

Part 4: Innocent dissemination

4.1 Introduction

As explained at para [3.5] above, defamation is a tort of strict liability. This may be harsh on persons who are liable for publishing, but who have no good reason to know the nature of material they are involved in communicating. The problem emerged in this form only after 1825, when *Bromage v Prosser*¹ established that actual malice was not an element in the tort of defamation. As Holdsworth explained, during the seventeenth and eighteenth centuries, the plaintiff in a defamation suit was required to plead and prove that the defamation was intentional and inspired by actual malice.² After *Bromage v Prosser*, however, it was established that publication of defamatory matter gave rise to a “presumption of malice”.³ The defence of innocent dissemination was introduced by the courts in the late nineteenth century to mitigate the harshness of the doctrine of strict liability on certain parties, provided they did not intentionally or negligently defame the plaintiff.⁴ The defence could, in a sense, be seen as a limited re-mergence of a mental element in the tort, albeit in the somewhat attenuated form of a limited defence.⁵

Since its inception, there has been a degree of uncertainty and awkwardness about the formulation, and juridical basis, of the defence of innocent dissemination. Thus, a leading English defamation text states that:

It has been difficult to reconcile this rule with other principles applicable to the law of libel.⁶

The principal conceptual difficulty is in reconciling strict liability with a defence that allows certain parties to escape liability if they are “innocent”. Difficulties have, however, also been experienced in defining those who are entitled to the defence, and the even more fundamental question of whether the doctrine is properly regarded as a defence. This part of the paper examines these issues. First, it looks at the development of the law of innocent dissemination. Secondly, it analyses the leading Australian authority on innocent dissemination, the High Court’s decision in *Thompson v Australian Capital Television Pty Ltd*.⁷ This important case dealt with whether a broadcaster which did no more than re-transmit program material was entitled to the defence. Thirdly, it contrasts the decision in *Thompson’s case* with a comparable United States decision, *Auvill v CBS 60 Minutes*.⁸ Fourthly, it deals with the statutory versions of the defence in

¹ (1825) 4 B&C 247, 107 ER 1051.

² WS Holdsworth, “Defamation in the Sixteenth and Seventeenth Centuries” (1925) 41 *Law Quarterly Review* 13.

³ See also *Adam v Ward* [1917] AC 309.

⁴ This has nothing to do with whether the publication is intentional or negligent, but whether the defendant intentionally or negligently made a defamatory statement.

⁵ As explained at para 4.2 below, this is apparent in the decision of Vaughan Williams LJ in *Vizetelly v Mudie’s Select Library Ltd* [1900] 2 QB 170.

⁶ Peter F Carter-Ruck and Harvey Starte, *Carter-Ruck on Libel and Slander* (5th ed, Butterworths, London, 1997) p 240.

⁷ (1996) 186 CLR 574.

⁸ 800 F Supp 928 (1992).

the two Code States, Queensland and Tasmania. The final section summarises the Australian law of innocent dissemination, and indicates continuing areas of uncertainty.

4.2 The development of innocent dissemination

Following the decision in *Bromage v Prosser*,⁹ the English courts appear to have experienced some discomfort in applying strict liability to persons with a limited involvement in publishing material and no knowledge of the contents of the material. Thus, in the 1837 case, *Day v Bream*,¹⁰ Patteson J held that a porter who delivered parcels containing defamatory material was *prima facie* liable for publishing the material, but could be excused if it was established that he had no knowledge of the contents. The porter was found not to be liable.

It was not, however, until 1885 that the defence of innocent dissemination was conclusively established in *Emmens v Pottle*.¹¹ In that case, the Court found that an innocent distributor was not a publisher. It held that, although newspaper vendors were *prima facie* liable for distributing defamatory material, they could be excused from liability if they could show that they did not know that the newspaper was likely to contain a libel, or that the material was distributed without reasonable care. Bowen LJ likened the position of a newspaper vendor to an innocent carrier:

It seems to me that the defendants are no more liable than any other innocent carrier of an article which he has no reason to suppose likely to be dangerous.¹²

Lord Esher expressed the reasons for excusing innocent disseminators from liability in the following terms:

If they were liable, the result would be that every common carrier who carries a newspaper which contains a libel would be liable for it, even if the paper were one of which every man in England would say that it was not likely to contain a libel. To my mind the mere statement of such a result shews that the proposition from which it flows is unreasonable and unjust. The question does not depend on any statute, but on the common law, and, in my opinion, any proposition the result of which would be to shew that the Common Law of England is wholly unreasonable and unjust, cannot be part of the Common Law of England.¹³

The general application of the defence of innocent dissemination to distributors was confirmed in *Vizetelly v Mudie's Select Library Ltd*.¹⁴ In that case, Romer LJ provided

⁹ (1825) 4 B&C 247, 107 ER 1051.

¹⁰ (1837) 2 M & Rob 54, 174 ER 212.

¹¹ (1885) QB 354. In *Godfrey v Demon Internet Ltd*, Morland J contended that the doctrine of innocent dissemination was established by *Day v Bream* and applied in *Emmens v Pottle*: [1999] 4 All ER 342 at 347. Until now, however, this has not been the generally accepted view.

¹² (1885) QB 354 at 358.

¹³ (1885) QB 354 at 357-8.

¹⁴ [1900] 2 QB 170.

what has become the definitive statement of the elements of the defence. He held that innocent dissemination would be made out if a secondary distributor could establish the following elements:

- (1) that he was innocent of any knowledge of the libel contained in the work disseminated by him;
- (2) there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel; and
- (3) when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel...¹⁵

Subsequently, in *Sun Life Assurance Co of Canada v WH Smith and Son Ltd*, Scrutton LJ suggested that these requirements could be simply summarised as whether the distributor knew, or ought to have known, that the material was defamatory.¹⁶

Discussions of innocent dissemination rarely mention the preliminary, and qualified, way in which these early cases originally formulated the doctrine. For example, in the foundation case of *Emmens v Pottle*, Lord Esher clearly stated that he did “not intend to lay down any general rule as to what will absolve from liability for a libel persons who stand in the position of these defendants”.¹⁷ In *Vizetelly’s case*, Romer LJ was careful to specify that whether the defence was made out depended upon the particular facts of the instant case, involving an examination of the circumstances in which the material was distributed, and the nature and conduct of the business of the distributor. In the same case, Vaughan Williams LJ was even more hesitant:

Under the circumstances of this case, therefore, and without saying anything as to the liabilities and position of persons who carry on the business of a circulating library generally, it appears to me that we ought not to interfere with the verdict in the present case.¹⁸

The poorly formulated juridical basis for the doctrine was also apparent in the early decisions. In *Vizetelly’s case* two of the judges suggested quite different explanations for the defence. Romer LJ argued that, because liability for publishing defamatory material was strict, and not dependent upon the intention or negligence of the publisher, the only way for the courts to excuse liability was to find that there was no publication. This means that, publication by a distributor effectively depends upon whether the distributor has intentionally or negligently defamed the plaintiff. Romer LJ maintained that, as a result of this convoluted reasoning, “the decisions on the subject have not been altogether logical or satisfactory on principle”.¹⁹

¹⁵ [1900] 2 QB 170 at 180.

¹⁶ [1933] All ER 432 at 434, 436. This formulation was approved by Gaudron J in *Thompson v Australian Capital Television Pty Ltd* (1996) 141 ALR 1 at 13.

¹⁷ (1885) QBD 354 at 356.

¹⁸ [1900] 2 QB 170 at 178.

¹⁹ [1900] 2 QB 170 at 179.

Vaughan Williams LJ, on the other hand, linked the rationale for innocent dissemination to the historical requirement of malice, meaning “wrongful intention”, as an element of the cause of action. As explained at para [4.2] above, in *Bromage v Prosser* it was established that publication of defamatory matter gave rise to a “presumption of malice”. Vaughan Williams LJ argued that innocent distribution of defamatory matter served to rebut the presumption. Somewhat confusedly, he contended that this explained the conclusion of *Emmens v Pottle* that an innocent dissemination meant that there was no publication. The problem with this suggestion is that it is difficult to see how, assuming the presumption is rebutted, the absence of a wrongful intention can be related to publication. Unless malice is an element of publication, an absence of malice can only mean that there has been no defamation, and not that there has been no publication.

The early problems of conceptualising the doctrine of innocent dissemination no doubt result from it being an *ad hoc* solution to the apparent injustice of imposing strict liability on distributors such as newspaper vendors and circulating libraries. The problems have never been fully confronted or resolved, and have continued to present difficulties in both conceptualising and applying the law. One area of controversy has been the degree of vigilance necessary for a distributor to qualify for the defence. In *Sun Life Assurance Co of Canada v WH Smith and Son Ltd*, Scrutton LJ interpreted *Emmens v Pottle* to mean that a newspaper vendor was liable for disseminating defamatory matter “if he (i) does not know, and (ii) ought not to have known – that is to say, if he carried on his business carefully – that the paper is one, not which did contain a libel, but which was likely to contain a libel”.²⁰ This suggests that newsagents, for example, may be liable for selling a publication that, because of its controversial nature, may be likely to contain a libel.

This issue was taken up by Lord Denning in his dissenting judgment in *Goldsmith v Sperrings Ltd*.²¹ Lord Denning’s decision was a characteristically unsuccessful attempt to re-write the law, in this case based mainly upon concerns to safeguard freedom of speech. He pointed out that distributors, such as newsagents, usually had neither cause nor time to be concerned with the contents of material being disseminated:

The distributors of newspapers and periodicals are nothing more than conduit pipes in the channel of distribution. They have nothing whatever to do with the contents. They do not read them, there is no time to do so. Common sense and fairness require that no subordinate distributor, from top to bottom, should be held liable for a libel contained in it unless he knew or ought to have known that the newspaper or periodical contained a libel on the plaintiff himself; that is to say, that it contained a libel on the plaintiff which could not be justified or excused; and I should have thought that it was for the plaintiff to prove this.²²

Lord Denning was disturbed by the potential adverse consequences of a rule that required mere distributors to make decisions about whether to sell publications based upon an

²⁰ [1933] All ER 432 at 437.

²¹ [1977] 2 All ER 566.

²² [1977] 2 All ER 566 at 572.

assessment of the likelihood of the publication containing defamatory material. Thus, he contended that:

Even though a publication may be contentious and controversial, even though it may be scurrilous and give offence to many, it is not to be banned on that account. After all, who is to be the censor? Who is to assess its worth? Who is to inquire how many libel writs have been issued against it and whether the words were true or the comment fair? No distributor can be expected to do it ... The freedom of the press depends on the channels of distribution being kept open.²³

The decision proposed two modifications to the law of innocent dissemination, derived from an idiosyncratic reading of the case law. First, Denning suggested a reversal of the accepted onus of proof, meaning that the plaintiff bears the onus of showing that the dissemination was not innocent. Secondly, he argued that a mere distributor should not be liable for handling defamatory material “in the ordinary course of business”, unless it can be established that the distributor had knowledge or notice that the material was defamatory. Apart from the extent to which these proposals represented a radical departure from the existing law, however, the majority in the case were prevented from considering the issue because it had not been raised by the parties.

Who is entitled to the defence?

Although the defence of innocent dissemination has been accepted as part of Australian law, only two reported judgments appear to have dealt with the issue. In these decisions the Australian courts, like the English courts, have experienced difficulties in formulating and explaining the defence. The Australian decisions have clarified little and, in some respects, have created even greater uncertainty.

Historically, the defence has applied only to publishers known as “subordinate distributors”. Thus, in *Vizetelly’s case* Romer LJ stated that the defence applied to “a person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken, what I may call, a subordinate part in disseminating it...”²⁴ In the first Australian case, *McPhersons Ltd v Hickie*,²⁵ the issue of whether a printer was entitled to the defence came before the New South Wales Court of Appeal. The Court referred to the following statement from the eighth edition of Fleming:

Persons who are not concerned with the production but play the more subordinate role of mere distributors, like newsagents, booksellers, libraries and, it is suggested, printers under modern technological conditions, are treated more sympathetically.²⁶

²³ [1977] 2 All ER 566 at 573.

²⁴ [1900] 2 QB 170 at 180.

²⁵ (1995) Australian Torts Reports 81-348.

²⁶ (1995) Australian Torts Reports 81-348 at 62,498, referring to John G Fleming, *The Law of Torts* (8th ed, Law Book Company, Sydney, 1992) pp 541-2.

Although the early English authorities clearly stated that printers were not entitled to the defence, the New South Wales Court of Appeal cast serious doubt on the continuing relevance of that rule. Before the Court, it was argued that decisions establishing that printers were not entitled to the defence should be reviewed because they were based upon the assumption that printers would necessarily know the contents of the material printed. With changes in technology, it was contended that printers are often unfamiliar with the contents of material printed. Priestly JA (with whom Mahoney JA agreed) acknowledged that there may be a case for changing or qualifying the law, so that the defence “applies to those persons, whatever they are called, who can prove that their part in printing and publishing defamatory material was done in ignorance of the defamatory nature of the material”.²⁷ He concluded that, while the defence was not necessarily available to a printer, it had been premature for the trial judge to strike it out.

Powell JA dealt more completely with the underlying conceptual problems raised by the defence of innocent dissemination. First, he pointed out the obvious difficulties of regarding the rule as a defence, given that the result of *Emmens v Pottle* and *Vizetelly’s case* was that establishing innocent dissemination meant that there was no publication whatsoever by the defendant. Moreover, he agreed with Romer LJ’s view in *Vizetelly* that the “process” by which the defence of innocent dissemination had been established was “unsatisfactory”.²⁸ Finally, he contended that, if mere distributors were excused from liability, it was illogical not to also excuse printers who could demonstrate they had no reason to know, or suspect, that a publication contained defamatory material.²⁹

In its 1979 report on *Defamation*, the Australian Law Reform Commission supported extending a defence analogous to innocent dissemination to printers.³⁰ The Commission argued that, although it was once true that printers could check material, modern electronic reproduction methods meant that this was no longer practicable. It conceded that plaintiffs may wish to pursue printers in cases where a publisher is impecunious, but it concluded that this consideration was “outweighed by the injustice likely to be suffered by innocent printers and the consequences for freedom of expression”.³¹

4.3 Thompson v Australian Capital Television

²⁷ (1995) Australian Torts Reports 81-348 at 62,498.

²⁸ (1995) Australian Torts Reports 81-348 at 62,499.

²⁹ Powell JA stated that: “... if, in the case of a news vendor – who, just as does a printer, carries on business with a view to profit – it can be said that, because he did not know, or had no reason to suspect, that a newspaper which he sold contained, or was likely to contain, libelous matter, he did not publish the libel, there is no reason in logic why it ought not also to be said of a printer who was able to demonstrate that he did not know, and had no reason to suspect, that a book, periodical, or other article which he had printed contained, or was likely to contain, libelous matter, that he did not publish the article.” (1995) Australian Torts Reports 81-348 at 62,499.

³⁰ Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* (ALRC Report No 11) pp 99-100, para 188.

³¹ See also Faulks Committee, *Report of the Committee on Defamation* (Cmnd 5909) paras 304-309; *Jenson v Clark* [1982] 2 NZLR 268 at 274-5 per Prichard J.

The principal Australian authority on innocent dissemination is the High Court's decision in *Thompson v Australian Capital Television Pty Ltd.*³² A central issue in that case was whether a television station, which did no more than re-transmit "live" broadcast material, produced by another broadcaster, was entitled to plead innocent dissemination.

The Federal Court decision

The majority of the Federal Court held that the broadcaster was not entitled to the defence.³³ In reaching this conclusion, Burchett and Ryan JJ first extracted a statement of the law of innocent dissemination from the eighth edition of *Gatley*. In relation to the issue of who is entitled to the defence, the extract states:

But the liability is somewhat different in the case of a person who is not the author, printer, or the "first or main publisher of a work which contains a libel", but has only taken "a subordinate part in disseminating it", eg by selling, distributing or handing to another a copy of the newspaper or book in which it appears.³⁴

Burchett and Ryan JJ argued that the defence of innocent dissemination could be supported by two related considerations: the limited involvement of disseminators in the original production of the libel; and a lack of knowledge or negligence in disseminating the material. Thus, they contended that a defendant, in seeking to show a lack of negligence "is assisted, as a factual consideration tending against any reasonable requirement of precautions on his part, by his lack of involvement in the original production of the libel".³⁵

In deciding that the defence was not available to the broadcaster, Burchett and Ryan JJ essentially argued that it was established that a broadcaster is a publisher of all material broadcast by the station, and not a 'subordinate distributor'. The judges relied, in large measure, on the United States *Second Restatement of Torts* which, relevantly, provides:

One who broadcasts defamatory matter by means of radio or television is subject to the same liability as an original publisher.³⁶

In interpreting the *Restatement*, Burchett and Ryan JJ drew no distinction between the usual activities of a broadcaster and re-transmission. They concluded that:

... the television company is an original publisher of the particular broadcast beamed from its station into the area covered by its broadcasts. If an analogy to a

³² (1996) 186 CLR 574.

³³ (1994) 127 ALR 317.

³⁴ (1994) 127 ALR 317 at 320 citing Philip Lewis, *Gatley on Libel and Slander* (8th ed, Sweet and Maxwell, London, 1981) para 241, p 111.

³⁵ (1994) 127 ALR 317 at 320.

³⁶ United States, *Second Restatement (Torts)*(1976) s 581(2).

newsagent or bookshop were to be sought in the electronic field, a shop selling or letting on hire video cassette recordings would be an obvious suggestion.³⁷

As a matter of policy, they referred to the recommendation of the Faulkes Committee in favour of retaining the rule that the defence is not available to a broadcasting company.³⁸ Moreover, they argued that the defence should not be extended to e-transmissions because this would effectively leave a plaintiff without a remedy if the originator of the broadcast were insolvent or out of the jurisdiction. This contention should, however, be compared with the contrary argument advanced by the Australian Law Reform Commission in relation to printers, and referred to at para [4.2] above. Finally, Burchett and Ryan JJ concluded that, even if the defence were available, it had not been made out because the broadcaster had not taken reasonable care to avoid the transmission of defamatory material, especially given the controversial nature of a live current affairs program. In *obiter* statements, they supported the view that, contrary to the suggestion of Lord Denning in *Goldsmith v Sperrings*, the onus of establishing innocent dissemination rests with the defendant.³⁹

In a dissenting judgment, Miles J held that the defence was available because a re-broadcaster was more analogous to a distributor of printed material than a primary publisher. He argued that to deny the defence to a broadcaster was a matter of policy, perhaps best resolved by the legislature rather than the courts. Neither the majority nor the dissenting decision, however, included substantive discussion of the basis for distinguishing between parties entitled to the defence and those not entitled to the defence.

The High Court's decision

The High Court confirmed the majority Federal Court decision, that the television station was not entitled to the defence of innocent dissemination. Different judges reached this conclusion by different reasoning.

In a joint judgement, Brennan CJ, Dawson and Toohey JJ acknowledged the confusion created by the view that establishing innocent dissemination means that there has been no publication by the defendant.⁴⁰ On their view of the cases, this could be explained on the basis that an innocent disseminator does not intend to publish the material. Nevertheless, the judges apparently preferred the view expressed in *Duncan & Neill on Defamation*, that it is:

³⁷ (1994) 127 ALR 317 at 323.

³⁸ See Faulkes Committee, *op cit*, paras 304-309????

³⁹ (1994) 127 ALR 317 at 322. See also *Jensen v Clark* [1982] 2 NZLR 268 at 275 per Prichard J; *Sun Life Assurance Co of Canada v WH Smith & Son* (1933) 150 LT 211 at 214 per Scrutton LJ.

⁴⁰ The judges referred to the "somewhat muddled origins" of the defence of innocent dissemination: (1996) 186 CLR 574 at 586.

... more accurate to say that any disseminator of a libel publishes the libel but, if he can establish the defence of innocent dissemination, he will not be responsible for that publication.⁴¹

The reasoning in the rest of the joint decision, however, adds little to clarify this area of the law. First, the judges dealt with the issue of who was entitled to the defence or, as they put it, who was a “subordinate publisher”. They referred to the argument in *McPhersons v Hickie*, that the defence should be extended to printers because there was no longer cause for printers to know the contents of the material printed. The judges concluded that the logic of extending the defence was “irresistable so long as the printer qualifies as a subordinate publisher”.⁴² This suggests that, according to the judges, the fact that a party has no reason to know the contents of material published is insufficient, on its own, to render that person a subordinate publisher.

Brennan CJ, Dawson and Toohey JJ then turned to the question of whether the broadcaster was a subordinate publisher. Following the majority of the full Federal Court, they referred to the treatment of broadcasters as original publishers in the United States *Second Restatement*.⁴³ The judges, however, qualified this general rule by pointing out that the *Restatement* was dealing with the “usual way” in which a broadcaster operates. Thus, they agreed with the dissenting opinion of Miles J that:

There is no reason in principle why a mere distributor of electronic material should not be able to rely upon the defence of innocent dissemination if the circumstances so permit.⁴⁴

Although accepting the application of the defence to broadcasters as a matter of principle, in applying the defence to broadcasting, the judges left little apparent scope for its operation. The judges evidently agreed with the submission that a subordinate publisher does not participate in the “production, selection or composition of the matter” and does not have “the ability to exercise control or supervision” over the published material.⁴⁵ Thus, the judges stated that:

It is true that Channel 7 did not participate in the production of the original material constituting the program. But Channel 7 had the ability to control and supervise the material it televised.⁴⁶

Although the broadcaster argued that it did not have the opportunity to monitor the program because the re-transmission was simultaneous, the judges held that this did not mean that the broadcaster was “merely a conduit”.⁴⁷ Rather, they pointed out that it was

⁴¹ (1996) 186 CLR 574 at 586, quoting Sir Brian Neill and Richard Rampton, *Duncan & Neill on Defamation* (2nd ed, Butterworths, London, 1983) p 110, fn 3.

⁴² (1996) 186 CLR 574 at 587.

⁴³ (1996) 186 CLR 574 at 589.

⁴⁴ *Ibid.*

⁴⁵ This was essentially how this submission was put by Gaudron J at (1996) 186 CLR 574 at 594.

⁴⁶ (1996) 186 CLR 574 at 589.

⁴⁷ (1996) 186 CLR 574 at 590.

the broadcaster that had decided to make the re-transmission near instantaneous. Finally, the judges argued that it would be difficult for the broadcaster to claim protection as a subordinate publisher because it had decided to instantaneously re-transmit a live current affairs program which “carries a high risk of defamatory statements being made”.⁴⁸

There are two essential weaknesses with the joint decision. First, it does not adequately explain the conditions under which a defendant is entitled to the defence of innocent dissemination. Under English common law, the defence has been applied to distributors of printed material. In determining whether a broadcaster who merely re-transmits live material is entitled to the defence, either analogies have to be drawn with distributors of printed material, or some principle for distinguishing between publishers not entitled to the defence and subordinate publishers must be established. As explained at para 4.4 below, and in Part 6 of the paper, the United States common law has distinguished between publishers and distributors on the basis that a distributor exercises no editorial control over published material. The submission apparently accepted by the joint decision appears to be based on this distinction. The joint decision therefore introduces a new distinction into Australian common law, between those who participate in the production of material, who are not entitled to the defence of innocent dissemination, and those who do not have the ability to control and supervise material, who are subordinate publishers, and are entitled to the defence. It is hard to see how this principle differs, to any substantial degree, from the United States distinction based upon the exercise of editorial control.

There are, however, major difficulties with the way in which the joint decision applied the distinction to a broadcaster who merely re-transmits a live broadcast. The joint decision held that the broadcaster had control over the broadcast material because it decided to make a near instantaneous broadcast. If the broadcaster wished to carry a live transmission, however, it could make no other decision. The only way the broadcaster could exercise control over the material was therefore to decide not to transmit the material. The ability to decide not to transmit material, however, cannot possibly amount to editorial control. If it did, it could be argued that distributors of print material, such as newsagents, booksellers and libraries, also exercise editorial control. For example, newsagents and libraries can decide to stock, or not to stock, particular publications. If we accept that the underlying rationale for the defence is that it would be unfair to penalise parties with no reason to know the contents of material published, then the level of control over material that it is possible for a party to exercise must surely be relevant. In examining this level of control, however, the commercial decision of a party to distribute material in a way that makes it difficult to assert editorial control – in this case, to make a near instantaneous transmission – is surely not relevant to whether the party is a subordinate publisher. If a decision to distribute material in a way that makes it difficult or impossible to exercise control over the content of the material is a form of editorial control, then newsagents and libraries must also be denied the defence of innocent dissemination. This is clearly absurd, and completely undermines the rationale for the defence.

⁴⁸ *Ibid.*

Secondly, although the joint judgment points out that some cases and commentaries illegitimately combine discussions involving the availability of the defence with whether the defence has been made out,⁴⁹ the decision itself does not sufficiently separate these logically distinct inquiries. Thus, the judges refer to the “high risk” of transmitting a live current affairs program, and the fact that the broadcaster took no precautions, to argue that the broadcaster was not a subordinate distributor.⁵⁰ Nevertheless, the decision to transmit a program “live”, without monitoring, while knowing that the program is likely to contain controversial material, is more properly a matter going to whether the elements of the defence are made out, not with the availability of the defence.

The final issue dealt with in the joint decision was the onus of proof in establishing innocent dissemination. As the judges found that the broadcaster was not a subordinate publisher, however, they concluded that it was unnecessary to decide this issue.⁵¹

In separate decisions Gaudron J and Gummow J agreed with the outcome of the decision, but differed on their views of innocent dissemination. After a review of the main cases, Gaudron J presented an interesting interpretation of the law. Encouragingly, she began the discussion of whether the broadcaster was entitled to the defence with the statement that the answer “necessarily depends on the principle upon which that rule rests and the purposes which it serves”.⁵² Moreover, she correctly pointed out that the defence of innocent dissemination lacks “any clear supporting principle”.⁵³ She said that the cases on innocent dissemination establish the following three points:

- printers are not entitled to plead innocent dissemination;
- the onus is on the subordinate distributor to establish the defence; and
- if the defence is established, the distributor is not liable because he or she did not publish the material.⁵⁴

On the last point, Gaudron J evidently disagreed with the joint decision, which preferred the view that establishing the defence meant that the material was published, but that the distributor was not liable for the publication. In relation to the availability of the defence to printers, she referred to the argument that printers should be considered as in the same position as subordinate distributors because they no longer inevitably acquire knowledge of the material printed. She deferred consideration of this issue, however, until after her analysis of the distinction between parties entitled to plead innocent dissemination, and publishers not entitled to do so.

Gaudron J then turned to whether the broadcaster was a subordinate publisher, or what she termed, a “secondary distributor”. She referred to the argument, supported by the joint decision, that a secondary distributor does not have the ability to control or

⁴⁹ (1996) 186 CLR 574 at 588.

⁵⁰ (1996) 186 CLR at 590.

⁵¹ (1996) 186 CLR 574 at 590.

⁵² (1996) 186 CLR 574 at 591.

⁵³ (1996) 186 CLR 574 at 592.

⁵⁴ (1996) 186 CLR 574 at 593.

supervise the material published. She argued that this was difficult to reconcile with the law on liability for publishing defamatory material. Thus, she stated that:

The difficulty with that submission is in relating it to some aspect of the law of defamation or, more precisely, some aspect of the law relating to publication, it being clear, as already indicated, that, for the purposes of the law of defamation, innocent dissemination does not constitute publication.⁵⁵

It is difficult to understand precisely what Gaudron J means by this statement, apart from the conceptual problem posed by the cases that establish that there is no publication if there is an innocent dissemination. It may be that she could not see any relevant connection between the level of control or supervision of material, and whether or not the material is published. In any case, she rejected the contention that a secondary distributor is a publisher who has no control or supervision over the published material. Next, Gaudron J suggested (without fully exploring the implications of this suggestion), that there was a link between the principle that there is no publication if there is an innocent dissemination and those cases, referred to at para [3.3] above, which establish that there is no publication if a communication is inadvertent, being neither intentional nor negligent.⁵⁶ These situations may be analogous; in both instances there is no publication because the communication is completely accidental. Nevertheless, it is difficult to see any relationship between the principles underlying the two situations. According to Gaudron J, if innocent dissemination is made out there is no publication because the defendant did not know nor ought to have known that the material was defamatory. In cases of inadvertent publication, however, there is no publication because the plaintiff has been unable to establish that the material was intentionally or negligently published.

The most important part of Gaudron J's decision involves the suggestion of a new test for determining whether a person is a subordinate distributor. Unfortunately, her discussion of this issue is confusing, partly because she conflates vicarious liability and personal liability for authorising the acts of another. First, Gaudron J states the principle that a person is liable for the acts performed by an employee in the course of employment. She correctly points out that knowledge of the acts is irrelevant to the liability of the employer, but fails to mention that this is because the employer is vicariously liable. She then argues that "knowledge is irrelevant to the liability of one who authorises another to act on his or her behalf".⁵⁷ As pointed out at para [3.7] above, however, knowledge of the defamatory nature of material is irrelevant in determining whether a person is personally liable for authorising the acts of another not because the person is vicariously liable, but because defamation is a tort of strict liability. Gaudron J goes on to argue that, because innocent dissemination depends upon establishing a lack of knowledge, the defence cannot apply to someone who has authorised a publication. The reasoning is evidently that, as a person who has authorised a publication is liable regardless of whether he or she knows of the publication, that person cannot escape liability by

⁵⁵ (1996) 186 CLR 574 at 594.

⁵⁶ (1996) 186 CLR 574 at 594-5 referring to *Huth v Huth* [1915] 3 KB 32 and *Powell v Gelston* [1916] 2 KB 615.

⁵⁷ (1996) 186 CLR 574 at 595.

establishing a lack of knowledge. On this basis, she proposes that the rule for distinguishing between persons not entitled to plead innocent dissemination and subordinate distributors be as follows:

In my view, it ought now be accepted that one who publishes by authorising a communication is not a subordinate distributor. Conversely, in my view, it ought also be accepted that one who does not authorise the communication but participates in it in some other way is a subordinate distributor and entitled to rely on the defence of innocent dissemination.⁵⁸

Applying this rule to the broadcaster, Gaudron J held that there was no doubt that it “authorised the retransmission to its viewers by its servants or agents of the material which was defamatory of the appellant”. She concluded that, because the broadcaster had authorised the retransmission it was not a subordinate distributor, and therefore not entitled to the defence of innocent dissemination.

Some reflection indicates that this reasoning is deeply flawed. First, Gaudron J does not define what is meant by “authorisation”. She seems, however, to assume that “authorisation” is identical to the vicarious liability of an employer, or principal, for the acts of an employee or agent. Secondly, this means that she does not adequately distinguish between vicarious liability and personal liability. An employer is liable for the acts of an employee performed within the course of employment, even if the employer does not know of the acts, because the employer is vicariously liable. A person who is personally liable for authorising the acts of another is, however, liable even if he or she does not know of the defamatory nature of the material because defamation is a tort of strict liability. Thirdly, this means that, in relation to knowledge of the defamatory nature of material published, the liability of a person who is personally liable for authorising the acts of another is no different to the liability of any person who publishes defamatory material. As innocent dissemination is an exception to the rule that liability for publishing defamatory material is strict, on Gaudron J’s own reasoning, personal liability for authorising publication cannot be a basis for distinguishing those entitled to the defence from those not entitled. Fourthly, the fact that a person is vicariously liable is also necessarily irrelevant to whether the defence applies. For example, the proprietor of a newsagent or bookstore is liable for defamatory material sold at the newsagent or bookstore, regardless of whether he or she knew the material was being sold. This is because the proprietor is vicariously liable for the acts of his or her employees in selling the material. If, as Gaudron J seems to argue, authorisation is the same as vicarious liability, then the proprietor has authorised the publication of the material just as, according to Gaudron J, the broadcaster authorised the retransmission of the program by its servants or agents. The proprietor of a newsagent or bookstore is, however, clearly entitled to the defence of innocent dissemination. Finally, as explained at para [3.6] above, the courts have not systematically developed the law relating to liability for authorising defamatory publications, and there are many areas of continuing uncertainty. The inevitable conclusion is that, however “authorisation” is interpreted, it cannot possibly provide a logical basis for distinguishing between those entitled to the defence

⁵⁸ *Ibid.*

of innocent dissemination and secondary distributors, or subordinate publishers, who are not entitled to the defence.

Whatever flaws in the reasoning, according to Gaudron J, a person who authorises a publication is not entitled to the defence of innocent dissemination, whereas a secondary distributor is a person who participates in publishing material otherwise than by authorising the publication. Applying this rule to printers, she argues that they should be entitled to the defence of innocent dissemination because they do not authorise the communication of defamatory material. In the absence of an adequate consideration of what is meant by “authorising” a publication, however, it is difficult to understand precisely how the suggested rule can be applied in practice.

The final issue raised by Gaudron J is that, with an important qualification, and at a very general level, she apparently agrees with the proposal advanced by Lord Denning in *Goldsmith v Sperrings Ltd*⁵⁹ that, once the defence is available, the burden of proving that the dissemination has not been innocent should rest with the plaintiff. The qualification is that she suggests that, in many cases, the circumstances of publication may give rise to an evidentiary presumption that the publication has not been innocent, thus shifting the onus to the defendant. She suggests that the factors in determining whether the presumption arises relate to the “practices and technologies” used to distribute the material.⁶⁰ It therefore seems that Gaudron J envisages that the defendant will usually continue to bear the burden of establishing innocent dissemination.

Although the comments on innocent dissemination are kept to a minimum, the decision of Gummow J may be the most satisfactory in *Thompson’s case*, principally because it acknowledges the difficulties of the area while avoiding further complications. Gummow J referred to the conceptual problems posed by innocent dissemination: the difficulty of reconciling strict liability with the limitation of liability for secondary distributors who neither know, nor ought to know, about the defamation; and the problem of a “defence” which, if made out, means that there has been no publication by the defendant. Because of the latter problem, Gummow J was careful to refer to the doctrine as the “so-called defence of innocent dissemination”.⁶¹ While not proposing an alternative explanation, he rejected the rationale proposed by Vaughan Williams LJ in *Vizetelly’s case* – that an innocent dissemination rebutted a presumption of “malice” – because it is clearly established that “malice” is entirely irrelevant to liability for publishing defamatory material.⁶² He pointed out that the decision of Romer LJ in *Vizetelly’s case* established that the defence applied to “a person not being a printer or first or main publisher . . . , and being one who has taken but a subordinate part in disseminating it in the ordinary course of business”.⁶³ With little discussion of the substantive issues, he held that there had been no error in the conclusions reached by the majority of the full Federal Court that the

⁵⁹ [1977] 2 All ER 566.

⁶⁰ (1996) 186 CLR 574 at 596.

⁶¹ (1996) 186 CLR 574 at 618.

⁶² Gummow J pointed out that: “the common averment that the words in question were published “falsely and maliciously” in modern times is little more than a pleader’s flourish.” (1996) 186 CLR 574 at 619.

⁶³ (1996) 186 CLR 574 at 618.

broadcaster was not entitled to the defence of innocent dissemination and that, even if the defence applied, it had not been made out.

4.4 Auvill v CBS 60 Minutes

The decision in *Thompson's case* may be contrasted with the decision of a United States federal District Court on comparable facts in *Auvil v CBS 60 Minutes*.⁶⁴ The doctrine of innocent dissemination, introduced by the English courts, has been adopted in the United States.⁶⁵ Thus, the *Second Restatement of Torts* states that:

One who only delivers or transmits defamatory material published by a third person is subject to liability if, but only if, he knows or had reason to know of its defamatory character.⁶⁶

The development of the doctrine in the United States has, however, been significantly influenced by the First Amendment protection of freedom of speech.⁶⁷ In *Smith v California*, a case involving the prosecution of a bookstore for possessing obscene or indecent material, the United States Supreme Court stated that:

The constitutional guarantees of the freedom of speech and of the press stand in the way of imposing strict liability for the contents of the reading materials they carry.⁶⁸

This principle was subsequently applied to defamation cases. Thus, in *Lerman v Flynt Distributing Co*, the Court stated that:

First Amendment guarantees have long been recognized as protecting distributors of publications ... Obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment.⁶⁹

In the United States, those entitled to rely on innocent dissemination are known as “secondary publishers”, or “distributors”. In *Gertz v Robert Welch, Inc*,⁷⁰ the United States Supreme Court adopted a minimum standard of negligence for defamation actions. Following this, there is no longer a burden on the defendant to establish innocent dissemination; the plaintiff bears the onus of establishing that the defendant was not

⁶⁴ 800 F Supp 928 (1992).

⁶⁵ See, for example, *Street v Johnson* 50 NW 395 (1891), approving and adopting *Emmens v Pottle*. See also *Balabanoff v Fossani* 81 NYS 2d 732 (1948).

⁶⁶ United States, *Second Restatement (Torts)* (1976)s 581; see also *Dworkin v Hustler Magazine, Inc* 634 F Supp 727, 729 (1986).

⁶⁷ Applied to the States by virtue of the Fourteenth Amendment.

⁶⁸ 4 L Ed 2d 205 (1959).

⁶⁹ 745 F 2d 123, 139 (1984).

⁷⁰ 418 US 323, 94 S Ct 2997, 41 L Ed 2d 789 (1974).

innocent.⁷¹ Thus, in the United States, “innocent dissemination” is not a defence, but establishing that the defendant was not innocent is one of the substantive elements in an action for defamation.

In *Auvill v CBS 60 Minutes*, the United States courts faced the issue of applying innocent dissemination to broadcasting transmissions for the first time. In that case, the television program “60 Minutes” included a segment that was critical of a product commonly used in the cultivation of apples. The program was broadcast by CBS and three local affiliates. A number of apple growers brought an action against the program, CBS and the affiliates. In relation to the affiliates, the central issue was whether, in the absence of fault, they were liable for transmitting the material. In other words, the question was whether the affiliates were entitled to the limited form of liability available to distributors in the United States.

Unlike the position in *Thompson’s case*, the transmission by the affiliates was not simultaneous with the CBS transmission; because of time differences in the United States, the affiliates had a period in which to review the program material before it went to air. The affiliates therefore had both the opportunity and ability to control the material broadcast. Nevertheless, the only information about the program the affiliates had was a brief statement indicating the general nature of the program material.

The plaintiffs argued that, because the affiliates had the opportunity and ability to control the material transmitted, they had an obligation to censor the material. The Court rejected this argument. First, it asserted that there was “no logical basis” for treating visual media any differently from distributors of print media, such as book sellers.⁷² The Court then held that, as the affiliates were mere ‘conduits’, they were in the same position as book sellers, and therefore not liable unless it could be established that they knew, or ought to have known, that the transmitted material was defamatory.

Three reasons were given for applying the principle of “distributor liability” to the affiliates. First, the Court argued that it would be economically unrealistic to impose a duty to censor on the affiliates. Secondly, it referred to the First Amendment basis for limiting the liability of distributors, contending that denying this protection to the affiliates would have a ‘chilling’ effect on freedom of speech. Thus, it stated that:

... it is difficult to imagine a scenario more chilling on the media’s right of expression and the public’s right to know.⁷³

Thirdly, the Court maintained that limiting the liability of mere conduits, such as the affiliates, would not impair the ability of plaintiffs to bring an action, because relief

⁷¹ Eldredge (1978) *op cit* pp 238-9; *Spence v Flynt* 647 F Supp 1266 (1986); *Godfrey v Demon Internet Ltd* [1999] 4 All ER 343 at 344.

⁷² 800 F Supp 928, 932 (1992).

⁷³ *Ibid.*

would remain available against the “generating source” – the original broadcaster – which the Court suggested “will generally be the deepest of deep pockets”.⁷⁴

The action against the affiliates was dismissed because it could not be established that they knew, or ought to have known, that the broadcast material was defamatory, but only that they knew the general nature of the material. From this, the Court held that the affiliates could have inferred that the material was controversial, but not that it was defamatory. The concern of the United States courts to protect freedom of speech is evident in the conclusion that:

All defamatory material may be controversial, but the converse is not true.⁷⁵

4.5 Statutory defence in Queensland and Tasmania

In Queensland and Tasmania, civil defamation law has been largely codified. Consequently, both States have statutory versions of the common law defence of innocent dissemination.⁷⁶ There are some important differences between the statutory defences applicable in Queensland and Tasmania, and the common law defence.

In Queensland and Tasmania the statutory defence applies to those who sell periodicals or books. Thus, in those States, a person who sells a periodical is not liable for defamation, unless he or she knows that the periodical contains defamatory matter, or that the periodical habitually or frequently contains defamatory matter.⁷⁷ Moreover, in both States, a person who sells a book, pamphlet, print, writing or other thing not forming part of a periodical, is not liable if he or she does not know that the material is defamatory at the time of sale.⁷⁸

The statutory defences in the Code States are both narrower and broader than the common law defence. They are narrower in that they protect only those who sell periodicals or books, and not others that are entitled to the common law defence, such as libraries. The statutory defences are, nevertheless, broader than the common law because they protect a defendant unless he or she has actual knowledge of the defamation, whereas a subordinate distributor is denied protection at common law if he or she ought to have known of the defamation.

A further statutory defence is available in Queensland and Tasmania to employers in relation to the sale by an employee of a book, pamphlet, periodical, print, writing or other thing. In both States, an employer is not liable for the sale unless the plaintiff can

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Defamation Act 1889* (Qld) ss 25, 26; *Defamation Act 1957* (Tas) s 26.

⁷⁷ *Defamation Act 1889* (Qld) s 25; *Defamation Act 1957* (Tas) s 26(1). “Periodical” is defined as “any newspaper, review, magazine, or other writing ... published periodically”: *Defamation Act 1889* (Qld) s 3; *Defamation Act 1957* (Tas) s 3.

⁷⁸ *Defamation Act 1889* (Qld) s 26; *Defamation Act 1957* (Tas) s 26(2).

establish that the employer authorised the sale knowing that the book, or other publication, contained defamatory matter.⁷⁹

In Western Australia, the *Criminal Code* establishes statutory defences for innocent sellers of periodicals and books.⁸⁰ The Western Australian defences, however, apply only to criminal defamation.⁸¹ The common law defence of innocent dissemination therefore applies to actions for civil defamation in Western Australia, to the same extent as it does in all States and Territories, except Queensland and Tasmania.

4.6 Conclusion

The common law of innocent dissemination is difficult and not entirely satisfactory. It is difficult to apply in practice, because the rules have been formulated in an imprecise and unclear manner. It has presented conceptual problems for the courts, largely because the juridical foundations of the doctrine have been inadequately thought through. These practical and conceptual problems appear to have arisen because the doctrine was based on expedience, and not on any clear underlying principles.

As so much of the law of innocent dissemination is contentious, providing a satisfactory statement of the law is far from straightforward. The existing Australian law must be drawn from the decision of the High Court in *Thompson's case*, and particularly from the joint decision of Brennan CJ, Dawson and Toohey JJ. On this basis, the current state of the Australian doctrine of innocent dissemination may be summarised by the following propositions:

- *Innocent dissemination is a defence, not a denial of publication.*

The better view, supported by Brennan CJ, Dawson and Toohey JJ, is that a subordinate publisher or secondary distributor publishes the material, but is not liable for the publication if he or she neither knows, nor ought to know, that the material is defamatory.⁸² Gaudron J proposed a different view. Preferring the clear words of the

⁷⁹ *Defamation Act 1889* (Qld) s 27; *Defamation Act 1957* (Tas) s 27. The defence does not apply to the sale of periodicals if the plaintiff can prove that the employer knew that defamatory material was habitually or frequently published in that periodical.

⁸⁰ *Criminal Code* (WA) ss 365, 366.

⁸¹ Section 5 of the *Criminal Code Act 1913* (WA) provides, in part, that no action can be brought in respect of any act declared to be lawful by the Criminal Code. In *West Australian Newspapers Ltd v Bridge* (1979) 141 CLR 535, however, the majority of the High Court held that there needed to be a specific declaration of “lawfulness” in the Criminal Code for s 5 to apply to an action for civil defamation. In that case, it was held that s 357(8) of the Criminal Code, which provides that fair comment is a “lawful excuse” for the publication of defamatory matter, was not a specific declaration of lawfulness, and did not provide a defence to an action for civil defamation. As sections 365 and 366 of the Code state that innocent booksellers, or sellers of periodicals, are not “criminally responsible” for the publication of defamatory matter, they do not specifically declare the innocent sale of books or periodicals to be lawful, and therefore cannot operate as defences to actions for civil defamation.

⁸² The Australian Law Reform Commission also treated innocent dissemination as a defence: ALRC (1979) *op cit* para 182, p 97.

English authorities, she contended that, if innocent dissemination is established, there is no publication. Gummow J, who referred to the doctrine as a ‘so-called’ defence, did not endorse the view adopted by the joint decision.

- *The onus of proving innocent dissemination rests with the defendant.*

In the Federal Court, Burchett and Ryan JJ followed the English case law in concluding that, unlike the United States position, in Australia the defendant bears the onus of establishing innocent dissemination. In the High Court, Brennan CJ, Dawson and Toohey JJ expressly approved statements from *Emmens v Pottle* and *Vizetelly’s case* placing the onus on the defendant. Gummow J cited *Pollock* for the proposition that the burden of proof rests with the defendant.⁸³ Although Gaudron J proposed a different view, the practical results are almost the same. She argued that the burden should rest with the plaintiff, but maintained that, in most cases, an evidentiary presumption would shift the burden to the defendant.

- *A subordinate publisher or secondary distributor is a publisher that does not have the ability to control and supervise the published material.*

According to Brennan CJ, Dawson and Toohey JJ, the distinction between a publisher that is not entitled to the defence of innocent dissemination and a subordinate publisher is that a subordinate publisher does not participate in the “production, selection or composition of the matter” and does not have “the ability to exercise control or supervision” over published material. This appears to mean that a subordinate publisher does not have editorial control over the material, a distinction drawn by the United States courts. The joint decision does not, however, clearly distinguish editorial control from control over the distribution of material. The judgments of Gaudron J and Gummow J did not draw the distinction on the same basis. According to Gaudron J, a secondary distributor is a party who does not authorise a publication, but who “participates in it in some other way”. This distinction seems to have little to recommend it. Gummow J went no further than the traditional English common law position that a party entitled to the defence is not a printer, or first or main publisher, but a person who has taken a subordinate part in disseminating the material.

- *The application of the defence to printers remains unresolved under Australian law.*

In *McPhersons Ltd v Hickie*,⁸⁴ Powell JA argued that the defence of innocent dissemination should be available to printers because, with modern technology, there was no reason for printers to know or suspect that material was defamatory. In *Thompson’s case*, Brennan CJ, Dawson and Toohey JJ accepted this argument, but held that the question remained whether a printer was a subordinate publisher. Following their analysis, this appears to mean that a printer is a subordinate publisher if he or she has no editorial control of the published material. Despite uncertainty about the application of this test, the joint decision seems to imply that the defence should be available to printers.

⁸³ (1996) 141 ALR 1 at 34, citing *Pollock’s Law of Torts* (15th ed, 1951) p 186, fn 57.

⁸⁴ (1995) *Australian Torts Reports* 81-348.

According to Gaudron J, printers are entitled to the defence because they do not authorise the publication of material. Gummow J simply restated the established law that a printer is not a subordinate disseminator. Although the position of printers under Australian law is unresolved, most of the *obiter* comments in the two reported decisions to date appear to offer cautious support for the extension of the defence of innocent dissemination to printers.

- *In Queensland and Tasmania, statutory defences are available to innocent sellers of periodicals and books.*

The statutory defences available in the Code States apply only to booksellers and sellers of periodicals, but offer greater protection to those entitled to the defences. The statutory defences are therefore both narrower and broader than the common law defence.

The most comprehensive Australian analysis of the law of innocent dissemination remains the 1978 report of the Australian Law Reform Commission (ALRC) on *Defamation Law*.⁸⁵ The ALRC argued that the policy underlying the defence was premised on establishing a balance between the interests of two potentially innocent groups:

- distributors of material, who could not reasonably be expected to know the existence of defamatory material; and
- persons who are defamed by material and, therefore, interested in preventing the spread of the defamatory material.

The ALRC recommended modifying the law to better reflect this balance. To better protect the interests of distributors, it recommended establishing a new defence of protected dissemination. It proposed that this defence protect all persons who publish defamatory material solely in the capacity of disseminators. To qualify for this proposed defence, disseminators would need only establish that they fell within the protected category of disseminators. Thus, the defence would remove the need for defendants to establish that they did not know that the material was defamatory and were not negligent in publishing it.

To balance the greater protection given disseminators, the ALRC recommended that an injunction be made available to plaintiffs to prevent the publication, including dissemination, of material if the plaintiff could establish that the material was defamatory.⁸⁶ Thus, the report stated that:

⁸⁵ ALRC (1979) *op cit* paras 182-189, pp 97-100; see also MD Kirby, “Books, Bookselling and the Law” [1982] *New Zealand Law Journal* 222.

⁸⁶ ALRC (1979) *op cit* para 186, p 99. The ALRC proposed that the injunction also apply to prevent publication of “sensitive private facts”: see Unfair Publication Act, Draft Bill, cl 31 (Appendix C to ALRC report).

If these proposals are accepted they would enable any of the specified publishers to publish, that is to print, sell and lend, with impunity – unless and until a judge, after considering the relevant facts of the particular case, granted an injunction.⁸⁷

The ALRC report proposed extending the defence to particular categories of publisher; it did not suggest any criteria for distinguishing between publishers entitled to the defence, and those not entitled to the defence. First, it recommended that the defence apply to distributors traditionally entitled to plead innocent dissemination: libraries, news-vendors and retailers. Secondly, the ALRC argued that, although there was less of a case to protect wholesalers, given that an injunction could be awarded to prevent distribution, they should also be entitled to the defence.⁸⁸ Thirdly, as explained at para [4.2] above, the ALRC recommended that the new defence apply to printers, essentially because it concluded that it was no longer practicable for printers to check printed material.⁸⁹ The Draft Bill prepared by the ALRC therefore extended the defence to a “processor”, which it defined as “a person who, on the instructions of another person, produces or reproduces material the content of which has not been determined by him and who does not himself disseminate that material to the public.”⁹⁰ Finally, the ALRC recommended that the defence should not apply to the distribution of imported material, because this would potentially deny plaintiffs the option of a damages remedy.⁹¹ Thus, under the ALRC proposals, local distributors would remain fully liable for the distribution of imported material.

The ALRC proposals represented an attempt to establish a rational policy basis for limiting the liability of distributors and publishers, such as printers, with little or no involvement in the production of content. Perhaps unsurprisingly, given the history of the defence, the ALRC found that there were inadequacies in the application of the defence of innocent dissemination to the traditional print media. Since the ALRC report, *Thompson’s case* has revealed difficulties in applying innocent dissemination to broadcasting. This suggests that there are likely to be difficulties in applying the defence of innocent dissemination to those involved in publishing by means of the Internet. This may require either the development of specific rules for Internet publications, or a more thorough-going re-assessment of the common law defence of innocent dissemination. These issues are taken up in Part 7 of this paper.

⁸⁷ *Ibid.* para 186, p 99.

⁸⁸ *Ibid.* para 187, p 99.

⁸⁹ *Ibid.* para 188, pp 99-100.

⁹⁰ Unfair Publication Act, Draft Bill, cl 7 (Appendix C to ALRC report).

⁹¹ ALRC (1979) *op cit* para 189, p 100.