

1. Introduction

Defamation is the making or publication of a statement about a person that tends to lower his reputation in the opinion of right-thinking members of the community¹. It can take the form of permanent publication - libel (e.g. written materials or video recording) or transient publication - slander (e.g. spoken words or even physical gestures). The law of defamation regarding libellous material was first developed pursuant to the advent of newspaper, radio and televisions in the 19th and 20th century². These ‘one-to-many’ type of communication made it possible for information (including those of a defamatory nature) to be circulated rapidly to a broad audience. The information so distributed could be said to originate from a single source (e.g. the newspaper publisher or radio station); accordingly, identifying the proper defendant of a libel dispute was often straightforward. However, in the era of Web 2.0³, the persons directly responsible for libellous statements may be anonymous, outside the jurisdiction or in practice immune from the execution of a local judgment, thus often leaving internet intermediaries (“**intermediaries**”) to be the only viable defendants. In the event of users posting libellous statements on online social platforms (e.g. Facebook or Twitter), one may query whether it is fair and in the interest of justice to hold the platform providers liable. The same dilemma arises with respect to internet service providers (‘**ISPs**’) and online search engines. For example, what if Google’s search results link the plaintiff’s name to libellous material?

In the age of mass information, it is often not straightforward to balance the competing principles of free speech and the defence of a person’s honour and reputation. Part 2 of this essay summarises the tort of defamation in general and highlights the difference between pre and post notice ‘publication’. Part 3 discusses various common law positions on liabilities concerning three categories of intermediaries: (1) platform/host providers; (2) ISP and; (3) search engines. In

¹ Oxford Dictionary of Law, 5thEd. (2003).

² Ribeiro PJ, “Defamation on the Internet” (paper presented to Obligations VII Conference, Hong Kong, July 2014) at §5.

³ First coined by Darcy DiNucci in 1999 and later popularised at the 2004 O’Reilly Media Web 2.0 Conference, the term refers to websites that emphasis on social networking and participatory culture of end-users.

particular, Part 3.1 compares the Hong Kong Court of Final Appeal (“**HKCFA**”) decision on online discussion forums in *Oriental Press v Fevaworks Solution Ltd*⁴ (“*Fevaworks*”) and the English Court of Appeal (“**ECA**”) decision on weblogs in *Tamiz v Google*⁵ (“*Tamiz*”). Part 4 discusses three problems with the current Hong Kong approach. First, the doctrine may result in defendants with conduct not blameworthy to be made liable as ‘publishers’. Second, the law incentivises intermediaries not to exercise any content monitoring *prior* to notification to prevent the imputation of knowledge or constructive knowledge. Third, regarding the *post-notice* context, intermediaries are perversely incentivised indiscriminately to remove any content upon receiving removal request under the current regime, thereby unduly limiting freedom of expression. Part 5 briefly touches on statutory approaches regarding intermediary liability. Part 6 concludes this essay’s exploration of intermediary liability by recommending the law in Hong Kong be reformed to follow the UK model.

2. Common Law Doctrine of Defamation

2.1 Pre-notice

(a) Publication by action

Liability in defamation extends to “*any person who participated in, secured or authorised the publication*”⁶ and publication takes place when a defendant conveys a statement with defamatory meaning to the mind of a third party (*i.e.* the recipient)⁷. *Prima facie*, a wide class of persons including author, editor, printer, and newspaper vendor can be found to be ‘publishers’ as each participated in the process of distribution and are so jointly and severally liable for the damage suffered by the plaintiff, regardless of the relative degree of responsibility each held for the publication⁸. Defamation is strict liability and the defendant need not intend or have knowledge of the content to be a publisher of libellous material⁹.

⁴ [2013] HKCFA 47.

⁵ [2013] EWCA Civ 68.

⁶ Gatley on Libel and Slander, 12th Ed (London, UK: Thomson Reuters, 2013) §11.18.

⁷ *Ibid* §6.1.

⁸ *Ibid* §6.11.

⁹ *See, e.g. Vizetelly v Mudie’s Select Library Limited* [1900] 2 QB 170 at §179.

To mitigate the harshness of that general rule, the innocent dissemination defence was made available only to a class called ‘secondary publishers’ in *Emmens v Pottle*¹⁰; conversely, those considered ‘primary publishers’ cannot rely on it. The distinction arose in the context of traditional mass print media so ‘secondary publishers’ such as printers and newsvendors would not be held liable if they exercised reasonable care in parsing the material they printed or sold yet lacked actual knowledge of its defamatory character¹¹. The HKCFA summarised that distinction in *Fevaworks* as follows: a first or main publisher is the one who knows or taken to know the gist or substantive content of what is being published (the “**knowledge criterion**”)¹² and who either authorises or has the ability or opportunity to prevent the publication (the “**control criterion**”)¹³.

In relation to secondary publishers, the defence limits the strict liability that would otherwise arise. In *Vizetelly v Mudie’s Select Library Limited*¹⁴, the ECA held that a defendant seeking to rely on the defence must prove that: (1) he had no knowledge of the libel contained in the work; (2) nothing of the work was of a character likely to contain a libel; and (3) the lack of knowledge was not due to any negligence on his part.

(b) Passive instrument doctrine – no publication

Subsequent English cases, however, have departed from that approach of fitting a defendant into one of those two classes, as demonstrated in *Bunt v Tilley*¹⁵. In that case, which concerned the liability of ISPs, the Court held that “the English law requires, at a minimum, *knowing involvement* in the process of publication of the *relevant words*”. In other words, a defendant that is a ‘mere conduit’ or ‘passive facilitator’ on the Internet would not be deemed to be a ‘publisher’. Successful invocation of the defence would, instead, result in the defendant being

¹⁰ (1885) 16 QBD 354 at §357.

¹¹ Joachim Dietrich, “Clarifying the Meaning of ‘Publication’ of Defamatory Matter in the Age of the Internet” (2013) 18 Media & Arts L Rev 88 at §91.

¹² *Fevaworks*, *supra* note 4, at §77.

¹³ *Ibid*, at §85.

¹⁴ *Vizetelly*, *supra* note 9, at §180.

¹⁵ [2006] EWHC 407 (QB) at §23.

deemed not to have published the libel at all. Such divergence between the English and Hong Kong positions will be further considered below in the analysis on *Fevaworks*.

2.2 Post-notice: publication by omission

A third doctrine which further complicates the matter is publication by omission concerning the liability of intermediaries after notice. In *Byrne v Deane*¹⁶, the defendant failed to remove a defamatory message posted on the bulletin board of a golf club after being notified that it was defamatory. The ECA opined that the action of not removing the defamatory matter would be inferred as acquiescence in or endorsement of the statement on the proprietor's part. The defendant made himself a publisher by omission and was therefore responsible for the continued presence of the statement¹⁷. Publishers by omission only become responsible *after* their failure to remove content upon notice, whereas secondary publishers are considered publishers *from the outset*¹⁸. Removal by the defendants within a reasonable time following notification should be sufficient to shield the defendant from liability as publisher by omission.

3. Application to Internet Intermediaries in Hong Kong

Although the range of intermediaries would be better placed at a continuum, leading authorities concur that three categories of intermediaries are relevant to the discussion of intermediary liability¹⁹: **(1) platforms/hosts providers** are bodies that allow and encourage user-generated content (such as blog owners and social media platforms); **(2) ISPs** are access providers who control the physical infrastructure needed to access the Internet (e.g. Hong Kong Broadband); and **(3) search engines** are programmes that use sophisticated algorithms to retrieve data, files or document from a database or network in response to a query (e.g. Google). Amongst the three, courts in Hong Kong were given the opportunity to deal with

¹⁶ [1937] 1 KB 818.

¹⁷ *Ibid* at §§837-838.

¹⁸ Emily Laidlaw et al., "Internet Intermediary Liability in Defamation" (2018) 56 Osgoode Hall Law Journal at [118].

¹⁹ See Article 19, Internet Intermediaries: Dilemma of Liability (London: Free World Centre, August 2013) ("Article 19").

platforms and search engines. Whilst other jurisdictions have been consistent in finding ISPs to be neither primary nor secondary publishers, it remains to be seen whether Hong Kong courts would follow their approach or apply *Fevaworks* in the ISPs context.

3.1 Platforms/Hosts

Common law jurisdictions split into two camps considering the liability of platforms/host: (1) holding them as secondary publishers with a potential innocent dissemination defence if they do not know of the defamatory matter and their lack of knowledge was not a consequence of negligence (e.g. Hong Kong in *FevaWorks* and Ontario in *Baglow v Smith*²⁰); or (2) treating platforms as a non-publisher under the passive instrument doctrine before notice and only regard them as publishers by omission if they have failed to remove the defamatory matter within a reasonable time after notice (e.g. United Kingdom in *Tamiz* and New Zealand in *Murray v Wishart*²¹).

(a) The *Fevaworks* case

Fevaworks addressed the question of whether online discussion forums (“ODFs”) should be held responsible for defamatory content published by Internet users using their service. The respondents concerned were the providers, administrators and managers of Hong Kong Golden Forum (“HKGF”), a well-known Hong Kong ODF which supports heavy traffic of up to 5000 posts per hour during peak hours²². The forum required users to register and agree to specific guidelines before posting²³, including a prohibition against posting objectionable content or defamatory statements. Two administrators were employed by the respondents to monitor the discussions for six to eight hours per day and to remove any objectionable content. On three occasions between 2007 and 2009, defamatory statements were posted alleging that the appellants were involved in, among other

²⁰ 2015 ONSC 1175.

²¹ [2014] 3 NZLR 722 at §129.

²² *Fevaworks*, *supra* note 4, at §§12-15.

²³ *Ibid.*

things, drug trafficking and money laundering²⁴. The Court of Appeal below found HKGF liable only for the 2007 statement, as it removed the content after approximately eight months following notice. On the other two occasions, HKGF was not held liable as it removed the statement almost immediately after being informed and upon its own discovery respectively²⁵.

The HKCFA unanimously dismissed the appeal against the judge’s decision with reliance on existing common law principles as the Hong Kong Defamation Ordinance does not address liability specifically arising to internet intermediates. Ribeiro P.J. *extended* common law principles and formulated a two-part test to determine if the ODF provider can rely on the innocent dissemination defence: (i) whether the provider is a first or main publisher or a subordinate publisher; and (ii) if it is found to be a subordinate publisher, whether it exercised reasonable care *prior* and *subsequent* to gaining knowledge of the defamatory material²⁶.

Applying the first part of the test, it was held that HKGF participated in the process of publication but given the extensive volume of posts, it lacked knowledge of the content published. It also did not have editorial control, and thus lacked the ability and opportunity to prevent publication²⁷. It followed that HKGF was a ‘subordinate publisher’ *ab initio*. The next question was whether ODF could be absolved from liability by making out the innocent dissemination defence *qua* publishers²⁸. The HKCFA was of the view that it was unfeasible for HKGF to filter and locate every libellous statement amongst the 5000 messages every hour. Consequently, it was satisfied that HKGF did not know of the defamatory matter and its ignorance was not due to negligence because there was nothing in the circumstances that would reasonably have led HKGF to suppose that certain posts were libellous²⁹.

²⁴ *Ibid*, at §6.

²⁵ *Ibid*, at §§7,8.

²⁶ Kelvin Kwok, “Liability of Online Service Providers for Defamatory Content: The Case of Online Discussion Forums” (2014). 130 Law Quarterly Review 206; Research Paper No. 2014/011.

²⁷ *Fevaworks*, *supra* note 4, at §76.

²⁸ Anne Cheung, “A Study of Online Forum Liabilities for Defamation: Hong Kong Court in Internet Fever” (2013) Media and Arts Law Review, Lexis Nexis, v.18 n.4, at [383].

²⁹ *Fevaworks*, *supra* note 4, at §27.

Having established that HKGF could rely on the defence *before* it was notified of the libellous material, the Court was likewise satisfied that by promptly removing the libellous posts upon becoming aware of their existence, HKGF took all reasonable steps as soon as practicable and therefore could *retain* the defence *after* notice. Commentators welcomed this expansive approach³⁰ as opposed to the one taken by English courts which confined the defence to the pre-noticed period³¹. It would be unreasonable to render an intermediary that acted immediately to halt the dissemination of the defamatory material liable for content origination it could not control.

(b) *Tamiz* – innocent disseminator not a publisher

Although there is a consensus on not holding an innocent disseminator liable, judicial opinions diverge on the interrelationship between the concept of publication and the defence of innocent dissemination. In *Tamiz*, Richards LJ held that successful invocation of the defence at common law resulted in the defendant being deemed not to have published the libel at all³².

In that case, Google provided a platform, Blogger.com, for users to share their thoughts and invite others to comment. No prior screening was exercised before posting, but there were rules governing ‘permitted content’, Google was authorised to remove any material posted in contravention of those rules. Upon receiving the complaint made by the plaintiff, Google forwarded the complaint to the originator and the contents were voluntarily removed three months after the complaint. Richards LJ reasoned that a person only involved in dissemination is not to be treated as a publisher unless he knew or ought to have known, exercising reasonable care, that the publication was likely to be libellous³³. Therefore, Google could not be treated as a publisher *prior* notification. As for

³⁰ Kwok, *supra* note 26, at [2].

³¹ See, e.g. *Metropolitan International School v Designtecnica* [2009] EWHC 1765 (“*MIS*”).

³² Although the Richards LJ did not explicitly refer the said defence as the ‘innocent dissemination defence’, Ribeiro P.J. is convinced that it is in substance the defence of innocent dissemination: *supra* note 2, at [8].

³³ *Tamiz*, *supra* note 5, at §§26, 34-35.

after notification, the Court left it open as to whether Google could be regarded as a secondary publisher³⁴.

This reasoning was explicitly rejected in *Fevaworks*, which instead, it followed the Australian High Court (“AHC”) in *Thompson v Australian Capital TV*³⁵ (“*Thompson*”) and found it to be more accurate to conclude that “any disseminator of a libel publishes the libel”³⁶. It is only when the defendant proves that he has satisfied requirements of the defence of innocent dissemination that he will not be responsible for the publication. It is a peculiar choice as *Fevaworks* and *Tamiz* arguably have much more similar fact patterns. In *Thompson*, the defendant was a television station that simultaneously broadcast a live current affairs program of another station. The AHC held that the defendant could not rely on the defence even though the defamatory content in question originated from another station as they have willingly employed such particular setup resulting in the defendant’s lack of control³⁷. It could therefore be argued that the HKCFA misapplied *Thompson*³⁸ because HKGF chose to run an ODF with little monitoring knowing that such set up would make it impossible for the administrators to identify libellous statements as they were posted.

(c) *Byrne* approach- publication by omission

The outcome in *Fevaworks* could arguably have been achieved without invoking the innocent dissemination defence³⁹ and that by mapping ODF into the common law equivalent of primary and secondary publishers, the HKCFA distorted the unique nature of Internet intermediaries⁴⁰. Indeed, the English courts have generally focused on whether the defendant acquiesced in the publication or assumed responsibility for it. In other words, liability will only arise upon notification of the statement; by not removing it, the intermediary is taken to have

³⁴ *Ibid.*

³⁵ (1996) 186 C.L.R. 547 at §§587-588.

³⁶ *Ibid* at §586.

³⁷ *Ibid* at §§ 589-590.

³⁸ Cheung, *supra* note 28, at [384].

³⁹ Kwok, *supra* note 26, at [2].

⁴⁰ Cheung, *supra* note 28, at [385].

acquiesced or endorsed the statement unless it removes it within a reasonable time. Although the ECA in *Tamiz* and Hong Kong Court of Appeal in *Fevaworks* cited *Byrne* with approval and agreed that a forum host is analogous to the provider of the notice board; the HKCFA rejected *Byrne*'s relevance on the basis that an ODF provider is wholly different from the occupier of a premise⁴¹. The Court was of the view that the former *actively encouraged and facilitated* postings⁴² to derive income from advertisement and therefore should be considered a secondary publisher from the outset.

Whilst it is true that ODFs encourage users to post content, it seems a stretch to assume that ODFs encourage and facilitate *defamatory* content⁴³. Moreover, there is a logical tension between finding a defendant to be a publisher due to active participation in the publication, but at the same time, concluding that the same degree of participation does not necessarily prevent the assertion of a defence of innocent dissemination⁴⁴.

3.2 ISPs

English courts have been consistent in finding ISPs not primary or secondary publishers following *Bunt*⁴⁵. By connecting users to the defamatory statement through a telecommunications network, ISPs arguably fall into the broad definition of 'publishers'; however, courts have generally regard ISPs' role to be *so passive* that they cannot be regarded as true 'publishers'. The passive instrument doctrine has, in effect, narrowed the scope of 'publication' and this approach has been endorsed by Canada⁴⁶ and the United States⁴⁷.

⁴¹ *Fevaworks*, *supra* note 4, at §50.

⁴² *Ibid*, at §51.

⁴³ Kwok, *supra* note 26.

⁴⁴ Cheung, *supra* note 28.

⁴⁵ See, e.g. *Godfrey v Demon Internet Service* [2001] QB 201.

⁴⁶ *Crookes v Newton*, 2011 SCC 47 at §89 cited *Bunt v Tilley* [2006] EWHC 407 (QB) at *obiter*.

⁴⁷ Early case laws e.g. *Cubby v CompuServe Inc*, 776 F Supp 135 (SD NY 1991) held that ISPs are not publishers. The later Communications Decency Act 47 USC §230 ("CDA") provides an immunity clause for providers and users of an interactive computer service (including ISPs) who publish information provided by third-party users.

To date, there have been no Hong Kong defamation cases alleging ISPs to be publishers. It is therefore uncertain whether the Hong Kong Courts would: (1) follow the passive instrument doctrine and find ISPs as non-publishers; or (2) apply *Fevaworks* in an ISP context and so hold an ISP to be a secondary publisher because of its participation in ‘publication’ subject to the assertion of the defence of innocent dissemination.

For completeness, it is unlikely for ISPs to be considered publishers by omission. ISPs realistically do not have control over content accessible on the Internet, nor do they have the power to remove it from the Internet except to block the website access. Therefore, given the unlikelihood of ISPs being sued for libel found on a specific website⁴⁸, there is no immediate need for the law to be reformed tailored to that specific context.

3.3 Search engines

Search engines are another special category of intermediaries providing access to third-party content in the form of algorithms and hyperlinks. It would appear that since potentially defamatory text are limited to the search results, descriptive text excerpts previews (“**snippets**”) and autocompletes, search engines should be able to rely on the doctrine of passive instruments following *Bunt*. Case law in England⁴⁹ and Canada⁵⁰ generally follows this approach, while the US courts have also dismissed actions in defamation brought against search engines relying on the immunity section under Communications Decency Act (“**CDA**”) §230⁵¹.

The Hong Kong courts considered that very issue in *Dr. Yeung, Sau Shing Albert v Google Inc*⁵². When the plaintiff’s name was typed into the search engine, the autocomplete feature automatically entered “**triad**” based on the number of

⁴⁸ Laidlaw, *supra* note 18, at [121].

⁴⁹ *MIS*, *supra* note 31.

⁵⁰ See, e.g. *Niemela v Malamas* [2015] BCSC 1024.

⁵¹ See, e.g. *O’Kroley v Fastcase Inc* 2014 WL 2197029 (M D Tenn) and CDA §230, *supra* note 47.

⁵² HCA 1383/2012.

previous searches completed using this phrasing. The first issue is whether Google could be considered a ‘publisher’ by merely creating an automated service deploying algorithmic process and artificial intelligence. If Google were not a publisher, the second issue would be whether Google could still be liable as a publisher by omission for refusing to take the content down after notice. The Court of First Instance (“CFI”) granted Google’s leave to appeal as there are conflicting authorities⁵³ on this unsettled area and it is in the ‘interest of justice’ to allow the motion to go forward.

Ribeiro P.J., writing extra-judicially, commented that search engines take up different roles by providing a hyperlink to a third party’s defamatory website and providing snippets of the defamatory content.⁵⁴ In the former case, the search engine was merely functioning as a location tool indicating already existing content, therefore the analogy with a mere conduit is compelling⁵⁵. On the other hand, the approach adopted to deal with snippets should follow *Fevaworks*, treating search engines as secondary publishers then decide if they can rely on the innocent dissemination defence before and after notification⁵⁶ because snippets are generated by indexing content of websites. Ribeiro did not, however, comment on autocomplete functions.

Given that *Fevaworks* is an HKCFA decision, it is likely that its application would extend to ISPs and search engines, among other intermediaries (assuming that they were regarded as intermediaries for the purposes of the law of defamation). The broad definition of ‘publishers’ adopted is mitigated by the relative generosity of available defences of passive instrument and innocent dissemination, which evidently exist to prevent liability arising from non-blameworthy conduct. The HKCFA addressed the potential harshness of its approach and acknowledged the technical difficulties involved in pre-notification

⁵³ In *Bleyer v Google* [2014] NSWSC 897, the Supreme Court of New South Wales held that Google could not be a publisher of the results produced by its automated search engine. However, the High Court of Australia in *Trkulja v Google LLC* [2018] HCA 25 found Google to be the publisher as endorsement can be inferred.

⁵⁴ Ribeiro, *supra* note 2, at §53.

⁵⁵ *Ibid*, at §57.

⁵⁶ *Ibid*, at §56.

monitoring by setting a low threshold of ‘reasonableness’ in detecting potentially libellous material. This is demonstrated by holding HKGF not negligent purely on the basis of the enormous volume of traffic without addressing whether merely employing two administrators for six to eight hours a day is sufficient. The English courts’ tendency of relying on the passive instrument doctrine after notification is based on the view that the onus should rest on the plaintiff to prove the defendant’s knowledge for publication⁵⁷, instead of imposing the burden of proof on the defendant to prove lack of knowledge for innocent dissemination.

4. Problems with the Hong Kong approach

Tort law generally requires some element of wrongdoing or culpability for liability to arise. The HKCFA’s view that innocent disseminators are nevertheless ‘publishers’ arguably captures conducts that lacks the requisite blameworthiness and is thus in principle contrary to the orthodox view of libel expressed in *Vizetelly*⁵⁸, which states that “*innocent publication by a disseminator is not a publication within the meaning of the law of libel*”. As a matter of principle, a defendant should not be treated as a publisher when the dissemination of defamatory content was “neither intentional nor due to any want of care on the defendant’s part”⁵⁹.

An area raised but left open by Litton LJ in his concurring judgment in *Fevaworks* was the standard of care ODF should be held to *before* acquiring knowledge of the defamatory postings⁶⁰. The defendant was considered a subordinate publisher because it was established that HKGF could not acquire knowledge or have control over the posts prior to notification. By that logic, intermediaries would be better off if they actively chose not to monitor content in order to avoid meeting

⁵⁷ Laidlaw, *supra* note 18, at [118].

⁵⁸ *Vizetelly*, *supra* note 9, at §178.

⁵⁹ Gatley on Libel and Slander, *supra* note 6, at §6.11.

⁶⁰ *Fevaworks*, *supra* note 4, at §131.

the requisite ‘knowledge criterion’ to be held to be a first or main publisher⁶¹. If *Fevaworks* is to remain good law, it is necessary to put additional protections for reasonable and good-faith monitoring in place through legislative means⁶². The law should encourage intermediaries to take adequate pro-active (as opposed to merely reactive) action to prevent the publication of libel instead of subjecting them to possible liability for actively trying to prevent it.

Moreover, administrators of intermediaries are often lay persons who may not appreciate whether an expression is defamatory in law. *Fevaworks* and *Tamiz* both held that liability could be avoided if intermediaries promptly took down the offending posts after becoming aware of them (also known as the ‘notice-and-take’ down regime). It follows that intermediaries would, in effect, become arbiters of what is defamatory. Under these circumstances, the most economical and risk-avoidant approach is to comply with any removal request without question to avoid the risk of endorsing the defamatory content (under the UK system) or losing the innocent dissemination defence (under the HK system). It may be queried whether this is a proportionate response that is consistent with the basic rights of freedom of expression and conscience enshrined in the Basic Law Article 27 and Article 32.

5. Statutory Approaches to Intermediaries Liability

Hong Kong currently does not have an overarching legislative framework governing the law of defamation in cyber-space, but in various other jurisdictions, statutes with specific provisions governing intermediaries have been enacted. These may broadly speaking be broken down into three models⁶³: (1) the strict liability model requires intermediaries to monitor contents or risk attracting

⁶¹ Adrian Fong, “Dissemination of Libel by Online Social Platforms: Reinterpreting Laws to Meet the Information Age”. (July 15, 2013), at [9].

⁶² *Ibid.*

⁶³ Article 19, *supra* note 19, at [7].

sanctions such as withdrawal of business licence (e.g. China and Thailand⁶⁴); (2) the safe harbour model provides conditional immunities if intermediaries comply with certain requirements such as taking down the content upon notification (e.g. the European Electronic Commerce Directive⁶⁵); and (3) broad immunity model confers general immunity on intermediaries against being treated as publishers of content created by a third party (e.g. the US⁶⁶ and Singapore⁶⁷).

While the strict liability approach is overly restrictive and demanding which could potentially stifle intermediaries' operation, a blanket general immunity on the other end of the spectrum does not give enough weight to the protection of reputation⁶⁸. A more nuanced approach would be the one taken by the UK by introducing the Defamation Act 2013 (“DA”), which draws from the previous Defamation Act 1996 and the Electronic Commerce (EC Directive) Regulations 2002⁶⁹. In particular, sections 5 and 10 DA deny the court jurisdiction to hear defamation actions against secondary publishers unless it is ‘not reasonably practicable’ to bring an action against the ‘primary publishers’⁷⁰. As a matter of principle, the liability of a party should not necessarily depend on the identifiability of another. It could further be argued that the DA encourages the pursuit of deep-pocketed but not the blameworthy, which is questionable by reference to the mischief that defamation statutes were intended to address. That said, I am of the view that the DA legislates for a pragmatic balance between the protection of intermediaries with limited control over the content they ‘publish’ and the rights of a defamed person to obtain a remedy.

⁶⁴ *Ibid.*

⁶⁵ Commission Directive 2000/31/EC.

⁶⁶ Communication Decency Act §230, *supra* note 45.

⁶⁷ Singapore Electronics Transaction Act 2010.

⁶⁸ Ribeiro, *supra* note 2, at §§37-38.

⁶⁹ Electronic Commerce (EC Directive) Regulations 2002 (UK), SI 2002/2013.

⁷⁰ Laidlaw, *supra* note 18, at [141].

6. Recommendation

It is submitted that regarding ‘publication’, the approach in *Tamiz*’s case of not treating an innocent disseminator as a publisher is preferable to that in *Fevaworks*. Knowledge and control are matters of degree and not simply questions of whether the intermediary has or does not have knowledge of the statement’s existence or whether the intermediary has the ability and opportunity to prevent publication⁷¹. For one, the ‘knowledge criteria’ should encompass the substantive, allegedly defamatory content of a publication and so go beyond the mere knowledge of its existence. In other words, intermediaries with a higher degree of knowledge should be expected to act more prudently and proactively and the defence of innocent dissemination should not be denied once a particular arbitrary knowledge threshold that is without regard to the specific circumstances and operational model of each publisher is met⁷². Hence, the line of authority following *Byrne* takes a more holistic approach in considering the circumstances as a whole (which include the degree of knowledge, control and participation on the intermediary’s part) to infer whether there have been endorsement or acquiescence. The law should require tortious conduct to have at a minimum an element of wrongdoing or negligence.

Fevaworks has shown that the traditional primary/secondary publisher distinction might be outmoded in the Internet era. Introducing legislation inspired by the DA would therefore be a positive development that builds upon the existing common law approach, whilst adapting it to the realities of ever more sophisticated communication media. Statutory provisions should therefore govern the nature of liability for respective categories of intermediaries according to the role they have taken in dissemination. Appropriate standards of care *before and after* notification should be identified and specified as positive duties to ensure intermediaries take a proactive but not arbitrary or overly scrutinising approach in monitoring and in response to allegations of potential defamation.

⁷¹ Kwok, *supra* note 26, at [5].

⁷² *Ibid.*