

**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**

FINAL APPEAL NO. 15 OF 2012 (CIVIL)
(ON APPEAL FROM CACV NO. 53 OF 2011)

(ON APPEAL FROM HCA NO. 2140 OF 2008)

Between :

ORIENTAL PRESS GROUP LIMITED

1st Plaintiff /
(1st Appellant)

ORIENTAL DAILY PUBLISHER LIMITED

2nd Plaintiff /
(2nd Appellant)

- and -

FEVAWORKS SOLUTIONS LIMITED

Defendant /
(1st Respondent)

(ON APPEAL FROM HCA NO. 597 OF 2009)

Between :

ORIENTAL PRESS GROUP LIMITED

1st Plaintiff /
(3rd Appellant)

ORIENTAL DAILY PUBLISHER LIMITED

2nd Plaintiff /
(4th Appellant)

THE SUN NEWS PUBLISHER LIMITED

3rd Plaintiff /
(5th Appellant)

MA CHING KWAN

4th Plaintiff /
(6th Appellant)

- and -

**FEVAWORKS SOLUTIONS LIMITED trading as
ALIVE! MEDIA AND COMMUNICATIONS**

1st Defendant /
(2nd Respondent)

ALIVE! MEDIA AND COMMUNICATIONS LIMITED

2nd Defendant /
(3rd Respondent)

Before : Chief Justice Ma, Mr Justice Chan PJ,
Mr Justice Ribeiro PJ, Mr Justice Litton NPJ and
Mr Justice Gleeson NPJ

Dates of Hearing: 5-6 June 2013

Date of Judgment : 4 July 2013

J U D G M E N T

Chief Justice Ma:

1. I agree with the judgment of Mr Justice Ribeiro PJ. The appeal should be dismissed.

Mr Justice Chan PJ:

2. I agree with the judgment of Mr Justice Ribeiro PJ.

Mr Justice Ribeiro PJ:

3. The respondents in this appeal are the providers, administrators and managers of a website which hosts one of the most popular internet discussion forums in Hong Kong. The appellants have sued them for libel in respect of defamatory statements posted by certain users of that forum. The defamatory

character of those statements is not in dispute. Nor is any libel defence such as privilege or fair comment relevant. What it falls to the Court to consider is the extent to which the providers of an internet discussion platform may be held liable for the posting of defamatory statements by its users. In particular, issues arise as to whether and to what extent such platform providers are in law to be regarded as publishers of the defamatory postings and as to whether the common law defence of innocent dissemination is applicable.

A. *The actions and the defamatory statements*

4. The statements complained of were posted on the forum in three batches and resulted in two actions being brought against the respondents.¹ The first action was brought by Oriental Press Group Limited and Oriental Daily Publisher Limited, the latter company being the registered proprietor, publisher and printer of a popular Chinese daily newspaper known as the “Oriental Daily News”. The former is a publicly listed company which owns the latter. That action is brought against Fevaworks Solutions Limited.

5. Those three companies are also parties to the second action which involves as additional plaintiffs The Sun News Publisher Limited and Mr Ma Ching Kwan. The Sun News Publisher Limited is the registered proprietor, publisher and printer of “The Sun”, another popular Chinese daily within the Oriental group. Mr Ma is the honorary chairman of the listed company. The second action is brought both against Fevaworks Solutions Limited and Alive! Media & Communications Limited, sued jointly as the providers, administrators and managers of the relevant website. I shall refer to the plaintiffs and defendants in the two actions collectively as the appellants and the respondents respectively.

¹ A third action has been stayed pending the outcome of these proceedings.

6. The first action,² which was commenced on 28 October 2008, relates to two batches of defamatory statements, the first having been posted on 27 and 28 March 2007 (“the 2007 statements”) and the second on 24 October 2008 (“the 2008 statements”). Initially, the action only concerned the 2008 statements which first came to the appellants’ attention on the day they were posted. As Chung J found at the trial, those statements contained the defamatory imputations that the appellants were involved in drug trafficking and money laundering; that they were involved in illegal and immoral activities and were corrupt, illegal, immoral and unethical. The appellants’ solicitors wrote to the respondents on the day that the statements appeared on the website, threatening legal proceedings. The respondents were consequently alerted to the existence of the offending words on 27 October 2008 and removed them from the website some three and a half hours after being so informed.

7. Although posted much earlier, the appellants did not know about the 2007 statements until 14 November 2008 and, on the Judge’s finding, those statements were not brought to the respondents’ attention until 10 December 2008. The 2007 statements related to the murder of a newspaper vendor in 1999³ and involved the imputation that the appellants had deliberately avoided reporting the trial and conviction of the men arrested and were thus somehow connected with or accomplices in the crime. Those statements were not removed from the website until August 2009, more than eight months after the respondents had been informed of their existence. The cause of action arising out of the 2007 statements was added by amendment to the first action. In the light of the delay in taking down the offending words, the Judge found that there was no defence to the action based on the 2007 statements and awarded the appellants damages of HK\$100,000.00 in respect thereof.

² HCA 2140/2008.

³ Dealt with by the Court of Appeal in *HKSAR v Lo Hon-hing* CACC No 107 of 2007 (12 September 2008).

8. The second action⁴ concerns defamatory postings made on the website on 21 January 2009 (“the 2009 statements”). They contained the imputations that the appellants were founded on drug money, were involved in drug trafficking, money laundering and immoral activities and were corrupt, illegal, immoral and unethical. They also alleged that Mr Ma was a member of a family involved in drug trafficking and a member of or associated with the 14K triad society. Those words were discovered by the respondents on 22 January 2009, about 12 hours after they had been posted and thereupon immediately removed.

9. It is not disputed that the respondents were unaware of the existence of the offending postings until informed of them by the appellants in the case of the 2007 and 2008 statements, and until the respondents themselves discovered the 2009 statements.

10. The two actions against the respondents were tried together by Chung J without a jury. His Lordship’s award⁵ regarding the 2007 statements was not challenged by the respondents either in the Court of Appeal or in this Court. However, he dismissed the appellants’ claims in both actions in respect of the 2008 and 2009 statements and his decision was upheld by the Court of Appeal both as to liability and damages.⁶

11. Leave to appeal was granted by the Court of Appeal on the basis that the following question of great general or public importance arises:

“In respect of statements defamatory of a third party posted on a commercial website which may be and were accessed by another party, whether the defence of innocent dissemination or any other defence is available to a commercial website host, and if so, under what circumstances may such defence be established or defeated?”

⁴ HCA 597/2009.

⁵ Chung J, HCA 2140/2008 and HCA 597/2009, 25 February 2011.

⁶ [2012] 1 HKLRD 848, Fok JA delivering the judgment on liability and Hartmann JA dealing with damages; Tang VP agreeing.

B. The forum's operation

12. The forum was known as the Hong Kong Golden Forum with the URL⁷ addresses <http://forum7.hkgolden.com> and <http://forum4.hkgolden.com>. The forum had different discussion “channels” catering for various interests of users, including channels concerning computer products and software, games, photography, academic matters, music, finance, sports, entertainment, mobile phones and leisure. The leisure channel⁸ was the most popular. Use of the forum was free, the respondents relying on advertising to generate income.

13. Anyone could browse the website but only persons who had registered as members were able to post messages on the forum. Someone wishing to register had to provide his or her name and certain other details, including a traceable e-mail address with a recognised internet service provider (“ISP”), rather than a more anonymous e-mail address from a web-based provider such as Gmail, Hotmail or Yahoo. Membership was also conditional on accepting the rules of the forum which included a prohibition against postings with objectionable content, including defamation, pornography, harassment and infringing intellectual property rights. A person who successfully registered as a member adopted a forum nickname and would automatically be assigned a password. A member who violated the rules might have his membership suspended or terminated.

14. Although the evidence indicated that the details purportedly provided by persons registering as members were very often obviously fictitious, the condition that they provide an e-mail address with a recognised ISP was of some significance. In the present case, the appellants obtained

⁷ Universal Resource Location, that is, the sequence of letters that identifies and locates resources on the World Wide Web and on the computer hosting the particular website.

⁸ It was suggested at the hearing that the Chinese title of the channel is better translated as “Gossip” rather than “Leisure”.

Norwich Pharmacal orders which led to disclosure by the respondents of certain details of the originators of the offending statements including their registered e-mail addresses. It was through those e-mail addresses that the respondents (with the aid of Court orders) were able to trace and identify the persons concerned. The Court was told by Mr Michael Thomas SC⁹ that the appellants have reached financial settlements with the originators whom it chose to pursue.

15. There was very considerable traffic on the website. Members of the forum would develop what are known as discussion “threads” involving postings expressing a user’s views on a particular topic, leading to a sequence of postings by other users with their views and comments on that topic. The evidence was that there could be 30,000 users online at any given time and that during peak hours, over 5,000 postings could be made each hour. There was thus no attempt to edit or filter postings before they appeared on the forum. However, two administrators were employed to monitor forum discussion for six to eight hours per day, their job being to remove objectionable content by deleting objectionable postings or discussion threads and to field complaints. Forum postings could not be downloaded and a deleted posting no longer exists in “cyberspace” and can no longer be accessed by anyone. Where infraction of the rules by a user was frequent, the administrators could suspend or terminate that user’s account and so his ability to post messages on the forum.

C. Libel and publication

16. The tort of libel has as its aim the protection of a person’s reputation. A person’s reputation consists of what others think of him or her. That reputation is damaged when a defendant publishes or communicates to a third person a defamatory statement (that is, a statement tending to lower someone in

⁹ Appearing with Mr Lawrence K F Ng for the appellants.

the estimation of right-thinking members of society generally¹⁰) about the person defamed. It follows that the act of publication is a fundamental constituent of the tort.

17. In seeking to decide whether and to what extent the respondents should in law be treated as publishers of the defamatory statements posted on the forum, it is necessary to examine the established common law rules on what constitutes “publication” of a libel.

18. As Isaacs J explained, “To publish a libel is to convey by some means to the mind of another the defamatory sense embodied in the vehicle ...”¹¹ It is a bilateral act, as was pointed out in *Dow Jones & Co Inc v Gutnick*:

“Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act – in which the publisher makes it available and a third party has it available for his or her comprehension.”¹²

19. Until mitigated by the common law defence of innocent dissemination which evolved in the late nineteenth century, liability for publishing a libel was strict and could lead to harsh results. A person was held liable for publishing a libel if by an act of any description, he could be said to have intentionally assisted in the process of conveying the words bearing the defamatory meaning to a third party, regardless of whether he knew that the

¹⁰ Gatley on Libel and Slander (Sweet & Maxwell, 11th Ed), §§1.7-1.8, citing Lord Atkin in *Sim v Stretch* (1936) 52 TLR 669 (HL) at 671. For other formulations of the meaning of “defamatory” see Duncan and Neill on Defamation (Lexis Nexis, 3rd Ed), §§4.01-4.02.

¹¹ *Webb v Bloch* (1928) 41 CLR 331 at 363. See also Gatley, §6.1 and §6.14.

¹² (2002) 210 CLR 575 at §26, per Gleeson CJ, McHugh, Gummow and Hayne JJ.

article in question contained those words.¹³ Thus, a textbook published in 1891¹⁴ stated:

“The term published is the proper and technical term to be used in the case of libel, without reference to the precise degree in which the defendant has been instrumental to such publication; since, if he has intentionally lent his assistance to its existence for the purpose of being published, his instrumentality is evidence to show a publication by him.”

20. As Abella J pointed out in *Crookes v Newton*:¹⁵

“... the breadth of activity captured by the traditional publication rule is vast. In *R v Clerk* (1728), 1 Barn KB 304, 94 ER 207, for example, a printer’s servant, whose only role in an act of publication was to ‘clap down’ the printing press, was found responsible for the libels contained in that publication, despite the fact that he was not aware of the contents (p 207).”

21. While (as in the 1891 text) the traditional rule is sometimes expressed as requiring the publication to a third person to be “intentional”,¹⁶ that reference is generally directed at situations where the defendant who authored the defamation does not intend its publication to a third person but where publication takes place without negligence on his part. Thus, where a defendant’s private diary containing defamatory imputations is lost without negligence on his part and made public by another person or, to take an example given by Lord Esher MR, where “the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes its contents known...,”¹⁷ no intentional publication by the author occurs. The requirement of intention in this sense did not narrow the width nor dilute the strictness of the traditional rule.

¹³ *Vizetelly v Mudie’s Select Library* [1900] 2 QB 170 at 179; *Godfrey v Demon Internet Ltd* [2001] QB 201 at 207 per Morland J; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at §25.

¹⁴ Folkard on Slander and Libel, 5th ed (1891), at p 439, cited by Isaacs J in *Webb v Bloch* (1928) 41 CLR 331 at 363-364.

¹⁵ [2011] 3 SCR 269 at §18.

¹⁶ Gatley, at §§6.4, 6.10-6.11.

¹⁷ *Pullman v Walter Hill & Co* [1891] 1 QB 524 at 527.

22. Moreover, publication could (and still can) be established against a person who is vicariously liable for his servants' acts of publication or for acts of publication which he has authorised. All who participated directly or vicariously in the publication were held jointly and severally liable for the entire damage suffered by the plaintiff, regardless of the degree of responsibility each had for the publication. As Gatley points out:

“The person who first spoke or composed the defamatory matter (the originator) is of course liable, provided he intended to publish it or failed to take reasonable care to prevent its publication. However, at common law liability extends to any person who participated in, secured or authorised the publication (even the printer of a defamatory work) though this is qualified by [the common law defence of innocent dissemination]...”¹⁸

“In accordance with general principle, all persons who procure or participate in the publication of a libel, and who are liable therefor, are jointly and severally liable for the whole damage suffered by the claimant.”¹⁹

23. Thus, under the strict rule, publication of a libel, for instance by a newspaper, meant that the journalist who was the originator of the article; the editor who accepted and prepared it for publication; the printer who set the type and printed it; the wholesale distributor who disseminated it; the newsagents who sold it to the readers; and the newspaper's proprietor who published it through its employees or agents were all jointly and severally liable for the damage to the plaintiff's reputation.

D. The common law defence of innocent dissemination

24. The strictness of the publication rule plainly called for some relaxation. The common law defence of innocent dissemination was developed to that end. It was a defence which became established in English law as a

¹⁸ At §6.4.

¹⁹ At §6.5, footnotes omitted.

result of the decisions in *Emmens v Pottle*²⁰ in 1886 and *Vizetelly v Mudie's Select Library Limited* in 1900.²¹

25. It had previously been well-established that the sale of a newspaper which contained a libel constituted a publication of that libel.²² The defendants in *Emmens v Pottle* were newsvendors who were sued for libel on the basis of such a sale. However, the jury gave judgment for the defendant, finding that they did not know and had no reason to suppose that the newspaper sold contained or was likely to contain a libel. On the basis of such findings, Lord Esher MR concluded:

“... the case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. That being so, I think the defendants are not liable for the libel.”²³

26. That was a robust repudiation of the strictness of the traditional rule, his Lordship adding:

“If they were liable, the result would be that every common carrier who carries a newspaper which contains a libel would be liable for it, even if the paper were one of which every man in England would say that it was not likely to contain a libel. To my mind the mere statement of such a result shews that the proposition from which it flows is unreasonable and unjust. The question does not depend on any statute, but on the common law, and, in my opinion, any proposition the result of which would be to shew that the Common Law of England is wholly unreasonable and unjust, cannot be part of the Common Law of England. I think, therefore, that, upon the findings of the jury, the judgment for the defendants is right.”²⁴

27. The elements of the defence are usually taken to be as stated in the judgment of Romer LJ in *Vizetelly v Mudie's Select Library Limited*,²⁵ where his Lordship formulated the principles as follows:

²⁰ (1886) 16 QBD 354.

²¹ [1900] 2 QB 170.

²² *The Duke of Brunswick and Luneberg v Harmer* (1849) 14 QB 184.

²³ *Emmens v Pottle* (1886) 16 QBD 354 at 357.

²⁴ At 357-358.

²⁵ [1900] 2 QB 170 at 180.

“The result of the cases is I think that, as regards a person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken, what I may call, a subordinate part in disseminating it, in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and, if he succeeds in shewing (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 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, then, although the dissemination of the work by him was prima facie publication of it, he may nevertheless, on proof of the before-mentioned facts, be held not to have published it. But the onus of proving such facts lies on him, and the question of publication or non-publication is in such a case one for the jury.”

28. In *Vizetelly*, the defendants operated a circulating library and were sued for lending out and selling copies of a book which, unknown to them, contained a libel on the plaintiff. The defendants pleaded but failed to establish the defence of innocent dissemination since they ought to have known of the libel but had negligently failed to take note of advertisements placed in the trade press by the commercial publishers of the book (who had been successfully sued by the plaintiff) recalling all copies of the book so that the offending page could be replaced.

29. The defence thus has two important features. First, not every person involved in the process of publication can rely on it. It is not available to “the printer or the first or main publisher of a work which contains a libel” but is confined to persons who, in the ordinary course of business, play “a subordinate part in disseminating it”. Secondly, for this second class of persons, it replaces the strict liability rule with a rule which imposes liability on the basis that the person playing the subordinate role knew or ought by the exercise of reasonable care, in the circumstances in which the work came to him or was disseminated, to have known that the article disseminated contained defamatory material. It places the onus on such subordinate disseminators to prove that they did not know that the article contained a libel and that their lack of knowledge was not due to their own lack of care.

30. As Gaudron J pointed out in *Thompson v Australian Capital TV Ltd*,²⁶ the defence has been adopted not only in subsequent English cases, but also in Canada, Australia and New Zealand. In some jurisdictions, statutory defences along the same lines have been enacted. Thus in England, Lord McKay of Clashfern LC introducing the bill which became section 1 of the Defamation Act 1996, described it as “a modern equivalent of the common law defence of innocent dissemination”.²⁷ Hong Kong has not introduced such legislation and the defence which concerns us is that which exists at common law.

31. Although in both *Emmens* and *Vizetelly*,²⁸ it was suggested that successful invocation of the innocent dissemination defence leads to the defendant being deemed not to have published the libel at all, I respectfully consider the better view to be that stated by Duncan and Neill in an earlier edition of their work,²⁹ noted by Brennan CJ, Dawson and Toohey JJ in their joint judgment in *Thompson v Australian Capital TV Ltd*,³⁰ namely, that:

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

²⁶ (1996) 186 CLR 574 at 592.

²⁷ See *Godfrey v Demon Internet Ltd* [2001] QB 201 at 204. Section 1(1) of the 1996 Act provides: “(1) In defamation proceedings a person has a defence if he shows that--(a) he was not the author, editor or publisher of the statement complained of, (b) he took reasonable care in relation to its publication, and (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.”

²⁸ Adopted in *McPhersons Ltd v Hickie (unreported) No. 40290 of 1994 Supreme Court of New South Wales Court of Appeal*, p 6 per Powell JA; and in the recent English Court of Appeal decision in *Tamiz v Google Inc* [2013] EMLR 14 at §§26-36, per Richards LJ.

²⁹ Duncan and Neill on Defamation, 2nd Ed, 1983, p 110, fn 3. The discussion in the current edition focusses on the statutory defence provided by section 1 of the Defamation Act 1996.

³⁰ (1996) 186 CLR 574 at 586.

32. The rule that persons relying on the defence are liable unless they discharge the onus of proving lack of knowledge and the absence of negligence indicates that they must in principle be publishers, albeit in a subordinate role, for otherwise they could not be held liable at all since a fundamental constituent of the tort would be missing. On this basis, it may perhaps be preferable to refer to those playing a subordinate role in the publication process as “subordinate publishers” rather than “subordinate distributors” as they are often called.

33. In the present appeal, one of the main issues dividing the parties is whether the respondents are eligible to rely on the innocent dissemination defence or whether they are first or main publishers to whom it does not apply.

E. Notice boards and graffiti

34. A further set of legal principles which featured prominently at the hearing of this appeal arises out of the line of cases invoked by the respondents involving actions brought against the owners or occupiers of premises in which unauthorised third parties had affixed defamatory statements on a notice board or scrawled such statements as graffiti on its walls.

35. That line of authorities begins with the decision of the English Court of Appeal in *Byrne v Deane*.³¹ There, a libel action was brought against the proprietors of a golf club in respect of a typewritten sheet of paper containing an allegedly defamatory statement set in verse which someone pinned onto a notice board visible to members using the club. The relevant question was whether the club’s proprietors could be held to have acted as publishers of that statement. It was a rule of the club that the posting of notices in the club premises without the consent of the club secretary was not allowed. One of the defendants was the club secretary. She admitted that she had read the statement but allowed it to

³¹ [1937] 1 KB 818.

remain on the notice board “for some days”³² because she could see no harm in it.

36. All three Judges held that there had been publication by her. Greer LJ³³ so concluded on the basis that she and her husband (the other defendant), being proprietors of the establishment:

“...by allowing the defamatory statement, if it be defamatory, to rest upon their wall and not to remove it, with the knowledge that they must have had that by not removing it it would be read by people to whom it would convey such meaning as it had, were taking part in the publication of it.”

37. Slessor LJ thought that only the secretary (and not her husband) had published the defamation by adopting the statement posted on the notice board:

“There are cases which go to show that persons who themselves take no overt part in the publication of defamatory matter may nevertheless so adopt and promote the reading of the defamatory matter as to constitute themselves liable for the publication. ... I think having read it, and having dominion over the walls of the club as far as the posting of notices was concerned, it could properly be said that there was some evidence that she did promote and associate herself with the continuance of the publication in the circumstances after the date when she knew that the publication had been made.”³⁴

38. Greene LJ pointed out that attaching the notice to the club’s walls was a trespass and that both defendants as proprietors had ample powers to remove it.³⁵ He stressed that whether what had occurred amounted to publication was a question of fact which depended on whether the circumstances justified the inference that the defendants had assumed responsibility for the continued presence of the statement on their notice board:

“It may very well be that in some circumstances a person, by refraining from removing or obliterating the defamatory matter, is 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

³² [1937] 1 KB 818 at 822.

³³ Who dissented on the question of defamatory meaning, the majority holding that the words were not capable of being defamatory.

³⁴ [1937] 1 KB 818 at 834-835.

³⁵ At 837.

the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?”³⁶

39. His Lordship gave as an example of a situation where no such inference could be drawn the case where:

“...somebody with a mallet and a chisel carved on the stonework of somebody's house something defamatory, and carved it very deeply so that the removal of it could only be effected by taking down the stonework and replacing it with new stonework. In a case of that kind it appears to me that it would be very difficult, if not indeed impossible, to draw the inference that the volition of the owner of the house had anything to do with the continued presence of that inscription on his stonework. The circumstance that to remove it would require very great trouble and expense would be sufficient to answer any such aspersion.”

40. Applying that approach to the case at hand, Greene LJ considered it proper to infer that the defendants had consented to the continued presence of the statement on the notice board and so were potentially liable as publishers:

“The defendants, having the power of removing it and the right to remove it, and being able to do it without any difficulty at all, and knowing that members of the club when they came into the room would see it, I think must be taken to have elected deliberately to leave it there. The proper inference, therefore, in those circumstances it seems to me is that they were consenting parties to its continued presence on the spot where it had been put up. That being so it seems to me that they must be taken to have consented to its publication to each member who saw it.”³⁷

41. The second case cited in this line of authority is the decision of the Court of Appeal of California in *Isabelle Hellar v Joe Bianco*.³⁸ This involved a defamatory graffito on the wall of the men's lavatory in the defendant's tavern which imputed that the plaintiff was “an unchaste woman who indulged in illicit amatory ventures”, supplying her telephone number. When alerted to its existence, her husband telephoned the bartender and demanded that he remove it within 30 minutes. The bartender said he was too busy to do so but would get round to it in due course. The plaintiff sued the owners of the tavern for libel but she was non-suited at first instance. The Court of Appeal reversed the

³⁶ At 837-838.

³⁷ At 838.

³⁸ (1952) 244 P 2d 757.

Judge, holding that it was a case which ought to be left to the jury. It cited *Byrne v Deane* for the theory that “by knowingly permitting such matter to remain after reasonable opportunity to remove the same the owner of the wall or his lessee is guilty of republication of the libel”, provided that the plaintiff was able to introduce “evidence tending to show that respondents adopted the defamatory matter or republished it”.³⁹ The Court of Appeal held that it was “a question for the jury whether, after knowledge of its existence, respondents negligently allowed the defamatory matter to remain for so long a time as to be chargeable with its republication, occurring when the husband and the group with him visited the rest room and saw the writing.”⁴⁰

42. The third case, *Urbanchich v Drummoyne Municipal Council*,⁴¹ contains a helpful analysis by Hunt J of the Supreme Court of New South Wales. It was the trial of a preliminary issue as to “the capacity of the plaintiff’s case [as pleaded] to establish his allegation that the second defendant had published the matter complained of”. The plaintiff was the leader of an extreme right wing group who sued, among others, the Urban Transit Authority (the second defendant) for libel on the basis that posters bearing photographs purporting to show him in the company of Adolf Hitler and of others in Nazi uniforms had been glued onto certain bus shelters controlled by the Authority. His solicitors asked the Authority to remove them but the posters remained in place for at least a month. Relying on *Byrne v Deane* and *Hellar v Bianco*, the plaintiff argued that he merely needed to prove notice to the Authority and its failure to comply with his removal request within a reasonable time to establish publication. Hunt J rejected that argument, stating:

“In a case where the plaintiff seeks to make the defendant responsible for the publication of someone else's defamatory statement which is physically attached to

³⁹ At 759.

⁴⁰ At 759-760.

⁴¹ (1991) Aust Torts Reports §81-127.

the defendant's property, he must establish more than mere knowledge on the part of the defendant of the existence of that statement and the opportunity to remove it. According to the authorities, the plaintiff must establish that the defendant consented to, or approved of, or adopted, or promoted, or in some way ratified, the continued presence of that statement on his property so that persons other than the plaintiff may continue to read it - in other words, the plaintiff must establish in one way or another an acceptance by the defendant of a responsibility for the continued publication of that statement.”⁴²

43. Hunt J therefore explained the *Byrne v Deane* rule as one which resulted in the occupier of the premises being treated as a publisher of the libel only if the facts, including a failure to remove the offending statements within a reasonable time of becoming aware of their existence, justified the inference that the occupier had consented to or adopted the defamatory statement. His Honour therefore held that the pleaded case, if duly proved, was:

“... capable of amounting to the publication by the second defendant of those posters provided that the jury also draws the inference from such conduct that the second defendant had in fact accepted a responsibility for the continued publication of those posters.”⁴³

44. The *Byrne v Deane* line of cases may therefore be viewed as authority for the following propositions:

- (a) Where a third person writes or affixes a statement defamatory of the plaintiff on the occupier's property without the occupier's knowledge, the occupier is not treated as a publisher of that statement prior to his becoming aware of it.
- (b) Once the occupier discovers its existence, he may be treated as a publisher but only if, having the power to do so, he does not remove or obliterate the offending statement in circumstances which justify inferring as a matter of fact that by his inaction he has consented to or ratified its continued publication.

⁴² At 69,193.

⁴³ At 69,195.

- (c) Where the occupier becomes aware of the libel but the circumstances show that removal or obliteration is very difficult or very expensive, the fact that the defamatory statement is not expunged may well not justify the inference that it remains in place with his approval.

45. The respondents seek to argue that their situation is analogous to that of the golf club proprietors and that application of the notice board approach exonerates them from liability.

F. The differences between the two sets of principles

46. It is important to appreciate the differences between the principles which derive from the notice board line of cases and those which constitute the innocent dissemination defence.

47. As analysed above, the innocent dissemination defence is a common law doctrine developed to mitigate the harshness of the strict publication rule. While it does not avail the first or main publishers it brings relief to subordinate publishers who have knowingly participated in the process of disseminating the article concerned. The defence is therefore applicable to persons who are admittedly publishers, although playing a subordinate role, allowing them to be exonerated from liability if they discharge the burden of showing that they did not know that the article which they had helped to disseminate contained the offending content and that such lack of knowledge was not due to any lack of reasonable care on their part.

48. In contrast, the occupiers in the notice board and graffiti cases have not in any sense assisted or participated in the originator's publication of the libel. These are not cases involving anyone who has played a role in a scheme for distributing the offending publication seeking relief from the strict rule. As Greene LJ pointed out in *Byrne v Deane*, the posting of the defamatory verse on

the club's notice board was an act of trespass. A person who defaces an occupier's walls with graffiti prima facie does not do so with the approval or encouragement of the occupier. What this line of cases addresses are the conditions which must be satisfied before the occupier can be regarded as having turned himself into a publisher of the libel. That occurs only if the plaintiff shows that the occupier became aware of the libellous statement on his premises and allowed it to remain in place in circumstances which justify the inference that he has adopted or ratified its publication. If the occupier was not aware or if the inference cannot properly be drawn, he does not make himself a publisher of the trespassing inscription and is not liable at all. These rules are therefore not about relieving a person's prima facie liability as a publisher but about whether or not an occupier is constituted a publisher. Since it is about establishing the occupier's liability as a publisher (and not about a publisher establishing a defence), the onus rests on the plaintiff.

49. It follows from the distinctions drawn above that I do not share the approach in some of the reported cases involving libel in an internet context where the *Byrne v Deane* principles appear to have been treated merely as a facet of the innocent dissemination defence or the defence under section 1 of the Defamation Act 1996, in the United Kingdom.⁴⁴

G. The Byrne v Deane principles inapplicable

50. Once the nature of the *Byrne v Deane* principles is grasped, it becomes clear that they do not apply to internet platform providers like the respondents. The provider of a discussion forum is in a wholly different position from that of the occupier of premises who is not in the business of publishing or facilitating publication at all, but who has had imposed on him the defamatory act of a trespasser.

⁴⁴ *Godfrey v Demon Internet Ltd* [2001] QB 201 at 208; *Davison v Habeeb and others* [2011] EWHC 3031 at §34; *Tamiz v Google Inc* [2013] EMLR 14 at §26-36.

51. The respondents plainly played an active role in encouraging and facilitating the multitude of internet postings by members of their forum. As described in Section B of this judgment, they designed the forum with its various channels catering for their users' different interests; they laid down conditions for becoming a member and being permitted to make postings; they provided users browsing their website access to the discussion threads developed on their forum; they employed administrators whose job was to monitor discussions and to delete postings which broke the rules; and they derived income from advertisements placed on their website, a business model which obviously benefits from attracting as many users as possible to the forum.

52. The respondents were therefore, in my view, plainly participants in the publication of postings by the forum's users and in that sense they were publishers from the outset, it being in issue whether they were first or main publishers or merely subordinate publishers. I accept Mr Thomas SC's submission that they were in a substantively different position from the occupiers in the notice board and graffiti cases. The relevant question in the present case is whether, as publishers, the respondents are entitled to rely on, and have established, the defence of innocent dissemination, relieving themselves of the strict publication rule which would otherwise be applicable. The question is *not* whether, originally being non-publishers, they have, when fixed with knowledge of the defamatory postings, demonstrated their consent to and adoption of those postings, turning themselves into publishers.

53. In this context, I respectfully part company with the reasoning (adopted on an interlocutory basis) of the English Court of Appeal in *Tamiz v Google Inc.*⁴⁵ It is reasoning which proceeds on the basis that successful invocation of the defence of innocent dissemination results in the defendant

⁴⁵ [2013] EMLR 14, which was adopted by Courtney J in the High Court of New Zealand in *Wishart v Murray* [2013] NZHC 540 at §§111-116.

being deemed not to have published at all. For the reasons previously given,⁴⁶ I do not accept that premise. Nor am I able to accept the distinction drawn between the notice board and graffiti analogies, nor the suggestion that “the provision of a platform for blogs is equivalent to the provision of a notice board”.⁴⁷ As indicated above, my view is that the provider of an internet discussion platform similar to that provided by the respondents falls from the outset within the broad traditional concept of “a publisher”, a characteristic not shared by a golf club or other occupier who puts up a notice board on which a trespassing message is posted.

54. I pause to note in passing that there is rightly no suggestion in the present case that the providers of a discussion platform like the respondents should be regarded as “mere conduits” or “passive facilitators” comparable to the Post Office or a telephone company, as has sometimes been argued in certain internet cases.⁴⁸

H. Publication and the internet

55. The crucial questions in this appeal are therefore whether the respondents are subordinate publishers entitled to rely on the common law defence of innocent dissemination and, if so, whether they have, on the facts, made out that defence. For these questions to be properly addressed it is necessary to consider the nature of publication on the internet in cases like the present.

⁴⁶ In Section D.

⁴⁷ [2013] EMLR 14 at §33. I also do not, with respect, subscribe to the analysis of this line of cases adopted by Dr Matthew Collins in “The Law of Defamation and the Internet” (OUP 3rd Ed) at §6.29-§6.34.

⁴⁸ *Godfrey v Demon Internet Ltd* [2001] QB 201 at 209-210; *Tsichlas v Touch Line Media Pty Ltd* 2004 (2) SA 112 at 123; *Bunt v Tilley* [2007] 1 WLR 1243 at §37; *Tamiz v Google Inc* [2013] EMLR 14 (CA) at §23; *Wishart v Murray* [2013] NZHC 540 at §110, §117.

56. The distinction between the first or main publishers of a work which contains a libel⁴⁹ and subordinate publishers of that work, central to the innocent dissemination defence, was developed in the era of mass communications in the print medium. As we have seen, the defence was designed to relieve from the strict publication rule, persons such as wholesalers, distributors, booksellers, librarians, newsagents and the like. While such persons came within the very broad traditional concept of “publication” since they intentionally participated in distribution of the work, they were relieved of liability if they could show that they did not know and could not with reasonable care have known the defamatory content of the article they were disseminating.

57. In the creation and distribution of such print publications, the first or main publishers have or can readily acquire full knowledge of the publication’s content before its release and are able to control and, if necessary, prevent dissemination of such content. It involves what is sometimes called a “one-to-many” model of mass communication. The “one” – the entity which originates and publishes the work – exercises editorial and general control over the publication process. Such an entity is denied the defence of innocent dissemination.

58. The same “one-to-many” model applies to radio and television broadcasts, as illustrated by *Thompson v Australian Capital TV Ltd.*⁵⁰ That was a case which involved a programme produced by one television channel (Channel 9) being broadcast live to air by another (Channel 7). The programme contained defamatory allegations, leading to an action against Channel 7 which sought to raise the innocent dissemination defence on the basis that it was a subordinate publisher of Channel 9’s programme. That defence was rejected on the basis that Channel 7 had full control of how and when the programme was

⁴⁹ Leaving printers aside for the moment.

⁵⁰ (1996) 186 CLR 574.

re-transmitted and that its decision to broadcast it live was a decision taken as a main publisher of that programme in its own right or as a main publisher by virtue of its having authorised publication of the content originating from Channel 9. In their joint judgment, Brennan CJ, Dawson and Toohey JJ stated:

“It is true that Channel 7 did not participate in the production of the original material constituting the program. But Channel 7 had the ability to control and supervise the material it televised. Channel 7’s answer is that time did not permit monitoring the content of the program between its receipt at Black Mountain and its telecast from the studios in the Australian Capital Territory. That may well be so but it by no means follows that Channel 7 was merely a conduit for the program and hence a subordinate disseminator. It was Channel 7’s decision that the telecast should be near instantaneous, a decision which was understandable given the nature and title of the program⁵¹ but which was still its decision. ... In those circumstances it would be curious if Channel 7 could claim to be a subordinate disseminator because it adopted the immediacy of the program. It did that for its own purposes, that is, to telecast to viewers in the Australian Capital Territory and adjoining areas.”⁵²

59. In many instances, publications on the internet involve a qualitatively different process, characterised by open, interactive, “many-to-many” communications made and accessed on platforms provided by internet intermediaries. This is explained by Professor Jack M Balkin⁵³ in the following terms:

“Mid-twentieth century mass media – newspapers, television, cable and satellite – were broadcasters, with one entity speaking to many people, and little opportunity to speak back. Twenty first century mass media, the so-called ‘new intermediaries’, are conduits, platforms, and services. They do not necessarily broadcast but facilitate the speech of others, and instead of being a one-to-many, there are many-to-many forms of communication. They include not only broadband companies, but also a whole range of online service providers, like YouTube, Blogger, and their parent company Google; social networking sites like MySpace and Facebook; Flickr, a photo-sharing service owned by Yahoo; and virtual worlds like Second Life. These online service providers offer platforms through which people can find content, create new content, transform existing content and broadcast the content to others ...

⁵¹ “The Today Show”.

⁵² (1996) 186 CLR 574 at 589-590.

⁵³ Knight Professor of Constitutional Law and the First Amendment, Yale Law School. Paper prepared for the Global Constitutionalism Seminar, 2010, Yale Law School, adapted from Jack M Balkin, *Media Access: A Question of Design*, 76 *George Washington L Rev* 933 (2008).

These new intermediaries are conduits for other people's speech and communications. Indeed, unlike twentieth century media, a key element of their business models is providing widespread, democratized, access to media and encouraging participation. That is because their business models depend on user-generated content ..."

60. In contrast, as Professor Balkin points out:

"The 'traditional' or 'legacy' media of newspapers, television, radio and cable television merge content delivery with content production. They tightly control the messages that they publish or broadcast."

61. The present respondents, as providers of the discussion forum, belong to the class of the "new intermediaries" described above. They were not the originators of the defamatory statements complained of. Those statements were the result of their having facilitated the speech of others in a forum hosting a large volume of many-to-many communications. Should the law of libel treat the respondents as main or subordinate publishers?

I. Authorization

62. Mr Thomas's first argument in support of depriving the respondents of the innocent dissemination defence is that they authorized the making of the offending statements and should, on that basis, be treated as the first or main publishers.

63. Plainly, if a defendant knew the content of a defamatory article and authorized or participated in its publication, that defendant would be liable as a main publisher. As Eady J pointed out in *Bunt v Tilley*, "It is clear that the state of a defendant's knowledge can be an important factor"⁵⁴ – a point to which I shall return. But in the present case, it is not in dispute that the respondents were unaware of the offending words until some time after they had been published on the forum. This is not a case where liability as publisher can be founded upon vicariously liability for the publishing acts of employees or upon rules for attributing liability to a corporation for the acts of its organs or agents.

⁵⁴ [2007] 1 WLR 1243 at §21.

How then could it be said that the respondents “authorized” their publication? Mr Thomas’s answer is that since, for their own commercial purposes, every posting on the forum was made with the respondents’ encouragement, they must be taken to have authorized each such posting, whatever its content.

64. It is of course possible in law that a principal might attract liability where he authorizes his agent to publish whatever statement the latter may choose to publish, including a defamatory statement. However, that would have to be established as a matter of fact with evidence of some pre-existing arrangement between principal and agent or later ratification. An example where such evidence did exist can be found in *Thompson v Australian Capital TV Ltd*,⁵⁵ where Channel 7’s decision to re-broadcast the programme made by Channel 9 instantaneously was held to be evidence of Channel 7 authorising publication of whatever content Channel 9 chose to put into that programme. Gaudron J reached that conclusion, stating:

“There can be no doubt that Channel 7 authorised the retransmission to its viewers by its servants or agents of the material which was defamatory of the appellant. Without its authority, the material would not have been retransmitted. And it is sufficient that it authorised the retransmission to its viewers of whatever was transmitted by Channel 9 without regard to its contents. Having authorised its retransmission, Channel 7 published the material in question. It cannot rely on the defence of innocent dissemination.”⁵⁶

65. That was of course a situation involving two television channels, each in the business of making “one-to-many” broadcasts, with one adopting the programme produced by the other. The re-transmission was pursuant to a specific mutual arrangement which was plainly evident.

66. Nothing approaching such evidence exists in the present case. It is inherently improbable that the provider of an internet platform facilitating many-to-many exchanges among users who may post as many as 5,000

⁵⁵ (1996) 186 CLR 574 at 592.

⁵⁶ At 596.

messages per hour should intend to confer a sweeping, undifferentiated authorization on each of them to post whatever unlawful and objectionable postings they may choose to post. The evidence is to the contrary. As noted above,⁵⁷ the respondents laid down forum rules prohibiting postings with objectionable content, including defamation, pornography, harassment and infringing intellectual property rights and employed two administrators tasked with making deletions and responding to complaints, having power to suspend or terminate the accounts of repeated offenders. Those rules may not have been efficiently or evenly enforced. But the stipulation of such rules with their enforcement from time to time suffices to show that the platform providers were not authorizing the publication of whatever forum users might choose to post. It is one thing to encourage heavy traffic to make the site attractive to advertisers, but another to conclude that such encouragement involved authorising defamatory postings such as those complained of. I am accordingly unable to accept the appellants' "authorization" submission.

J. A process of elimination

67. Mr Thomas's second argument for excluding the innocent dissemination defence involves the contention that, by a process of elimination, the respondents must have acted as the first or main publishers of the offending statements since no other possible candidates exist. The respondents, as providers of the forum, he submits, stored the defamatory postings on their server and conveyed them to any person seeking to access the relevant discussion threads, there being no other person involved in the act of publication. It was argued that the originators of the offending postings are not relevant to the process of publication which should be seen as involving only the forum provider and the person who accesses the offending material. To illustrate this, Mr Thomas invited the Court to consider the situation where the

⁵⁷ In Section B.

originator posts the defamatory statement and, before anyone accesses it, the respondents' server crashes, making the posting inaccessible by anyone. Such a situation, he argued, shows that the crucial publisher is not the originator, but the forum provider.

68. It is clear law that internet material is published when and where it is accessed or downloaded in comprehensible form. A person wishing to view on his computer the webpage containing the relevant material, sends a request to the URL address of the website on which that material is stored and, in response, the webpage is transmitted to the requesting computer. When it is received and accessed or downloaded in a form comprehensible to the person making the request, the material is "published" for the purposes of libel law.⁵⁸

69. However, I do not accept that the originator and any other persons "upstream" from the forum provider should somehow be ignored. As Gatley points out:

"The person who first spoke or composed the defamatory matter (the originator) is of course liable, provided he intended to publish it or failed to take reasonable care to prevent its publication."⁵⁹

70. In *Emmens v Pottle*,⁶⁰ when contrasting the position of a subordinate disseminator with that of a first or main publisher, Lord Esher MR stated:

"The proprietor of a newspaper, who publishes the paper by his servants, is the publisher of it, and he is liable for the acts of his servants. The printer of the paper prints it by his servants, and therefore he is liable for a libel contained in it. *But the defendants did not compose the libel on the plaintiff, they did not write it or print it; they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel?*"

⁵⁸ *Godfrey v Demon Internet Ltd*[2001] QB 201 at 208-209; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at §§14-16, 44; *Loutchansky v Times Newspapers Ltd (Nos. 2-5)* [2002] QB 783 at §58.

⁵⁹ Gatley at §6.4.

⁶⁰ (1886) 16 QBD 354 at 357.

71. His Lordship was plainly indicating (by the words which I have italicised) that if the defendants had composed or written the libel, they would obviously have been liable as first or main publishers, but that since they had not done so and had only disseminated the libel, it was necessary to consider their position as subordinate publishers.

72. Thus, a journalist is undoubtedly to be treated as the (or at least, *a*) first or main publisher of a newspaper article, having authored it in the first place. The originator of a forum posting occupies a like position. As stated previously, the process of publication is bilateral. At one end are those who create the article and participate in its dissemination. At the other, is the reader, listener or viewer who receives it. There is no conceivable reason for ignoring the originator of the posting as the first and one of the main publishers. Indeed, as we have seen, the appellants pursued some of the originators as publishers of the defamatory statements and obtained financial settlements from them.

73. It does not assist the appellants' argument to postulate the crashing of the forum's server, resulting in failure of the publication process. To suggest that this shows that the only publisher is the forum provider involves a misdirected "but for" argument. True it is that "but for" the proper functioning of the forum's server, the hypothetical defamatory statement would not have been published to persons seeking to access the website. But that does not provide a basis for excluding the originator as a first or main publisher. It remains also true that "but for" the originator making the defamatory posting in the first place, there would be no libel to convey to the ultimate recipient. Where the server does not crash and the chain of publication is completed, the originator is seen to be an obviously essential first or main publisher in the bilateral publication process. I therefore reject the argument that in the absence of any other candidate, the respondents must be held to be the only first or main publisher.

K. Who is in law a “first or main publisher”?

74. I turn then to the first of the central issues in this appeal: Are the respondents in law to be treated as the first or main publishers or merely as subordinate publishers of the defamatory statements posted by the forum users in question? What are the criteria for determining whether a person who plays some role in the process of publishing a particular article is a first or main publisher of that article?

75. As the authorities on the innocent dissemination defence show, in a newspaper setting, the journalist, editor, printers⁶¹ and (vicariously) the newspaper proprietor are all treated as first or main publishers. In my view, this is because they are persons whose role in the publication process is such that they know or can be expected easily to find out the content of the articles being published and who are able to control that content, if necessary preventing the article’s publication. It is because they occupy such a position that the law has held them strictly liable for any defamatory statements published.

76. In my view, the abovementioned characteristics supply the criteria for identifying a person as a first or main publisher. They are (i) that he knows or can easily acquire knowledge of the content of the article being published (although not necessarily of its defamatory nature as a matter of law); and (ii) that he has a realistic ability to control publication of such content, in other words, editorial control involving the ability and opportunity to prevent publication of such content. I shall, for brevity refer to them as “the knowledge criterion” and “the control criterion” respectively.

⁶¹ Although they may nowadays better be viewed as subordinate publishers.

K.1 The knowledge criterion

77. That the knowledge criterion identifies a distinguishing characteristic of a first or main publisher is clear from the doctrine of innocent dissemination itself: the absence of knowledge is the first requirement of that defence, being a defence only open to subordinate publishers. Thus, in *Emmens v Pottle*,⁶² Lord Esher MR stated :

“The question is whether, as such disseminators, they published the libel? If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel, and would have been liable for so doing. That, I think, cannot be doubted.”

78. And as laid down by Romer LJ in *Vizetelly*, to avail himself of the defence, the defendant must establish “... that he was innocent of any knowledge of the libel contained in the work disseminated by him.”⁶³

79. The knowledge criterion is also reflected in the traditional inclusion of printers as within the class of first or main publishers – and in the more recent tendency to question whether such treatment of printers ought to be maintained.

80. Thus, in *Thompson v Australian Capital TV Ltd*,⁶⁴ the Australian High Court expressed itself in favour extending the innocent dissemination defence to printers on the basis that their knowledge of content can no longer be assumed or expected. In their joint judgment,⁶⁵ Brennan CJ, Dawson and Toohey JJ stated:

“...in both *Emmens v Pottle* and *Vizetelly* printers were regarded as outside the ambit of the defence of innocent dissemination. The printing technology of the time made it inevitable that the printer would know the contents of what was being printed. With changes in technology, the logic of treating printers in the same way as distributors

⁶² (1886) 16 QBD 354 at 357.

⁶³ *Vizetelly v Mudie's Select Library* [1900] 2 QB 170 at 180.

⁶⁴ *Thompson v Australian Capital TV Ltd* (1996) 186 CLR 574.

⁶⁵ At 586-587.

was accepted by the Faulks Committee in the United Kingdom and by the Australian Law Reform Commission. The logic is irresistible so long as the printer qualifies as a subordinate publisher ...”

K.2 Knowledge of what?

81. What must the publisher be shown to have known or to be expected to have known in order to be treated as a first or main publisher and so deprived of the defence? Mr Thomas submitted that it was sufficient that these respondents knew that they were hosting and making accessible a multitude of postings on the forum. They must therefore, he argued, be taken to know the content of the postings or discussion threads complained of since they formed part of that multitudinous body of material. I cannot accept such a broad and indiscriminate basis for deeming an internet intermediary strictly liable as a first or main publisher. It should be stressed that adopting a more focussed requirement as to knowledge does not mean absolving a platform provider from liability. It means treating it as a subordinate publisher and throwing on it the burden of bringing itself within the innocent dissemination defence.

82. Eady J in *Bunt v Tilley*,⁶⁶ helpfully explains the nature of the knowledge requirement in the following terms:

“I have little doubt ... that to impose legal responsibility upon anyone under the common law for the publication of words it is essential to demonstrate a degree of awareness or at least an assumption of general responsibility, such as has long been recognised in the context of editorial responsibility. As Lord Morris commented in *McLeod v St Aubyn* [1899] AC 549 , 562: ‘A printer and publisher intends to publish, and so intending cannot plead as a justification that he did not know the contents. The appellant in this case never intended to publish.’ In that case the relevant publication consisted in handing over an unread copy of a newspaper for return the following day. It was held that there was no sufficient degree of awareness or intention to impose legal responsibility for that ‘publication’. ... for a person to be held responsible there must be knowing involvement in the process of publication of *the relevant words*.” (Italics in the original)

83. In *Emmens v Pottle*, in summarising the situation which gave rise to the innocent dissemination defence, Lord Esher MR stated: “...the defendants

⁶⁶ [2007] 1 WLR 1243 at §§22-23.

were innocent disseminators *of a thing* which they were not bound to know was likely to contain a libel.”⁶⁷ And in *Vizetelly*, Romer LJ spoke of the defendant being “innocent of any knowledge of the libel contained in *the work* disseminated by him.”⁶⁸

84. There may well be scope for argument in any particular case as to what the internet equivalent of the article or “thing” or “work” whose contents are known to the publisher should be taken to be. However, that debate is in my view of little consequence. The important question is whether the publisher knew or can properly be expected to have known the content of the article being published. Eady J stated that knowledge of “the relevant words” contained in the article complained of must be shown. That should be taken to mean that the publisher must know or be taken to know the content – not necessarily every single word posted – but the gist or substantive content of what is being published, to qualify as a first or main publisher. Such knowledge may exist in relation to the content of a particular posting or a particular discussion thread or group of discussion threads, it being irrelevant whether the provider realised that such content was in law defamatory.⁶⁹ I reject in any event the appellants’ suggestion that a discussion forum provider should be treated as having knowledge of the content of every message posted on the forum and deemed to be a first or main publisher thereof.

K.3 The control criterion

85. The requirement that a first or main publisher must also be shown to have control over the published content (meaning the ability and opportunity to prevent its publication) reflects the law’s policy of mitigating the strict

⁶⁷ (1886) 16 QBD 354 at 357 (Italics supplied).

⁶⁸ *Vizetelly v Mudie’s Select Library Limited* [1900] 2 QB 170 at 180 (Italics supplied).

⁶⁹ See Eady J in *Bunt v Tilley* [2007] 1 WLR 1243 at §23, as to the irrelevance of knowledge regarding the legal significance of the statement published.

publication rule in relation to a person who plays a less important role in the publication process and thus does not know the content being published or can do nothing to prevent its publication. Conversely, if the person concerned was aware of the article's content and had the opportunity to prevent its dissemination, there is no reason in principle for excluding the strict publication rule.

86. The ability to exercise such control was central to the decision in *Thompson v Australian Capital TV Ltd.*⁷⁰ As noted above, Channel 7 was held liable as a first or main publisher for re-broadcasting live to air the defamatory programme produced by Channel 9 since it was clear that Channel 7 had had the ability and opportunity to prevent publication of the defamatory content but had decided not to exercise such control. In the main judgment, their Honours stated:

“It is true that Channel 7 did not participate in the production of the original material constituting the program. But Channel 7 had the ability to control and supervise the material it televised. Channel 7's answer is that time did not permit monitoring the content of the program between its receipt at Black Mountain and its telecast from the studios in the Australian Capital Territory. That may well be so but it by no means follows that Channel 7 was merely a conduit for the program and hence a subordinate disseminator. It was Channel 7's decision that the telecast should be near instantaneous, a decision which was understandable given the nature and title of the program but which was still its decision.”⁷¹

87. In *Bunt v Tilley*, Eady J pointed to knowledge and control (meaning “an opportunity to prevent the publication”) as the basis for allocating responsibility:⁷²

“In determining responsibility for publication in the context of the law of defamation, it seems to me to be 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, when there would be an opportunity to prevent the

⁷⁰ (1996) 186 CLR 574.

⁷¹ Per Brennan CJ, Dawson and Toohey JJ, at 589-590.

⁷² [2007] 1 WLR 1243 at §21.

publication, there would seem to be no reason in principle why liability should not accrue.”

88. Editorial control was given central importance by the Supreme Court of Canada in *Crookes v Newton*.⁷³ The Court had to decide whether by creating a hyperlink that connects a reader to allegedly defamatory material, the creator of the hyperlink can be said to “publish” the offending material. A hyperlink is a device which can be imbedded in an internet article which, when clicked on, takes the reader to a secondary article to which the author wishes to refer. The Court held that providing a hyperlink did not amount to publication of the linked article. The majority emphasised that the author who created the hyperlink did not control the secondary article’s content or publication.⁷⁴ Abella J, writing for the majority stated:

“A reference to other content is fundamentally different from other acts involved in publication. Referencing on its own does not involve exerting *control* over the content. Communicating something is very different from merely communicating that something exists or where it exists. The former involves dissemination of the content, and suggests control over both the content and whether the content will reach an audience at all, while the latter does not. Even where the goal of the person referring to a defamatory publication is to expand that publication’s audience, his or her participation is merely ancillary to that of the initial publisher: with or without the reference, the allegedly defamatory information has already been made available to the public by the initial publisher or publishers’ acts. These features of references distinguish them from acts in the publication process like creating or posting the defamatory publication, and from repetition.”⁷⁵

K.4 Applied to the respondents

89. When the abovementioned criteria are applied to the respondents, it is in my view clear that they are subordinate publishers and not first or main publishers of the defamatory postings. They were certainly publishers of those postings (and do not seek to argue otherwise) since they provided the platform

⁷³ [2011] 3 SCR 269.

⁷⁴ Abella J with Binnie, leBel, Charron, Rothstein and Cromwell JJ; with whom McLachlin CJ and Fish J substantially agreed.

⁷⁵ [2011] 3 SCR 269 at §26 (Italics in the original).

for their dissemination, but the respondents were not aware of their content and realistically, in a many-to-many context, did not have the ability or opportunity to prevent their dissemination, having learned of them only after they had already been published by their originators. The respondents are therefore in principle able to invoke the innocent dissemination defence as subordinate publishers. I deal in the next Section with the consequences of their acquiring knowledge of the defamatory content as such subordinate publishers.

L. Reasonable care and subsequently acquired knowledge

90. Formulated as a defence which requires the defendant to prove that he did not know and would not, with the exercise of reasonable care in the relevant circumstances, have known that the article contained defamatory content, the focus of the innocent dissemination defence has been on past, completed publications. Thus, a newsagent who has already sold its consignment of newspapers which contained an offending article will rely on the defence seeking to prove that, when making the sales, it was not aware of the defamatory content and could not, with reasonable care, have discovered it.

91. What is needed to satisfy the standard of reasonable care will vary according to the circumstances. Thus, in an internet context, the standard may well demand particular monitoring of postings by certain forum members or of postings on particular discussion topics if previous experience indicates a propensity or special risk of defamatory postings.

92. The potential need for particular care in certain cases is illustrated by two decisions involving defendants who mounted campaigns against targeted persons. Thus, in *Kaplan v Go Daddy Group*,⁷⁶ a customer dissatisfied with his Hunter Holden car started a blog website provocatively called “www.hunterholdensucks.com” inviting others to share their comments about

⁷⁶ [2005] NSWSC 636.

the car. Unsurprisingly, some of the comments posted on the blog site were extremely negative. Similarly, in *Wishart v Murray*,⁷⁷ the defendants set up a Facebook page campaigning for a newly published book to be boycotted and casting serious aspersions against one of the authors. Unlike the hosts of a discussion forum involving many thousands of discussion threads, the creators of such a blog or Facebook page have a relatively narrow horizon to monitor and, given that their express purpose is to mount a campaign critical of others, they might reasonably be expected to exercise particular care in respect of potentially defamatory comments posted at their invitation.

93. The requirement of reasonable care is also relevant in cases involving subsequently acquired knowledge. The forum provider may initially satisfy the requirements of the innocent dissemination defence in terms of lack of knowledge, etc, but may subsequently become aware of the relevant defamatory content in circumstances where the defamatory article is still available for distribution and where, before it can be removed, some further acts of publication in fact occur. Thus, a magazine with an offending article may be still available for purchase on the shelves of various shops operated by a firm of newsvendors and some copies may be sold after the moment when the firm acquires such knowledge. And in an internet context, an offending discussion thread may still be accessible by forum users when the provider first learns of its defamatory content, and “hits” accessing that content may occur before it can be removed from the site. How does such acquired knowledge affect the innocent dissemination defence? Are the newsvendors and the platform provider in the examples just given excluded from the defence from the moment that they become aware of the defamatory content?

⁷⁷ [2013] NZHC 540.

94. The existing authorities have tended to deal with this situation under the rubric of the “notice board cases” as discussed above.⁷⁸ But as previously stated, I do not consider that analysis satisfactory. The issue appears to me to be better viewed as arising in the context of the innocent dissemination defence.

95. One possible view might be that since the first requirement of the defence is that the defendant, in Romer LJ’s terms, must show that he was “innocent of any knowledge of the libel contained in the work disseminated by him”, he is deprived of the defence from the moment that he learns of the offending content and he is strictly liable for all subsequent publications. However, I think that such a rule runs against the grain of the common law defence.

96. In the situation posited, the premise is that the defendant is a subordinate publisher who made the article available when there was nothing in the work or the circumstances under which it came to him or was disseminated by him which should have led him to suppose that it contained a libel; and his lack of awareness was not due to any negligence on his part. The defence implicitly recognizes that such a defendant may in fact unwittingly publish matter that is defamatory of the plaintiff, but exempts him from liability provided he meets the standard of reasonableness.

97. In my view, it is consistent with the policy underpinning the defence that the same standard of reasonableness should be applied in a situation of acquired knowledge. A subordinate publisher should be afforded the continued protection of the defence if he proves that upon becoming aware of such content, he promptly took all reasonable steps to remove the offending content from circulation as soon as reasonably practicable. Such an approach is also in keeping with the rule which imposes liability on a person as first or main

⁷⁸ In Section E.

publisher if, having relevant knowledge or easy access to knowledge and editorial control so as to be able to prevent publication of defamatory content, he fails to exercise such control. The subordinate publisher who, in contrast, forthwith takes all reasonable steps to prevent further publication, should not be placed in the same category. Whether in any particular case the subordinate publisher succeeds in proving that he has met those requirements is again a question of fact. Evidence as to how readily the offending content could be withdrawn or deleted would be important.

98. I note in this context that in *Metropolitan International Schools Ltd v Designtecnica Corpn*,⁷⁹ Eady J considers the position after defamatory content is brought to the attention of a search engine operator and points out that:

“There is a degree of international recognition that the operators of search engines should put in place such a system (which could obviously either be on a voluntary basis or put upon a statutory footing) to take account of legitimate complaints about legally objectionable material.”⁸⁰

99. His Lordship suggests that :

“...it does not follow as a matter of law that between notification and ‘take down’ the third defendant becomes or remains liable as a publisher of the offending material. While efforts are being made to achieve a ‘take down’ in relation a particular URL, it is hardly possible to fix the third defendant with liability on the basis of authorisation, approval or acquiescence.”⁸¹

M. The defence of innocent dissemination applied to the respondents

100. We are only concerned with the 2008 and 2009 statements. It is not in dispute that the respondents were unaware of the postings containing those statements until the 2008 statements were subsequently brought to their attention by the appellants and until they themselves discovered the 2009

⁷⁹ [2011] 1 WLR 1743 at §54.

⁸⁰ At §56.

⁸¹ At §58.

statements.⁸² It may be recalled that the 2008 statements were posted on 24 October 2008 and found by the Judge to have been brought to the respondents' notice on 27 October 2008.⁸³ The 2009 statements were posted at 11.25 pm on 21 January 2009 and discovered by the respondents the next morning.⁸⁴ In accordance with the approach discussed above, I shall first address the position concerning publication of the defamatory statements before the respondents, as subordinate publishers, became aware of them; and then turn to consider the position after they acquired such awareness.

101. Should the respondents, exercising the reasonable care demanded by the circumstances, have known of the offending 2008 and 2009 statements before they actually became aware of them? The Courts below properly stressed the very high volume of traffic rapidly generated on the forum, with as many as 5,000 postings per hour and 30,000 users on line at any time. The Judge noted that in the circumstances, only minimal editorial control was exercised⁸⁵ and Fok JA pointed to the impracticability of automated or manual screening of postings before they appeared on the forum.⁸⁶ Fok JA accordingly supported the finding that "in the light of the sheer volume of postings on the defendants' forum, the defendants could not be said to be negligent in not knowing of the existence of the defamatory statements complained of or the likelihood of their being on the website forum prior to being informed of the same".⁸⁷ That was the basis for concluding that the respondents had made good the innocent dissemination defence in relation to the period prior to their learning of the offending postings.

⁸² Judge at §56, Court of Appeal at §129.

⁸³ Judge at §77.

⁸⁴ Court of Appeal §50.

⁸⁵ Judge at §§55 and 67.

⁸⁶ Judge at §67, Court of Appeal at §105.

⁸⁷ Court of Appeal at §138.

102. Although it would have been helpful if the Judge had made fuller and more explicit findings in relation to innocent dissemination, Fok JA's conclusions were fully justified on the undisputed and incontrovertible evidence. The respondents were originally unaware of the defamatory content posted by the originators. Given the very large volume of traffic on the forum and the speed with which it was generated, they had no realistic means of acquiring such knowledge or of exercising editorial control over the content before it was posted. There was nothing to alert them of any likelihood that the originators of the relevant postings would be posting or had posted the offending 2008 statements, until they were informed of those statements by the appellants. Although it is unclear what precisely had led the respondents to discover for themselves the 2009 statements, the fact that they did in fact independently make that discovery less than 12 hours after those statements were posted, is consistent with the respondents having taken a more proactive approach regarding potentially defamatory postings affecting the appellants, given their experience of the 2008 statements. It is therefore my view that the Judge and the Court of Appeal were entitled to conclude that the respondents had made good the defence in respect of the period before the offending material came to their notice.

103. Turning to what occurred after the respondents came to know of the postings, it is not in dispute that the 2008 statements were taken down some three and a half hours after notification was received. And the 2009 statements which had been posted at 11.25 pm on 21 January 2009, were removed by the respondents at 11.40 am on 22 January 2009 as soon as they were discovered.⁸⁸ While the Courts below⁸⁹ assessed the adequacy of the respondents' reactions on the basis of the notice board line of cases which I consider inapplicable, their conclusion that the respondents took down the offending postings within a

⁸⁸ Affirmation of Lam Cho Shun, 23 September 2009, §7(b).

⁸⁹ Judge at §§77 and 80; Court of Appeal at §140.

reasonable time after they became aware of them was plainly open to them and is a conclusion equally pertinent to the standard of reasonableness discussed in Section L above. The promptness with which the respondents took down the offending postings justifies the finding that they acted properly in accordance with that standard. I therefore conclude that the respondents made good the innocent dissemination defence in respect of the defamatory postings both before and after they came to know of their existence. The appellants' appeal must therefore be dismissed. However, before leaving this judgment, I wish to deal with aspects of the argument advanced at the hearing concerning the constitutional right to freedom of expression in the present context.

N. The constitutional right to freedom of expression

104. It is somewhat to state the obvious to point out that the law has always required a balance to be struck between the right to freedom of expression on the one hand, and the right to have one's reputation protected against defamation on the other. The rights on both sides of that balance are constitutionally recognized in Hong Kong.⁹⁰

105. Mr Thomas, however, argued that such balance does not come into the picture in the present case. He submitted that there is no question of restricting freedom of expression on the part of the originators and the respondents since they have fully exercised that freedom in publishing the defamatory statements. He cited Lord Hobhouse of Woodborough in *Reynolds v Times Newspapers Ltd*,⁹¹ for the proposition that:

“There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society, being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society.

⁹⁰ Basic Law, Article 27 and Bill of Rights, Article 16.

⁹¹ [2001] 2 AC 127 at 238.

There is no duty to publish what is not true: there is no interest in being misinformed. These are general propositions going far beyond the mere protection of reputations.”

106. There can be no quarrel with that proposition. Indeed, Article 16 of the Bill of Rights expressly makes exercise of the right to freedom of expression subject to restrictions necessary for respect of the rights or reputations of others. So plainly, a purveyor of libellous statements cannot claim constitutional protection for his conduct.

107. But the balance, properly understood, remains of great importance. It does not involve, as Mr Thomas suggests, a misguided attempt to weigh the claims to freedom of expression by a defaming defendant against the law-abiding victim’s right to reputation. The balance involves two important competing interests affecting society at large, described in the main judgment in *Dow Jones & Co Inc v Gutnick* in the following terms:⁹²

“It is necessary to begin by making the obvious point that the law of defamation seeks to strike a balance between, on the one hand, society's interest in freedom of speech and the free exchange of information and ideas (whether or not that information and those ideas find favour with any particular part of society) and, on the other hand, an individual's interest in maintaining his or her reputation in society free from unwarranted slur or damage. The way in which those interests are balanced differs from society to society.”

108. The power of the internet is such that it greatly magnifies what is at stake in considering how that balance should be struck. It must certainly be recognized that a defamation circulated on the internet may do enormous damage to a person’s reputation. In *Crookes v Newton*,⁹³ Abella J cited the following excerpt from an article by Professor Lyrissa Barnett Lidsky:

“Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, they are communicated through a medium more pervasive than print, and for this reason they have tremendous power to harm reputation. Once a message enters cyberspace, millions of people worldwide can gain access to it. Even if the message is posted in a discussion forum frequented by only a handful of people, any one of them can republish the message by printing it or, as is more likely, by

⁹² (2002) 210 CLR 575 at §23, per Gleeson CJ, McHugh, Gummow and Hayne JJ.

⁹³ [2011] 3 SCR 269 at §37.

forwarding it instantly to a different discussion forum. And if the message is sufficiently provocative, it may be republished again and again. The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that ‘the truth rarely catches up with a lie’. The problem for libel law, then, is how to protect reputation without squelching the potential of the Internet as a medium of public discourse.”⁹⁴

109. On the other side of the scale, advocates who warn against interfering with free and open exchanges on the internet have powerful arguments to deploy. An example can be found in counsel’s arguments in the *Dow Jones* case, summarised by Kirby J⁹⁵ as follows:

“The crucial attributes [of the World Wide Web], so it was said, include the explosion in the availability of readily accessible information to hundreds of millions of people everywhere, with the consequent enhancement of human knowledge, and the beneficial contribution to human freedom and access to information about the world’s peoples and their diverse lives and viewpoints that the Internet makes available, thereby contributing to human understanding. It was argued that the law should generally facilitate and encourage such advances, not attempt to restrict or impede them by inconsistent and ineffective, or only partly effective, interventions, for fear of interrupting the benefit that the Internet has already brought and the greater benefits that its continued expansion promises.”

110. His Honour acknowledged that the internet “is a medium that overwhelmingly benefits humanity, advancing as it does the human right of access to information and to free expression”, adding: “But the human right to protection by law for the reputation and honour of individuals must also be defended to the extent that the law provides”.⁹⁶

111. It is important to bear those competing social interests in mind when approaching questions such as those presently being addressed. The value of free and open many-to-many communications on discussion platforms must be recognized. The ability of internet intermediaries to host them in good faith must not be unduly impaired by the imposition of unrealistic or overly strict

⁹⁴ Lyrissa Barnett Lidsky, “*Silencing John Doe: Defamation & Discourse in Cyberspace*” (2000), 49 Duke LJ 855, at 863-64.

⁹⁵ (2002) 210 CLR 575 at §88.

⁹⁶ At §164.

standards which would make commercial operation impossible or introduce a chilling effect discouraging free and open exchanges. At the same time, a platform provider must genuinely recognize and take all reasonable steps to protect the rights and reputations of persons from being unlawfully damaged by postings published on the forum. Thus, for instance, while an internet intermediary may not be expected to police or filter the many-to-many discussions hosted, it is appropriate to require prompt action to take down offending postings upon receiving a complaint or otherwise becoming aware of them.

112. As it happens, the evidence indicates that the discourse often encountered on the respondents' forum is of very doubtful social value. It frequently involves merely vulgar abuse. But freedom of expression must not be devalued because it permits such low grade exchanges. Examples of forums of undeniable value to society in the political, scientific, social, cultural and other spheres are plentiful.

O. Conclusion

113. For the foregoing reasons, I conclude that the respondents:

- (a) did not authorize publication of the defamatory statements;⁹⁷
- (b) are not to be regarded as the only possible first or main publishers;⁹⁸
- (c) did not know the content of the relevant statements and did not realistically have the ability or opportunity to prevent their publication and therefore were not the first or main publishers of those statements;⁹⁹ and

⁹⁷ Section I above.

⁹⁸ Section J above.

⁹⁹ Section K above.

- (d) as subordinate publishers, satisfied the requirements of the innocent dissemination defence both before and after they became aware of the defamatory content of the offending postings.¹⁰⁰

114. I would accordingly dismiss the appellants' appeal and make an order nisi that they pay the respondents' costs, directing that the parties have liberty to file written submissions on the question of costs within 14 days from the date of this judgment.

Mr Justice Litton NPJ:

115. Mr Justice Ribeiro PJ's judgment gives a helpful view of how the law of libel evolved as technology for the transmission of messages advanced. Over the past fifteen years or so there has been a quantum leap in the development of the mass media, and the appearance of the "social media", with the increasing use of the internet. Even in the traditional realm of radio and television the focus has shifted: Instead of the operators uniquely controlling content, the media has become much more interactive, with listeners and viewers contributing to the content in open discussion.

116. The public has accordingly greater scope now for freedom of expression than in olden times: A freedom which the common law protects in the public interest: see for instance *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 where the House of Lords held that institutions of government have no right at common law to sue for defamation in respect of their public functions: Notwithstanding the fact that Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁰¹

¹⁰⁰ Section L above.

¹⁰¹ "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...." See p.550-F

had not been enacted into domestic law in the United Kingdom. At p.551-F Lord Keith of Kinkel agreed with Lord Goff of Chieveley in *A-G v Guardian Newspapers (No.2)* [1990] 1 AC 109 at 283-4 that, in the field of freedom of speech, there was no difference in principle between English law on the subject and Article 10 of the European Convention.

117. It is accordingly to the common law that I turn for the resolution of this appeal. It is here that the balance between freedom of expression on the one hand and the protection of individual reputations on the other has to be struck¹⁰².

118. The medium for the dissemination of opinions thoughts and expressions, and their means of distribution, fall within a wide spectrum: From the words carved on stonework in somebody's house (the example given by Greene LJ in *Byrne v Deane* [1937] 1 KB 818 at 838) at one end of the spectrum to articles on the first page of a leading newspaper at the other; from the stone mason who wielded the mallet to the street-side news-vendor. For liability for libel, the question is always this: At what point does the law seek to pin responsibility for such dissemination? For the author of the article on the first page of the newspaper and for its editor the answer is obvious. But what about the owner of the house in Greene LJ's example, or the proprietors of the golf-club in *Byrne v Deane* who would not normally have expected defamatory statements to be pinned on their notice-board?

119. In this regard, labels such as "main publisher" "subordinate distributor" "mere disseminator", as appearing in the books, are simply labels. They seek to do nothing more than to define, in an imprecise way, the position of the defendant within the wide spectrum.

¹⁰² See *Panday v Gordon* [2006] 1 AC 427 at 436-E per Lord Nicholls of Birkenhead: "The purpose of the law of defamation is to hold a balance between freedom of speech and the right to reputation. The basic position at which the common law holds this balance is to impose strict liability for defamatory statements in the absence of justification."

120. In this case the respondents maintain for commercial reasons a forum with different discussion channels, the most popular of which is the so-called “leisure”¹⁰³ channel. Registered members of the forum would initiate discussion “threads” by posting comments thoughts and expressions which any user of the internet can read. Other subscribers respond. Thus a thread of dialogue develops. The heavier the traffic the greater the gain for the respondents, for they depend upon the number of “clicks” for their advertising income. It is not in the respondents’ commercial interest that those “threads” be dull and insipid in content.

121. Mr Michael Thomas SC’s first argument is that the respondents were the first or main publishers of the libel and as such they attract strict liability¹⁰⁴. Libel is actionable *per se*, the law making the presumption that damage flows from it. And, being the first or main publishers, as Mr Thomas argues, the defence of innocent dissemination, as developed by the common law, is not available to the respondents. Mr Thomas relies on a passage in the judgment of Romer LJ in *Vizetelly v Mudie’s Select Library, Limited* [1900] 2 QB 170 at 180 where he said:

“...The result of the cases is I think that, as regards a person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken, what I may call, a subordinate part in disseminating it, in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and, if he succeeds in shewing (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

¹⁰³ In Chinese “吹水台”, a vulgar expression meaning “gossip channel”.

¹⁰⁴ “Defamation is committed when the defendant publishes to a third person word or matters containing an untrue imputation against the reputation of the claimant”: *Gatley on Libel and Slander* : 11th ed. *para. 1.6*

was disseminated by him 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, then, although the dissemination of the work by him was prima facie publication of it, he may nevertheless, on proof of the before-mentioned facts, be held not to have published it. But the onus of proving such facts lies on him,..."

Mr Thomas focusses upon the opening lines and submits that the respondents were "the first or main publishers".

122. In the circumstances of this case, if Mr Thomas were right, the respondents had no defence and the appeal must succeed. So the first question is this: Were the respondents entitled to rely on the defence of innocent dissemination?

123. In answering this question I agree with Mr Justice Ribeiro PJ that the respondents, as forum hosts, must be treated as publishers of the defamatory statements: Though, obviously, not as *first* publishers; the first publishers being the authors of the statements who posted those statements in the forum intending that those statements be published. It is here, in my judgment, that the common law demonstrates its flexibility to accord with the changing times¹⁰⁵.

124. In theory a forum host such as the respondents in this case has some control over the contents of the statements published through the medium of the website maintained by them. And the respondents have demonstrated that they had control in this case because, in relation to "the 2009 statements" (those posted on 21 January 2009), these were discovered by the respondents

¹⁰⁵ As Lord Roskill said in a different context:

"New situations regularly arise in the practice of the law which require previously held and sometimes generally accepted views to be reviewed and if necessary to be revised in the light of that new situation. Indeed, the evolution of the common law of this country to meet the changing needs of contemporary society and its adaptability to change owes much to judicial acceptance of this philosophy."

Home Office v Harman [1983] 1 AC 280 at 320G

themselves the next day – not in response to a specific complaint by the appellants’ solicitors – and taken down immediately. But, in practice, as the courts below found, such control cannot be exercised across the board because of the huge volume of traffic generated by the forum. The respondents, unlike the editors of newspapers, cannot possibly *know* the content of the statements they publish; nor can they be equated with the operators of a television station such as the defendants in *Thompson v Australian Capital Television PTY Limited* [1996] 186 CLR 574 where the station owners chose to re-broadcast a live interview and had the means of control over the contents before they were broadcast: As Fok JA remarked at §104, it would have been relatively straight forward in *Thompson* to delay the transmission by a few minutes to determine whether any part of the material should be expurgated. On the facts of a case like the present, manual screening of the content was impossible and no technology has yet been invented to filter out defamatory statements by mechanical means. As Fok JA observed at §105, filtering by keywords was not possible since defamatory meaning could be communicated by a combination of words, which may individually be innocuous.

125. No reported case in the common law world has been found to fit the circumstances of this case. *Godfrey v Demon Internet Ltd* [2001] QB 201 comes fairly close. There the service provided by the defendant, called a “bulletin board”, was described by Morland J (at p.204G) as a “one-to-many publication from author to readers round the world”, available to those with access to a service called *Usenet*. A defamatory message was posted on the bulletin board; the plaintiff alerted the defendant to the existence of the offending posting; the posting was not removed; subscribers were able to read the offending message until it was automatically erased 10 days after the posting. The plaintiff claimed damages for libel in respect of the period when the message remained on the bulletin board after the defendant became aware of

it. The question before Morland J was whether the defendant had an arguable defence under s.1(1)(b) and (c) of the Defamation Act 1996¹⁰⁶.

126. Morland J held that the defendant was not “author, editor or publisher” of the statement complained of, in terms of s.1(1)(a) of the Act, so the issue boiled down to the question of *reasonable care* under sub-section (b) and *knowledge* and *reasonable belief* under sub-section (c). The judge held on the facts that the defence could not be made out and struck out that part of the pleadings.

127. There is no statutory equivalent of subsections 1 and 2 of the Defamation Act 1996 in Hong Kong, so the law has to be developed on common law principles, within the polarity of the two rights: Freedom of expression on the one hand, and protection of reputation on the other. In this context I would unhesitatingly reject Mr Thomas’ primary submission that the respondents must be regarded as first or main publisher, attracting strict liability. Such an approach would have an unacceptable “chilling effect” on freedom of expression. I would adopt Mr Justice Ribeiro PJ’s categorization of the respondents’ role as *subordinate publishers*, this being a better description. The common-law defence of innocent dissemination, as developed by Romer LJ in *Vizetelly* (see para. 121 above), is available to the respondents, as the two courts below have found.

¹⁰⁶ “Responsibility for publication

(1) In defamation proceedings a person has a defence if he shows that – (a) he was not the author, editor or publisher of the statement complained of, (b) he took reasonable care in relation to its publication, and (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.”

It should be noted that for the defence to succeed (a) and (b) and (c) have to be established by the defendant. Section 1 continues:

“(2) For this purpose.... ‘publisher’ [has] the following meanings, which are further explained in subsection (3).... ‘publisher’ means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.”

128. As formulated in *Vizetelly* what a defendant must show, on a balance of probabilities, are:

- (i) he had no knowledge of the libel contained in the message disseminated by him;
- (ii) there was nothing in the circumstances which ought to have led him to suppose that the message contained a libel, and
- (iii) there was no negligence on his part in disseminating the libel.

129. Here, it was not the appellants' case that the respondents *knew* of the 2008 and 2009 statements when they first appeared in the "leisure" channel. Their focus of attack was on the elements (ii) and (iii) above. As to these, there were concurrent findings of fact in the courts below, in favour of the respondents, though the trial judge's findings were somewhat sparse.

130. As mentioned earlier, the respondents' commercial success depends largely upon polemics and controversy: dull and insipid threads posted in their "leisure" channel are unlikely to attract lively participation. Commonsense suggests that, given such a set-up, defamatory statements would be posted from time to time. But the respondents had rules which prohibited objectionable postings, and a subscriber who violated the rules could have his membership suspended or cancelled.

131. This appeal, on the facts, comes within a narrow compass. It is confined to the 2008 and 2009 statements. Mr Thomas, for the appellants, puts emphasis on this point: When the October 2008 words were published, the respondents had already been sued by the appellants in relation to the March 2007 statement, so the respondents should have been alerted to the possibility of recurrence. These points were fully explored in the courts below. The findings of those courts were that the elements in para (ii) and (iii) above were satisfied. These are not findings which this Court can disturb. In so

concluding I say nothing about the situation where, to the knowledge of the respondents, a person (such as Mr Ma Ching Kwan the 6th appellant) or the Oriental Press Group have been deliberately targeted by defamatory statements from groups of anonymous subscribers. In these circumstances, to merely employ two administrators to monitor forum discussion for six to eight hours a day, five days a week, may not be enough. Whilst keywords to identify defamatory statements may not be possible, is there any reason why the identities of key persons cannot be high-lighted and brought to the attention of the administrators? This was not an aspect of the case which was explored either in the courts below or before us. I therefore say nothing more about it.

132. I agree with Mr Justice Ribeiro PJ's judgment.

Mr Justice Gleeson NPJ:

133. I agree with the judgment of Mr Justice Ribeiro PJ.

Chief Justice Ma:

134. For the reasons contained in the judgment of Mr Justice Ribeiro PJ, this appeal is unanimously dismissed. As to costs, an order nisi is made in terms of paragraph 114 above.

(Geoffrey Ma)
Chief Justice

(Patrick Chan)
Permanent Judge

(RAV Ribeiro)
Permanent Judge

(Henry Litton)
Non-Permanent Judge

(Murray Gleeson)
Non-Permanent Judge

Mr Michael Thomas SC and Mr Lawrence Ng instructed by Iu, Lai & Li for the Appellants

Mr John Reading SC and Ms Elizabeth Herbert instructed by Oldham, Li & Nie for the Respondents

[Press Summary \(English\)](#)

[Press Summary \(Chinese\)](#)