THE LAW OF DEFAMATION AND THE INTERNET

by

MATTHEW COLLINS
BA, LLB (Hons), PhD
Barrister, Owen Dixon Chambers, Melbourne

OXFORD UNIVERSITY PRESS
CONTENTS

Foreword by Lord Bingham of Cornhill v
Tables of Cases xxvii
Table of Statutes xli
Table of Rules li
Abbreviations liii

I THE INTERNET REVOLUTION

1. General Introduction
   A. The Internet 1.01
   B. Defamation via the Internet 1.02
   C. Sources of Law 1.03
       United Kingdom 1.04
       Australia 1.09
       A shared common law heritage 1.11

2. The Internet
   A. A Brief History of the Internet 2.01
       Computer networks and the origins of the Internet
       The growth of the Internet 2.05
   B. How the Internet Works 2.14
       Interconnected computers
       The transfer of information 2.16
       Internet addresses 2.19
   C. Some Consequences 2.22
       Intermediaries
       Communications travel via indeterminate routes 2.23
       Interception 2.24
       Anonymity 2.25
   D. How the Internet is Used 2.26
       E-mail 2.27
       Bulletin board postings and analogous group communications 2.34
       The world wide web and analogous information services 2.41
   E. A Glimpse into the Future 2.51
       Speed 2.52
       Sounds and pictures 2.53
       Convergence 2.54
       Commercialization 2.55
       Cyberspace 2.56
### 3. Issues for Defamation Law

**A. Why the Internet is a Communications Revolution**
- Geographical indeterminacy 3.02
- Intermediaries 3.04
- Republication 3.09
- Hyperlinks 3.11
- Different forms of publication 3.13

**B. A Framework for Analysis**
- The cause of action for defamation 3.15
- General defences 3.16
- Liability of Internet intermediaries 3.17
- Remedies 3.19
- Jurisdiction and choice of law 3.20
- Other relevant sources of law 3.21
- Appendices 3.22

### II THE CAUSE OF ACTION FOR DEFAMATION

**4. Libel or Slander?**

**A. Introduction**
- General principles 4.01
- The tests for libel and slander 4.04
- The Internet 4.05

**B. United Kingdom Legislation**
- Section 166(1) of the Broadcasting Act 1990 4.07
- Northern Ireland 4.14

**C. Australian Legislation**
- Broadcasting 4.15
- Datacasting 4.16
- Summary 4.23

**D. Internet Publications at Common Law**
- How Internet communications are published 4.25
- Most defamatory Internet publications constitute libel, not slander 4.31
- Special cases 4.34

### 5. Publication

**A. General Principles**
- The concept of publication 5.01
- Communication to a third party 5.02
- Publication in a form capable of being understood 5.03
- Internet publications 5.04
B. Ascertaining the Meaning of a Publication
   Natural and ordinary meaning 7.03
   True or legal innuendo meaning 7.04
   Imputations 7.06
   Relevance of the nature of the publication 7.07
   Bane and antidote 7.09
   Tone and expression 7.14

C. Tests of Defamatory Meaning
   The tests 7.16
   The standards of society 7.21

III GENERAL DEFENCES

8. Justification
   A. Introduction
      General principles 8.01
      Substantial truth 8.04
   B. Multiple Imputations
      Common law 8.06
      United Kingdom and Tasmania 8.07
      New South Wales 8.08
      Lucas-Box meanings and the Polly Peck principle 8.09
      Application to the Internet 8.12
   C. ‘Public Benefit’ and ‘Public Interest’
      General principles 8.15
      Matters of public concern 8.17
      Application to the Internet 8.18

9. Fair Comment
   A. Introduction
      Elements of the defence 9.01
      Queensland and Tasmania 9.03
   B. ‘Comment’
      General principles 9.04
      Imputations of dishonest or corrupt motives 9.05
   C. The Comment Must Relate to a Matter of Public Interest
      Matters of public interest 9.07
      Application to the Internet 9.09
   D. The Comment Must be Based on Facts which are Stated or Indicated in the Material
      General principles 9.10
      Application to the Internet 9.11
Contents

E. The Facts on which the Comment is Based Must be True or Absolutely Privileged
   General principles 9.12
   Common law 9.13
   United Kingdom, New South Wales and Tasmania 9.14
   Queensland, Tasmania and the Australian Capital Territory 9.15

F. The Comment Must be Fair
   General principles 9.16
   Publishing the comment of another 9.17

G. Malice
   General principles 9.20
   Publishing the comment of another 9.22

10. Absolute Privilege

A. Common Law
   Introduction 10.01
   Absolutely privileged occasions 10.02

B. Legislation 10.04
   United Kingdom 10.05
   Australia 10.10
   Publication of absolutely privileged reports via the Internet 10.12

11. The Duty and Interest Form of Qualified Privilege

A. Introduction
   Forms of qualified privilege 11.01
   The duty and interest form of qualified privilege 11.02

B. Performance of a Duty or Protection of an Interest
   General principles 11.04
   Examples 11.05

C. Recipients' Corresponding Duty or Interest
   General principles 11.06
   Publication to uninterested persons 11.08
   Application to the Internet 11.09

D. Publication to the World at Large
   Introduction 11.12
   United Kingdom: Reynolds v Times Newspapers Ltd 11.14
   Australia: reasonable discussion of government and political matters 11.22

E. Related Statutory Defences: Queensland, Tasmania and New South Wales 11.27
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Queensland and Tasmania</td>
<td>11.27</td>
</tr>
<tr>
<td>New South Wales</td>
<td>11.31</td>
</tr>
<tr>
<td>F. Malice</td>
<td></td>
</tr>
<tr>
<td>Onus</td>
<td>11.39</td>
</tr>
<tr>
<td>Malice defined</td>
<td>11.40</td>
</tr>
<tr>
<td>Publishing the statement of another</td>
<td>11.42</td>
</tr>
<tr>
<td>Queensland, Tasmania and New South Wales</td>
<td>11.43</td>
</tr>
</tbody>
</table>

### 12. The Fair Reports Form of Qualified Privilege

A. Common Law
- Privileged occasions                                                | 12.01|
- Protected reports                                                   | 12.02|
- 'Fair and accurate'                                                 | 12.03|
- Publication to uninterested persons                                 | 12.04|

B. Statutory Categories: United Kingdom
- Schedule 1 to the Defamation Act 1996                               | 12.05|
- Relationship between the statutory categories and the common law    | 12.09|

C. Statutory Categories: Australia                                     | 12.12|

### 13. Miscellaneous Other Defences

A. Offer of Amends
- United Kingdom                                                       | 13.01|
- Australia                                                            | 13.03|
- Application to Internet intermediaries                               | 13.04|

B. Apology and Payment into Court
- General principles                                                  | 13.06|
- Application to the Internet                                          | 13.08|

C. Spent Convictions and Related Matters
- United Kingdom: Rehabilitation of Offenders Act 1974                | 13.09|
- Australia                                                           | 13.16|

D. Expired Limitation Period
- The limitation period                                                | 13.17|
- Accrual of the cause of action                                       | 13.18|

E. Consent                                                             | 13.22|

F. Triviality                                                          | 13.24|

G. Miscellaneous Defences in Scots Law
- Statements made *in rixa*                                            | 13.26|
- Mere abuse                                                           | 13.27|
- Fair retort                                                          | 13.28|

xviii
IV LIABILITY OF INTERNET INTERMEDIARIES

14. Internet Intermediaries

A. Different Kinds of Intermediaries
   - Content hosts
   - Mere conduits
   - Caching

B. Sources of Law: United Kingdom
   - Common law
   - Section 1 of the Defamation Act 1996
   - Directive on Electronic Commerce
   - Overview

C. Sources of Law: Australia

D. Structure of Part IV

E. The United States

15. Internet Intermediaries and Publication

A. Introduction

B. Godfrey v Demon Internet Ltd
   - The facts and decision
   - Ramifications of the decision
   - Was Godfrey v Demon Internet Ltd correctly decided?

C. Failure to Remove Defamatory Material
   - Byrne v Deane
   - Urbanchich v Drummoyne Municipal Council
   - Application to the Internet

D. Analogies with Intermediaries in other Contexts
   - Postal services
   - Telephone carriers

E. Conclusions
   - Intermediaries who know they are hosting or caching defamatory Internet content
   - Mere conduits
   - Intermediaries who unknowingly host or cache defamatory Internet content

16. The Common Law Defence of Innocent Dissemination

A. Introduction
   - Elements of the defence
   - Subordinate distributors
   - Actionability of the defamation
B. Thompson v Australian Capital Television Pty Ltd

Introduction
16.09
Decision of the Full Federal Court
16.12
Decision of the High Court
16.15
Auvil v CBS '60 Minutes'
16.20
Analysis
16.29

C. Applying the Defence of Innocent Dissemination to Internet Publications

Introduction
16.43
Intermediaries who host or cache defamatory Internet content
16.45
Mere conduit intermediaries
16.50

17. Section 1 of the Defamation Act 1996 (UK)

A. Introduction
Scope of the defence
17.01
Section 1(1)
17.02
Section 1(2)
17.03
Section 1(3)
17.04
Section 1(4)
17.05
Section 1(5)
17.06

B. Availability of the Defence to Internet Intermediaries
Section 1(1)(a): authors, editors and publishers
17.07
Section 1(1)(b): reasonable care
17.13
Section 1(1)(c): knowledge and suspicion
17.17
Godfrey v Demon Internet Ltd
17.19

C. Availability of the Defence in Linking and Framing Cases
17.20

18. The Directive on Electronic Commerce

A. Introduction
European Directives generally
18.03
The Directive on Electronic Commerce
18.05

B. Article 12: Mere Conduits
The provision
18.09
Analysis
18.12

C. Article 13: Caching
The provision
18.17
Analysis
18.19

D. Article 14: Hosting
The provision
18.22
Hosts
18.24
Actual knowledge 18.25
Awareness of facts and circumstances 18.26
Negligence 18.27
Removal of defamatory material 18.30

E. Article 15: No General Obligation to Monitor
The provision 18.32
Relationship between article 15 and the section 1 defence 18.33

F. Summary 18.34

19. Statutory Defences in Australia

A. Introduction 19.01

B. The Clause 91 Defence
The provision 19.02
The defence potentially applies to liability arising under
civil defamation law 19.06
The defence does not apply to all Internet publications 19.11
The defence potentially applies to most kinds of intermediaries 19.24
The defence only applies to content hosted or carried in
Australia 19.28
The defence is not available where the host or provider is
aware of the nature of the Internet content 19.30
The defence discourages monitoring 19.35
Summary 19.37

C. Queensland and Tasmania
Statutory defences 19.39
The defences only apply to sellers of written material 19.40
Application of the defences to Internet intermediaries 19.41
Actual knowledge defeats the defences 19.43

V REMEDIES AND RELATED MATTERS

20. Injunctions and Related Remedies

A. Interim Injunctions
Introduction 20.01
England 20.02
Australia 20.11
Scotland 20.14
Application to the Internet 20.15

B. Permanent Injunctions
General principles 20.23
Application to the Internet 20.24
Human Rights Act 1998 (UK) 20.26
21. Damages

A. Introduction 21.01

B. Compensatory Damages
   General principles 21.02
   Level of damages 21.05

C. Aggravated Damages
   General principles 21.08
   Examples 21.09
   Application to the Internet 21.11

D. Exemplary Damages
   General principles 21.12
   Scotland and New South Wales 21.13
   Application to the Internet 21.14

E. Other Matters
   Human Rights Act 1998 (UK) 21.15
   Mitigation of damages 21.16
   Appellate interference with jury awards 21.19
   Contribution 21.21

22. Enforcement of Judgments against Foreign Defendants

A. General Principles 22.01

B. Enforcement of Judgments in the United States
   Introduction 22.04
   Bachchan v India Abroad Publications Inc 22.05
   Telnikoff v Matusievitch 22.06
   Analysis 22.07

23. Alternatives to Defamation Law

A. Introduction 23.01

B. Malicious Falsehood and Verbal Injury
   General 23.02
   Scots law 23.03

C. Negligence 23.04

D. Privacy 23.05

E. Data Protection Legislation 23.06
VI JURISDICTION AND CHOICE OF LAW

24. Jurisdiction

A. Introduction
   Multi-jurisdictional defamation in the pre-Internet age 24.01
   The advent of the Internet 24.02
   Issues 24.03

B. Sources of Law
   Traditional rules 24.04
   The Brussels and Lugano Conventions and the Brussels Regulation 24.05
   Overview 24.10
   Future reforms 24.11

C. The Traditional Rules
   Introduction 24.12
   Service within the jurisdiction 24.13
   Voluntary submission to jurisdiction 24.16
   Service authorized by rules of court 24.17

D. The Conventions and the Brussels Regulation
   Domicile in the United Kingdom 24.23
   Place where the harmful event occurred 24.25
   Joint tortfeasors 24.29
   Submission to jurisdiction 24.30
   Intra-United Kingdom cases 24.31

E. Forum Non Conveniens
   General principles: United Kingdom 24.32
   General principles: Australia 24.36
   Forum non conveniens enquiries 24.37
   Relevant factors 24.38
   Application to defamation cases and to the Internet 24.40

F. Australia: Staying and Transferring Proceedings
   Cross-vesting legislation 24.54
   Service and Execution of Process Act 1992 (Cth) 24.58
25. Choice of Law

A. Introduction 25.01

B. The Double Actionability Test
   Phillips v Eyre 25.03
   Refinements of the Phillips v Eyre test: double actionability 25.05

C. Flexibility
   United Kingdom 25.11
   Australia 25.15

D. Choice of Law in Defamation Cases
   United Kingdom 25.16
   Australia 25.18
   Application to the Internet 25.20
   Relevant factors 25.27

E. The Substance–Procedure Distinction
   General principles 25.29
   Limitation periods 25.30
   Availability of heads of damages 25.33

F. Intra-Australian Torts
   Introduction 25.36
   Lex loci delicti: the governing law for intra-Australian torts 25.37
   The double actionability test discarded 25.38
   The substance–procedure distinction 25.39
   Implications for defamation actions 25.40

G. Proof of Foreign Law
   General principles 25.47
   Judicial notice 25.48
   Expert evidence 25.49
   Production of legislation or judgments 25.50
   Other matters 25.53
   Application to the Internet 25.54

VII OTHER RELEVANT SOURCES OF LAW

26. Jurisprudence of the European Court of Human Rights

A. Relevance of the European Convention on Human Rights
   The Human Rights Act 1998 (UK) 26.01
   Overview 26.05

B. An Overview of the Authorities
   Introduction 26.07
   Limits must be prescribed by law 26.08
   Types of protected expression 26.11
   Protection of reputation 26.19
## Contents

<table>
<thead>
<tr>
<th>Application to the Internet</th>
<th>26.22</th>
</tr>
</thead>
<tbody>
<tr>
<td>C. Incremental Changes to Defamation Law?</td>
<td>26.26</td>
</tr>
<tr>
<td>Introduction</td>
<td>26.26</td>
</tr>
<tr>
<td>The protection of freedom of speech in United Kingdom law</td>
<td>26.27</td>
</tr>
<tr>
<td>Ramifications</td>
<td>26.37</td>
</tr>
</tbody>
</table>

### 27. Liability for Internet Defamation in the United States

A. Introduction | 27.01 |

B. Overview of American Defamation Law
   Introduction | 27.02 |
   Public figure plaintiffs | 27.04 |
   Other plaintiffs | 27.07 |
   Policy differences | 27.08 |
   ‘John Doe’ cases | 27.10 |

C. The Liability of Internet Intermediaries under American Common Law
   Introduction | 27.11 |
   Cubby, Inc v CompuServe Inc | 27.12 |
   How Cubby might have been decided in the United Kingdom | 27.17 |
   How Cubby might have been decided in Australia | 27.20 |
   Stratton Oakmont, Inc v Prodigy Services Company | 27.23 |
   How Stratton Oakmont might have been decided in the United Kingdom | 27.29 |
   How Stratton Oakmont might have been decided in Australia | 27.32 |
   Lunney v Prodigy Services Company | 27.35 |
   How Lunney might have been decided in the United Kingdom | 27.40 |
   How Lunney might have been decided in Australia | 27.43 |
   Conclusions about the American common law | 27.46 |

D. The Communications Decency Act 1996
   Introduction | 27.50 |
   Zeran v America Online, Inc | 27.55 |
   How Zeran might have been decided in the United Kingdom | 27.59 |
   How Zeran might have been decided in Australia | 27.62 |
   Blumenthal v Drudge | 27.65 |
   How Blumenthal v Drudge might have been decided in the United Kingdom | 27.68 |
   How Blumenthal v Drudge might have been decided in Australia | 27.71 |
   Summary | 27.74 |

Glossary of Internet Terms | 391 |
## Appendix of Selected Legislation

| A.2 | Defamation Act 1996 (UK), section 1 | 403 |
| A.3 | Broadcasting Services Act 1992 (Cth), Schedule 5, clause 91 | 404 |
| A.4 | Communications Decency Act, 47 USC (1996) (USA), section 230(c) | 405 |

Index | 407 |