

## **Part 5: Defamation via the Internet: content providers, message originators and carriers**

### **5.1 Introduction**

In Australia, the common law rules of liability for publishing defamatory material apply to persons who publish by means of the Internet. From Parts 3 and 4 of this paper, it is clear that, under English and Australian common law, there are three categories:

- publishers who are strictly liable for publishing defamatory material, and not entitled to the defence of innocent dissemination;
- subordinate publishers or secondary distributors, who are liable for publishing defamatory material, but entitled to the defence of innocent dissemination; and
- those who are not liable because they are not publishers.

These categories are similar, but not necessarily identical to, distinctions drawn under United States law between:

- primary publishers, who are not entitled to the form of limited liability available to distributors;
- secondary publishers, or distributors, who are subject to a form of limited liability; and
- those who are not liable because they are not publishers.

It has sometimes erroneously been assumed that the distinctions made under English and Australian law, on the one hand, and United States law, on the other, are the same.<sup>1</sup> Although the distinctions are roughly analogous, in the United States the First Amendment protection of freedom of speech has had a significant influence on defamation law. The influence of the First Amendment on the development of the limited liability of distributors under United States law is explained at para [4.4] above. As English and Australian courts have pointed out, this means that United States precedents must be treated with some caution.<sup>2</sup> Thus, in *Godfrey v Demon Internet Ltd*, Morland J made the following comments:

Care has to be taken before American cases are applied in English defamation cases. The impact of the First Amendment has resulted in a substantial divergence of approach between American and English defamation law. For example in innocent dissemination cases in English law the defendant publisher has to establish his innocence, whereas in American law the plaintiff who has been libelled has to prove that the publisher was not innocent.<sup>3</sup>

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<sup>1</sup> See, for example, Peter Bartlett, 'Internet: the legal tangle' (1995) 11 *Computer Law and Practice* 110

<sup>2</sup> See, for example, *Thompson v Australian Capital Television* (1996) 141 ALR 1 at 11, fn 45 per Brennan CJ, Dawson and Toohey JJ.

<sup>3</sup> [1999] 4 All ER 342 at 343-4. See also *Hercules v Phease* [1994] 2 VR 411.

Later in the decision, Morland J dealt with the United States decisions in some detail, but concluded that they were “only of marginal assistance because of the different approach to defamation across the Atlantic”.<sup>4</sup> Nevertheless, as the United States courts have considered issues that have not arisen under English and Australian law, American decisions remain an important reference point for analysis of how liability rules for publishing defamatory material might be applied to persons who publish via the Internet.

Parts 5 and 6 of this paper apply the existing liability rules established under English and Australian common law to those who publish by means of the Internet. This Part of the paper deals with those at the extremes of the content/carriage continuum. At one extreme, content providers and message originators are those most directly concerned with the production of content. Content providers and message originators, who communicate material to third persons by means of the Internet, clearly publish the material. It is, however, much more difficult to determine the liability of a content provider for material that may be accessed from his or her Web site by a hyperlink; similarly, it is difficult to apply the law to determine the liability of message originators for material attached to a message. At the other extreme, telecommunications carriers are usually completely uninvolved with content, being concerned predominantly with the automated carriage of material across their networks. Under English and Australian common law, the legal question is whether the limited role of a telecommunications carrier in communicating material means that it is not a publisher. An area of some difficulty is whether a carrier that is notified that its facilities are being used to distribute defamatory material becomes liable if it fails to prevent access to the defamatory material.

## **5.2 Content providers and message originators**

Part 2 of this paper distinguished content providers from message originators. Whereas content providers create material that appears on the World Wide Web, message originators create and send interpersonal messages by means of e-mail and mailing lists. Content providers and message originators perform essentially the same functions as authors of printed material. Consequently, content providers and message originators who transmit defamatory material to third persons by means of the Internet are liable for publishing the material to those third persons. Moreover, as the case law clearly establishes that an author or the main publisher of material is not a subordinate publisher, content providers and message originators are not entitled to the defence of innocent dissemination.

The few cases to have considered the liability of content providers and message originators confirm that they stand in the same position as authors of printed material. To date, there appear to be only three significant Australian cases dealing with defamation by means of the Internet. The first case was a 1994 decision of a single judge of the Western Australian Supreme Court in *Rindos v Hardwick*.<sup>5</sup> In that case, defamatory

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<sup>4</sup> [1999] 4 All ER 342 at 348.

<sup>5</sup> Unreported, Supreme Court of Western Australia, Ipp J, 31 March 1994.

remarks about an academic were posted to a computer bulletin board devoted to material relevant to anthropology. Ipp J awarded the plaintiff damages for the defamatory comments. Although the case established that posting material to a computer bulletin board will be regarded as a publication for the purposes of defamation law, the decision was uncontested by the defendant and therefore needs to be approached with some caution. The next case, *Oxford Media Pty Ltd v Haynes*,<sup>6</sup> was a 1997 decision of a single judge of the Queensland Supreme Court. In that case, the Court awarded an interlocutory injunction ordering the creator of a Web home page to remove defamatory material. The most recent case, *Macquarie Bank Ltd v Berg*,<sup>7</sup> was an *ex parte* application for an injunction to restrain the publication of material appearing on a Web site, apparently stored on a server located in the United States. The defendant also seemed to be residing in the United States. Simpson J of the New South Wales Supreme Court refused to exercise the Court's discretion to grant an injunction essentially because, as the Internet is global, an injunction would involve restraining the defendant from publishing anywhere in the world. According to Simpson J, this would involve an impermissible extra-territorial extension of New South Wales defamation law. In reaching this conclusion, Simpson J stated that:

An injunction to restrain defamation in NSW is designed to ensure compliance with the laws of NSW, and to protect the rights of plaintiffs, as those rights are defined by the law of NSW. Such an injunction is not designed to superimpose the law of NSW relating to defamation on every other state, territory and country of the world. Yet that would be the effect of an order restraining publication on the Internet ... It may very well be that, according to the law of the Bahamas, Tazakistan, or Mongolia, the defendant has an unfettered right to publish the material. To make an order interfering with such a right would exceed the proper limits of the use of the injunctive power of this court.<sup>8</sup>

Although these Australian decisions are not overwhelmingly authoritative, the liability of content providers and message originators for publishing defamatory material by means of the Internet has not been questioned in common law jurisdictions. For example, in *Egerton v Finucan*,<sup>9</sup> an Ontario court held that an academic had a cause of action for defamation against a superior for the distribution of a critical performance evaluation, and termination letter, over a university e-mail network. The liability of content providers and message originators is, indeed, so clear that Tobin and Sexton have concluded that:

There is obviously no problem in principle with the proposition that a person who places material on the internet where it can be accessed by other users of the system may be liable for the publication of that material ...<sup>10</sup>

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<sup>6</sup> Unreported, Supreme Court of Queensland, White J, 18 April 1997.

<sup>7</sup> [1999] A Def R 53, 035.

<sup>8</sup> *Ibid.* para 14.

<sup>9</sup> [1995] OJ No 1653, 55 ACWS (3d) 1089.

<sup>10</sup> Tobin and Sexton (1999) *op cit* para [5112].

### *Liability for republication of e-mail messages*

At para [3.10] above, it was explained that, under certain circumstances, a person who publishes defamatory material may be liable for the republication of that material by another. Thus, the original publisher may be liable if: he or she authorised or intended the republication; the person who repeats the statement is under a duty to repeat the statement; or republication is the “natural or probable” result of the original statement. E-mail messages differ from other forms of person-to-person communications in that they may easily be re-transmitted by a receiver to other people. It is, for example, comparatively easy for a person who receives an e-mail to re-transmit the message to a mailing list. The ease of re-transmitting e-mail messages creates the possibility of the widespread dissemination of defamatory messages.

As explained at para [3.10], it has been held that a person may be liable for the republication of defamatory statements made at a press conference, because republication of the statements is a “natural or probable” consequence of the original statements. Similarly, it could be argued that, given the ease of re-transmission, it is the “natural and probable consequence” of sending an e-mail message, for it to be distributed beyond the immediate receiver.<sup>11</sup> Whether republication is a “natural or probable” consequence will depend, in large measure, on the character of the original message. For example, if there are indications that the message is to be treated confidentially, it is extremely unlikely that the message originator will be liable for republications. On the other hand, if the message is posted to a mailing list, it may be more likely that it will be distributed beyond those on the mailing list.

The essential problem is that e-mail is a relatively informal means of communication, which seems especially well-adapted to the circulation of gossip and rumour.<sup>12</sup> It could be argued that receivers are more likely to republish e-mail messages than other forms of interpersonal message, such as letters received through ordinary mail. On the other hand, it could equally be argued that the re-transmission of e-mail messages requires an independent decision by the receiver, which breaks the chain of causation. It is unlikely that the courts will adopt a general rule that the re-transmission of e-mail messages is a “natural and probable” consequence of sending an e-mail message. It is much more likely that each individual case will be considered on its merits, with the courts looking to the particular characteristics of the individual e-mail.

### *Hyperlinks*

Hyperlinks are a novel way of linking associated sources of information, and one of the most useful features of the World Wide Web. A Web site may include a hyperlink to

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<sup>11</sup> Takach, for example, maintains that: “Given its electronic make-up, and the ease with which e-mail can be retransmitted by its recipient, it would not be surprising for a court, in the appropriate circumstances, to find that the original sender of an e-mail message is responsible for its subsequent transmission, as this was a natural and probable consequence of the original e-mail transmission.” Takach (1999) *op cit* p 26.

<sup>12</sup> On qualitative differences between e-mail and other forms of communication see: Patrick Quirk, “Defamation in Cyberspace and the Corporate Cybersmear” in Anne Fitzgerald et al (eds) *Going Digital 2000* (2<sup>nd</sup> ed, Prospect Media Pty Ltd, St Leonards, 2000) pp 298 -9.

another Web site that contains defamatory material. A hyperlink directs users to, and provides access to, the material on the hyperlinked Web page. Hyperlinks have no direct parallels in the print nor, as yet, the broadcast media.

A number of authorities deal with whether directing a person to defamatory material amounts to publishing the material, or to republishing the original material by reference. None of the authorities, however, are concerned with situations that are precisely analogous to hyperlinks. It should be borne in mind that the liability of a content provider for hyperlinked material is a novel issue, and that the decided cases cannot be treated as determinative. Perhaps the closest authority is the nineteenth century English case, *Hird v Wood*.<sup>13</sup> In that case, it was held that evidence that a person sat by a defamatory placard beside a roadway, and pointed to it whenever others passed, was sufficient to constitute publication of defamatory material on the placard. This may be compared with an earlier case, *Smith v Wood*,<sup>14</sup> in which it was decided that there was no publication when the defendant showed a defamatory caricature to another upon request. Nevertheless, as *Gatley* contends, the decision in *Smith v Wood* seems difficult to reconcile with the principle that defamatory material is published if it is communicated to others.<sup>15</sup> In *Lawrence v Newberry*,<sup>16</sup> the issue was whether a letter published in a newspaper, which referred readers to a speech in the House of Lords, constituted publication of defamatory matter in the speech. The Court held that reference to the speech in the letter might be sufficient to amount to publication of material in the speech by the author of the letter.

The question of whether directing others to defamatory material is a publication has also arisen in the United States. In *Lindley v Delman*<sup>17</sup> it was held that requesting persons to go to a place where defamatory material could be read was a publication. In that case, however, the defendant had also personally exhibited the document to several persons. In *MacFadden v Anthony*,<sup>18</sup> a case sometimes contrasted with *Hird v Wood*, the issue was whether a radio commentator, who referred to a magazine article, published defamatory material contained in the article. Without much discussion, the Court held that merely drawing attention to the article, without repeating the defamatory material, was not a republication, and the broadcasting company was not liable.

Although the case law is not entirely clear, contrary to what many may believe, incorporating a hyperlink to associated Web content may possibly render a content provider liable for publishing defamatory material published on the hyperlinked documents. This is because a hyperlink may be interpreted as directing users to the defamatory content, in a similar way to the person pointing to the placard in *Hird v Wood*, or the letter referring to the defamatory speech in *Lawrence v Newberry*. Although a user must make a decision to access the hyperlinked material, and must 'click' on the hyperlink, less effort is required than tracking down a speech referred to in

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<sup>13</sup> (1894) 38 SJ 234.

<sup>14</sup> (1813) 3 Camp 323, 170 ER 1397.

<sup>15</sup> Milmo and Rogers (1998) *op cit* para [6.4], p 131, fn 33.

<sup>16</sup> (1891) 64 LTR 795.

<sup>17</sup> 26 P 2d 751 (1933).

<sup>18</sup> 117 NYS 2d 520 (1952).

a newspaper letter. Even if a hyperlink is not interpreted as directing users to linked content, however, a hyperlink provides access to other Web material. It is perhaps arguable that a content provider that includes a hyperlink could be regarded as a distributor of the linked material, and therefore liable for publishing the material.

If content providers are found liable for hyperlinked material, the question arises as to whether they are entitled to the defence of innocent dissemination. A content provider will usually have no control or supervision over the content of linked Web material. On principle, it would seem that, as hyperlinks are a means of accessing material, content providers are more like distributors than authors, or main publishers. Thus, it would seem that the defence of innocent dissemination would likely be extended to content providers in relation to hyperlinked material. In practice, difficult questions may arise concerning whether the defence can be made out because the nature of the material chosen to be linked should have alerted the defendant to the defamation. For example, there may be more risk in linking to the “Drudge Report”, or even to a site operated by an on-line newspaper, than to a site providing only weather reports. It should be remembered that, in *Thompson’s case*, Brennan CJ, Dawson and Toohey JJ argued that a live broadcast of a current affairs program entailed a “high risk” of defamatory statements.<sup>19</sup> On the other hand, given that hyperlinked Web material may be rapidly changed, it would seem onerous to impose a requirement on content providers to monitor material linked to their Web site by hyperlinks.

One of the main advantages of the World Wide Web is the ease of access it provides to a large and diverse range of information sources. The United States Supreme Court referred to this in *Reno v ACLU*, when it stated that:

The Web is ... comparable, from the readers’ viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.<sup>20</sup>

Hyperlinks allow users to navigate between information sources, thus facilitating convenient access to Web material. Regardless of legal principles, the consequences of finding content providers liable for hyperlinked material need to be carefully considered before such a step is taken. This may properly be a policy decision for the legislature, rather than a decision left to courts. The issues are considered further in Part 7 of this paper.

### *Attachments*

Applications such as e-mail, mailing lists and newsgroups allow the sender to include attachments - in the form of text, graphics, sound or video – which may be opened by recipients. There is little doubt that a message originator is liable for defamatory matter included in an attachment, even if the attached material was produced by another person. This is no more than an application of the general principle that a person who repeats

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<sup>19</sup> (1996) 141 ALR 1 at 11.

<sup>20</sup> 138 L Ed 2d 874, 886 (1997).

defamatory material is liable for publishing the material.<sup>21</sup> Even if the message includes statements refuting defamatory matter contained in an attachment, this does not mean that the message originator is not liable. The question must be whether the message and the attached material, taken together, convey a defamatory imputation.<sup>22</sup>

### 5.3 Telecommunications carriers

It is usually assumed that a telecommunications carrier is not liable for defamatory material transmitted over a network operated by the carrier. This assumption may be generally accurate, but the reasons for excluding carriers from liability under English and Australian common law are difficult to state with any degree of precision. Moreover, it is difficult to define the circumstances in which a carrier may, by its acts or omissions, make itself a party to the publication of defamatory material.

To date, there are no decisions on the liability of carriers under English and Australian common law. There are two straightforward reasons for the lack of attention given to the issue until comparatively recently. First, it is difficult to see how a carrier could be liable for defamatory messages communicated by traditional person-to-person telephony. The position of a carrier in relation to traditional telephony is no doubt analogous to the position of the post office in relation to letters, and it has never seriously been suggested that the post office should be liable. It is only with the introduction of services supplying communications content to subscribers by means of a carrier's network, such as telephone information services, that the liability of a carrier could be of practical significance. Secondly, until the 1980s, carriers in England and Australia were wholly publicly owned and, like the post office, were protected from tortious liability by Crown immunity. With the introduction of competition and the privatisation of government-owned carriers, however, this has ceased to be the case. Thus, section 26 of the *Telstra Corporation Act 1991* (Cth) provides that Telstra is not to be taken to have been incorporated for a public purpose; is not a public authority or agency of the Crown; and is not entitled to any immunity of the Commonwealth.

It is sometimes suggested that carriers are not liable for transmitting defamatory material because they are facility providers and not publishers. For example, after asserting that telephone companies are facility providers, Bartlett states that:

Facility providers have not been held liable for defamatory material transmitted by their systems as it is considered that they have not published the material but merely provided the mechanism to pass it on.<sup>23</sup>

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<sup>21</sup> See *Truth (NZ) Ltd v Holloway* [1960] 1 WLR 997; *Wake v John Fairfax & Sons Ltd* [1973] 1 NSWLR 43.

<sup>22</sup> See Milmo and Rogers (1998) *op cit* para [6.29], pp 152-4; *Savage v News* [1932] SASR 240; *Hopman v Mirror Newspapers* [1961] SR (NSW) 632; cf *Bik v Mirror Newspapers* [1979] 2 NSWLR 679.

<sup>23</sup> Peter Bartlett, "Internet: the Legal Tangle" (1995) 11 (4) *Computer Law and Practice* 110 at 111.

Similarly, *Gatley* contends that a telephone company is not liable because it is “in the same position as the supplier of newsprint or printing machinery to a newspaper which publishes a libel”.<sup>24</sup> The problem with these assertions, reasonable as they may be, is that they are unsupported by any case law establishing that facility providers are not publishers. Moreover, as a matter of logic, if it is true that facility providers are not publishers, this would seem to be properly a consequence of a more general principle distinguishing publishers from non-publishers, than an independent basis for denying liability.

There is only one United States authority on the liability of telecommunications carriers, the decision of the New York Court of Appeals in *Anderson v New York Telephone Company*.<sup>25</sup> As the only common law authority on the issue of carrier liability, the reasoning in the decision merits close scrutiny. In that case, a recorded information telephone service, containing clearly defamatory statements, was made available by means of the defendant company’s network. The plaintiff, a minister in the Church of God in Christ, requested the carrier to stop the service, but the telephone company did nothing to prevent transmission of the service, nor did it attempt to establish the accuracy of the messages.

Before *Anderson’s case*, numerous United States cases had considered the liability of telegraph companies for transmitting defamatory messages.<sup>26</sup> While telegraph companies have been held liable for publishing defamatory messages, a number of cases have recognised that they are protected under United States common law by a form of qualified privilege.<sup>27</sup> This privilege protects a telegraph company, unless it can be established that the company was motivated by actual malice, meaning knowing, or having reason to know, that a statement is defamatory.<sup>28</sup> In *Anderson’s case*, the majority of the Appellate Division of the New York Supreme Court<sup>29</sup> essentially applied a modified version of this common law privilege to the telephone company. The majority held that a telephone company would be liable for publishing defamatory material if it could be established that the material was transmitted by the carrier knowing that the material was false, or if the carrier was recklessly indifferent as to whether the material was false or not. Furthermore, the majority held that there would be no liability

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<sup>24</sup> Milmo and Rogers (1998) *op cit* para [6.8] fn 62.

<sup>25</sup> 361 NYS 2d 913 (1974).

<sup>26</sup> See, for example, *Nye v Western Union Tel Co* 104 F 628 (1900); *Paton v Great Northwestern Tel Co* 170 NW 511 (1919); *Rogers v Postal Telegraph-cable Co* 164 NE 463 (1929); *Grisham v Western Union Tel Co* 142 SW 271 (1911). See also Laurence H Eldredge, *The Law of Defamation* (the Bobs-Merrill Company, Indianapolis, 1978) p 234.

<sup>27</sup> See, for example, *Klein v Western Union Tel Co* 13 NYS 2d 441 (1939); *Von Meysenbug v Western Union Tel Co* 54 F Supp 100 (1944); *Mason v Western Union Tel Co* 91 ALR 3d 1005 (1975); *Flynn v Rainke* 225 NW 742 (1929). These cases are discussed in Annotation, “Liability of Telegraph or Telephone Company for Transmitting or Permitting Transmission of Libelous or Slanderous Messages” 91 ALR 3d 1015.

<sup>28</sup> It has been suggested that the privilege derived from a statutory duty to transmit all messages without prejudice, but this does not adequately explain the exception for clearly defamatory messages. Instead, it has been contended that a more coherent basis for the privilege is the public interest in an efficient communications services: see, for example, *Nye v Western Union Telegraph Co* 104 F 628 (1900).

<sup>29</sup> 345 NYS 2d 740 (1973).

if the telephone company had a reasonable belief that the material was true. They suggested, however, that a carrier might be recklessly indifferent if, after being notified of allegedly defamatory material, it failed to contact the originator of the message to check its veracity.

In a strong dissenting opinion, Witmer J held that a carrier did not publish messages transmitted over its network because it did not participate directly in the communication, but merely provided a facility. Thus, he argued that:

The telephone company's role in this communication is not legally different from the role played by a person who leases a sound amplification system to a person who makes a defamatory public speech, or who leases a typewriter to one who writes defamatory messages or a tape recorder to one who broadcasts a defamatory message. In none of these cases does the mere leasing of communication facilities cast the lessor in liability under libel laws, even if the lessor is informed about the nature of the message being communicated. In no sense has the person providing the facilities participated in preparing the message, exercised any discretion or control over its communication, or in any way assumed responsibility. For these reasons, there has been no publication in the present case, because the telephone company was not the legal cause for communicating the defamatory matter to third persons.<sup>30</sup>

Witmer J was also concerned about the practicality of the approach suggested by the majority, and of the potential infringement of freedom of speech. Moreover, he argued that, assuming that a telephone company did publish material transmitted by means of its network, it should be entitled to the same qualified privilege as telegraph companies. On this point, Witmer J essentially held that there was no evidence to suggest that the telephone company was motivated by malice or bad faith.

On appeal, the New York Court of Appeals unanimously overturned the majority decision, and confirmed the minority opinion that telecommunications carriers are not publishers, but are mere suppliers of facilities used in the publication of material. The Court stated that:

It could not be said, for example, that International Business Machines, Inc., even if it had notice, would be liable were one of its leased typewriters used to publish a libel. Neither would it be said that the Xerox Corporation, even if it had notice, could be held responsible were one of its leased photocopy machines used to multiply a libel many times ... The telephone company, if anything, would have even less control over the use of its leased equipment than would those companies in the hypotheses just above noted.<sup>31</sup>

In reaching this conclusion, the Court had to distinguish the position of telecommunications carriers from telegraph companies that, as mentioned above, had

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<sup>30</sup> 345 NYS 2d 740, 752 (1973).

<sup>31</sup> 361 NYS 2d 913, 916 (1974).

long been held liable for publishing defamatory communications. For example, in *Klein v Western Union Telegraph Co*,<sup>32</sup> it was assumed that sending and receiving a message by employees of a telegraph company was a publication, even though the company was a common carrier with an obligation to accept and transmit messages. In *Anderson's case*, the dissenting opinion in the Appellate Division had contended that, unlike telecommunications carriers, telegraph companies directly participated in a communication. Similarly, an article published shortly after the decision of the Appellate Division argued that publication required some affirmative act; and that a carrier was not a publisher because it did not actively communicate a message, but was merely a passive medium through which a message was published.<sup>33</sup> The article maintained that a telegraph company played an active role in communicating messages because:

Its clerks hear or see all messages before or at the time of communication and have the opportunity to question those who wish to have messages sent.<sup>34</sup>

An earlier influential article by Young B Smith had given a slightly different explanation for holding telegraph companies liable for publication. Smith argued that a telegraph company was responsible for defamatory messages sent by telegraph because the transmission of a message from a sending operator to a receiving operator constituted publication to the receiving operator.<sup>35</sup> A similar conclusion seems to have been reached by Canadian courts.<sup>36</sup>

The New York Court of Appeals in *Anderson's case* cited Smith's article with approval, without directly referring to its reasoning. Instead, it simply maintained that a telegraph company is a publisher because its employees "actively aid" in communicating a message, whereas a carrier is not liable because it has a "merely passive" role.<sup>37</sup> Thus, it concluded that:

In order to be deemed to have published a libel a defendant must have had a direct hand in disseminating the material whether authored by another, or not.<sup>38</sup>

Although it is often cited as authority for the proposition that a carrier is not a publisher because it is a facility provider, this interpretation fails to fully appreciate the reasoning

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<sup>32</sup> 13 NYS 2d 441(1939).

<sup>33</sup> See Note, "Must the Telephone Company Censor to avoid Liability for Libel: *Anderson v New York Telephone Company*" (1974) 38 *Albany Law Review* 317.

<sup>34</sup> *Ibid.* p 319.

<sup>35</sup> Young B Smith, "Liability of a Telegraph Company for Transmitting a Defamatory Message" (1920) 20 *Columbia Law Review* 30 at 34, 41-2. See also Marc McDonald, *Irish Law of Defamation* (2<sup>nd</sup> ed, The Round Hall Press, Dublin, 1989) p 66, fn 32. It is established law that communications between employees of a company amounts to publication: see *Riddick v Thames Board Mills* [1977] QB 893.

<sup>36</sup> See Raymond E Brown, *Law of Defamation in Canada* (Carswell, Toronto, 1987) pp 277-8 citing *Kahn v Great Northwestern Telegraph Co of Canada* (1930) 39 OWN 11; *Dominion Telegraph Co v Silver* (1882) 10 SCR 238. In *Williamson v Freer* (1874) LR 9 CP 393 at 395, Brett J confirmed that: "[A] communication ... if sent through the telegraph office ... is necessarily communicated to all the clerks through whose hands it passes".

<sup>37</sup> 361 NYS 2d 913, 915 (1974).

<sup>38</sup> *Ibid.*

in the decision. The decision itself acknowledges that in certain circumstances, such as printing defamatory material, the provision of facilities may be a factor in determining liability for publication. Thus, in the following passage, the Court attempts to define the conditions under which those that provide facilities may be liable:

We would limit to media of communications involving the editorial or at least participatory function (newspapers, magazines, radio, television and telegraph) the dictum, “He who furnishes the means of convenient circulation, knowing, or having reasonable cause to believe, that it is to be used for that purpose, if it is in fact so used, is guilty of aiding in the publication and becomes the instrument of the libeler” ( 34 NY Jur Libel and Slander, s 61; *Youmans v Smith*, 153 NY 214, 47 NE 265). The telephone company is not part of the “media” which puts forth information after processing it in one way or another.<sup>39</sup>

As subsequently pointed out in *Lunney v Prodigy Services Company*,<sup>40</sup> this suggests that a person who provides the means for distributing defamatory material will not be liable for publishing the material unless the person performs some “editorial or at least participatory function”. This, however, begs the question as to what is meant by a “participatory function”. The true significance of *Anderson’s case* is, in fact, found in two footnotes to the decision which distinguish telecommunications carriers from the postal service, on the one hand, and telegraph companies, on the other. The article published after the Appellate Division decision, referred to above, argued that a telephone company was simply an “electronic version” of the postal service.<sup>41</sup> The first footnote suggests that this analogy is imperfect because the postal service will rarely have notice of the contents of letters. Nevertheless, the footnote agrees that the postal service and carriers are alike “in that both are in no way involved in preparing or processing the message itself”.<sup>42</sup> The second footnote argues that a telephone company differs from a telegraph company in that the employees of a telephone company “perform no active or affirmative function in the preparation or transfer of” a message.<sup>43</sup> This echoes the reasoning of the article on the decision of the Appellate Division.

The distinction drawn by *Anderson’s case* between those who publish defamatory material and those who do not is therefore that non-publishers perform no active or affirmative function in the preparation or transfer of communications content. The legal basis for excluding a carrier from liability in *Anderson’s case* is not because it is a facility provider, but because it performs a purely passive role in the preparation or transfer of material; in other words, that it is concerned only with carriage and not at all with content. It is in this sense that carriers are analogous to other persons who supply facilities, such as suppliers of newsprint, typewriters and photocopy machines; each of these persons has no active or affirmative function in the preparation or transfer of

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<sup>39</sup> *Ibid.*

<sup>40</sup> 250 AD 2d 230 (1998). This case is dealt with in detail at para 6.2.1 below.

<sup>41</sup> Note, “Must the Telephone Company Censor to avoid Liability for Libel: *Anderson v New York Telephone Company*” (1974) 38 *Albany Law Review* 317 at 323.

<sup>42</sup> 361 NYS 2d 913, 915 (1974) fn 1.

<sup>43</sup> *Ibid.* fn 2.

content. Under United States law, facility providers are not publishers because of this distinction, and not because they are facility providers *per se*.

As the Court of Appeals held that the telephone company was not a publisher, it did not find it necessary to consider the application of the qualified privilege extended to telegraph companies. The application of the qualified privilege, discussed by the Appellate Division, has subsequently been considered at length in relation to Internet intermediaries, such as ISPs, in *Lunney v Prodigy Services Company*.<sup>44</sup> That case is dealt with at para 6.2.1 below.

Although the decision in *Anderson's case* has been cited in relation to the proposition that a carrier is not a publisher, as in other areas of defamation law, United States authorities dealing with the liability of carriers must be treated with caution. This is mainly because United States law has imposed special obligations on telephone companies as common carriers. Thus, in *Anderson's case*, Gabrielli J stated that:

The telephone company is a public utility which is bound to make its equipment available to the public for any legal use to which it can be put ... and is privileged under its tariff restrictions to terminate service for cause only in certain prescribed circumstances none of which encompasses the subscriber's dissemination of defamatory messages.<sup>45</sup>

The common carrier status of telecommunications companies under United States law means that American precedents dealing with carrier liability cannot be directly applied in Australia.

English and Australian courts have not, so far, drawn any explicit distinction, such as that suggested in *Anderson's case*, based upon performing an active function in the preparation or transfer of a message, and not doing so. To date, only one recent English decision, *Godfrey v Demon Internet Ltd*,<sup>46</sup> has referred to *Anderson's case*. That case concerned the liability of an ISP for publishing defamatory material, and is dealt with in detail at para 6.2.2 below. As explained below, the defendant ISP argued that, as its role was analogous to that of the telecommunications carrier in *Anderson's case*, it was not a publisher. After pointing out that the United States decisions were of limited assistance, Morland J held that *Anderson's case* was not applicable because the defendant "did not play a merely passive role".<sup>47</sup> While this confirms that the legal distinction drawn in *Anderson's case* is based on whether facility providers perform an active or merely passive function, it does not mean that the distinction is, as yet, part of English common law. The liability of telecommunications carriers under English and Australian common

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<sup>44</sup> 250 AD 2d 230 (1998).

<sup>45</sup> 361 NYS 2d 913, 915-916 (1974). See further Eric C Jensen, "An Electronic Soapbox: Computer Bulletin Boards and the First Amendment" (1987) 39 *Federal Communications Law Journal* 217 at 249-252; Terri A Cutrera, "Computer Networks, Libel and the First Amendment" (1992) 11 *Computer/Law Journal* 555 at 567-8.

<sup>46</sup> [1999] 4 All ER 342.

<sup>47</sup> [1999] 4 All ER 342 at 349.

law must therefore be approached by the application of established principles of liability for publishing defamatory material.

As explained at para [3.2] above, Australian courts have adopted the principle that everyone who “takes part” in communicating defamatory material, in whatever degree, is a publisher, and therefore liable for the publication of defamatory material. There is no English or Australian authority that conclusively establishes that a facility provider is not liable for publishing defamatory material. Nevertheless, some *obiter* comments point in this direction. For example, in *Australian Broadcasting Corporation v Comalco*, in the course of deciding that a broadcaster published all material transmitted, Neaves J stated that:

... I am unable to regard the circumstances in which the programme the subject of these proceedings came to be telecast as involving no more than the making available by the appellant of its facilities to those who wished to make use of them.<sup>48</sup>

In England, legislation has been enacted to protect telecommunications carriers, who are now entitled to a statutory defence provided to operators of a “communications system”.<sup>49</sup> This defence is dealt with in greater detail at para [6.3.2] below. In Australia the liability of telecommunications carriers is presently left entirely to the common law.

Few texts deal with the common law liability of carriers in any detail. The most extensive treatment in relation to English common law is the current edition of *Gatley*, which deals with the matter in a footnote.<sup>50</sup> *Gatley* argues that, if it were not for the defence available under United Kingdom legislation, telecommunications carriers would be in the same position as suppliers of newsprint or printing machinery. *Gatley* deals with the liability of such facility providers in another footnote.<sup>51</sup> The one case referred to in connection with the liability of suppliers of newsprint is *Lobay v Workers and Farmers Publishing Association Ltd*,<sup>52</sup> which is referred to at para [3.7] above. That case, however, dealt with the liability of a printing company for material printed on its presses by its employees after business hours. It has little to say about the liability of facility providers, although *Gatley* implies that it suggests that a facility provider may be liable if it is aware that defamatory material is being published by means of its facilities and does nothing to prevent it. It is, however, difficult to draw this conclusion from the actual decision.

*Gatley* also refers to the *CBS Songs case* for the distinction between procuring and facilitating a tort. As explained at para [3.9] above, that case held that advertising the ability of hi-fi systems to make tape-recordings did not amount to procuring an infringement of copyright. By analogy, this may well mean that a mere facility provider

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<sup>48</sup> (1986) 68 ALR 259 at 318.

<sup>49</sup> *Defamation Act 1996* (UK) s 1.

<sup>50</sup> Milmo and Rogers (eds) (1998) *op cit* para [6.8] fn 62.

<sup>51</sup> *Ibid.* para [6.15] fn 98.

<sup>52</sup> [1939] 2 DLR 272.

will not usually be liable for procuring the publication of defamatory material. On the other hand, the distinction between procuring and facilitating a tort is irrelevant to determining whether a carrier “takes part” in publishing material.

In *Irish Law of Defamation*, McDonald deals quite differently with the common law liability of carriers. He argues that telephone companies may be entitled to the defence of innocent dissemination, but that the position is completely unclear because of the absence of case law. McDonald maintains that the liability of telephone companies for defamatory publications made by users raises:

... difficult legal issues concerning the innocent person or utility who assists, either actively or passively, the distribution of defamatory matter through electronic or other means. While common sense might suggest that there should not be liability in such cases, it is not clear whether that would be because there is no publication by the utility, or if there is, that it is absolutely privileged, or that it comes within the distributor’s exception, or is protected by a qualified privilege – which, in the last two cases would mean that liability could be found on some occasions.<sup>53</sup>

The liability of telecommunications carriers for transmitting defamatory material is unclear under English and Australian common law because there is no authoritative case law. The only statements dealing directly with the issue are those of Morland J in *Godfrey v Demon Internet Ltd*,<sup>54</sup> who merely held that *Anderson’s case* could not assist the ISP defendant, because it did not play a merely passive role in communicating defamatory material. There are, however, strong policy considerations in favour of minimising the liability of telecommunications carriers for communications content. These considerations include providing an efficient public communications system and protecting the privacy of communications transmitted by a carrier.<sup>55</sup>

If a carrier is held not to be a publisher of material communicated by means of its network, the result is that, as in *Anderson’s case*, there would be no publication by the carrier even if it knows that material being sent over its network is defamatory. *Gatley*, however, apparently interprets *Lobay’s case* as suggesting that knowledge that facilities are being used to publish defamatory material may render the facility provider liable for publishing the material. At para 3.6.2 above, it was pointed out that in *Urbanich v Drummoyne Municipal Council*, Hunt J held that a person in control of premises could be liable for publishing a defamatory statement displayed on the premises if it could be established the person consented to the presence of the statement; and that consent could be inferred from notice of the statement, an ability to remove it and a failure to do so within a reasonable time. The problem with *Gatley’s* interpretation is that, to date,

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<sup>53</sup> McDonald (1989) *op cit* p 66.

<sup>54</sup> [1999] 4 All ER 342.

<sup>55</sup> In Australia, the privacy interests of persons using telecommunications systems are principally protected by the *Telecommunications (Interception) Act 1979* (Cth) and Part 13 of the *Telecommunications Act 1997* (Cth). For a full discussion of telecommunications privacy in Australia see Roger S Magnusson, “Telecommunications and Privacy: new issues for carriers and carriage service providers” (1999) 4(3) *Media and Arts Law Review* 159.

however, no comparable principle has been established to render a person who provides facilities used in the publication of defamatory material liable once he or she has notice of the defamatory material.

One potential problem with holding that a carrier is not a publisher is that it would seem to mean that a distinction must be drawn between electronic dissemination and the physical distribution of material. The need for this distinction arises from the old English case, *Day v Bream*,<sup>56</sup> referred to at para [3.5] above, in which a porter who merely delivered handbills was held *prima facie* liable for publishing defamatory matter contained in the bills.

If a carrier is held to be a publisher, there is little doubt that, under Australian common law, it would be entitled to the defence of innocent dissemination. This is because, in the normal course of business, a carrier has no control of the content of material transmitted by means of its network. In fact, it could be argued that the very essence of the role of a telecommunications carrier is to have no involvement in the content of material transmitted by means of its communications system.

#### 5.4 Conclusion

Even at the extreme ends of the content/carriage spectrum there are significant areas of uncertainty about the application of the law relating to liability for publishing defamatory matter to persons involved with the communication of material by means of the Internet. Content providers and message originators are liable for publishing material to the same extent as the authors, or main publishers, of print or broadcast material. Message originators are liable for repeating defamatory material included as attachments to Internet messages. It is unclear whether content providers are liable for publishing defamatory matter published on hyperlinked Web sites. Nevertheless, it could possibly be argued that content providers publish hyperlinked material because the hyperlinks direct users to the linked Web material, or serve to distribute the linked material. If content providers are liable for hyperlinked material, in relation to that material, they probably stand in the position of subordinate publishers or secondary distributors, and are therefore entitled to the defence of innocent dissemination.

In the United States, a New York court has held that a telecommunications carrier is not liable for publishing material transmitted by means of its network. This is because a carrier does not perform an active or affirmative function in the preparation or transfer of a message. Given the extent to which special obligations are imposed on common carriers under United States law, it cannot be assumed that English and Australian common law will follow this precedent. The one English case to consider the United States decision, *Godfrey v Demon Internet Ltd*,<sup>57</sup> did not expressly endorse the distinction between those that play an active role in communicating material, and those that play a purely passive role. Nevertheless, neither did the decision reject this basis for

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<sup>56</sup> (1837) 174 ER 212.

<sup>57</sup> [1999] 4 All ER 342.

distinguishing between publishers and non-publishers. Moreover, there are sound policy reasons for excluding a carrier from liability for defamatory messages transmitted by means of its network. These considerations include the importance of an efficient telecommunications system, and the need to preserve the privacy of telecommunications users. Before an Australian court could conclude that a carrier is not a publisher, however, the basis for distinguishing between publishers and non-publishers needs to be clarified, particularly in relation to the liability of mere facility providers.

In the absence of case law, there appear to be three possible ways of characterising the liability of a carrier:

- A carrier is not a publisher, even if it has notice that its network is being used to communicate defamatory matter. This is the position established in the United States by *Anderson's case*. This position was neither approved nor rejected by Morland J in *Godfrey v Demon Internet Ltd*.<sup>58</sup>
- A carrier is a publisher if it consents to the communication of defamatory material by means of its network. Consent might be inferred from notice of the material, an ability to remove it and a failure to remove it within a reasonable period following a request. This possibility is based on an analogy with cases such as *Byrne v Deane* and *Urbanchich v Drummoyne Municipal Council*, which establish that a person who controls premises may be liable for failing to remove defamatory material. As explained at para [6.2.2] below, this is one basis on which Morland J held that an ISP is a publisher in *Godfrey v Demon Internet, Ltd*.
- A carrier may be a publisher because it “takes part” in communicating defamatory material, in the same way as an innocent porter who delivers defamatory printed matter is liable. This is the position established, in relation to printed material, by *Day v Bream*. If a carrier is liable on this basis, there is little doubt that it will be entitled to the defence of innocent dissemination, as it is analogous to distributors of printed matter, and has little control or supervision of the content of material transmitted by its network. This would appear to be the least likely of the possible approaches to be adopted by the courts.

Whether a telecommunications carrier should be liable for defamatory material transmitted by means of its network and, if so, the appropriate extent of liability, is dealt with in Part 7 of this paper.

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<sup>58</sup> [1999] 4 All ER 342.