EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

MONTSERRAT

CLAIM NO. MNIHCV 2001/0031

BETWEEN:

DAVID S. BRANDT

Claimant

and

CLAUDE HOGAN

TONY GLASER

Defendants

2009: April 20;
2012: March 5

Appearances:
Mr. Warren Cassell for the Claimant.
Mr. Jean Kelsick for the Defendants.

JUDGMENT[1]

Introduction

[1] LEIGERTWOOD-OCTAVE J: The internet is a new phenomenon[2]. In January 1997, in the foreword to the first edition of Gringas: The Laws of the Internet[3], Hon Sir Richard Jacob had this to say, "Judging by some of the stuff one reads – particularly from journalists – the Internet will throw laws, or many of them into chaos". Whether that statement applies to the law of defamation is still undecided but one of the issues in this case begs the question.

[1] Approved for delivery subject to any editorial corrections
[2] Eady J – Bunt v Tilley check paragraph
[3] Gringas: The Laws of the Internet – 3rd Ed. [2008] Tottel Publishing

[2] The Claimant ["Mr. Brandt"] is a former Chief Minister of Montserrat and a practising barrister and solicitor on the island.

[3] The Second Defendant ["Mr. Glaser"] is a medical doctor who lived and worked in Montserrat from 1981 to 1983. Sometime in 1995, Mr. Glaser"], a medical doctor set up an online email group called "The Electronic Evergreen", also referred to as "MNI-INFO". The First Defendant ["Mr. Hogan"] was a member and subscriber of the Electronic Evergreen.

[4] On 31st July 2001, Mr. Hogan posted the following email message ["the Hogan posting"] on the Electronic Evergreen:

> *'Hi Folks,*
> *By now you are all aware that the name former Chief Minister frightens me. Only this past week David S. Brandt again passed off as a member of a Government delegation which traveled to St. Maarten for talks with the AUC's, Mr. Tien.*
> *DBS did not travel with the Government delegation, but apparently he is a lawyer for the proposed Tien operation for Montserrat was in St. Maarten at the same time.*
> *By now you would have read the Reporter's abstract of the ludicrous set of concessions sought from the GOM which DSB as a Montserratian could not have drafted. Then again you never know.*
> *The point is however there seems to be some force so anti-British and so unkind to the Montserratian people that the island is offered to the Chinese. I guess the pay-off will come in the form of legal fees.*
>
> *Claude H.'*

[5] On 1st October 2001, Mr. Brandt filed a defamation claim against Mr. Hogan and Mr. Glaser, in relation to the words contained in the Hogan posting, alleging that Mr. Hogan had falsely and maliciously written the posting and had published it. As the administrator of the Electronic Evergreen, Mr. Glaser was responsible for receiving the posting and for disseminating it to its members, thereby publishing it electronically. Mr. Brandt claimed damages for injury to his character, credit and reputation.

[6] Mr. Hogan's defence was that the words complained of in the posting were not defamatory.

[7] In his Defence, Mr. Glaser admitted setting up Electronic Evergreen as a subscription only email list but denied that he had disseminated or published the Hogan posting electronically or at all. His case is that his role in relation to the Electronic Evergreen was permitting someone to join the email group. The posting of members' email messages was an entirely automatic electronic process in which he did not and could not participate.

[8] His alternative contention is that the words in the posting are true in substance and in fact.

[9] It is appropriate to state at this point that at the commencement of the trial, Mr. Cassell informed the court that Mr. Brandt was no longer proceeding against Mr. Hogan and that Mr. Kelsick had been so advised in writing. Mr. Hogan however remained a party to the action as no application was made to discontinue proceedings against him.

ISSUES

[10] There is one issue common to most defamation claims that the court does not have to determine and that is whether or not the words contained in the Hogan posting were defamatory, because at the beginning of his closing address, Mr. Kelsick conceded that they were.

[12] That leaves as the critical issue whether Mr. Glaser had published the Hogan posting. If it is found that that he did in fact publish it and that he could not rely on the defences innocent dissemination, justification or fair comment for doing so, then the court would have to go on to determine the amount of damages that should be awarded to Mr. Brandt.

The Evidence

[13] It is common ground that the Hogan posting was published on the Electronic Evergreen and to be able to conclude who could be said to have published it, evidence relating to its nature and how it functioned is particularly relevant. Neither side adduced any expert technical evidence during the trial.

[14] On the Claimant's side, although Mr. Brandt admitted in cross-examination that he did not understand the difference between a website and an email list, he knew that Mr. Glaser had started and set up the Internet service and maintained it. He was aware of the technical ability to control or edit it. No one could join without his permission and he alone could put people on the system and take them off. He believed that Mr. Glaser had set it up in such a way that any member of the list could publish what they wished including libel. Mr. Glaser was the founder, solicitor and facilitator of the list.

[15] Mr. Glaser gave the background to the Electronic Evergreen. In 1995, after learning of the volcanic crisis on Montserrat, Mr. Glaser stated that on his own initiative, he had started an email group called the Electronic Evergreen to help the friends and relatives of Montserratians all over the world to find out what was going on in Montserrat. He chose the name Electronic Evergreen because he felt it should be like the old Evergreen Tree in Plymouth. The Evergreen was a place where you would run into pretty much run into everyone, and where you could catch up on news and gossip, and generally feel that you were part of the life of Montserrat.

[16] At first he just sent email messages on his own but then he was offered the resources of Gem Radio's computer system, which allowed email messages to be automatically forwarded to anyone who wanted to receive them. On his own initiative he created a forum so that persons in Montserrat could communicate with persons all over the world and over 500 persons joined this group.

[16] Mr. Glaser described the Electronic Evergreen as being nothing more than an email group. If someone wanted to join the group or "list", as it was also referred to, he would tell a central computer called the "list server", which Mr. Glaser believed to be located in Wisconsin in the United States, to send mail to that person. If they wanted to leave the list, he would tell the list server. Mr. Glaser told the list server who was and who was not a member of the list, he did not own, lease or control it in any other way.

[17] He compared the list server to the Post Office which allows someone to send mail to other people and to receive mail from other people, looks after getting the mail delivered, not opening or reading the mail but just passing it along. Material is "posted" in the same way as you would post a letter. There is no possibility of "removing" a

posting or taking it out of the public domain, anymore than you can "remove" a letter that you had mailed at the Post Office, it could not be retrieved or accessed by anyone.

[18] As the coordinator of the Electronic Evergreen, Mr. Glaser compared his role to that of the Post Master. He looked after the system and made sure it kept running but he did not handle or deliver the mail himself. Each member of the list was aware of the basic functioning of the Evergreen Electronic, because Mr. Glaser's welcome message to them included this statement, *"This is an unmoderated group – that is, I do not and cannot screen or edit messages, and I received them at the same time as everyone else".*

[19] Because of the way that the Electronic Evergreen was set up it was technically impossible for him to read the email messages before they were delivered. The email messages were forwarded without any human intervention at all. It was not possible for Mr. Glaser to stop any mail that a member had sent from reaching its destination or from reaching all the other persons on the list. It was handled entirely by the list server. The email messages did not pass through his hands or his computer on the way, he could not open, read or censor them before they were sent on. It was on that basis that Mr. Glaser maintained that he could not be responsible for the posting because he did not write, publish, forward or disseminate it.

[20] Once someone had joined the list they could send an email to the list server and it would automatically send the email to every other member of the group. Unless you were subscribed to the group at the time the posting was made, you could not read it. As a member of the Electronic Evergreen he had received the posting complained of and there was a choice to click on "reply" or to make a comment. A member received the email at the time it was written, or not; it was a one-time, non-repeatable phenomenon. The material would never and could never be sent again, unless someone copied it by replying to it. In his case he had sent a response on 31st July 2001 disagreeing with the posting and he had replied to Mr. Cassell.

[21] Several of the questions put to him in cross-examination focused on the way that the Electronic Evergreen was set up. He agreed that the way it was set up there was no way of telling what someone would post but denied that he had had set it up that way.

He answered that he did not actively make a decision to set it up like that, instead it was the default way the whole set up at that was the way it operated. He was challenged on his answer that he had set it up with the assistance of other people when it was put to him that he had always maintained that he was one who had set it up. When asked if as a result of the way the Electronic Evergreen was set up, it was possible for a member to libel someone; his response was that he was not an expert on the definition of libel. He did state however that he had never contemplated defamatory matter being posted on the Electronic Evergreen.

Publication

[22] A defamation action cannot be maintained unless there is a publication, that is a communication of the words complained of to some person other than the claimant[4]. Any person who causes, procures, authorizes, concurs or approves the publication of defamatory material is prima facie liable for its publication[5]. The burden of proving that the defamatory words were published rests on the Claimant[6].

[23] In Byrne v Deane[7], Greene LJ set out how the court should approach the question as to what constitutes publication in a defamation action: *"publication… is a question of fact, and it must depend on the circumstances in each case whether or not publication has taken place[8]."* In that case a sign defaming the Claimant had been put up at the Defendants' golf club and it had remained there for a couple of days. In finding that as the Defendants had control over what was posted on the wall and could have removed the defamatory sign, were therefore liable for the publication, Greene J stated:

> *"In some circumstances a person, by refraining from removing or obliterating the defamatory matter, in not committing any publication at all. In other circumstances he may be doing so. The test it appears to me is this: having regard to all the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?"*

[4] Duncan & Neil on Defamation, Butterworths 2nd Ed. at para. 8.01
[5] Steel & Anor v Mc Donald's Corporation & Anor [1999] EWCA Civ 1144
[6] Ibid
[7] [1937] 1K.B. 818
[8] Ibid at 837

[24] The parties' submissions on publication focused primarily on the cases of Godfrey v Demon Internet Limited[9] and Bunt v Tilley[10], a case that the court brought to the attention of the parties at the close of the evidence and invited them to include it in their submissions[11]. Both cases deal with defamation and the Internet are directly relevant to the issue of electronic publication which arises in this case.

[25] The judgment in Godfrey v Demon Internet Limited[12] states that it is likely to have been first English defamation case involving the Internet to come up for judicial decision. The Plaintiff was a lecturer working in London. The Defendant was a major UK Internet Service Provider ["ISP"]. A posting made to an Internet newsgroup was received and stored on the Defendant's server. The posting was made by an anonymous person using another ISP but it appeared to come from the Plaintiff, who informed the Defendant that it was a forgery and requested that it be removed from their server as it defamed him. Although, having the technical capacity to do so, the Defendant did not remove the posting and it remained on the server for another ten days until it was deleted automatically. The Plaintiff brought an action against the Defendants claiming damages for libel as they had failed to remove the posting even after receiving his complaint.

[26] The main issue before the court on the Plaintiff's application to strike out the Defence was whether the Defendants could rely on Section 1 of the Defamation Act 1966, which deals with the defence of innocent dissemination. There is no statutory equivalent to Section 1 of the Defamation Act in our jurisdiction so the court's finding on that issue is not relevant in this case. However in granting the Plaintiff's application and relying on the case of Byrne v Deane[13], Morland J held that at common law, the Defendants were the publisher of the defamatory statement, because as the ISP, they had received and stored the posting and had transmitted or facilitated its transmission via the Internet to their newsgroup subscribers. They were not merely the passive owner of an electronic device through which postings were transmitted but actively chose to receive and store the newsgroup exchanges containing the defamatory

[9] [2001] QB 201
[10] [2006] EWHC 407 (QB)
[11] Maersk Co. Ltd v Wilson [2004] EWCA Civ 313
[12] Supra
[13] [1937] 1KB 818

posting, which could be accessed by their subscribers and they could have chosen to remove the posting.

[27] Bunt v Tilley[14] which was decided some seven years after Godfrey v Demon Internet Limited[15] . Mr. Bunt brought a claim against three individuals, including Mr. Tilley for libel and harassment, alleging that they had posted defamatory statement on the Internet. He also sought remedies against each individual's Internet Service Provider ["the ISP Defendants"], alleging that by providing the individual Defendants with a connection to the Internet, the ISPs were responsible for the posting and for the publication of the defamatory statement. There was no allegation made or evidence adduced that the ISPs had done anything other than to provide the individual Defendants with a connection to the Internet and one of them, Tiscali, applied to have the claim struck out or summarily dismissed, arguing that it had only provided a passive role by facilitating posting and could not therefore be a publisher in the context of defamation proceedings.

[28] In his judgment Eady J considered liability for publication in the context of the law of defamation:

> *"It seems to me important to focus on what the person did, or failed to do, in the chain of communication. It is clear that the state of a defendant's knowledge can be an important factor. If a person knowingly permits another to communicate information which is defamatory, where there would be an opportunity to prevent the publication, there would seem to be no reason in principle why liability should not accrue.[16].*
>
> …
>
> *I have little doubt, however, that to impose legal responsibility upon anyone under the common law for the publication of the words it is essential to demonstrate a degree of awareness or at least an assumption of general responsibility, such as has long been recognized in the context of editorial responsibility.[17]*
>
> *…*

[14] Supra.
[15] Supra.
[16] Ibid at para. 21
[17] Ibid at para. 22

> *To be liable for a defamatory publication it is not always necessary to be aware of the defamatory content … on the other hand, for a person to be held responsible there must be a knowing involvement in the process of publication of the relevant words. It is not enough that a person merely plays a passive instrumental role in the process[18].*

[29] Eady J finding for Tiscali held that an ISP which performed nothing more than a passive role in facilitating posting on the internet could not be deemed a publisher at common law[19].

[30] Relying on Bunt v Tilley[20], Mr. Cassel urged the court to conclude that Mr. Glaser was the publisher of the Hogan posting because unlike the ISP in that case, he had played an active and not passive role in its publication. He had set up the email group and the forum on his own initiative and he had created it to be a place for news, gossip and rumours, similar to the Evergreen tree that existed in Plymouth. He permitted the members to communicate and he knew that it was possible that defamatory matter could be posted. He failed to put a vetting mechanism in place and ensured that postings reached members of the group and it was irrelevant whether or not the postings were permanent. Mr. Glaser was aware of the Hogan posting although not aware of its defamatory content, which as Eady J held, was not mandatory to establish liability.

[31] Mr. Kelsick, relying on the same case, submitted that the ISPs that the judge had exonerated as "innocent facilitators" had a played a much more expansive role than Mr. Glaser. Unlike an ISP, he was not an intermediary and as a moderator he would be less culpable, as he did not have the ability to remove the posting. This was an unmoderated group and Mr. Glaser was not aware of the Hogan posting before dissemination. He referred to Paragraphs 36 and 37 of the judgment, to argue that a Claimant would have to prove that the Defendant had "knowingly participated" in the publication of the Hogan posting and that he had taken a conscious decision not to do

[18] Ibid para. 23
[19] Ibid at para. 36
[20] Supra

anything. Mr. Glaser had not admitted this in his witness statements and nothing elicited in cross examination could support such a finding.

[32] He also argued that on the principles in Godfrey v Demon Internet Limited[21] that Mr. Glaser was not liable, as he had not been asked to remove the Hogan posting and had failed to do so, which was the basis for the ISP's liability starting on the date it refused the posting that Mr. Godfrey had complained of. The question of being able to remove the posting did not arise in relation to Mr. Glaser's case because of the way the list server was set up and functioned from a technical point of view. The technical information given by Mr. Glaser in his evidence was uncontroverted and the court must accept it.

Findings on the Publication Issue

[33] I have reviewed the authorities and submissions in this case and found them to be quite helpful. Undoubtedly, publication in defamation actions has been affected by the advent of technology and will to continue to be so affected as it is likely that the numbers of online defamation claims are likely to increase in this jurisdictions and other jurisdiction worldwide. What remains the same since the seventy five years since the decision in Byrne v Deane[22] is the fundamental principle that publication is a question of fact and a determination of the issue depends on the circumstances of each individual case[23].

[34] Byrne v Deane[24], Godfrey v Demon Internet Limited[25] and Bunt v Tilley[26] are all authorities where third parties and not the Defendants had written the defamatory material, as is the allegation in this case. They set out that in determining whether a person is a publisher, the court must carefully examine his role in the process and the extent of his knowledge of the defamatory material. Liability for publication in the first two cases was based on the fact that the Defendants had control over the defamatory material was placed and they had failed to remove it, in the former from a wall at their golf club and the latter from their server. On the other hand, the ISP Defendant Tiscali

[21] Supra
[22] Supra
[23] See Footnote 7
[24] Supra
[25] Supra
[26] Supra

in Bunt v Tilley[27] was not held to be liable as by providing an Internet connection they had only played a passive role in facilitating the defamatory posting.

[35] In considering the three authorities, they are clearly distinguishable on the facts. The Defendants in Byrne v Deane[28] had control of the wall where the defamatory sign was posted, there is no evidence that Mr. Glaser had any control over the list server and the posting was not placed any where that was under his control. The ISP Defendant in Godfrey v Demon Internet Limited[29] had actually received stored and transmitted the defamatory posting. More importantly, Mr. Glaser did not have the technical capacity remove the Hogan posting. The ISP Defendant had been asked to remove the defamatory material and had failed to do so.

[36] I cannot accept Mr. Cassell's submission that by setting up the forum, Mr. Glaser had facilitated the transmission of the posting. From the authorities, I conclude that a Defendant must have specific knowledge of the material complained of. It cannot be a general contemplation that defamatory material could be transmitted. Mr. Cassell's attempt to link what obtained to the actual Evergreen green tree in Plymouth to the virtual evergreen, and to relate Mr. Glaser's comment that as far as he knew no one was ever sued for any comments made under the tree, is not sufficient to establish his knowledge.

[37] Mr. Glaser admitted that because of the way that the Electronic Evergreen was set up it would be possible to libel someone but I accept that his evidence that when he set it, he did not set it up a view to providing a forum for persons to defame other person. I accept it because credibility was not a really an issue in this case, I found that I could accept the evidence of both Mr. Glaser and Mr. Brandt because I found them to be truthful. Their evidence was not in conflict because it was difficult for them to contradict each other because the nature of the evidence that they each gave.

[38] I have concluded that Mr. Glaser did not do anything that set off a chain of events that led to the publication of the Hogan posting. Setting up the forum does not in my view

[27] Supra
[28] Supra
[29] Supra

amount to facilitating its transmission as in Godfrey v Demon Internet Limited[30] and Bunt v Tilley[31]. If the conclusion was otherwise, in my view his role would have been a passive one consistent with the principles in Bunt v Tilley[32]. The Claimant has failed to prove that Mr. Glaser received the Hogan posting other than as a member of the email list, that he posted it or disseminated it and he has also failed to prove that Mr. Glaser had not taken reasonable care to prevent publication, when he had in fact sent out a welcome message to persons joining the email list, that it was an unmoderated group.

[39] Having considered the applicable law, it is my judgment that, the facts in this case do not a support a finding that Mr. Glaser was a publisher of the Hogan posting and for the reasons that I have stated, I dismiss Mr. Brandt's claim and award costs to Mr. Glaser. As this is not a claim for a monetary sum, the value of this claim is placed at $50,000.00. On my finding, that there has been no publication of the Hogan posting by Mr. Glaser, the matter concludes at this point.

The Claim for Reimbursement

[40] On 14th May 2007, Mr. Glaser filed an application claiming that he was entitled to loss of income, in relation to a vacated trial date and the court had indicated that this matter would be dealt with when the matter came on for trial.

[41] I have reviewed the evidence in support of the application and I have to agree with Mr. Brandt the computations are just too vague to allow the court to make a finding. The proposed billings and estimations of loss of income of professional fees are not in my view definite enough to be relied upon. Mr. Kelsick himself made the comparison with the order the court made on 19th May 2006, in relation to Mr. Glaser being reimbursed for his airline ticket. In that case, the loss was defined and was not an estimation.

[42] I have considered the submissions and the authorities referred and I have refused the application.

[30] Supra
[31] Supra
[32] Supra

Order

[43] In light the reasons that I have stated in this judgment, I make the following order:

1. Claim MNIHCV2001/0031 is dismissed.
2. Prescribed costs are awarded to Mr. Glaser in the sum of $14,000.00 in accordance Rule 65.59(2)(b)(iii) in the sum of $14,000.00.
3. Mr. Glaser's application filed on 14th May 2007 is dismissed with costs to Mr. Brandt in the sum of $750.00.

Ianthea Leigertwood-Octave
High Court Judge