

BETWEEN A ROCK AND A HARD PLACE: DEFAMATION AND INTERNET SERVICE PROVIDERS

Ryan Savage*

Defamation law has long since attempted to strike a delicate balance between the rights of free speech and the right to one's reputation. This balance has, however, become increasingly difficult to maintain since the explosion of mass communication through the Internet. The Internet provides users, who can hide behind a cloak of anonymity, with instant communication to mass audiences relatively free of effort or cost. It is the only form of mass communication that is not subject to any type of filtering process before messages are published to the world. These factors have thrown the law of defamation into an entirely new context. Canada must address the changing needs of defamation law within this new era of technology.

Internet service Providers (ISPs) have been caught in the legal confusion as traditional defamation law attempts to address a changing reality. ISPs have relied on the common law defence of innocent dissemination. The defence is grounded in the principle that persons should not be held liable for material over which they had no effectual control. This defence has led courts to create a key distinction between distributors and publishers of defamatory material. Usually the latter will face liability while the former will not.

However, as the jurisprudence in the United States (US) and the United Kingdom (UK) has shown, the distinction has placed ISPs in a "catch-22" situation. If they actively filter their service, in a moral attempt to discourage defamation, the courts are likely to label them a publisher (due to the degree of control they exercise over the material) and thus find them liable for any defamatory statements that are made. On the other hand, if ISPs do nothing the courts may find that they "ought" to have known, or that they were negligent in not knowing of the defamation.

Both the US and the UK have dealt with the liability of ISPs through legislation. The US has dealt with this issue by passing the Communications Decency Act (CDA), which provides ISPs with a complete statutory defence for any defamatory material disseminated by its users. The UK, on the other hand, passed the Defamation Act, which essentially codified the defence of innocent dissemination.

Canada has not yet chosen to address the issue by statute. I would argue that Canada should maintain this position and allow the common law tort of defamation do exactly what it is best suited to do - evolve. The US and the UK have tied their hands by passing their respective statutes. The key issue with respect to this area of law is the degree of control that the ISPs have over the material disseminated.

* Taylor McCaffrey Barristers & Solicitors.

This is a question of fact, which should be determined on a case by case basis, having concern for many different factors. These factors include the nature of the ISP, the amount of postings which the ISP would be required to screen, the longevity of the postings, and the ISP's reaction to any notification or warning that may have been given regarding the defamatory material. In issuing damages, Canadian courts must be cautious so as not to dissuade ISPs from providing a service which society deems beneficial. In making determinations based on these factors, and by issuing damages within the unique context that ISPs find themselves in, perhaps Canada can find a balance between the right to free speech and the right to one's reputation.

I. INTRODUCTION

*Good name in man and woman, dear my lord,
Is the immediate jewel of their souls;
Who steals my purse steals trash; 'tis something, nothing,
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches of me my good name,
Robs me of that which not enriches him,
And makes me poor indeed.*

William Shakespeare, Othello III

SINCE THE BEGINNING OF CIVILIZATION, humans have recognized the importance of status among communities. That status is, and has always been, based upon a person's reputation. To be viewed poorly by others therefore, is to lose one's earned position within the community and is not taken lightly. The law in Canada has recognized this fact and has made it both a criminal offence and a civil wrong to maliciously ruin another's reputation.

The importance of reputation, and a right not to have it tainted at the hands of another, has been met with much controversy. For those who believe in free speech, the right to speak freely must be held above any right to reputation. The law of defamation has tried to balance these two competing interests. This balance has, however, become increasingly different in our highly technological society. The internet has brought the world closer together and, through mass communication, has made it easier than ever to set up a soap box and voice grievances. The internet has a "no holds barred" ethic, where free speech prevails and the timid are not welcome. These factors have resulted in defamation rapidly becoming one of the hottest legal issues on the internet. While the 20th century was the age of internet proliferation, the 21st century may become the age of internet litigation.

This paper will deal with the civil liability of Canadian internet serv-

ice providers (ISPs) for defamatory material that is posted through their service. For clarity's sake, it is important to begin with a brief look at the principles behind the tort of defamation. This paper will then briefly examine the role of the internet and the ISP. Canadian jurisprudence on this topic is virtually nonexistent. In order to properly examine the issue it is, therefore, necessary to look at the law as it has developed in both the United States (US) and the United Kingdom (UK). Only then will it be possible to consider the factors that will most likely be influential in establishing our own national jurisprudence in the area.

II. DEFAMATION

DEFAMATION OCCURS IN TWO FORMS: slander and libel. Traditionally, slander refers to oral statements, while libel refers to published materials. This distinction is important because at common law damages are presumed for libel but not for slander. In Manitoba this problem has been addressed by the Defamation Act,¹ which clearly specifies that damages are presumed in an action for both libel and slander.

The Criminal Code of Canada defines defamatory libel as:

matter published, without lawful justification, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person concerning whom it is published.²

The standard for civil defamation is not quite as high. Lord Atkin, in a House of Lords decision, stated that a defamatory statement is one that tends "to lower the plaintiff in the estimation of right-thinking members of society generally."³

Liability for defamation is strict in that damages are presumed. In order to succeed in an action for defamation the plaintiff need only prove that the publication was defamatory, that the material refers to the plaintiff, and that it was published to a third party. Upon proof of publication the law presumes that the statement is false and that it was published with malice.⁴ Under Canadian law, every repetition of a defamatory state-

¹ R.S.M. 1987, c. D20 at s. 2.

² R.S.C. 1985, c. C-46 at s. 297.

³ *Sim v. Stretch*, [1936] 2 ALL E.R. 1237 at 1240.

⁴ D. Potts, "Defamation on the Internet" in *New and Emerging Legal Issues on the Internet* (Toronto, Ontario: Canadian Institute Publications, 1996) at 10.

ment is a new publication for which a separate cause of action will lie.⁵ This obviously creates a problem for ISPs as messages can be sent to thousands of people through their service in a matter of seconds.

In determining whether a statement is defamatory a judge will construe the statement as a whole, considering the natural and ordinary meaning of the words, and will take into account all of the relevant circumstances. What seems harmless may, therefore, become defamatory once certain factors are considered. For example, a story associating a person with a house may be harmless, but if it is known to some as a brothel, then the statement may become defamatory. Since liability does not depend on proof of fault, publishers cannot escape liability by claiming ignorance of these special facts.

The common law does, however, recognize certain defences to defamation. The first such defence is justification, or proof that the statement is true. The second is that it is fair comment on a matter of public interest. What constitutes public interest is a matter of law.⁶ The defendant must show that the comment was fair by reference to at least some truth. The third defence to defamation is privilege. In Manitoba, these privileged communications have been codified in the Defamation Act. The fourth and final defence for an action of defamation is innocent dissemination. Wholesalers, booksellers, and libraries have avoided liability on the basis that they were mere distributors, providing that they did not know, and had no reason to believe, that the material was defamatory. The idea behind the defence of innocent dissemination is that liability should not attach to individuals who act as mere conduits for the dissemination of defamatory material.

The principle of innocent dissemination was established over 100 years ago, in a decision of the English Court, *Vitzelly v. Mudies Select Library Ltd.*:

A Distributor can take the benefit of this defence where he can show:

1. that he was innocent of any knowledge of the libel contained in the work disseminated by him,
2. that there was nothing in the work or the circumstances under which it came to him, or was disseminated by him

⁵ R. Brown, *The Law of Defamation in Canada*, vol. 1, 2d ed. (Scarborough, Ontario: Carswell, 1994) at 361.

⁶ E. Barendt et al., *Libel and the Media* (New York: Oxford University Press, 1997) at 9.

which ought to have led him to suppose that it contained a libel, and

3. that 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...⁷

This defence is vital for ISPs and will be discussed in detail later in the paper.

III. THE INTERNET

THE INTERNET HAS PROVIDED AN UNPRECEDENTED OPPORTUNITY for mass communication, on limitless topics, at an extremely affordable price. The internet is highly interactive in nature as communications from people around the world can now occur at once. Perhaps the greatest appeal of the internet, however, is its anonymity. Users can make postings anonymously or under assumed names. This makes it exceedingly difficult to enforce defamation laws on the internet. The internet in and of itself does not create a problem in applying defamation law. A libelous statement made online is as defamatory as a statement published in a book or on a wall. Less clear is the liability of ISPs. The difficulty in holding the actual user liable will surely lead many victims to seek compensation against the intermediary distributors. Justice Sopinka of the Supreme Court of Canada admitted that anonymity will likely increase the likelihood of holding ISPs liable. Sopinka J. stated:

Where the defamatory message is posted by an anonymous user, a court may be reluctant to excuse the service provider and leave the injured party empty-handed.⁸

Defamation law has historically recognized the liability of third party intermediaries. Publishers of books, articles, and newspapers have been held liable for defamatory material. Publishers have also been held liable for any republications that are a "natural and probable consequence of the original publication."⁹ This obviously creates another problem for ISPs

⁷ [1900] 2 Q.B. 170 at 180.

⁸ J. Jannuska, "To Shoot the Messenger? A Canadian Approach to Libel and the On-Line Service Provider," online: Catalaw <<http://www.catalaw.com/logic/docs/jj-libel.html>>, as quoted by Sopinka J of the Supreme Court of Canada.

⁹ *Chinese Cultural Centre of Vancouver v. Holt* (1978), 87 D.L.R. (3d) 744, in which a Toronto newspaper was held liable for defamatory remarks published by another newspaper in British Columbia.

as messages can be (and are) forwarded almost instantaneously. The internet is truly unique in that it is the only form of mass communication where the author of disseminated material is not subject to any editorial filter prior to publication. This makes it next to impossible for an ISP to exercise any control over its users in making the initial defamatory statement.

IV. INTERNET SERVICE PROVIDERS

AN ISP IS A GENERIC TERM representing two different types of actors: a pure access provider and a mixed service provider. Both provide access to the internet through your personal computer, using either telephone lines or cable. Individuals are then charged for the service and for the time they spend on the internet. Mixed service providers, besides providing access to the internet, distribute some original content. Shaw or Videon are examples of pure access providers, while an example of a mixed service provider is America Online (AOL).

V. ANALYSIS

THE LAW WITH RESPECT TO THE LIABILITY OF ISPs for defamation has been led by the US and, to a lesser degree, the UK. As mentioned earlier, a key defence for ISPs is that of innocent dissemination. This defence is grounded in the policy issue of control over the material. One should not be liable for material or statements he has no effectual control over. Pre-internet law has recognized this policy concern, and has responded by creating two separate classes of dissemination: publisher and distributor. This distinction is based on the expected level of control over the material. A publisher, such as a newspaper or magazine, has traditionally had the power to exercise control over what is disseminated in its publications. By contrast a distributor, such as a bookstore or newsstand, does not typically have the same level of control. Historically, therefore, courts are much more eager to find liability in the former, rather than the latter.

A. The United States

Two leading American cases exemplify the importance of the distinction between publisher and distributor. In *Cubby Inc. v. CompuServe Inc.*,¹⁰ the defendant CompuServe, had developed contracts with outside publishers to provide newsletters and information databases for its

¹⁰ 776 F. Supp. 135 at 137 (1991).

CompuServe Network. One of the newsletters was titled "Rumorville," and contained articles and updates of journalists and their work. A competing publication, "Skuttlebut," was developed by the plaintiff, Cubby Inc., and was accessible through a private bulletin board service (BBS). An April 1990 edition of Rumorville appearing on CompuServe's network accused Skuttlebut of stealing its information and republishing it as its own. The Court considered the issue of whether CompuServe could be held liable as a republisher of the material. (It is important to note that CompuServe had no opportunity to review the contents of the publication at issue before it was uploaded into its computer banks.) The majority of the Court held that CompuServe could not be held liable for the material because it was a "mere passive conduit."

CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so.¹¹

The second leading case on ISP liability for defamation is the case of *Stratton Oakmount v. Prodigy*.¹² Stratton Oakmount, a securities firm, alleged that defamatory statements accusing it of fraudulent acts were published in "Money Talk," a computer bulletin board managed by the defendant, Prodigy Services Company. The defendant had hired a board leader, whose task it was to keep discussion on "money talk" running smoothly, according to its own rules and guidelines. Prodigy also had a "content guidelines" provision, in which users were requested to refrain from using insulting language. If they failed to do so, Prodigy would remove the user as soon as it was brought to its attention. Prodigy also had a software screening program which filtered offensive language. A *Justice* held that Prodigy, in addition to holding itself out to the public as a content-editing service provider, by creating a position to effect that editing process, voluntarily accepted responsibility for the defamatory statements published on its service.¹³

As these two cases demonstrate, ISPs are placed in a "catch-22" position. By exercising responsibility and attempting to regulate its service, the ISP may be classified as a publisher, thereby exposing itself to liabil-

¹¹ *Ibid* at 140.

¹² WL 323710 N.Y. Sup. at 2 (1995).

¹³ *Ibid* at 2, 4.

ity. On the other hand, if it does not act it could be found negligent in failing to maintain proper security measures and be denied the defence of innocent dissemination. As well, because communications occur so frequently and rapidly, a complaint could be posted seconds after the defamatory message was made. If an ISP does not react to the complaint in a reasonable amount of time, it may be held liable.

As a result of this confusion, the US Congress passed the 1996 Communications Decency Act (CDA).¹⁴ The preamble recognizes the development of interactive computer services, and the "myriad of avenues for intellectual activity."¹⁵ The act states that it is the policy of the US to remove disincentives for the development and utilization of blocking and filtering techniques, and for the protection of "good samaritan" blocking and screening.¹⁶ These references are a clear government aim at eliminating the potential dilemma that the Prodigy and CompuServe cases surely would have created for ISPs. The key provision in the act provides that:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.¹⁷

The first major case to apply the CDA was *Zeran v. America Online, Inc.*¹⁸ Shortly after the Oklahoma City bombings, postings began to appear on AOL offering to sell tasteless t-shirts and other merchandise depicting the tragedy. The posting requested those interested to contact "Ken." The phone number provided was the business number of a Mr. Kenneth Zeran. Mr. Zeran denied all involvement, and notified AOL of the postings. Similar messages continued to appear however, and Mr. Zeran took legal action. Mr. Zeran tried to get around the CDA by suing AOL, not as a publisher, but as a distributor who had been put on notice of the defamation. Therefore, just as a bookstore could be held liable for continued distribution of a book that it knew to contain false and defamatory material, Zeran argued that AOL ought to be held liable for continued distribution of, and failure to retract, material AOL knew to be defamatory. Zeran argued that this form of distributor liability was distinct from any publisher liability covered under the CDA. The Court however, disagreed. Ellis J. stated:

¹⁴ 47 U.S.C.A. § 230.

¹⁵ *Ibid.* at s. 230(a), (b).

¹⁶ *Ibid.* at s. 230(c)(i).

¹⁷ *Zeran v. America Online, Inc.*, 958 F. Supp. 1124 (1997).

¹⁸ *Ibid.* at 1133.

A distributor liability, or more precisely, liability for knowingly or negligently distributing defamatory material, is merely a species or type of liability for publishing defamatory material.¹⁹

The District Court held that the CDA intended to retain state law remedies against ISPs, except where those remedies conflicted with federal law (i.e. the CDA). The Court then held that the plaintiff's claim against AOL for negligent distribution of defamatory material conflicted with the purposes and objectives of the CDA.²⁰ The Court, therefore, barred recovery and denied the action.²¹ The decision was upheld by the Court of Appeal and petition to the US Supreme Court was denied.²²

The law in the US with respect to the liability of ISPs for defamation on the internet seems to be settled. The CDA gives ISPs a complete defence for defamatory statements made by its users, and the courts are seemingly not prepared to challenge its scope or effect.

B. The United Kingdom

In 1996, the UK passed the Defamation Act 1996 (UK).²³ Simply put, this act codified the defence of innocent dissemination. It states that a person will have a defence to an action in defamation if he shows that:

- he was not the author, editor or publisher of the statement complained of,
- he took reasonable care in relation to its publication and
- he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.²⁴

The act goes on to state that:

[a] person shall not be considered the author, editor or publisher of a statement if he is only involved -

¹⁹ *Ibid.* at 1135.

²⁰ *Ibid.* at 1137.

²¹ *Zeran v. America Online, Inc.*, 129 F. 3d 327 (1997).

²² *Zeran v. America Online, Inc.*, 118 S. Ct. 2341 (1998).

²³ c. 31.

²⁴ *Ibid.* at s. 1(1).

- in processing, making copies of, distributing or selling any electronic medium in or in which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, or distributed, or made available in electronic form; or
- as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.²⁵

The leading English case that applies the Defamation Act (1996) to ISPs is the case of *Godfrey v. Demon Internet Ltd.*²⁶ The defendant ISP carried a newsgroup service called "Soc Culture Thai." On 13 January 1997, a defamatory statement concerning the plaintiff was posted on the defendant's ISP. The plaintiff sent a letter by fax to the defendant's managing director, informing him of the posting and asking that it be removed. The posting was not removed, and remained until its expiry on about 27 January 1997. The plaintiff only claimed damages from the time the defendant received notice of the defamatory statements.²⁷ The English Court reviewed the American authority, including the CDA. Morland J. stated: "[i]n my judgement the English [Defamation Act] - 1996 did not adopt this approach or have this purpose" (referring to the CDA).²⁸ The Court ruled that the defendants could not avail themselves of the defence given by the Defamation Act (1996) once they had actual knowledge of the defamatory statements.²⁹

The law in the UK, though seemingly comparable to the US, has continued to place an importance on how much control the ISP had over the statements made. As in the common law, once the ISPs are made aware of such statements, they cannot rely on the defence of innocent dissemination or any codified version thereof. However, the act does not address the policy concern that was alluded to in the CDA. That is, ISPs are still left in a catch-22 position. If they take positive means to filter their content, then they are likely to be deemed to have control, and will thus be branded as a publisher. If they do not take any positive steps, the court may find that they did not take reasonable care in regard to their publication.

²⁵ *Ibid.* at s. 1(3).

²⁶ *Godfrey v. Demon Internet Ltd.*, [1999] E.W.J. No. 1226.

²⁷ *Ibid.* at para. 11.

²⁸ *Ibid.* at para. 50.

²⁹ *Ibid.* at para. 45.

C. Canada

Canada has yet to establish case law or legislation in online defamation. Canadian ISPs are therefore only left with the common law defences to defamation. As was the case in the US prior to the CDA, the distinction between publishers and distributors becomes key. The policy reason behind this distinction is to address the expected level of control that the disseminator will have over the material. Clearly, it would be unwise for Canada to adopt American jurisprudence prior to the development of the CDA. This would result in ISPs being punished for taking an active role in attempting to screen their material. The American CDA addressed the importance of this "good samaritan" principle, and so too should Canada. Canada however, must find a way to address this principle without tying its hands, similar to what the Americans have done with the CDA. Degree of control underlies the defence of innocent dissemination. It seems clear that the level of control will be a question of fact. A blanket statute cannot properly address this issue. Courts must try to find a balance between the interests of ISPs and the interests of users. They must also find a balance between the right of free trade speech and the right to personal integrity. This balance involves an examination into many factors and should go beyond the labelling of ISPs as either a publisher or a distributor.

The first, and perhaps most important factor to be considered is whether the ISP is a pure access provider or mixed access provider. Recall that pure access providers merely establish the connection to the internet, while mixed access providers are more heavily involved in the dissemination of material. Greater scrutiny and liability should therefore attach to mixed service providers, which will have a better opportunity to control the material posted through their service.

Another key factor to consider is the sheer volume of postings that an ISP would be required to screen. The nature of ISPs is such that rarely is there knowledge of defamatory material before it is brought to the attention of an ISP through complaint. The failure to review all content should not automatically be viewed as negligent. However, liability should not be limited to actual knowledge by the ISP either. The court must determine, looking at the nature of the ISP, whether there were circumstances that should have led the ISP to suspect that its users might make libelous statements. An example of this would arise where a mixed service provider was operating a chat room on a very sensitive and controversial issue. This should create a level of warning for the ISP, and an expectation that the ISP would then take greater care in monitoring its users activities on the site.

The courts must also consider the longevity of the information trans-

mitted. The longevity of the information has a direct influence on the possibility of exercising control. Liability, therefore, cannot be evaluated in the same way for information that is stable as for information that varies continuously. It is in many cases, virtually impossible to revise the content of variable information, or once transmitted, to stop its circulation before damage is suffered.

If an ISP is warned of a defamatory message, the court must examine the ISP's conduct in response to the complaint. An ISP would lose the defence of innocent dissemination if it became aware of a posting but took no reasonable measures to have it removed.

Damages for defamation on the internet must be considered unique. Courts should not base damages on standards that have traditionally applied to publishers of defamatory material. Publishers may be held liable for each and every republication of the defamatory statement. However, considering the speed and mass volume of communication that the internet allows, this would create an undue burden on ISPs. With the click of a single button, defamatory material can be transmitted to thousands of people, throughout the world. This must be considered by courts when assessing damages. A cap should be placed upon an ISP's liability for damages. If an ISP knew that it could potentially be liable for the actions of its users for amounts that would exceed the potential benefits of doing business, there would be little incentive for ISPs to begin or to continue operating.

ISPs, like any business venture, must please their customer base. Internet users traditionally prefer to communicate in an uncensored environment. The most popular bulletin boards tend to be those where users can speak freely. For the ISP, a decision to edit or screen its content may be a difficult one. Most of the profits that ISPs receive come from company advertising, and companies will naturally look to advertise in the most popular sites. Any decision to screen user content may, therefore, diminish subscriptions and result in a loss of advertising dollars. An ISP's decision will not be made any easier when it considers that any move to screen its content may expose it to liability by being classified as a publisher. Again this cannot be the policy direction that Canadian courts would want to follow.

As with most of our legal jurisprudence, Canada seems stuck somewhere in the middle between the US and the UK. Having examined the case law and legislation for both jurisdictions, however, this does not seem to be such a bad place to be. It seems that the American approach may be too strict. While the CDA was drafted to deal with the dilemma that ISPs were facing (the "good samaritan" principle), it may actually have worsened the situation. ISPs can now hide behind the CDA and escape liability when they did (or should) have had control over the material. The decision in

Zeran, for example, seems to give ISPs complete immunity from liability even when they knew that there was defamatory material being posted on their service and chose not to act.

The approach taken in the United Kingdom appears to be more suitable despite the fact that it is a codification of a legal principle that has been established for over 100 years. Issues arising with respect to the internet are numerous and constantly changing. The law must be capable of evolving with these changes. As a result, it would seem counter-productive to codify the principle of innocent dissemination. In addition, the UK Defamation Act (1996) does not resolve the catch-22 situation that ISPs fall under. If no positive steps are taken to filter information, the ISP may lose the defence provided for under the act. If they do take positive action however, the court may later construe these actions as steps taken to exercise control and classify the ISP as a publisher. Codification of the innocent dissemination defence does not take into consideration the many factors listed above. The courts are in a better position than the legislature to deal with these factors. They must be considered on a case-by-case basis, and are not prone to codification.

The easiest route to resolving the issue of ISP liability would be to have a better system of enforcing defamation law against the actual users who post such statements. This is obviously complicated by the ability of internet users to remain completely anonymous. The identity of a person in cyberspace may be discovered through the records of the ISP, where a person's name and e-mail address are attached. Even assuming that the user has indicated his correct name and address however, there is no duty on ISPs to voluntarily divulge user information. In fact, ISPs would most likely be reluctant to do so, as doing so would surely result in a loss of subscribers who often wish to remain unknown.

An Ontario Superior Court decision³⁰ dealt with this very issue. The Court required an ISP to produce the name of its user so that the plaintiff could pursue an action for defamation against him. The plaintiff relied on ss. 30.10 and 31.10 of the Ontario Rules of Civil Procedure, which provide for production or inspection of documents in the possession, control, or power of persons not a party to the action. They also allow for examination for discovery of any person where there is reason to believe that he or she has information relevant to a material issue in the action.³¹ The Court began by affirming that an ISP did not have a duty to produce the names or addresses of its users on request. Wilkins J. stated:

Some degree of privacy of confidentiality with respect to

³⁰ *Irwin Toy Ltd. v. Doe*, [2000] O.J. No. 3318.

³¹ *Ibid.* at para. 13.

the identity of the internet protocol address of the originator of a message has significant safety value and is in keeping with what should be perceived as being good public policy. As far as I am aware, there is no duty or obligation upon the internet service provider to voluntarily disclose the identity of an internet protocol address or to provide that information upon request.³²

The Court ruled, however, that there had been a *prima facie* case against the would-be defendant that, the Court asserted, was the test used to determine whether ss. 30.10 and 31.10 could be used. It is interesting to note that the ISP was not included in the statement of claim. In fact Wilkins J. stated that the law with respect to the liability of ISPs is unclear and that:

It would be unjust and expensive to require a plaintiff to commence a potentially losing law suit just to obtain the identity of the real tortfeasor from the service provider.³³

VI. CONCLUSION

ALTHOUGH IT IS DIFFICULT TO BE DEFINITIVE with respect to the likely result under Canadian law, the case of *Irwin Toy* suggests that courts may be more willing to force ISPs to better account for their users by maintaining and supplying victims of defamation with the identity of their users. Perhaps Canadian courts ought to realize the difficulty that is created when traditional classifications such as publisher and distributor are applied to the internet.

The decisions on defamation liability emanating from the US and the UK highlight the constant tension that surrounds defamation law - balancing the interests of free speech with the interests of personal reputation. The internet adds other considerations to this balance, as traditional defamation law cannot be strictly adhered to. These considerations include the nature of the ISP, the practicality of reviewing millions of postings, the longevity of those postings, and the actions taken by the ISP if or when it was notified of the defamation. In assessing damages, the court must again be conscious of competing considerations. The traditional principle of defamation, that every republication of a defamatory statement is a separate cause of action, cannot be strictly applied to ISPs. An

³² *Ibid.* at para. 11.

³³ *Ibid.* at para. 19.

ISP cannot be held liable for every separate act of defamation that results from a single statement. This would result in an immediate loss of ISP services, as these companies would choose not to settle in Canada. ISPs are providing a service that society sees as beneficial (access to the internet). Therefore courts should not issue damages against an ISP that are so grave as to eliminate the opportunity to profit and thereby the motivation to pursue business. The public may view ISPs as the "bad guys" if courts are going to force them to screen and censor all of their material. The bottom line is that without ISPs there is no connection or access to the internet. Courts must recognize the dilemma that ISPs are in when assessing liability for damages.

The best way for Canadian courts to deal with the onslaught of litigation that will soon arrive at our borders is to do exactly what the common law does – evolve. The common law defence of innocent dissemination is a valuable tool for courts and ISPs to use in order to properly administer and distribute liability for defamation. However, it must not be applied strictly with reference to traditional cases and libel and slander. The internet has practically eliminated any functional use for the publisher/distributor distinction and courts should be loath to follow it. Instead, courts should be aware of the policy reasons behind the defence of innocent dissemination, that those who do not have and could not have practical control over the material disseminated should not be liable. In doing so, and in considering the practical factors that have, and will continue to develop around the internet, Canadian courts may find a balance between the right to speak freely and the right to protect one's reputation.