DISPUTE RESOLUTION

Liability for Defamation on Social Media

IN THIS ARTICLE, CAITLIN TAN HUI YI DISCUSSES A PERSON’S LIABILITY FOR THIRD-PARTY CONTENT ON SOCIAL MEDIA.

Introduction

In the law of defamation, a person is responsible for the defamatory words published (libel) by himself/herself to others.

However, with the proliferation of social media, complex questions arise whether one is responsible for statements made by third parties, that is, third party comments. Whilst social media such as Facebook, Instagram and Twitter have become an integral part of our lives, many will admit that they do not know the extent of their liability under the law of defamation.

“Do you think that your liability is only limited to your own publications and/or postings?” — hold on to this thought as we discuss this issue below.

Third party publication — an issue in its infancy

The Defamation Act 1957 does not define the terms “publication” and “publisher”.

The term “publication” generally refers to the dissemination of libellous statements either in oral or written form. The term “publisher” would naturally refer to the person publishing the statements. As such, the question of whether the term “publisher” should include a person not being the originator of the defamatory statements is an issue in its infancy. In fact, none of the Malaysian cases have considered this issue extensively until GS Realty Sdn Bhd v Lee Kong Seng¹ in late 2018.
Actual knowledge

When will one be held responsible for the third party comments on his or her Facebook or Instagram account?

Actual knowledge appears to be one of the paramount considerations, if not the main factor in the imposition of liability.

A few illustrations on this issue are set out below.

Blog service provider

The case of Tamiz v Google\(^2\) dealt with Google's liability as the blog service provider. In this case, Tamiz sued Google for defamatory third party comments on Blogger.com, a website operated and managed by Google.

One of the issues raised was whether Google was a publisher of the third party comments. The Court of Appeal held that once a reasonable time had elapsed from the time Google was notified of the third party comments, Google might be inferred to have associated itself with, or made itself responsible for, the continued presence of the defamatory third party comments on the blog by its mere failure to remove the words. In that situation, Google may be liable as a publisher of the third party comments under the common law.

Facebook page owner

The principle in Tamiz was cited with approval in the case of Murray v Wishart\(^3\).

In this case, the Murrays created a Facebook page and published allegedly defamatory comments against Wishart. The Murrays also used Twitter to publicise the Facebook page. Wishart commenced a defamation suit against the Murrays claiming that the third party comments on Twitter and Facebook had defamed him. One of the legal issues raised was whether the Murrays should be held liable for the third party comments.

The Court went on to discuss the proper test to determine a Facebook page owner's liability. The Court expressed concerns over the use of the "ought to know test" as the "ought to know test" imposes liability on the Facebook page owner the moment a third party posts a defamatory third party comment. It holds the host liable almost on a strict liability basis. Therefore, the Court held that the "actual knowledge test" should be the only test in determining a Facebook page owner’s liability as the publisher of the third party comments.

The pilot case in Malaysia

Facebook account owner

In Malaysia, the recent case of GS Realty Sdn Bhd v Lee Kong Seng has set the precedent for the imposition of liability for third party comments. In this case, Lee Kong Seng was sued for defamation for his defamatory statements posted in certain Facebook
public forums and on his own Facebook page. He was also sued for the defamatory third party comments posted below his Facebook postings.

The High Court was faced with the issue of whether Lee Kong Seng, as a Facebook account owner, should be held responsible as the publisher of the third party comments. The High Court Judge ruled affirmatively after having found that Lee Kong Seng knew about the defamatory third party comments.

The learned Judge considered several common law precedents and the notice board analogy in the case of Bryne v Deane⁴ was referred to illustrate the situation. In that case, the rules provided that no notice should be posted without the consent of the club's secretary. The plaintiff was a member of a golf club of which the two defendants (male and female) were the proprietors and the female defendant also the secretary. The defendants had seen the notice alleged to be defamatory but had not removed it.

The England and Wales Court of Appeal, by a majority, found that the female defendant was responsible for the publication of the notice because having power to remove the notice, she had refrained from doing so. This founded an inference that the defendants had made themselves responsible for the continued presence of the defamatory notice on the wall.

In GS Realty, the Court ruled that Lee Kong Seng was liable for the third party comments because the evidence showed that Lee Kong Seng had knowledge of them. Lee Kong Seng was notified of the third party comments, participated in the comments sections and engaged with the third parties in the exchange of messages.

Furthermore, Lee Kong Seng also had editorial control over his Facebook account including the third party comments but chose not to remove them even upon the receipt of a legal demand. As such, Lee Kong Seng was said to have caused the publication of the third party comments. He was therefore held liable.

**Conclusion**

In summary, liability for online material is not limited to your own publications. If one has knowledge of defamatory third party comments, has control over the publication but opts not to remove them, the law deems that one has allowed or authorised the publication of the third party comments.

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For further information regarding dispute resolution matters, please contact our Dispute Resolution Practice Group.
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2 [2013] EWCA Civ 68.
3 [2014] NZCA 461.
4 [1937] 2 All ER 204.