

## PUBLICATION, INNOCENT DISSEMINATION AND THE INTERNET AFTER *DOW JONES & CO INC V GUTNICK*

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### I INTRODUCTION

Defamation claims involving internet technologies are regularly brought before Australian courts. Over the last fifteen years,<sup>1</sup> cases have been brought in relation to emails<sup>2</sup> and websites.<sup>3</sup> In addition, claims have been brought relying on parallel publication of the same matter in both traditional and ‘new’ media.<sup>4</sup> This is unsurprising, given the pervasiveness of internet communications in contemporary society. The quotidian nature of the internet has been recognised by Australian legislatures – a cause of action in defamation arises out of the publication of defamatory matter<sup>5</sup> and the term ‘matter’ in turn has been defined legislatively to include ‘a program, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication’.<sup>6</sup>

Although internet technologies have significantly transformed communications, their impact on the legal principles governing them is less clear. The High Court of Australia’s decision in *Dow Jones & Co Inc v Gutnick*, handed down almost a decade ago, remains the leading Australian authority on internet defamation.<sup>7</sup> In that case, competing claims were made about the

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1 The first case of internet defamation before an Australian court appears to have been *Rindos v Hardwick* (Unreported, Supreme Court of Western Australia, Ipp J, 31 March 1994).

2 See, eg, *Ryan v Premachandran* [2009] NSWSC 1186 (6 November 2009); *Simeone v Walker* [2009] SASC 201 (10 July 2009).

3 See, eg, *Restifa v Pallotta* [2009] NSWSC 958 (16 September 2009); *Young v The Neil Jenman Group Pty Ltd* [2010] FCA 318 (26 March 2010).

4 See, eg, *Kermode v Fairfax Media Publications Pty Ltd* [2009] NSWSC 1263 (23 November 2009); *Bolkus v Australian Broadcasting Corporation* [2010] SASC 150 (28 May 2010).

5 *Civil Law (Wrongs) Act 2002* (ACT) s 120; *Defamation Act 2006* (NT) s 7; *Defamation Act 2005* (NSW) s 8; *Defamation Act 2005* (Qld) s 8; *Defamation Act 2005* (SA) s 8; *Defamation Act 2005* (Tas) s 8; *Defamation Act 2005* (Vic) s 8; *Defamation Act 2005* (WA) s 8.

6 *Civil Law (Wrongs) Act 2002* (ACT) s 116; *Defamation Act 2006* (NT) 3; *Defamation Act 2005* (NSW) s 4; *Defamation Act 2005* (Qld) s 4, sch 5; *Defamation Act 2005* (SA) s 4; *Defamation Act 2005* (Tas) s 4; *Defamation Act 2005* (Vic) s 4; *Defamation Act 2005* (WA) s 4.

7 (2002) 210 CLR 575 (*Dow Jones v Gutnick*’).

revolutionary nature of the internet, and consideration was given to the consequent impact of an acceptance or rejection of this characterisation on the applicable principles of defamation and conflict of laws. *Dow Jones v Gutnick* raised a range of questions. What constitutes publication for the purposes of defamation? Where does publication occur? Is the 'multiple publication' rule an essential part of the common law or can it be discarded in favour of a 'single publication' rule? Should technology specific rules be developed to cover internet publications or can the existing principles be adapted in this regard? Although the judgments in *Dow Jones v Gutnick* displayed varying degrees of receptivity to arguments about the novelty of internet technologies, ultimately they all disposed of the case in an orthodox and anticipated way.

Since *Dow Jones v Gutnick*, the jurisprudence on internet defamation, in Australia and internationally, has burgeoned. It is therefore timely to evaluate how the issues raised by *Dow Jones v Gutnick* have developed through the subsequent case law. It is not only in decided cases that these issues have been addressed. There have also been important legislative developments which deal with these issues. This article analyses some of these key concepts and the ways in which courts and legislatures have responded to the challenges posed by internet technologies. It focuses on one of the essential elements of defamation – the requirement of publication – in particular, the issues of what constitutes publication and who qualifies as a publisher for the purposes of defamation. It examines whether potential defendants in claims for internet defamation, such as internet service providers, internet content hosts and search engines – if they qualify as publishers – should otherwise have a defence of innocent dissemination or some other, more broadly based statutory immunity. This raises the difficult issue of whether rules and principles should be technology neutral or technology specific, against the background of the common law's resistance to adapt, of its own motion, to reflect technological changes. Academic commentary, both in Australia and overseas, has tended to focus on the private international law issues arising from *Dow Jones v Gutnick*;<sup>8</sup> instead this article focuses on the case's impact on defamation. An analysis of the case law and the legislative developments over the last eight years suggests that, while internet technologies have brought about a revolution in communications,<sup>9</sup> their impact on defamation law has not been equally radical. Rather, internet technologies have caused courts and legislatures to reconsider basic concepts of defamation

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8 See, eg, Brian Fitzgerald, 'Dow Jones & Co Inc v Gutnick: Negotiating "American Legal Hegemony" in the Transnational World of Cyberspace' (2003) 27 *Melbourne University Law Review* 590; Richard Garnett, 'Dow Jones & Co Inc v Gutnick: An Adequate Response to Transnational Internet Defamation?' (2003) 4(1) *Melbourne Journal of International Law* 196; Uta Kohl, 'Defamation on the Internet – Nice Decision, Shame about the Reasoning: Dow Jones & Co Inc v Gutnick' (2003) 52 *International and Comparative Law Quarterly* 1049; Nathan W Garnett, 'Dow Jones & Co Inc v Gutnick: Will Australia's Long Jurisdictional Reach Chill Internet Speech World-Wide?' (2004) 13 *Pacific Rim Law and Policy Journal* 61; Dan Svantesson, "'Place of Wrong" in the Tort of Defamation – Behind the Scenes of a Legal Fiction' (2005) 17(2) *Bond Law Review* 149.

9 See, eg, *Bunt v Tilley* [2007] 1 WRL 1243, 1246 [9]; Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 2<sup>nd</sup> ed, 2005) [1.01].

law, at the level of principle and as they operate in practice, sometimes to refine them, sometimes to amend them. The changes are more modest but are nevertheless important.

## II PUBLICATION AND THE INTERNET IN *DOW JONES v GUTNICK*

The prominent Melbourne businessman, Joseph Gutnick, brought defamation proceedings against Dow Jones & Co Inc ('Dow Jones') in the Supreme Court of Victoria. The proceedings arose out of an article in *Barron's Online*, a subscription only publication, as well as its appearance in the hard copy edition of *Barron's Magazine*. Gutnick alleged that the article, titled 'Unholy Gains', conveyed imputations that he was involved in money laundering and tax evasion.<sup>10</sup> The writ and the statement of claim were served on Dow Jones outside the jurisdiction,<sup>11</sup> on the respective grounds that the tort was committed in Victoria or that damage caused by the tort was suffered in Victoria. Dow Jones filed a conditional appearance in the proceedings and sought to have the proceedings struck out or permanently stayed. It submitted that the Victorian court did not have any ground to exercise jurisdiction in the matter or, if it did, that it should decline to exercise jurisdiction on the basis that it was a clearly inappropriate forum. It argued that publication occurred when the defamatory matter was uploaded onto its servers in New Jersey or when the matter was composed and finally edited in New York, with the consequence that a US court, applying US defamation law, should determine the matter.<sup>12</sup> At first instance, Hedigan J rejected Dow Jones' application.<sup>13</sup> Special leave to appeal to the Victorian Court of Appeal was refused.<sup>14</sup> Dow Jones appealed to the High Court of Australia.

The joint judgment of Gleeson CJ and McHugh, Gummow and Hayne JJ characterised the central issue of the appeal as: '[W]here was the material of which Mr Gutnick complained published? Was it published in Victoria?'<sup>15</sup> As their Honours noted, the appeal crucially turned on the potentially problematic concepts of 'jurisdiction' and 'publication',<sup>16</sup> necessarily raising the interaction of principles of defamation with private international law. In order for the tort of defamation to be complete, the plaintiff needs to establish that there has been the publication of defamatory matter. This raises the issue of what constitutes publication for the purposes of defamation. Having established that publication

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10 As to the facts of this case, see *Gutnick v Dow Jones & Co Inc* [2001] VSC 305 (28 August 2001) [11]–[12] ('*Gutnick v Dow Jones*'); *Dow Jones v Gutnick* (2002) 210 CLR 575, 643–45.

11 *Supreme Court (General Civil Procedure) Rules 1996* (Vic) rr 7.01(1)(i), (j).

12 *Dow Jones v Gutnick* (2002) 210 CLR 575, 598, 613, 624.

13 *Gutnick v Dow Jones* [2001] VSC 305 (28 August 2001).

14 *Dow Jones & Co Inc v Gutnick* [2001] VSCA 249 (21 September 2001).

15 *Dow Jones v Gutnick* (2002) 210 CLR 575, 595. Justice Gaudron agreed with the joint judgment: at 610.

16 *Ibid* 596–7.

has occurred, the issue is then where that publication has occurred, for the purpose of determining which legal systems might be involved in the claim and which courts have jurisdiction. It is interesting to note how Callinan J characterised the issue on appeal: at the outset of his judgment, his Honour identified the central issue as ‘whether the development of the Internet calls for a radical shift in the law of defamation’.<sup>17</sup> The concepts of publication and jurisdiction, their meanings and interaction, as well as the impact of judicial perceptions of internet technologies on the relevant principles, as articulated and applied are central to the High Court’s decision in *Dow Jones v Gutnick*.

Dow Jones argued that, as a matter of policy, it should only be subjected to one law.<sup>18</sup> The joint judgment rejected Dow Jones’ argument that the law of the place where the servers were maintained should be the governing law, unless the location of the servers was ‘merely adventitious or opportunistic’.<sup>19</sup> Their Honours noted that the meaning and application of the words ‘adventitious’ and ‘opportunistic’ were uncertain.<sup>20</sup> They also noted that the test propounded by Dow Jones was convenient for it but failed adequately to consider competing interests, notably a plaintiff’s interest in protecting his or her reputation.<sup>21</sup> They acknowledged the need for publishers to have certainty and predictability but observed that ‘certainty does not necessarily mean singularity’ and that more than one legal system can have a legitimate interest in the resolution of a dispute.<sup>22</sup>

The joint judgment then turned to examine the fundamental concepts underlying defamation law at issue in the appeal. Their Honours noted that damage to the plaintiff’s reputation, not the insult to the plaintiff, is the gist of the action.<sup>23</sup> No damage is done to a plaintiff’s reputation unless there has been publication of defamatory matter to a person other than the plaintiff. That publication needs to be communicated in a form comprehensible to the recipient. Chief Justice Gleeson and McHugh, Gummow and Hayne JJ stressed that publication is a bilateral rather than a unilateral act, involving publisher and recipient.<sup>24</sup> Their Honours noted that the bilateral conception of publication underpinned the ‘multiple publication’ rule, which was such an established part of the common law of defamation that the High Court could not depart from it.<sup>25</sup> The application choice of law in tort rule is the *lex loci delicti* (the law of the place of the wrong).<sup>26</sup> Therefore, determining the place of the wrong is crucial to

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17 Ibid 643.

18 Ibid 598.

19 Ibid 598–9. This position was supported by the Australian, UK and US media outlets that intervened in the appeal: at 598 n 92.

20 Ibid 599.

21 Ibid 599–600.

22 Ibid.

23 Ibid 600, 606.

24 Ibid 600, 605–6.

25 Ibid 600–1.

26 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 540; *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, 520.

determining which system of law applies to the claim. The joint judgment reasoned that the tort of defamation is committed at the place of publication because that is where the damage to the plaintiff's reputation occurs. In the context of internet defamation, their Honours specifically identified the place where the recipient downloads the defamatory matter as the place of publication.<sup>27</sup> Their Honours accepted that Gutnick had suffered damage to his reputation in Victoria, which was sufficient under the relevant rules of court to confer jurisdiction on a Victorian court.<sup>28</sup> As Gutnick had limited his claim to Victoria in respect of a tort committed there, it could not be found that the Supreme Court of Victoria was a clearly inappropriate forum, so as to require the discretionary non-exercise of jurisdiction.<sup>29</sup>

In separate reasons for judgment, Kirby and Callinan JJ also found that the Supreme Court of Victoria had jurisdiction over the matter under its rules of court<sup>30</sup> and that it was not a 'clearly inappropriate forum'.<sup>31</sup> One of the striking aspects of their respective judgments is the manifestation in them of different perceptions of internet technologies and their potential impact on the applicable legal principles.<sup>32</sup>

Justice Kirby commenced his judgment by endorsing a remark made by Lord Bingham of Cornhill to the effect that internet technologies will require a review of almost every rule and principle of defamation.<sup>33</sup> His Honour identified reasons supporting, and tending against the reformulation of the common law of defamation sought by Dow Jones.<sup>34</sup> He then examined in detail the nature of internet technologies.<sup>35</sup> Justice Kirby concluded that the 'special features of the Internet present peculiar difficulties for the legal regulation of its content'.<sup>36</sup> His Honour identified himself as one of those judges for whom 'the call to reform [is] more urgent'.<sup>37</sup> He rejected the view of the judge at first instance, Hedigan J, that the claims made on behalf of internet technologies were 'mere slogans', instead recognising that the impact of internet technologies on daily life was 'already enormous' and likely to continue to be profound.<sup>38</sup> Ultimately, however, Kirby J found that the principles at issue were too well established at common law to permit the Court to alter them.<sup>39</sup> In addition, his Honour observed that it was preferable to articulate technology neutral rules, thereby avoiding the problem of

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27 *Dow Jones v Gutnick* (2002) 210 CLR 575, 606–7.

28 *Ibid* 607. Their Honours did not need to decide whether the tort of defamation had been committed in Victoria.

29 *Ibid* 608.

30 *Ibid* 621–2, 652–3.

31 *Ibid* 642, 654.

32 Justice Gaudron did not comment on the nature of internet technologies in her reasons.

33 *Dow Jones v Gutnick* (2002) 210 CLR 575, 612 citing Lord Bingham's foreword to Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 1<sup>st</sup> ed, 2001).

34 *Ibid* 614–16.

35 *Ibid* 615–18.

36 *Ibid* 618.

37 *Ibid* 619 citing *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 142–3 (Brennan J).

38 *Ibid* 629.

39 *Ibid* 630.

obsolescence when new technologies superseded existing ones.<sup>40</sup> Although Kirby J thought Dow Jones and the interveners had demonstrated ‘real defects’ in Australian defamation law’s treatment of internet publications, he considered it was not possible for a court to reconcile the competing interests at issue.<sup>41</sup> Nevertheless, his Honour found that the dismissal of the appeal was ‘a result contrary to intuition’<sup>42</sup> and ‘less than wholly satisfactory’.<sup>43</sup> He explained that this was because

[i]ntuition suggests that the remarkable features of the Internet (which is still changing and expanding) makes it more than simply another medium of human communication. It is indeed a revolutionary leap in the distribution of information, including about the reputation of individuals. It is a medium that overwhelmingly benefits humanity, advancing as it does the human right of access to information and to free expression.<sup>44</sup>

Justice Callinan took a markedly different view of the claims made about internet technologies, opining that

[t]he Internet, which is no more than a means of communication by a set of interconnected computers, was described, not very convincingly, as a communications system entirely different from pre-existing technology.<sup>45</sup>

His Honour rejected Dow Jones’ contention that its server was passive,<sup>46</sup> and emphasised the commercial imperatives on Dow Jones. This, in turn, led him to reject Dow Jones’ submission that it did not push its publication into any particular jurisdiction, on the basis that it was in the commercial interest of Dow Jones to maximise the global reach of its magazine.<sup>47</sup> Justice Callinan went on to deny the distinction between the internet and pre-existing technologies:

Statements made on the Internet are neither more nor less ‘localized’ than statements made in any other media or by other processes. Newspapers have always been circulated in many places. The reach of radio and television is limited only by the capacity of the technology to transmit and hear or view them, which already, and for many years, has extended beyond any one country.<sup>48</sup>

His Honour specifically rejected the suggestion that the internet was uniquely ubiquitous, reasoning that ‘[s]ome brands of motor cars are ubiquitous but their manufacturers, if they wish to sell them in different jurisdictions must comply with the laws and standards of those jurisdictions.’<sup>49</sup>

The joint judgment of Gleeson CJ and McHugh, Gummow and Hayne JJ presents an intermediate position, closer to Callinan J than Kirby J. It is more dispassionate in its approach to internet technologies,<sup>50</sup> exhibiting neither

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40 Ibid 630–1.

41 Ibid 635.

42 Ibid 642.

43 Ibid 643.

44 Ibid 642.

45 Ibid 647.

46 Ibid.

47 Ibid 648.

48 Ibid 649.

49 Ibid.

50 Ibid 597–8.

enthusiastic endorsement of, nor robust scepticism about, claims as to the revolutionary nature of the internet. Their Honours accepted that internet technologies represented ‘a considerable technological advance’, but found that the associated legal issues were not novel, having arisen in the context of widely disseminated newspapers, magazines and radio and television broadcasts.<sup>51</sup> They were not prepared to accept that internet technologies were essentially unique, pointing out that satellite television attains a similarly ubiquitous reach.<sup>52</sup> Ultimately – and to the consternation of many overseas commentators – their Honours found that the nature of internet technologies themselves did not provide a basis for departing from the orthodox application of existing principles.<sup>53</sup>

In *Dow Jones v Gutnick*, there were disparate views expressed about the novelty of internet technologies but consensus as to the principles of defamation and private international law and their application to the facts. Whether specific types or features of internet technologies warrant a departure from established principles is a matter explored in a line of authority subsequent to *Dow Jones v Gutnick*.

### III WHAT CONSTITUTES PUBLICATION AND WHO IS A PUBLISHER?

The High Court’s decision in *Dow Jones v Gutnick* remains the highest appellate consideration of the requirement of publication for the purposes of defamation. The principle confirmed in *Dow Jones v Gutnick* – in order for the tort of defamation to be complete, there must be publication of defamatory matter, in the sense that the defamatory matter must be communicated in a comprehensible form to a person other than the plaintiff – is long standing.<sup>54</sup> Understood in this sense, it is the publication, not the composition, of defamatory matter that constitutes the wrong in the tort of defamation.<sup>55</sup> Equally long standing is the breadth of liability for publication in defamation law. The starting point of the common law was the imposition of strict liability for the publication of defamatory matter.<sup>56</sup> Any voluntary conduct leading to the dissemination of

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51 Ibid 605.

52 Ibid.

53 As to the reaction of overseas commentators to the High Court’s decision in *Dow Jones v Gutnick*, see, eg, Editorial, ‘Down (Under) with the Internet’, *The Wall Street Journal* (New York), 11 December 2002, 18; Editorial, ‘A Blow to Online Freedom’, *The New York Times* (New York), 11 December 2002, 34; Mark Stephens, ‘Libel is Not the Sort of Tourism that Countries Want to Encourage’, *The Times* (London), 17 December 2002, 2, 23.

54 *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524, 527 (Lord Esher MR), 529 (Lopes LJ); *Powell v Gelston* [1916] 2 KB 615, 619; *Webb v Bloch* (1928) 41 CLR 331, 363; *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports ¶81-127, 69192; *Beitzel v Crabb* [1992] 2 VR 121, 127.

55 *Hebditch v MacIlwaine* [1894] 2 QB 54, 58, 61; *Lee v Wilson* (1934) 51 CLR 276, 287; *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports ¶81-127, 69193.

56 *Godfrey v Demon Internet Ltd* [2001] QB 201, 207 citing *Day v Bream* (1837) 174 ER 212. See also *Vizetelly v Mudie’s Select Library Ltd* [1900] 2 QB 170, 179.

defamatory matter could attract liability. The potential harshness of this position has been ameliorated by the availability to defendants of an argument based on innocent dissemination.<sup>57</sup> Nevertheless, liability for publication remains broad.

In most defamation cases, publication is not at issue. For example, the dissemination of defamatory matter in newspapers, magazines and book and on radio and television readily satisfies the requirement of publication and there is no need for additional proof of publication to individual recipients.<sup>58</sup> Nevertheless, prior to *Dow Jones v Gutnick*, the issue of what constitutes publication had arisen periodically. The types of cases in which the requirement of publication have been contentious are those in which the defamatory matter was opened by or communicated to an employee of the plaintiff<sup>59</sup> and those in which the defamatory matter was opened by or communicated to a relative of the plaintiff.<sup>60</sup>

Liability for publication in defamation law is not limited to positive conduct on the part of the defendant. A failure to prevent the dissemination of defamatory matter can lead to the imposition of liability on a defendant as a publisher. This was firmly established by the English Court of Appeal's decision in *Byrne v Deane*.<sup>61</sup> In this case, the plaintiff, Edmund Byrne, complained that some doggerel, anonymously posted to a wall of a golf club of which he was a member, falsely alleged that he had alerted the police to the presence of illegal gaming machines at the club.<sup>62</sup> Byrne sought to hold the proprietors of the club liable for defamation, not on the basis that they had composed the libel, but on the basis that, having been made aware of its presence on the premises, they took no steps to remove it, thereby becoming its publishers. By majority (Greer and Greene LJ, Slesser LJ dissenting in part), the English Court of Appeal found that

57 As to innocent dissemination, see below Part IV: Innocent Dissemination, Immunities and Internet Technologies.

58 *Al Amoudi v Brisard* [2007] WRL 113, 118 [22] citing *Fullam v Newcastle Chronicle and Journal Ltd* [1977] 1 WLR 651.

59 See, eg, *Delacroix v Thevenot* (1817) 171 ER 573 (sufficient evidence for jury to find publication to plaintiff's clerk established); *Pullman v Walter Hill & Co* [1891] 1 QB 524, 527, 529 (Lopes LJ) (sufficient evidence for jury to find publication to clerks at plaintiff's firm); *Boxsius v Goblet Freres* [1894] 1 QB 842, 846 (Lopes LJ) (sufficient evidence for jury to find publication to clerks at plaintiff's firm); *Huth v Huth* [1915] 3 KB 32, 38–9, 43, 46 (insufficient evidence for jury to find publication to plaintiff's inquisitive butler); *Riddick v Thames Board Mills Ltd* [1977] QB 881, 899, 907 (dictation of confidential memorandum to typist and disclosure to fellow employee sufficient to establish publication); *Traztand Pty Ltd v Government Insurance Office (NSW)* [1984] 2 NSWLR 598, 600 (publication by company to one of its servants or agents sufficient); *Jones v Amalgamated Television Services Pty Ltd* (1991) 23 NSWLR 364, 366 (publication by one employee to another sufficient).

60 See, eg, *Wennhak v Morgan* (1888) 20 QBD 635, 637–8 (husband gave defamatory reference to wife – no publication); *Powell v Gelston* [1916] 2 KB 615, 619 (father opened letter addressed to son – no publication); *Theaker v Richardson* [1962] 1 WLR 151, 158 (Harman LJ), 161 (Pearson LJ) (husband opened letter addressed to wife – publication).

61 [1937] 1 KB 818.

62 *Ibid* 828.

the Deanes were liable as publishers of the defamatory matter.<sup>63</sup> Lord Justice of Appeal Greer reasoned that the Deanes knew of the lampoon and had the power to remove it but did not, thereby consenting to its publication.<sup>64</sup> Lord Justice of Appeal Greene specifically rejected the submission that liability for publication of defamatory matter required a positive act on the part of the defendant.<sup>65</sup> Instead, his Lordship articulated the applicable test as being whether

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?<sup>66</sup>

Applying the test to the facts, Greene LJ found that the Deanes knew of the presence of the defamatory matter, had the power to remove it and it was easy to remove. Therefore, his Lordship was willing to draw the inference that the Deanes consented to the continued presence of the defamatory matter on the premises, so as to render them liable for its publication.<sup>67</sup>

*Byrne v Deane* establishes that a failure to act in relation to defamatory matter can make a defendant liable as a publisher. However, not every failure to act has this consequence. Central to the reasoning on the issue of publication in *Byrne v Deane* was the knowledge of the Deanes as to the presence of the defamatory matter on their premises and their ability to remove it. The possibility of extending this reasoning to internet publishers, depending on their knowledge and control, is clear. The potential consequences and the desirability of such an extension of liability are still being explored by courts and legislatures.

In the context of internet publications, defendants have begun to argue that they should not be held liable as publishers because their conduct is merely passive. The distinction between a failure to act, leading to the imposition of liability, along the lines of *Byrne v Deane*, and mere passivity, leading to the avoidance of liability, is beginning to assume significance in cases of internet defamation. For instance, although by the time the appeal reached the High Court in *Dow Jones v Gutnick*, Dow Jones' argument was principally one based on policy grounds, Dow Jones had unsuccessfully submitted at first instance, before Hedigan J, that it had played merely a passive role in uploading the matter to its servers, with the active conduct leading to publication being performed by the readers seeking, downloading and reading the matter. Dow Jones contrasted its conduct with the active dissemination of newspapers and radio and television broadcasts.<sup>68</sup>

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63 Ibid 829–30, 838. Lord Justice of Appeal Slesser found that the evidence did not establish that Mr Deane had published the defamatory matter but did establish Mrs Deane's liability for publication: at 834–6. The appeal was dismissed by a differently constituted majority (Slesser and Greene LJJ, Greer LJ dissenting) on the basis that an allegation that a person has alerted the police to criminal conduct was incapable of being defamatory: at 832–3, 840.

64 Ibid 829–30.

65 Ibid 837.

66 Ibid 838.

67 Ibid.

68 *Dow Jones v Gutnick* (2002) 201 CLR 575, 598.

### A *Godfrey v Demon Internet Ltd*

The issue as to whether a defendant plays a merely passive role in the dissemination of defamatory matter was an important part of the reasoning in a series of English cases involving internet technologies, decided in the last decade. For instance, in *Godfrey v Demon Internet Ltd*, Morland J found that the internet service provider, Demon Internet, did not merely play a passive role but rather was a publisher of the defamatory matter.<sup>69</sup> In this case, an academic, Dr Laurence Godfrey, complained that a posting to the newsgroup, 'soc.culture.thai', was a forgery, purporting to be from him and inviting email communication about its contents.<sup>70</sup> Justice Morland characterised the content of the posting as 'squalid' and 'obscene'. Godfrey notified Demon Internet as to its posting and its storage on the news server but the internet service provider ('ISP') took no steps to remove it, allowing it to expire instead.<sup>71</sup> His Lordship found that Demon Internet could not rely on the *Defamation Act 1986* (UK) chapter 31, section 1 to avoid responsibility for publication, given the ISP's actual or constructive knowledge of the defamatory matter.<sup>72</sup> Justice Morland went on to find that:

the defendants, whenever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their ISP who accesses the newsgroup containing their posting.<sup>73</sup>

### B *Bunt v Tilley*

In *Bunt v Tilley*, Eady J had to determine applications for the striking out of, or summary judgment in, defamation proceedings.<sup>74</sup> John Bunt brought defamation proceedings against three individual defendants, as well as against three ISPs – AOL UK Ltd, Tiscali UK Ltd and British Telecommunications plc.<sup>75</sup> The ISPs did not host the websites but merely provided internet access to the individual defendants.<sup>76</sup> Relying on a distinction drawn by Matthew Collins in *The Law of Defamation and the Internet*, Eady J accepted there was a distinction at the level of principle between publishers, broadly defined, to whom liability for defamation attached, and 'mere facilitators' to whom no such liability attached.<sup>77</sup> His Lordship observed that *Godfrey v Demon Internet* had left open the issue of whether 'an ISP [which] had truly fulfilled no more than a passive role as owner of an electronic device through which defamation postings were

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69 [2001] QB 201, 210, distinguishing *Anderson v New York Telephone Co* 35 NY 2d 746, 749 (1974) (telephone company played merely passive role where its services used to play recorded messages defamatory of plaintiff).

70 Ibid 204–5.

71 Ibid 205.

72 Ibid.

73 Ibid 208–9.

74 [2007] 1 WRL 1243.

75 Ibid [2].

76 Ibid [5], [8].

77 Collins, above n 9, [15.38], [15.43], cited at *Bunt v Tilley* [2007] 1 WRL 1243 [10], [15].

transmitted' was a publisher for the purposes of defamation.<sup>78</sup> Justice Eady identified the state of the defendant's knowledge as a crucial determinant of whether the defendant should be accepted as a publisher,<sup>79</sup> reasoning that a degree of awareness or the assumption of responsibility was necessary to satisfy the requirement of publication.<sup>80</sup> Expanding on the element of the defendant's knowledge, his Lordship observed:

Of course, to be liable for a defamatory publication it is not necessary to be aware of the defamatory content, still less of its legal significance. Editors and publishers are often fixed with responsibility notwithstanding such lack of knowledge. On the other hand, for a person to be held responsible there must be 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.<sup>81</sup>

Justice Eady preferred to decide the issue by reference to principle, rather than relying on public policy.<sup>82</sup> In addition, reviewing the evidence before the Court, his Lordship was satisfied that none of the ISPs knowingly participated in the dissemination of the matter complained of by Bunt.<sup>83</sup> Justice Eady concluded that 'as a matter of law ... an ISP which performed no more than a passive role in facilitating postings on the internet could not be deemed to be a publisher at common law'.<sup>84</sup> His Lordship went further, stating that he 'would not, in the absence of any binding authority, attribute liability at common law to a telephone company or other passive medium of communication'.<sup>85</sup> Thus, Eady J struck out Bunt's claims against the ISPs.<sup>86</sup>

### C *Metropolitan International Schools Ltd v Designtecnica Corp*

In *Metropolitan International Schools Ltd v Designtecnica Corp*, Eady J had to determine whether the claimant, which conducted a business providing adult distance education services, could sue the search engine Google for publishing defamatory matter originally posted in Designtecnica's online forums, in circumstances where third parties used Google to conduct a search that directed them readily to the forums.<sup>87</sup> His Lordship noted that Google had no control over the search terms entered by third parties.<sup>88</sup> Once the search terms were entered, Google would automatically execute the search and arrange the pages according to relevance, without human intervention.<sup>89</sup> Justice Eady observed that the issue for determination was a novel one.<sup>90</sup> Unaided by any

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78 *Bunt v Tilley* [2007] 1 WRL 1243 [14].

79 *Ibid* 1249 [21].

80 *Ibid* 1249 [22].

81 *Ibid* 1249 [23] (emphasis in original).

82 *Ibid* 1249–50 [24].

83 *Ibid* 1250–2 [25]–[36].

84 *Ibid* 1252 [36].

85 *Ibid* 1252 [37].

86 *Ibid* 1263 [77].

87 [2010] 3 All ER 528 [1]–[8].

88 *Ibid* [13].

89 *Ibid* [11] — [12].

90 *Ibid* [35], [48].

common law or statutory guidance, his Lordship characterised the central issue as ‘whether [Google] is to be regarded as a publisher of the words complained of at all’.<sup>91</sup> Referring at length to his previous judgment in *Bunt v Tilley*, Eady J found that a plaintiff needed to establish a mental element on the part of a putative defendant in order to establish publication.<sup>92</sup> Crucially, his Lordship held that any such mental element was absent in the present case because Google did not supply the search terms. As it did not authorise or cause the snippet to appear on the user’s screen, Google was not a publisher but a mere passive facilitator.<sup>93</sup> His Lordship further held that, even if Google were made aware of the search results, that would be insufficient to transform Google into a publisher for the purposes of defamation.<sup>94</sup> His Lordship observed that there were steps Google could take to remove the defamatory matter, if alerted to its presence, but the complete efficacy of such steps was debatable.<sup>95</sup> In reaching this conclusion, Eady J distinguished Justice Morland’s decision in *Godfrey v Demon Internet*, observing that simply because one form of internet technology led to a finding of publication did not automatically mean that another form would as well.<sup>96</sup>

Tellingly, in both *Bunt v Tilley* and *Metropolitan International Schools v Designtechnica*, Eady J found that certain internet intermediaries were not publishers for the purposes of defamation. In both of these cases, his Lordship also had regard to the defence of innocent dissemination. Justice Eady’s conclusions as to both of these issues and his observations as to their interaction are important not only for the way in which cases of internet defamation might be dealt with but also for the refinement of basic principles of defamation law.

#### IV INNOCENT DISSEMINATION, IMMUNITIES AND INTERNET TECHNOLOGIES

A significant way in which courts in the 19<sup>th</sup> century attempted to ameliorate the stricture of the rule that any person voluntarily participating in the dissemination of defamatory matter was liable as a publisher was through the development of the defendant’s plea of innocent dissemination.<sup>97</sup> As it originally developed, the plea of innocent dissemination was not properly categorised as a

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91 Ibid [48].

92 Ibid [49].

93 Ibid [51].

94 Ibid [54]–[5].

95 Ibid [56]–[64].

96 Ibid [54]–[55]. See also *Budu v British Broadcasting Corporation* [2010] EWHC 616 (QB) (23 March 2010); *Underhill v Corser* [2010] EWHC 1195 (QB) (27 May 2010).

97 As Romer LJ observed in *Vizetelly v Mudie’s Select Library Ltd* [1900] 2 QB 170, 178, ‘[t]he law of libel is in some respects a very hard one.’ See also *McPhersons Ltd v Hickie* (1995) Aust Torts Reports ¶81–348, 62499 (Powell JA).

free standing defence but rather as a plea of ‘no publication’.<sup>98</sup> In the landmark case, *Emmens v Pottle*, Lord Esher MR accepted that the news vendors sued for defamation were prima facie liable as publishers of defamatory matter contained in the newspaper they sold,<sup>99</sup> but found it would be ‘wholly unreasonable and unjust’ to hold them so liable, given their lack of knowledge and the fact that such ignorance was not the result of their own negligence.<sup>100</sup> His Lordship fashioned innocent dissemination as a policy based exception to the general principle of publication.<sup>101</sup> Rejecting an analogy with dangerous goods, Bowen LJ evocatively stated that ‘[a] newspaper is not like a fire; a man may carry it about without being bound to suppose that it is likely to do an injury’.<sup>102</sup> For his Lordship, the actual or constructive knowledge of the news vendor was critical<sup>103</sup> – a view endorsed in subsequent cases. The prevailing view of innocent dissemination now is that it is a free standing defence, rather than a plea of ‘no publication’. A person disseminating defamatory matter can be treated as a publisher but can avail himself or herself of a defence of innocent dissemination.<sup>104</sup>

Although the principles are technology neutral, the plea or defence of innocent dissemination proceeded implicitly on an understanding of the particulars of printing technology, as it existed in the late 19<sup>th</sup> century.<sup>105</sup> For instance, in *Emmens v Pottle* Lord Esher MR accepted without question that the publisher and printer of defamatory matter could not rely on a plea of innocent dissemination because they would have had knowledge of the presence of defamatory matter.<sup>106</sup> In developing the concept of a ‘subordinate distributor’ in *Vizetelly v Mudie’s Select Library Ltd*, Romer LJ distinguished such an actor from ‘the printer or the first or main publisher of the work’.<sup>107</sup> A printer in the late 19<sup>th</sup> century (and, indeed, well into the second half of the 20<sup>th</sup> century) could have attributed to it actual knowledge of the presence of defamatory matter by virtue of the way in which matter was printed. The printer would need to construct the composite board to strike the galleys. Given the volume of work,

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98 *Emmens v Pottle* (1885) 16 QBD 354, 357; *Vizetelly v Mudie’s Select Library Ltd* [1900] 2 QB 170, 178 (Vaughan Williams LJ), 180; *McPhersons Ltd v Hickie* (1995) Aust Torts Reports ¶81–348, 62499 (Powell JA); *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 594.

99 (1885) 16 QBD 354, 356. See also *Ridgway v Smith & Son* (1890) 6 TLR 275, 276 (Lord Coleridge CJ).  
100 (1885) 16 QBD 354, 357.

101 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 584–5, 592, 618.

102 *Emmens v Pottle* (1885) 16 QBD 354, 358.

103 *Ibid.*

104 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 586. For an instance of the defence of innocent dissemination failing, see *Sun Life Assurance Co of Canada v W H Smith & Son Ltd* (1934) 150 LT 211. For instances of the defence of innocent dissemination succeeding, see *Mallon v W H Smith & Son* (1893) 9 TLR 621; *Martin v Trustees of the British Museum* (1894) 10 TLR 338; *Weldon v “The Times” Book Co Ltd* (1911) 28 TLR 143; *Bottomley v F W Woolworth and Co Ltd* (1932) 48 TLR 521.

105 *Ibid.* 587.

106 (1885) 16 QBD 354, 357.

107 [1900] 2 QB 170, 180. See also, in the context of contempt of court, *McLeod v St Aubyn* [1899] AC 549, 562.

the printer was unlikely to have been checking for defamatory content and was more likely seeking out errors. Nevertheless, the printer could be assumed to have actual or constructive knowledge of any defamatory matter produced. The decisive changes in printing technologies, with newspapers, magazines and books now being produced electronically, have meant that the common law's position about printers has needed to be revisited. However, the view that printers were liable for defamation and could not avail themselves of the defence of innocent dissemination persisted until the late twentieth century.<sup>108</sup> For instance, the NSW Court of Appeal suggested in *McPhersons Ltd v Hickie* that printers might be able to prove, due to changes in printing technologies, that this defence should be available to them.<sup>109</sup>

As it has developed, the common law defence of innocent dissemination has extended in principle to new technologies but, in practice, defendants using such technologies have found it difficult to rely on this defence to avoid liability. For example, in *Thompson v Australian Capital Television Pty Ltd*, the highest appellate consideration of innocent dissemination, the High Court of Australia accepted that this defence was not limited to printers but could, in principle, extend to electronic broadcasters.<sup>110</sup> According to Brennan CJ, Dawson and Toohey JJ, '[t]here is no reason in principle why a mere distributor of electronic material should not be able to rely on the defence of innocent dissemination if the circumstances so permit'.<sup>111</sup> However, in the circumstances of the case, the High Court unanimously refused to allow the regional television station to rely on the defence for relaying a live programme obtained from a national network into the Australian Capital Territory.<sup>112</sup> As it had engaged in the conscious process of selecting and airing television programmes, it did not qualify as a subordinate distributor.<sup>113</sup> In principle, there is no reason why the common law defence of innocent dissemination should not apply to defendants using internet technologies to disseminate defamatory matter but the cases that have considered it have not found the appropriate circumstances in which to apply it.<sup>114</sup>

The centrality of a defendant's state of knowledge, as well as the aversion to technology specific rules, are reflected in the statutory defence of innocent dissemination under the national, uniform defamation laws, which came into effect in early 2006.<sup>115</sup> The elements of the statutory defence of innocent dissemination substantially replicate the common law, requiring a subordinate

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108 See, eg, *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478, 487.

109 (1995) Aust Torts Reports ¶81-348, 62498 (Priestley JA), 62499 (Powell JA).

110 (1996) 186 CLR 574.

111 *Ibid* 589.

112 *Ibid* 596-8.

113 *Ibid* 589-90.

114 See, eg, *Godfrey v Demon Internet Ltd* [2001] QB 201, 208-9; *Dow Jones v Gutnick* (2002) 210 CLR 575, 651-2.

115 *Civil Law (Wrongs) Act 2002* (ACT) s 139C; *Defamation Act 2006* (NT) 29; *Defamation Act 2005* (NSW) s 32; *Defamation Act 2005* (Qld) s 32; *Defamation Act 2005* (SA) s 30; *Defamation Act 2005* (Tas) s 32; *Defamation Act 2005* (Vic) s 32; *Defamation Act 2005* (WA) s 32. See also David Rolph, 'A Critique of the National, Uniform Defamation Laws' (2008) 16 *Torts Law Journal* 207, 237-9.

distributor to prove a lack of actual or constructive knowledge and that such ignorance was not due to negligence.<sup>116</sup> It is in the identification of subordinate and primary distributors that the statutory defence of innocent dissemination explicitly extends its coverage beyond that presently contemplated by the common law equivalent. In addition to booksellers, newsagents, libraries, wholesalers, retailers and providers of postal services, the relevant legislative provision also includes the following publishers as potential subordinate distributors:

- (f) a provider of services consisting of:
  - (i) the processing, copying, distributing or selling of any electronic medium in or on which the matter is recorded, or
  - (ii) the operation of, or the provision of any equipment, system or service, by means of which the matter is retrieved, copied, distributed or made available in electronic form, or
- (g) an operator of, or a provider of access to, a communications system by means of which the matter is transmitted, or made available, by another person over whom the operator or provider has no effective control, or
- (h) a person who, on the instructions or at the direction of another person, prints or produces, reprints or reproduces or distributes the matter for or on behalf of that other person.<sup>117</sup>

Defining subordinate distributors in a way that emphasises processes, such as copying, distributing, retrieving and transmitting, rather than naming particular technologies, media or formats, will allow this defence to extend to new technologies as they develop.

However, given the difficulties defendants have on occasion encountered in establishing the defence of innocent dissemination and the incremental extension of the defence to new technologies, there remains scope for more broadly based defences and immunities, particularly to limit internet publishers' exposure to liability for defamation. The most significant legislative development in this regard has been the *Broadcasting Services Act 1992* (Cth) schedule 5 cl 91. This clause was introduced by the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth). It is not directed specifically at defamation but liability for this tort is clearly within its scope.<sup>118</sup> The clause provides a broad immunity for ISPs and internet content hosts ('ICH'). It states that no law of a State or Territory and no rule of common law or equity can subject an ISP or ICH directly or indirectly to civil or criminal liability for hosting internet content of which the ISP or ICH was not aware, nor can it subject an ISP or ICH directly or indirectly to an obligation to monitor, make inquiries or keep records about internet content

116 *Civil Law (Wrongs) Act 2002* (ACT) s 139C(1); *Defamation Act 2006* (NT) s 29(1); *Defamation Act 2005* (NSW) s 32(1); *Defamation Act 2005* (Qld) s 32(1); *Defamation Act 2005* (SA) s 30(1); *Defamation Act 2005* (Tas) s 32(1); *Defamation Act 2005* (Vic) s 32(1); *Defamation Act 2005* (WA) s 32(1).

117 *Civil Law (Wrongs) Act 2002* (ACT) s 139C(3); *Defamation Act 2006* (NT) s 29(3); *Defamation Act 2005* (NSW) s 32(3); *Defamation Act 2005* (Qld) s 32(3); *Defamation Act 2005* (SA) s 30(3); *Defamation Act 2005* (Tas) s 32(3); *Defamation Act 2005* (Vic) s 32(3); *Defamation Act 2005* (WA) s 32(3).

118 Matthew Collins, 'Liability of Internet Intermediaries in Australian Defamation Law' (2000) 5 *Media and Arts Law Review* 209, 211; Collins, *Law of Defamation* 2<sup>nd</sup> ed, above n 9, [19.09]–[19.10].

it hosts.<sup>119</sup> As Collins notes, this immunity does not apply to all forms of internet publications.<sup>120</sup> For example, email is excluded from the definition of 'internet content'.<sup>121</sup> Nevertheless, as Collins concludes, most intermediaries will be able to invoke this clause.<sup>122</sup> Although directed towards internet technologies, the concept of 'hosting' in particular is sufficiently open textured to embrace a range of internet publishers. However, the immunity under this clause is not absolute. Significantly, an ISP or ICH can only avoid liability if it is unaware of the content it hosts. It follows that, if the ISP or ICH is made aware, it will be unable to rely on this immunity. In this way, the clause makes the knowledge of the ISP or ICH crucial, in the same way that the knowledge of the subordinate distributor is central to the operation of both the common law and statutory variants of innocent dissemination. The clause does, however, differ from innocent dissemination in the sense that the negligence of the ISP or ICH as to its state of knowledge does not appear to be relevant to this clause, whereas it is highly relevant to the defence of innocent dissemination.<sup>123</sup>

In light of these defences, it is instructive to return to the English line of authority on the liability of internet intermediaries for defamation. In *Godfrey v Demon Internet*, Morland J found that the ISP, having knowledge of the defamatory content and the power to remove it but refusing to use it, could not rely on a defence of innocent dissemination. This is consistent with the position under the common law defence of innocent dissemination and would also follow from the application either of the statutory defence of innocent dissemination or the *Broadcasting Services Act 1992* (Cth) schedule 5 cl 91. Similarly, as Callinan J pointed out in *Dow Jones v Gutnick*, the defence of innocent dissemination would not be available to Dow Jones, as it had actively created and disseminated the defamatory content.<sup>124</sup> Tellingly, however, in *Bunt v Tilley*, Eady J found, as the ISP in question was not a publisher, it did not need to have recourse to innocent dissemination. According to his Lordship, the ISP in question

is not analogous to someone in the position of a distributor, who might at common law need to prove the absence of negligence ... There a defence is needed because the person is regarded as having 'published'. By contrast, persons who truly fulfil no more than the role of a passive medium for communication cannot be characterised as publishers: thus they do not need a defence.<sup>125</sup>

In the context of the search engine in *Metropolitan International Schools v Designtechnica*, Eady J reiterated this observation.<sup>126</sup> In the latter case, his Lordship even went so far as to find that, as the search engine was not a

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119 *Broadcasting Services Act 1992* (Cth) sch 5 cl 91(1).

120 Collins, 'Liability of Internet Intermediaries', above n 118, 211; Collins, *Law of Defamation* 2<sup>nd</sup> ed, above n 9, [19.11]–[19.23].

121 *Broadcasting Services Act 1992* (Cth) sch 5 cl 3.

122 Collins, *Law of Defamation* 2<sup>nd</sup> ed, above n 9, [19.24]–[19.27].

123 Collins, 'Liability of Internet Intermediaries', above n 118, 212; Collins, *Law of Defamation* 2<sup>nd</sup> ed, above n 9, [19.30]–[19.31].

124 (2002) 210 CLR 575, 651–2.

125 [2007] 1 WRL 1243, 1252 [37].

126 [2010] 3 All ER 548 [64].

publisher, its state of knowledge and its negligence in dealing with the defamatory matter were irrelevant to the issue of whether it should be held responsible for publication.<sup>127</sup> Given the common law's conventional approach to the issues of publication and innocent dissemination, this conclusion by Eady J represents a significant development of principle.

## V IMPLICATIONS FOR PUBLICATION AND INNOCENT DISSEMINATION

The concepts of publication and innocent dissemination are historically and doctrinally interconnected, with important consequences for internet defamation. The test for publication is articulated at the level of principle in a sufficiently open textured way as to allow it to be applied flexibly and to take account of the particular medium or technology in a given case. The element of publication requires proof that the defamatory matter was communicated in a comprehensible form to a person other than the plaintiff. It is not further qualified or refined by rules or principles derived from the involvement of a particular medium or technology. Rather, in each case, whether the element of publication has been satisfied is a question of fact. Adopting this approach in relation to internet technologies is not difficult; earlier authorities have had to grapple with what inferences could be drawn from particular types of media or formats.<sup>128</sup> Questions arose as to what inferences relevant to the issue of publication should be drawn from the fact that a letter was sealed or unsealed,<sup>129</sup> or was or was not marked 'Private',<sup>130</sup> or from the fact that the defamatory matter was conveyed on a postcard.<sup>131</sup> Questions have arisen, and will continue to arise, as to what inferences relevant to the issue of publication should be drawn from particular cases involving internet technologies. The defence of innocent dissemination, both at common law and under statute, is also articulated in a way that is not technology specific. Given the existing diversity of internet technologies and the certain development of further ones in the future, it is undesirable to limit these concepts by fashioning technology specific rules or principles. The concepts of publication and innocent dissemination, both in its common law and statutory variants, should be sufficiently flexible to accommodate internet technologies.

Nevertheless, internet technologies have already invited reconsideration and refinement of the basic principles of defamation law. In this regard, Justice

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127 Ibid [54]–[64].

128 See, eg, *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524; *Gomersall v Davies* (1898) 14 TLR 430; *Sharp v Skues* (1909) 25 TLR 336; *Powell v Gelston* [1916] 2 KB 615.

129 See, eg, *Thorley v Lord Kerry* (1812) 4 Taunt 355; (1812) 128 ER 367; *Clutterbuck v Chaffers* (1816) 1 Stark 471; (1816) 171 ER 533; *Huth v Huth* [1915] 3 KB 32, 41, 44, 46; *Theaker v Richardson* [1962] 1 WLR 151; [1962] 1 All ER 229.

130 See, eg, *Delacroix v Thevenot* (1817) 2 Stark 63; *Theaker v Richardson* [1962] 1 WLR 151; [1962] 1 All ER 229.

131 See, eg, *Robinson v Jones* (1879) 4 Ir 391; *Sadgrove v Hole* [1901] 2 KB 1, 4; *Huth v Huth* [1915] 3 KB 32, 39.

Eady's judgments in *Bunt v Tilley* and *Metropolitan International Schools v Designtecnica* contain an important development in the law relating to publication. His Lordship found in both cases that the internet defendants – an ISP in the former case and a search engine in the latter case – were not publishers of the defamatory matter and therefore were not answerable to the defendants. Whereas innocent dissemination entered the common law as a plea of 'no publication' based on policy considerations and remains somewhat uncomfortably justified on that basis, Eady J reached his conclusion as to his findings of 'no publication' based on a refinement of the basic principles of publication. His Lordship distinguished between conduct amounting to publication, on the one hand, and mere passive facilitation of the dissemination of defamatory matter, on the other. Confirming a view of publication that allows defendants to avoid liability if they are merely passive facilitators is a small but significant development in the principles governing publication. Internet technologies have not caused a revolution in the principles of defamation law and it seems unlikely that they will do so in the future. What is more likely to occur is what has happened in relation to publication – that courts will have to consider again basic principles and how they apply to changing technologies. Sometimes, this will necessitate incremental but nevertheless important developments that refine the existing principles of defamation law.

## VI FUTURE DEVELOPMENTS

Although the issues of liability for internet publication have not yet been sued to final judgment in Australian courts, they are likely to be litigated in the near future. A vehicle for their consideration might be the defamation proceedings brought by Milorad Trkulja in the Supreme Court of Victoria. In separate proceedings, Trkulja is suing Yahoo! and Google in relation to search engine results that showed photographs of him taken from a website about Melbourne's criminal underworld. In late May 2010, Yahoo! and Google unsuccessfully applied to have the imputations pleaded by Trkulja struck out.<sup>132</sup> If the litigation proceeds, it will become a test case for liability in defamation of search engines in Australia. In particular, it will provide an opportunity for Australian courts to determine whether the approach of Eady J to the concept of publication in *Bunt v Tilley* and *Metropolitan International Schools v Designtecnica* should be followed.

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132 *Trkulja v Yahoo! Inc* [2010] VSC 215 (25 May 2010); *Trkulja v Google Inc LLC* [2010] VSC 226 (27 May 2010).

## VII CONCLUSION

Writing about the position under UK law, Eady J observed in *Metropolitan International Schools v Designtecnica* that ‘it is surprising how little authority there is within this jurisdiction applying the common law of publication or its modern statutory refinements to Internet communications’.<sup>133</sup> This applies *a fortiori* to the position under Australian law. The High Court’s decision in *Dow Jones v Gutnick* is the highest appellate consideration of this concept in Australian law. *Dow Jones v Gutnick* squarely presents the issue of what the common law requires for the purposes of publication in defamation and how this interacts with technology. This problem is not novel; the common law has struggled with this previously – but internet technologies make this problem acute. *Dow Jones v Gutnick* and subsequent cases involving internet technologies have invited reconsideration of the concept of publication and its relationship to the defence of innocent dissemination. While the internet may represent a revolution in communication technology, the legal response to it is more appropriately characterised as an evolution. The recent line of authority from the UK suggests that the concept of publication needs to be refined, so as to exclude conduct that amounts only to the merely passive facilitation of disseminating defamatory matter. Internet technologies present particular challenges to the articulation and application of the principles of defamation. These challenges are not best addressed by devising technology specific rules. Rather, they are more usefully addressed by having recourse to basic principles, reconsidering them and refining them in light of technological development.

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133 [2010] 3 All ER 548 [35].