending written notice to the host refusing its

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<sup>277</sup> *Murray v Wishart*, above n 9, at [146]; see 5.4 below on s 5 of the Defamation Act 2013 (UK).

<sup>278</sup> Sections 24(1) and 25(4).

<sup>279</sup> Section 24(2).

<sup>280</sup> Section 24(2)(c).

<sup>281</sup> Section 24(2)(d).

<sup>282</sup> *Murray v Wishart*, above n 9; see 3.3.1 above.

<sup>283</sup> Section 23(3).

<sup>284</sup> Sections 24(2)(b), 24(2)(e) and 24(2)(c) respectively.

removal.<sup>285</sup> This means that the author is identifiable, and has clearly assumed responsibility for the publication, such that it makes sense to limit the host's liability.

### 5.3.1 Remove first; ask questions later

One problem with the safe harbour provisions is that their structure seems disproportionately weighted towards the removal of content. Where the host cannot contact the author, or the author does not reply to a notice of complaint, s 24 requires that the content must still be removed.<sup>286</sup> There is no penalty for a false or malicious complaint, so there is a risk that complainants could abuse the safe harbour provisions to compel the removal of content for illegitimate reasons.<sup>287</sup> Malicious use of 'take down' provisions is not a novel phenomenon. Urban and Quilter note that § 512 of the American Digital Millennium Copyright Act, which contains a take down mechanism in relation to alleged copyright infringement, was:

“commonly being used ... to create leverage in a competitive marketplace, to protect rights not given by copyright (or perhaps any other law) and to stifle criticism, commentary and fair use.”<sup>288</sup>

The potential for suppression of legitimate free speech is real, especially in cases where the material is posted anonymously, making the author difficult to contact.

The Office of the Privacy Commissioner does not seem to share this concern, asserting that the host only needs to remove material where the complaint comes from someone who is directly affected by the content:

“It's not enough for content to be generally offensive or outrageous. It needs to be specifically harmful to the individual who complains about it. This means that any “flooding” would be able to be quickly triaged by the content host, and most of it dismissed out of hand.”<sup>289</sup>

The wording of the safe harbour provisions does not appear to stipulate such a restriction, and it is unclear on what basis this statement is made. Instead, it seems the most onerous

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<sup>285</sup> Section 24(2)(d).

<sup>286</sup> Sections 24(2)(b) and (e).

<sup>287</sup> Andrew Easterbrook “Harmful Digital Communications “safe harbour”” (21 August 2015) Auckland District Law Society <[www.adls.org.nz/for-the-profession/news-and-opinion/2015/8/21/harmful-digital-communications-%E2%80%9Csafe-harbour%E2%80%9D/](http://www.adls.org.nz/for-the-profession/news-and-opinion/2015/8/21/harmful-digital-communications-%E2%80%9Csafe-harbour%E2%80%9D/)>.

<sup>288</sup> Jennifer M Urban and Laura Quilter “Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act” (2006) 22 Santa Clara Computer and High Tech LJ 683 at 687.

<sup>289</sup> Sam Grover “Harmful Digital Communications Act: two months in” (31 August 2015) Privacy Commissioner Blog <[www.privacy.org.nz/blog/harmful-digital-communications-act-two-months-in](http://www.privacy.org.nz/blog/harmful-digital-communications-act-two-months-in)>.

requirement in the notice of complaint is to explain why the complainant considers that the content is unlawful or in breach of the HDCA.<sup>290</sup>

### 5.3.2 Conclusions on the HDCA

National MP Scott Simpson noted in a speech during the Harmful Digital Communications Bill's Third Reading that one of the Bill's key aims was to protect young people who did not have the ability to use "the tools that existed prior to this legislation being enacted, such as taking defamation actions".<sup>291</sup> While the HDCA will likely succeed in addressing some cases of online defamation, it is not perfect. By implementing a 'take-down-first, ask-questions-later' approach to internet moderation, the HDCA risks upsetting the delicate balance that the defamation tort attempts to strike in its measured infringement of the right to freedom of expression.

However, arguably the defamation tort is not doing a very good job of striking this balance in practice. Defamation proceedings are expensive and lengthy, notoriously so.<sup>292</sup> Perhaps the single most attractive feature of the HDCA safe harbour provisions is that they provide a far cheaper and simpler avenue of recourse than the traditional litigation route. In being cheaper and simpler, the safe harbour provisions should make recourse against a tortfeasor more accessible. Given the greater accessibility and transmissibility of internet communications, this is both appropriate and desirable.<sup>293</sup>

### 5.4 The equivalent scheme in the United Kingdom

Section 5 of the Defamation Act 2013 (UK) provides a very similar 'take down' scheme to the HDCA safe harbour provisions.<sup>294</sup> The s 5 scheme provides 'operators' of websites with a complete defence in respect of third party content on their websites if they respond to a notice

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<sup>290</sup> Section 24(3).

<sup>291</sup> (30 June 2015) 706 NZPD 4850.

<sup>292</sup> See, for example, *Davis v Independent Newspapers Ltd* HC Auckland CP67SD02, 12 March 2003 at [35]: "the process of defending a claim for defamation can be a protracted and expensive exercise"; *Awa v Independent News Auckland Ltd* [1996] 2 NZLR 184 at 187 per Hammond J: "Defamation proceedings are notoriously expensive"; *Police v W* [1989] 3 NZLR 696 at 701 per Fisher J: "A civil action for defamation is extraordinarily protracted and expensive compared with virtually all other classes of civil litigation".

<sup>293</sup> See 2.2 above.

<sup>294</sup> Defamation Act 2013 (UK), s 5.

of complaint and comply with the take down procedure prescribed by the Act's regulations.<sup>295</sup>

This part of the Act reflects 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”.<sup>296</sup>

The Joint Committee on the Draft Defamation Bill identified two key problems with the English law as it stood prior to the Act. The first was the risk aversion of service providers. Given service providers risked attracting primary liability for content once they received a complaint, their reaction was often to take down the allegedly offending content whenever a complaint was received.<sup>297</sup> Service providers typically do not have a strong understanding of defamation law, resulting in the removal of many entirely legitimate comments.<sup>298</sup> Rather than up-skilling, or employing lawyers, to place themselves in a position to make the kind of judgments necessary to assess liability, service providers were more likely to simply remove content following a complaint. A second problem was that if service providers *did* employ moderators or a moderating system this could actually lead to increased liability. Because liability was founded on knowledge of the allegedly defamatory content, employing moderators to actively monitor content meant that providers risked attracting liability earlier than they otherwise would have, as the moderators became aware of the content.<sup>299</sup> Thus:

“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.”<sup>300</sup>

The structure of incentives created by the law did not align with the protection of reputation, nor did it encourage the right to freedom of expression.

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<sup>295</sup> Section 5, along with the Defamation (Operators of Websites) Regulations 2013 (UK); see also Ter Kah Leng “Internet defamation and the online intermediary” (2015) 31 CLSR 68 at [2].

<sup>296</sup> (12 June 2012) 546 GBPD HC 177.

<sup>297</sup> Joint Committee on the Draft Defamation Bill (UK) *Draft Defamation Bill* (19 October 2011) at 53-54.

<sup>298</sup> At 53-54.

<sup>299</sup> At 54.

<sup>300</sup> At 54.

The s 5 scheme in the Defamation Act 2013 (UK) is structured in a similar manner to the HDCA safe harbour provisions. ‘Operator’ will likely have a comparable meaning to ‘online content host’ in the HDCA.<sup>301</sup> Notably, where the operator cannot contact the author of the content, the author does not reply to the operator’s notice of complaint, or the author sends an incomplete reply to the operator, the same presumption that the content will be taken down applies.<sup>302</sup> Where the originator responds in accordance with the scheme, the operator must not remove the content and the operator has a defence to liability for defamation.<sup>303</sup> One difference between the two schemes is that in the original complaint to the operator the complainant must explain why the statement is *defamatory* of the complainant.<sup>304</sup> However, since the Act does not require the operator to verify this claim, a mere assertion might suffice, meaning the s 5 scheme is potentially exposed to malicious complaints in the same manner as the HDCA.<sup>305</sup>

One of the key attractions of the s 5 scheme is that, like the HDCA safe harbour provisions, it clarifies the responsibility of the author. Turner lauds the s 5 scheme for facilitating conversations:

“between the claimant and the [author] (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)”.<sup>306</sup>

As explored above, this will likely achieve a clearer delineation of responsibility for the publication, by compelling the author to either take responsibility for the content (in writing), or risk having it taken down.<sup>307</sup>

The second key benefit of the HDCA safe harbour provisions also applies to the s 5 scheme: it allows for recourse against distributors of defamatory third party content outside of actual

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<sup>301</sup> See 5.3 above; ‘operator’ is defined, in para 1(2) of the Defamation (Operators of Websites) Regulations 2013 (UK), as “the operator of the website on which the statement complained of in the notice of complaint is posted”, but this does little to clarify the scope of the definition.

<sup>302</sup> Defamation (Operators of Websites) Regulations 2013 (UK), paras 2(3), 5 and 6 of the Schedule respectively; see 5.3.1 above.

<sup>303</sup> Defamation (Operators of Websites) Regulations 2013 (UK), para 8 of the Schedule.

<sup>304</sup> Defamation Act 2013 (UK), s 5(6)(b). The equivalent requirement under New Zealand’s Harmful Digital Communications Act 2015, found in s 24(3), is much broader, requiring the complainant to set out why he or she considers the content unlawful or in breach of the HDCA; see 5.3.1 above.

<sup>305</sup> See 5.3.1 above.

<sup>306</sup> Turner, above n 91, at 62.

<sup>307</sup> At 5.3.

or threatened defamation litigation.<sup>308</sup> The time and expense associated with bringing a proceeding in defamation makes the existence of a simpler and cheaper avenue of recourse against a tortfeasor hugely attractive.<sup>309</sup>

## 5.5 Conclusion

The nascent safe harbour provisions in the HDCA have the potential to greatly affect the third party liability of Facebook hosts in New Zealand. Indeed, the Court of Appeal in *Murray v Wishart* appeared to accept that a person “in Mr Murray’s shoes” would be protected by s 5 of the United Kingdom’s Defamation Act.<sup>310</sup> Presumably, then, given the similarities between s 5 and the safe harbour provisions of the HDCA, Mr Murray would have been able to use the safe harbour provisions to his benefit. The HDCA has therefore bolstered the protection afforded to online hosts already strengthened by the Court of Appeal’s narrowing of the legal test for third party publication on Facebook. While it does have the potential to be abused through malicious use of the safe harbour provisions, it also has great potential as a cheaper and more direct method of protecting the rights to speech and reputation online.

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<sup>308</sup> Turner, above n 91, at 62; see 5.3.2 above.

<sup>309</sup> See 5.3.2 above.

<sup>310</sup> *Murray v Wishart*, above n 9, at [146].

## CONCLUSION

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In applying the defamation tort to the internet, the fundamental challenge is in working out how the tort can continue to effectively protect reputational interests without undermining the great potential of the internet as a medium for public expression. However, publication on the internet is significantly different to publication via traditional print media. Compared to print media, publication on the internet is characterised by the ease with which material can be published, the increase in the material's longevity, the ease with which material can be retrieved, and the ability to publish anonymously. The cost of publishing something on the internet has reduced to virtually zero, meaning the potential for republication is effectively unlimited. This new paradigm of publication represents a set of challenging conditions for the defamation tort. Indeed, these changes to the way society communicates have rightly been called "revolutionary".<sup>311</sup>

That the courts have had difficulty in applying the defamation tort to internet media is therefore unsurprising. In the *Murray v Wishart* proceedings the High Court and the Court of Appeal had to decide how to determine the liability of a Facebook host for comments posted on his page by third parties. Both courts applied *Byrne v Deane* publication by omission principles to assess the Facebook host's liability for third party content. The Hong Kong Court of Final Appeal took a different approach in a case that had some similar features, using publication by *action* principles to assess the liability of forum providers for third party content.

Neither of these approaches is perfect. While the publication by action approach would hold a Facebook host to a higher level of liability, given the statutory construction of the innocent dissemination defence in New Zealand, it would likely lead to an undesirably broad application of liability.<sup>312</sup>

It seems then that the *Byrne v Deane* line of authority must provide the appropriate legal framework. The High Court and Court of Appeal differed as to the type of knowledge required to found publication by omission. While constructive knowledge allows for a more

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<sup>311</sup> Solove, above n 90, at 17.

<sup>312</sup> See 1.4.1 and 4.3.2(b) above.

nuanced application of *Byrne v Deane* principles, what it gains in flexibility it sacrifices in certainty. Conversely, while the actual knowledge test provides greater certainty, its rigidity means that the circumstances surrounding the Facebook page cannot affect the assessment of liability.

Ultimately the question of what is the appropriate legal test, and the difficulties therein, gives way to a larger question. If the attempt to apply the principles of defamation law to internet media is inevitably going to be clumsy, could the better course be to implement technology-specific rules governing defamation-type situations online?

That is what the enactment of the Harmful Digital Communications Act 2015 hopes to achieve. The safe harbour provisions in the HDCA have the potential to greatly affect the third party liability of Facebook hosts in New Zealand. They have bolstered the protection afforded to online hosts already strengthened by the Court of Appeal's narrowing of the legal test for third party publication on Facebook. A Facebook host who follows the procedure prescribed in the HDCA will be protected from liability for defamation. While the HDCA does have the potential to be abused through malicious use of the safe harbour provisions, it also has great potential as a cheaper and more direct method of protecting the rights to speech and reputation online. For this reason it should be welcomed.

As the internet continues to transform the modern world, it will continue to challenge established common law concepts, and make demands on those responsible for the upkeep and development of the law. Defamation's intersection with the internet ultimately demonstrates the difficulty that the common law, and the defamation tort in particular, has in coping with the upheavals of the internet age.



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