

LLM Dissertation

An Awkward Debate About Defamation:
Is libel law compatible with the internet?

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Part 1: Extended Introduction

*“ It is inconceivable that the courts should continue to struggle forever with a monstrous fungoid growth of law which has sprung up without rhyme or reason, entirely haphazard, and with no thought as to its consequences. ”*¹

— Professor William Prosser on libel law (1953)

Between the sheer wealth of academic commentary on defamation, and the many decided cases on same, there is material enough to inspire a PhD thesis, let alone an LLM dissertation. Indeed, one’s first discovery in researching defamation law, especially in a technological context, is that so many issues are inter-connected, meaning discussion of one feels incomplete without limited discussion of others. Therefore, by way of an extended introduction, it is proposed to give an overview of the role that defamation law plays in society, the controversial distinction it has long made (and will continue to make) between printed and spoken words, and the obvious difficulty of applying this distinction to modern communications mediums — especially the internet.

It is also proposed to set some boundaries on this discussion, thereby establishing which issues warrant closer analysis, and which issues do not. In particular, it will be necessary to address a few alternative debates, if only to dispose of these summarily.

¹ Charlotte Waelde, Lilian Edwards, ‘Defamation and the Internet: A case study of anomalies and difficulties in the information age’ (1996) 10 IRLCT 263.

Note, too, that this paper will focus throughout on *personal* defamation (scorn heaped upon the good name of an individual), not business or professional defamation.

It is hoped that by the end of this introduction, the reader's mind will be open to two possibilities — firstly, traditional defamation rules are incompatible with the internet; secondly, the internet signifies more than a convenient alternative to the fax machine.

Defamation law exists to deter unjustifiable attacks upon reputation, and to compensate any person whose reputation is damaged by such an attack. An attack will often take the form of a lie or untruth, although other defamatory gestures, if expressed to the public, may be penalised the same — for example, a snide innuendo.

It is quite arguable that 'protection of reputation' has come to be recognised as a fundamental human right in democratic societies, central to dignity² — as supported by the fact that numerous human rights treaties recognise respect for the reputations of others as a legitimate ground for restricting free speech.³

Defamation is said to occur whenever a statement is made public about a particular person, as a result of which, that person tends to be lowered in the estimation of right-thinking members of society generally.⁴ Printed defamation (or 'libel') is perceived as more serious than spoken defamation (or 'slander'), as reflected by the fact that the former was punishable as both a crime and a civil wrong (or 'tort') until very recently. Moreover, victims of the printed word do not have to prove damage to reputation;

² Dario Milo, *Defamation and Freedom of Speech* (OUP 2008) 16 and 33-41.

³ e.g. Article 10(2) of the European Convention on Human Rights, Article 13(2)(a) of the American Convention on Human Rights, and Article 17(1) of the International Covenant on Civil and Political Rights.

⁴ *Sim v Stretch* (1936) 2 All ER 1237 at 1240.

the law presumes it.⁵ But from the moment of its inception, this presumption has been prone to strong criticism.⁶

It is widely accepted today that the English civil law of defamation⁷ did not evolve from centuries of judicial wisdom, nor is it the product of informed legislative debate. English defamation law, separated as it is into two distinct torts of libel and slander, came about as the result of an “anomalous and haphazard history”⁸ which is “difficult to justify on any logical grounds.”⁹ Be that as it may, the past century has witnessed judges, in England and elsewhere, labouring to make these old torts comport with the new technologies of radio and television¹⁰ — and most recently, the internet.^{11 12} None of these mediums can be said to align neatly with the distinction between printed and spoken words, so the tendency has been to regard all three as potentially libellous on account of their ‘permanence’ as opposed to mere ‘transience.’¹³

⁵ Paula Giliker, Silas Beckwith, *Tort* (4th edn, Sweet & Maxwell 2011) 400-1.

⁶ See, e.g. Patrick Milmo, WVH Rogers, *Gatley on Libel and Slander* (9th edn, Sweet & Maxwell 1998) 104: “A defamatory letter read by one person is actionable *per se*, but a slander [amplified] to a packed Wembley Stadium requires proof of special damage.”

⁷ English law applies to both England and Wales. It also forms the basis of all other common law jurisdictions, so is often treated as persuasive abroad. In turn, English law is often influenced by judicial decisions emanating from other common law jurisdictions; e.g. America.

⁸ Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Publishing 2005) 3.

⁹ Brian Neill, Richard Rampton, *Duncan & Neill on Defamation* (2nd ed, Butterworths 1983) 4.

¹⁰ Finley P Maxson, ‘A Pothole on the Information Superhighway: BBS Operator Liability for Defamatory Statements’ (1997) 75 WULQ 673 at 676-7.

¹¹ The ‘internet’ is an international network of servers linking billions of devices, thereby enabling the rapid publication and sharing of information, plus instantaneous communications. The internet is also referred to as the ‘World Wide Web.’

¹² The first recorded case of internet defamation is *Cubby v CompuServe* (1991) 776 F Supp 135 (SDNY), in which it was held that an American Internet Service Provider (ISP) was not responsible for libellous comments posted on one of its public discussion forums, since, in this particular instance, the ISP merely hosted the forum; it lacked the control of a publisher.

¹³ (n 5)

Arguably, three new torts of defamation by radio, television and internet would have made better sense, and provided stronger legal certainty, than stretching 17th century libel into the 20th century (and beyond) in efforts to regulate these innovative new forms of communication.¹⁴ However, whilst the situation with respect to radio and television has long been settled, it is not too late for law-makers in common law countries to introduce a new tort of defamation by internet — as advocated by (e.g.) *Danay*,¹⁵ *Maxson*,¹⁶ and *Taylor*.¹⁷ Ideally, this new cause-of-action would abolish the outmoded distinction between printed and spoken words, focusing more upon the context in which a slur has been communicated, and less upon the medium of communication itself, for as *Danay* aptly puts it: “the medium is not the message.”¹⁸

A few common law countries have recently abolished the general distinction between libel and slander, including Ireland, Australia and (in effect) New Zealand.¹⁹

¹⁴ See, e.g. RC Donnelly, ‘Defamation by Radio: A Reconsideration’ (1948) 34 ILR 12 at 16. Also: Robert L. Hersh, ‘Libel and Slander: Defamation by television broadcast is actionable *per se*’ (1962-63) 46 MLR 397.

¹⁵ Robert Danay, ‘The Medium Is Not The Message: Reconciling reputation and free expression in cases of internet defamation’ (2010) 56 MLJ 1 at 33: Author does not specifically call for the creation of a new tort, but refutes the view that internet defamation is akin to traditional libel, proposing that “courts must treat each and every ... case on its own merits, without relying on any sweeping generalizations about the broad reach and dangers of internet publications.” In other words, then, the courts should set a bold new cyber-precedent.

¹⁶ (n 10) 692: Author proposes guidelines to be “adopted through legislation or judicially constructed” to prevent public forum operators being held unduly liable for defamatory posts.

¹⁷ Jeffrey M Taylor, ‘Liability of Usenet Moderators for Defamation Published by Others: Flinging the law of defamation into cyberspace’ (1995) 47 FLR 247 at 280: Author advocates a new tort of ‘Network Defamation’ whereby only persons “who perform meaningful editorial control over [website] content” would face being penalised for defamatory publication.

¹⁸ (n 15)

¹⁹ Matthew Collins, *The Law of Defamation and the Internet* (3rd edn, OUP 2010) 47.

However, damage continues to be presumed in cases of internet defamation,^{20 21} meaning that, in practice, the internet has simply been likened to a newspaper in these countries, with victims being compensated for harm that is theoretical — akin to libel. As will be argued, though, a new tort would do better to treat most, if not all, instances of ‘online’ defamation as being closer to slander than libel, with damage to reputation thus requiring proof as opposed to being presumed. This is because, in the submission of this author, the internet has given rise to a type of ‘cyber-culture’ in which people instinctively know to question sensational data encountered in the vastness of cyberspace²² (assuming such data is encountered at all) — for the reason that *anyone* is able to publish *anything*.²³ Hence, the sheer unrestricted nature of the medium reduces the impact of slurs made public by it. Or, to put it another way: society is far less impressed by data, since data costs nothing to produce and can be produced by anyone — unlike newspapers, radio programmes and television shows.

Talk has never been cheaper, so the law might do well to reflect this. But how realistic is it that such a reform could occur in England?

²⁰ (n 19) 54: “[The] publication of defamatory matter of any kind, including via the internet, is actionable throughout Australia without proof of special damage.”

²¹ See, e.g. Laura Rattigan, ‘A Note on Defamation [in Ireland]’ (27 August 2013) <<http://knowledgenet.carmichaelcentre.ie/articles/note-defamation>> accessed 28 June 2014. See also: Kelly / Warner, ‘Defamation Laws in New Zealand’ (2014) <<http://kellywarnerlaw.com/newzealand-defamation-laws/>> accessed 28 June 2014.

²² Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (Vintage 2001) 181-2: Author argues that whilst information published ‘online’ is available to millions of people around the world, there are *billions* of webpages, so “the chances that anyone will stumble across [one particular] page are quite slight.” Hence, cyberspace is vast.

²³ Tae Kim, ‘Free Speech in Cyberspace’ (Harvard 1998) <http://cyber.law.harvard.edu/fallsem98/final_papers/Kim.html> accessed 15 July 2014: Author observes that “television audiences and newspaper readers, for the most part, are ‘listeners’ only. Cyberspace, on the other hand, allows us to become both a ‘speaker’ and a ‘listener.’”

On 1st January 2014, the Defamation Act 2013 came into force in England and Wales — its aim being to “clarify and increase the accessibility of the law of defamation, as well as to [introduce] substantive changes, including ... a framework for tackling defamation on the internet.”²⁴ However, despite acknowledging, to some extent, the place of the internet in modern society,²⁵ Parliament has not seen fit to abolish the distinction between libel and slander (‘online’ or otherwise). It should be noted that Parliament has maintained this troublesome distinction, despite its abolition being formally recommended by a Parliamentary Select Committee in 1843,²⁶ as well as the Faulks Committee on Defamation in 1975²⁷ ²⁸ — although neither committee advocated abolishing the presumption of damage.

Defamation Acts were previously passed by Parliament in 1952 and 1996, presenting an opportunity for significant legislative reform on both these occasions. Indeed, the 2013 Defamation Act had the benefit of three centuries’ debate, as well as contemporary input from free speech advocates. And yet, once again, Parliament has, by its silence, given tacit approval to the libel/slander distinction. That said, Section 1 of the 2013 Act creates a requirement of actual or probable “serious harm” for

²⁴ James Price QC, Felicity McMahon, *Blackstone’s Guide to the Defamation Act 2013* (OUP 2013) 10.

²⁵ e.g. Section 5 of the Act provides a new defence for “operators of websites” who did not actually ‘post’ the statement that is alleged to be defamatory. This is, arguably, a recognition by Parliament that social networking via *Twitter* (and similar websites) has become so commonplace that to hold operators strictly liable would be to harm the public interest, since it is the public who would then stand to lose this fundamental innovation.

²⁶ *Report from the Select Committee of the House of Lords appointed to consider the law of defamation and libel* (HMSO London) iii—iv.

²⁷ *Report of the Committee on Defamation* (Cmnd 5909, HMSO London) paras 75-91.

²⁸ An additional report (The Porter Report) was commissioned and published in 1948 which ultimately approved the distinction, and Parliament appears to have preferred this one — *Report of the Committee on the Law of Defamation* (Cmnd 7536, HMSO London 1948).

individual complaints arising on or after 1st January 2014. It is too soon to tell if this will bolster free speech (especially ‘online’) by debarring certain kinds of libel suits, but where appropriate, this paper will bring the new threshold to bear on internet cases with a view to offering a prediction.

Hence, for the time being, and for better or worse, 17th century jurisprudence must continue to regulate a technology that was barely foreseeable two decades ago, let alone during the reign of King Charles II.²⁹

What does this paper aim to show?

This paper proposes to examine whether traditional libel law can be extended logically to the internet. It is anticipated that the answer will be *no*, and that a new tort of defamation by internet (requiring proof of special damage) would be better than likening electronic postings on websites to printed articles in newspapers.

In other words, then, the following argument lies at the heart of this dissertation:

Complaints about internet defamation should be approached in the same way as complaints about slander, not libel. This suggested reform could take the shape of an amendment made by Parliament to the 2013 Defamation Act, or a precedent set by the UK Supreme Court in an appropriate case on appeal. Either way, the end result would be a new cause-of-action.

In order to reach a credible conclusion, it is intended that a genuine effort be made to test the case for reform by first arguing the traditional position, then responding to this by invoking the ‘cyber’ perspective. It should be stressed that this paper is

²⁹ The first civil case to distinguish between libel and slander was *King v Lake* (1670) 145 Eng Rep 499 — decided during the reign of Charles II.

concerned with reforming English law, but the suggested reform might serve as a welcome change in many other common law countries.

Academic work on defamation has, so far, tended to avoid “the awkward debate as to whether internet defamation is libel or slander.”³⁰ Moreover, there is a curiously ‘intuitive’ assumption shared by many academics, lawyers and law students that any form of typed defamation has to be regarded as libellous, not slanderous^{31 32} — irrespective whether a typed statement appears in *The Guardian* or on *Twitter*. Hence, it is this author’s aim to contribute some cyber-specific analysis in an effort to challenge this assumption and kick-start the awkward debate.

Part 2 will briefly consider what is meant by ‘cyberspace’ — and the importance of this for judges in internet defamation cases.

Part 3 will consider ‘e-conversing’ — that is, the means by which random internet users can interact via instant messaging in chatrooms, or by periodically contributing to discussion forums. It is intended to consider the text-based (not voice-over) aspects of these platforms. Vicarious liability of service providers will not be explored. This part will be the most crucial, as it will bring to light recent major developments.

Part 4 will consider ‘social networking’ — that is, a platform which has evolved from e-conversing, whereby each user can build a community of friends and casual

³⁰ (n 15) 27.

³¹ e.g. Stephen Dooley, ‘Defamation on the Internet’ (1995) 1 CTRLR 191 — Author states that “one assumption is made in this article: defamatory material appearing on the internet amounts to libel rather than slander [because] even though a message [posted] to an [internet] bulletin board may be in existence for only a short period of time, this is no more transitory than writing a remark on paper and then shredding it.”

³² e.g. Trotter Hardy, ‘Defamation in Canadian Cyberspace’ [2004] NLJ <<http://www.angelfire.com/ca2/defamation/introduction.html>> accessed 9 July 2014 — Canadian defamation lawyer, George Takach, wrote in 1998: “The internet promises to be the supreme mechanism for perpetrating libellous statements” (i.e. not ‘slanderous’ or ‘defamatory’ ones).

acquaintances with whom to share thoughts, digital photographs, etc. It is not intended to explore liability for repeating (or ‘re-tweeting’) defamatory posts.

Finally, a conclusion will decide whether libel law, however flawed in its origin, and however theoretical in its approach, can nonetheless regulate internet speech logically.

Thus, this paper plans to observe the internet through the lens of social interaction.

What does this paper plan to avoid?

This paper will not explore whether the awkward debate might be averted by taking some kind of ‘limited damages’ approach³³ to internet defamation cases — or, indeed, to all defamation cases in general.

For instance, one might argue that a far simpler solution would be to dispense with the libel/slander distinction and to presume, in all cases, that *some* harm has occurred. Then, with a token sum as the starting point, higher levels of compensation would need to be justified by proof of egregiousness — e.g. “a pattern of abusive conduct.”³⁴

³³ See, e.g. Daniel J Solove, *The Future of Reputation: Gossip, Rumor and Privacy on the Internet* (YUP 2007) 124: Author extols the virtues of restricting awards, but with a view to “[steering] litigation toward resolving disputes more quickly and inexpensively.” This implies that reputational harm is still presumed, albeit to a more limited extent.

³⁴ (n 33)

This approach still accords with the traditional conception of reputation as dignity,³⁵ in that the presumption of damage aids the rapid restoration of a victim's good name. Yet, by limiting the size of awards, it offsets the strict liability for printed defamation. However, in this author's opinion, the approach is unsatisfactory for three reasons.

Firstly, it smacks of the same legal fiction which has made libel law controversial for centuries — namely, that a mistaken untruth expressed in a letter (or e-mail, or internet chatroom), read by only one other person, is always damaging to reputation, whereas a blatant spoken lie, amplified to a packed Wembley Stadium, may not be.³⁶ Whilst a 'limited damages' approach might, at least, presume *some* degree of harm at Wembley Stadium, it would still penalise the mistaken letter writer (or e-mail sender, or chatroom commenter) for harm that is probably more imagined than real.

Secondly, as some degree of harm is always presumed, such a reform would contribute nothing to reducing the heavy burden on England's civil courts.^{37 38} Indeed, if libel and slander were to be merged into a single damage-based approach, the overall number of complaints may actually rise, since slander would join libel as a

³⁵ (n 2) 39.

³⁶ (n 6)

³⁷ Gary Slapper, David Kelly, *The English Legal System* (15th edn, Routledge 2014) 211.

³⁸ *The Lord Chief Justice's Report 2013* (page 28) <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/lcj_report_2013.pdf> accessed 15 July 2014.

³⁹ Note that there are just two occasions when slander, like libel, is actionable *per se*; that is, without proof of special damage. These are falsely stating that a person has committed a very serious crime, or is incompetent in their trade. It is no longer actionable *per se* to falsely accuse any woman of being unchaste, or any person of having an infectious disease — per Section 14 of the Defamation Act 2013. That said, it is the opinion of this author that slander should not be actionable *per se* under any circumstances. Free speech, common sense and the prior strength of a person's good name are sufficient to overcome a verbal untruth in the vast majority of instances. Indeed, the vast majority of people have no other option, since the power of the writ lies beyond their means.

tort actionable *per se*.³⁹ Consequently, more defendants may find that they have little to lose by confronting their accuser in court, and repeating their slander in evidence.

Thirdly, even if a default award were to be fixed at one penny, with principle alone becoming the key motivation behind every case, nevertheless, the internet is now empowering so many people to express themselves publicly that, in terms of both legal and moral culpability, any damage-based approach would blur the distinction between the casual ‘tweeter’⁴⁰ and the professional journalist — thus rendering both equally blameworthy. Indeed, this peculiar state of affairs may already be the *de facto* state of the law.⁴¹

Hence, it might be better for the law’s credibility, the over-burdened court system and freedom of speech, if internet defamation were actionable, in all or most cases, upon no less than proof of special damage.⁴²

As a final aside, it is arguable that since ‘protection of reputation’ is settled as part of international human rights law,⁴³ “[declaring] the internet a defamation-free zone

⁴⁰ A ‘tweeter’ is the popular nickname given to a user of the social networking site ‘Twitter.’

⁴¹ See, e.g. Brian Wheeler, ‘Twitter users: A guide to the law’ (BBC News Magazine, 26 February 2013) <<http://www.bbc.co.uk/news/magazine-20782257>> accessed 14 July 2014 — A senior BBC journalist writes: “The law concerning Twitter is clear. If you make a defamatory allegation about someone, you can be sued for libel. It is the same as publishing a false and damaging report in a newspaper.”

⁴² To be clear, the term ‘special damage’ refers to a specific and identifiable loss, upon which a monetary figure can be placed.

⁴³ (n 3)

would be a breach of human rights”⁴⁴ — as defamatory words expressed ‘online’ can most certainly affect reputations ‘offline.’ Thus, it is not proposed to explore the possibility of ‘online’ defamation being resolved among users in a digital Wild West, where Barlow-esque self-regulation^{45 46 47} trumps the ordinary rule of law. Nor is it proposed to explore the idea that human rights (particularly speech and reputation) apply differently to the world of cyberspace.^{48 49} However, it is submitted that, whilst real-world harm calls for real-world remedies,⁵⁰ some familiarity with the concept of cyberspace, and the effect it is undoubtedly having on the real world (or real-space), is essential for gauging the true extent of any ‘offline’ harm caused by ‘online’ conduct.

Summary

This concludes the extended introduction, which, to recap, has effectively dealt with the three following questions.

⁴⁴ Dan Svantesson, ‘Jurisdictional Issues in Cyberspace: At the crossroads — The proposed Hague Convention and the future of internet defamation’ (2002) 18 CLSR 191 at 195.

⁴⁵ John Perry Barlow, ‘Declaration of the Independence of Cyberspace’ (8 February 1996) <<https://projects.eff.org/~barlow/Declaration-Final.html>> accessed 7 July 2014.

⁴⁶ (n 17) 278-9.

⁴⁷ Nor is it possible for this paper to consider ‘half-way’ measures between self-regulation and ordinary legal regulation, such as e-Arbitration, advocated by Al-Swelmiyeen and Al-Nuemat in ‘Dispute Resolution in Cyberspace: to duello or to arbitrate’ (2013) 35 EIPR 533.

⁴⁸ (n 22) 140 and 238-9: *Lessig* argues that the internet, at its birth, “protected fundamental aspects of liberty [including] free speech.” Such freedom “flowed from the architecture” of the internet, as originally conceived. This may be changing today, but no authority supports an assertion that free speech ‘online’ must follow the same restrictions as free speech ‘offline.’ Indeed, *Lessig* suggests: “We can [still] embrace the architecture the Net was.”

⁴⁹ (n 23) *Kim* argues that free speech protection in ‘real-space’ is premised on assumptions which do not translate to the internet. Therefore, “a wholly different conception of speech should be considered with respect to cyberspace.”

⁵⁰ This paper subscribes to a jurisdictional theory most akin to the ‘effects’ doctrine of public international law, whereby the right to try a defendant belongs to courts of the State in which the effects of his unlawful conduct are felt — per Malcolm Shaw, *International Law* (6th edn, CUP 2008) 688-9. This approach avoids complex debate about ‘borders’ in cyberspace.

(1) *What will be investigated?* —

Answer: whether traditional libel law can be applied logically to the internet.

(2) *Why is it worthy?* —

Answer: because internet speech is being curbed by reference to a legal fiction.

(3) *How will it be done?* —

Answer: by arguing the traditional view, then responding to this as a cyber-lawyer.

Part 2: Understanding Cyberspace

The term ‘cyberspace’ comes from a science fiction novel, published in 1984, about a computer hacker.⁵¹ The term is thought to have struck a cultural nerve among many at the forefront of the micro-computer revolution⁵² — thus inspiring the ideal behind what might today be described as cyber-culture.

Nowadays, the term ‘cyberspace’ is used interchangeably with ‘the internet.’

However, many respected scholars insist that there is a difference. For example,

Lawrence Lessig distinguishes between being “on the internet” and “in cyberspace.”⁵³

⁵¹ William Gibson, *Neuromancer* (first published 1984, Harper Voyager 1995).

⁵² See, e.g. James Patrick Kelly, ‘Who Owns Cyberpunk?’ (New York Review of Science Fiction, 7 March 2013) <<http://www.nyrsf.com/2013/07/who-owns-cyberpunk-by-james-patrick-kelly.html>> accessed 21 July 2014.

⁵³ *Code: Version 2.0* (Basic Books 2006) 15 and 83.

For him, people do many trivial (but important) things “on” the internet, such as paying bills, buying books, making reservations, getting news and writing to family.⁵⁴ None of these activities are unique to the internet; the internet simply offers a more convenient way to do them.⁵⁵ But ‘cyberspace’ implies something deeper:

“[Cyberspace] is not just about making life easier; it is about making life different, or perhaps better. It evokes ... ways of interacting that were not possible before.”⁵⁶

In other words, then, the internet goes beyond a mere “Yellow-Pages-on-steroids.”⁵⁷ It serves, potentially, as the gateway to a special place, in which both friends and perfect strangers can meet (day or night) to discuss life, play chess, share fantasies, listen to music, debate politics, write a book (and publish it online), compose songs.... or anything else that the internet’s technology enables. But this notion of cyberspace as a ‘place’ is not accepted by every scholar who considers the question. For instance, the late *Julius Thomas Fraser*, a leading space-time philosopher, stated:

“Obviously, cyberspace is not a space in the ordinary sense, but a name for a new family of signals appropriate for communication in the technical and cultural setting of the age.”⁵⁸

⁵⁴ (n 53) 83.

⁵⁵ (n 54)

⁵⁶ (n 54)

⁵⁷ (n 53) 9.

⁵⁸ *Time and Time Again: Reports from a Boundary of the Universe* (Brill 2007) 363.

Whilst *Fraser* essentially dismisses ‘cyberspace’ as some new mode of telephony, he appears to accept, by referring to the “technical and cultural setting of the age”, that society has grown more sophisticated in its interactions. This could not be so without the technology of interaction exerting some prior influence on society, thereby leading to the change in culture which he acknowledges.

Hence, whether one chooses to regard cyberspace as a place or otherwise, the term at least conveys the sense of an increasingly ‘online’ society where technology is not just making interaction easier; it is also making it *different*.

What is the relevance of this for judges?

If libel judges adopt a Fraser-esque view, they will remain amenable to traditional arguments grounded in presumption. A judge’s understanding of cyberspace is thus important because Section 1(1) of the Defamation Act 2013 now provides:

“A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant” (emphasis added).

Therefore, assessing “*likely to cause*” accurately will require a willingness to avoid presumptions based on the internet’s potential reach. Judges must instead be willing to consider the difference between (e.g.) a newspaper in real-space, with a daily readership of 2 million people, and a blog in cyberspace, whose readership actually comprises but a handful of internet users, spread sporadically around the globe.

In other words, context counts in cyberspace.

Part 3: e-conversing

English defamation law requires that a slur upon someone's good name be published before an action for libel or slander can stand. This is not to say that there must be a commercial publication in the popular sense of the word, but rather, there must be some "communication to anyone other than the person actually defamed."⁵⁹ Hence, a defamatory letter read by the victim alone, and no one else, *does not* amount to publication, whilst a verbal untruth about the victim, spoken to a third party, *does*. The important point is that 'publication' requires an audience of as little as one.⁶⁰

Internet chatrooms⁶¹ are like virtual bars where people go to unwind. The premise is quite simple. Users visit a chat site and select a 'room' to enter. The name of the room determines what the people inside will be discussing. So, for example, a room entitled 'Rugby' will attract users wishing to discuss rugby, whereas a room entitled 'Dirty Talk' will attract users wishing to talk dirty. Once inside a chatroom, a list of all its users will appear on one side of the screen. Comments posted by users will appear at the centre of the screen for all to see, and in real-time. Newcomers to a chatroom will generally start by reviewing a few previous comments in order to get up-to-speed with the conversation. Some chatrooms enable the use of a microphone to transmit live voice messages, too.

⁵⁹ Peter F Carter-Ruck, Harvey Starte, *Carter-Ruck on Libel and Slander* (5th edn, Butterworths 1997) 63.

⁶⁰ But communication between husband and wife does not count as 'publication' — *Wennhak v Morgan* (1888) 20 QBD 635. Today, this rule would probably extend to e-mail.

⁶¹ e.g. The website 'E-Chat' enables you to "chat with anyone you want, anytime you want, about anything you want, free" — <http://www.e-chat.co>

Online forums⁶² (also known as ‘bulletin boards’) differ from chatrooms in two main respects. Firstly, discussion does not occur in real-time; comments may be added to a conversation over days, weeks, months, or even years. Secondly, ‘rooms’ are substituted for ‘threads’ which display a short heading to indicate what the conversation is about. Generally speaking, forums deal with more serious subject matter than is typically encountered in chatrooms, although, just as in chatrooms, comments posted to forums are often of a spontaneous nature.

Users of chatrooms and forums may enter and speak as themselves by displaying their own real-space name, or by adopting a fictitious cyberspace persona.

And so, the question for now becomes: Does it make sense to regard defamatory e-conversation as a form of libel, thus to be regulated by libel law?

Arguing as a traditionalist

In short, a traditionalist’s answer is likely to be *yes*.

Communication via chatrooms and forums (for the most part) occurs in the manner of typed words appearing on a screen, which are specifically intended for an audience. There is strong authority to support that such communication, if defamatory, is to be regarded as libellous publication — namely, *Takenaka Ltd and Corfe v Frankl*.⁶³ ⁶⁴

In this case, a disgruntled ex-employee sent three e-mails to a company under the

⁶² e.g. The website ‘UK Politics Forum’ displays various political debates spanning months, which anyone is permitted to read and contribute to — <http://www.politicsforum.co.uk/forum/>

⁶³ [2001] EWCA Civ 348 — and transcript of first-instance decision is available on Westlaw.

⁶⁴ Will Knight, ‘Landmark ruling in e-mail case’ (ZD Net, 13 October 2000) <<http://www.zdnet.com/landmark-ruling-in-email-case-3002081932/>> accessed 25 July 2014.

pseudonym ‘Christina.’ The e-mails were calculated to discredit Mr Corfe by accusing him of having an extra-marital affair (among other things). Unfortunately for Christina, however, the company decided to spare no expense in uncovering the true identity of the e-mail sender. A high-tech investigation was conducted, and this pointed to the computer of one David Frankl, whom the company then sued for libel. The Court awarded £26,000 for damage to reputation, plus £100,000 in costs.

Hence, a traditionalist would cite *Takenaka* in order to persuade a judge that chatroom and forum comments, like e-mails, may be treated as a form of libel.

It is submitted that *Takenaka* stands as authority for two additional propositions. Firstly, using an assumed identity is no bar to justice.⁶⁵ Secondly, it matters not whether the spreader of malicious gossip is known to the audience, as long as the audience is familiar with the person who is the target of that gossip.⁶⁶

In applying these propositions to chatrooms and forums, there seems to be no good reason why a defamatory comment pertaining to (e.g.) a person’s fidelity should not be regarded as libellous in the same way as the e-mails sent by ‘Christina’ — provided the comment is seen by at least one person who is familiar with the victim.

Takenaka was decided by the High Court in 2000 and upheld by the Court of Appeal in 2001. To date, no subsequent appeal has overruled it, so the case continues to be regarded as good law. That said, *Takenaka* coincided with the entry into force of the Human Rights Act 1998 — which made freedom of expression an integral part of the

⁶⁵ (n 63) Whilst no analysis could conclusively identify whose fingers had been on the keyboard, both the trial judge and appeal court were satisfied that expert evidence proved, on the balance of probabilities, that Mr Frankl had authored and published the e-mails. Nowadays, service providers may be compelled by court order to disclose real identities.

⁶⁶ (n 63) At page 9 of the first-instance transcript, the trial judge was impressed by counsel’s submission that “a defamatory statement can seep into the crevasses of the subconscious and lurk there, ever ready to spring forth its cancerous evil.”

English constitution.⁶⁷ Consequently, while nobody was disputing that offenders like David Frankl deserve to get their comeuppance, a view began to emerge that the fact of being sued at all for defamation is potentially a serious interference with one's freedom of expression.⁶⁸ Hence, it no longer seemed fair that in a democratic society, one citizen can always compel another to undertake the expense and worry of litigation in order to defend their words. It was thus felt that claimants should be made to surmount some hurdle at the outset — notwithstanding that in libel actions, damage to reputation has traditionally been presumed. This rationale would lead to the landmark decisions of *Jameel*⁶⁹ and *Thornton*⁷⁰ in 2005 and 2010, respectively.

In *Jameel*, the Court of Appeal considered whether the presumption of damage was compatible with freedom of expression. Their Lordships found that it was.⁷¹ Thus, the centuries-old tort of libel would not be re-formulated so as to become actionable only upon proof of special damage. However, two recent developments in English law were deemed significant: the coming into effect of the Human Rights Act, which enshrined freedom of expression, and introduction of the new Civil Procedure Rules, whose overriding objective is to save expense and allot resources.⁷² In light of these developments, the Court ruled that unless libel claimants can show that a “real and substantial tort” has occurred, then actions may be struck-out as an abuse of process.⁷³

⁶⁷ Section 12.

⁶⁸ See, e.g. *Lonzim Plc v Sprague* [2009] EWHC 2838 at para 33.

⁶⁹ *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75.

⁷⁰ *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414.

⁷¹ (n 69) para 41.

⁷² (n 69) para 55.

⁷³ (n 69) paras 69—71.

Later, in *Thornton*, it was held that the long-standing definition of ‘defamatory’ in *Sim v Stretch*⁷⁴ (i.e. “tends to lower a [claimant] in the estimation of right-thinking members of society generally”) actually contains an implicit threshold of seriousness. Mr Justice Tugendhat accepted that a “true interpretation” of the *Sim v Stretch* dictum leads to the conclusion that a statement is not ‘defamatory’ unless it is likely to cause more than trivial harm.⁷⁵ And His Lordship made the following observation:

“[This] explains why, in libel, the law presumes that damage has been suffered by a claimant. If the likelihood of adverse consequences ... is part of the definition of what is defamatory, then the presumption of damage is the logical corollary of what is already included in the definition. And conversely, the fact that, in law, damage is presumed is itself an argument why an imputation should not be held to be defamatory unless it has a tendency to have adverse effects upon the claimant. It is difficult to justify why there should be a presumption of damage if words can be defamatory while having no likely adverse consequence.”⁷⁶

Putting it more plainly, it is no longer enough for a claimant to posit that if certain people should see a bad statement then damage to his reputation could result. Now, there must be a *likelihood* of certain people seeing the statement, and damage, which is more than trivial, actually resulting. If not, then no matter how untrue or malicious

⁷⁴ (n 4)

⁷⁵ (n 70) paras 90, 82 and 86.

⁷⁶ (n 70) para 94.

a statement happens to be, it will not be regarded as ‘defamatory.’ This is a very subtle qualification, but one which raises the bar for bringing a claim.

And so, returning to the question of whether defamatory e-conversation should be regarded as a form of libel. It appears, in applying *Thornton*, that chatroom and forum comments cannot properly be described as ‘defamatory’ unless they are likely to cause the victim significant harm. Moreover, in applying *Jameel*, there must be a “real and substantial tort” before the Court will entertain any complaint. This begs the question: While *Takenaka* remains good law in theory, if a similar case were to come before the Court today (involving, say, a malicious comment on a forum), then is *Takenaka* likely to be applied in practice?

In considering whether *Takenaka* involved a real and substantial tort, it is clear that publication was restrictive, insofar as three e-mails were sent to just one person. However, that one person happened to be the company director, whose estimation of the claimant, Mr Corfe, was of paramount importance, and whose word would carry considerable weight among colleagues. As to whether there was a likelihood of significant reputational harm, the e-mails were salacious, and were thus conducive to the spreading of gossip. Therefore, as to whether *Takenaka* is still likely to be applied in practice, the answer would appear to be *yes* — the Court will surely find in favour of claimants wherever the facts resemble.

It is submitted that similar publication to a person’s spouse would be actionable, especially if the offender posted comments to a forum or chatroom which he knew to be frequented by the spouse, or a close friend of the spouse. The crucial point is that “real and substantial tort” does not necessarily mean “publication to lots of people”, and “likely to cause more than trivial harm” does not necessarily mean “guaranteed to

destroy a person’s reputation.” And clearly, this view is beginning to take root among libel judges in internet cases.⁷⁷

It deserves to be pointed out that following *Jameel* and *Thornton*, English libel law has adapted to the internet, in that a comment posted online is not presumed to have been read by others. To quote Mr Justice Tugendhat recently:

“In the case of defamatory allegations posted on the internet, the Court does not presume that there were any ... publishees. The claimant has to prove publication, [though] it is sufficient if the claimant can prove facts from which the Court can infer that there were probably publishees.”⁷⁸

In other words, whilst damage in internet libel actions is presumed, the same cannot be said for publication (despite the internet’s global reach).⁷⁹ This contrasts sharply with the view taken in Canada, where the Ontario Court of Appeal ruled that the “extent of publication is particularly relevant in the internet context [because] such communication is instantaneous, seamless, inter-active, borderless and far-reaching”⁸⁰ — in other words, virtually omnipresent. The Canadian court even took the view that

⁷⁷ e.g. *Fox v Boulter* [2013] EWHC 1435 — Case concerned a website article in which it was implied that a former Cabinet Minister was withholding key evidence from an investigation. Mr Justice Bean stated, at paragraphs 29 and 30: “[Counsel] submits that [the comment] is too trivial to form the basis of a claim. This is not the gravest of libels by comparison with some which have come to court, but in my judgment, it is not at all trivial.”

⁷⁸ *Mole v Hunter* [2014] EWHC 658 at para 87.

⁷⁹ Unlike libel actions generally, where publication is often presumed along with damage — See, e.g. *Huth v Huth* (1915) 3 KB 32 at 39-40 (CA).

⁸⁰ *Barrick Gold Corp v Lopehandia* [2004] OJ 2329 at para 31.

the internet's "anonymous nature can create a greater risk that defamatory remarks are believed"⁸¹ — which, if taken to its logical extreme, suggests that people may be more inclined to accept the word of a perfect stranger (communicating from a computer in his bedroom) than that of a recognised commercial source, such as a printed magazine.⁸² Clearly, such a view creates great scope for oppressive litigation, which may well be why English law has taken a different line.

In summary, the case of *Takenaka* provides strong authority for regarding defamatory e-conversation as a form of libel. As demonstrated, *Takenaka* is able to withstand recent modifications made to the law by *Jameel* and *Thornton*, so has not been rendered obsolete by the Human Rights Act and updated Civil Procedure Rules. The tort itself remains substantially unchanged, in that publication to one person may still be sufficient to found an action, except that today, that one person would need to bear some kind of relevance to the victim — which is to say, publication to any old "Tom, Dick or Harry" is unlikely to satisfy a judge. Thus, one might feel that in light of recent developments, libel law is a perfectly sensible regulator of e-conversation.

Note that the developments discussed under this heading will prove relevant throughout the rest of this paper.

⁸¹ (n 80)

⁸² Matthew Nied, 'Damage Awards in Internet Defamation Cases: re-assessing assumptions about the credibility of online speech' [2010] ALR (Online Supplement) <<http://www.albertalawreview.com/index.php/alr/supplement/view/Damage%20Awards%20in%20Internet%20Defamation%20Cases>> accessed 26 July 2014 — (IV) A Canadian lawyer highlights that anonymity is treated as a reason for *reducing* awards in the case of traditional speech, yet, paradoxically, anonymity is treated as a reason for *increasing* awards in the case of internet speech. Thus, in Canada, posting anonymously online may aggravate damages.

Responding as a cyber-lawyer

It is conceded that a strong case can be made for regarding e-conversation as a form of libel. Indeed, the traditionalist's argument is grounded in high judicial authority — primarily, a Court of Appeal decision from 2001. However, while traditionalists are able to cite the higher authority, cyber-lawyers can now lay claim to a judgment concerning forums, which is thus on point and requires no analogy with e-mail.

In *Smith v ADVFN (2008)*,⁸³ the High Court considered an application made by one Nigel Smith, a vexatious litigant, to lift an order which had been made to prevent his pursuing a large number of libel claims against users of a forum. Mr Justice Eady characterised the claims as “totally without merit”⁸⁴ and highly unlikely to achieve “the only legitimate goal of vindicating reputation.”⁸⁵ Hence, the application to lift the order was refused.

From an academic standpoint, *Smith* is intriguing because, as will be demonstrated, the judge avoids making the ‘intuitive’ assumption that defamatory forum comments are obviously a form of libel. The judge goes so far as to suggest that such comments, despite appearing as typed words on a screen, could actually be regarded as slander.⁸⁶ But there is a practical aspect to *Smith* which seems to have been overlooked by all other commentators — namely, in ruling that the claims lacked merit, the judge had,

⁸³ [2008] EWHC 1797.

⁸⁴ (n 83) para 108.

⁸⁵ (n 83) para 107.

⁸⁶ (n 83) para 16.

whether intentionally or not, assessed them as potential slander claims, not libel ones. In other words, the judge's remarks concerning slander were not merely given *obiter*; they formed part of the reasoning which led to his decision to refuse Nigel Smith's application. Thus, it will shortly be argued that *Smith* is persuasive authority for instigating reform in a future case, notwithstanding His Lordship's warning:

"I would not suggest for a moment that blogging [*sic*] cannot ever form the basis of a legitimate libel claim. I am focusing only on these particular circumstances."⁸⁷

The judge's view of the nature of bulletin board communications⁸⁸ (i.e. forum posts) will now be considered, followed by his reasons for refusing the application.

His Lordship acknowledged that bulletin boards are read by "relatively few people, most of whom will share an interest in the subject matter."⁸⁹ Thus, there is a tacit acceptance that bulletin boards are highly unlikely to command the same broad readership as, say, a traditional newspaper. While publication to a few (or even one) does not necessarily preclude a libel action, it is nonetheless recognised that "a libel published to millions has a greater potential to cause damage than a libel published to a handful of people."⁹⁰ Realistically, therefore, bulletin board posts should seldom be the focus of any libel claim.

⁸⁷ (n 83) para 108 — Note that in this paragraph, the judge mistakenly refers to "blogs" when he clearly means "posts" made to a bulletin board.

⁸⁸ (n 83) paras 13–17.

⁸⁹ (n 83) para 14.

⁹⁰ *John v MGN Ltd* [1997] QB 586 at 607.

In unprecedented fashion, His Lordship then analogised typed bulletin board posts to spoken-word exchanges occurring in everyday situations:

“[Bulletin board posts] are rather like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or give-and-take.”⁹¹

From this, one can deduce the rationale for ordinarily treating printed words as more serious than spoken ones; namely, because printed words are commonly believed to be “more durable, and therefore more likely to damage reputation”,⁹² especially since their ‘poison’ may continue to spread long after the initial publication has occurred.⁹³ But the case of *Smith* now stands as authority for challenging such accepted wisdom. At a minimum, *Smith* proposes a viable exception to the rule.

With respect to the anonymity which often accompanies bulletin board exchanges, His Lordship deemed this a telling characteristic: “[It] is no doubt a disinhibiting factor affecting what people are prepared to say in this special environment.”⁹⁴ And His Lordship’s reference to this “special environment” which people can be “in” would suggest that he subscribes to the notion of cyberspace as a ‘place’ — not just a way to send e-mail and other digital messages.

⁹¹ (n 83) para 14.

⁹² David Price, *Defamation: Law, Procedure & Practice* (Sweet & Maxwell 1997) 37.

⁹³ *Cassell v Broome* [1972] AC 1027 at 1125.

⁹⁴ (n 83) para 15.

Ultimately, His Lordship broke with tradition, stating:

“When considered in the context of defamation law, therefore, communications of this kind are much more akin to slanders ... than to the usual, more permanent kind of communications found in libel actions. People do not often take a ‘thread’ and go through it as a whole like a newspaper article. They tend to read the remarks, make their own contributions if they feel inclined, and think no more about it. [It] is often obvious to casual observers that people are just saying the first thing that comes into their heads and reacting in the heat of the moment.”⁹⁵

In other words, just because posts added to a thread appear in printed form, and are stored online to be accessed by others, it does not necessarily follow that such posts are to be regarded as communication in a permanent form.

At least a decade prior to *Smith*, some commentators predicted that although defamatory e-mails were likely to be regarded as libellous, a few forms of online communication would be “[more] akin to a conversation, where even though words appear on a screen, they are not stored [so are] likely to be considered slander.”⁹⁶

Indeed, it was predicted that storage of message data, or the lack thereof, would be determinative of whether defamatory communications online are libellous.⁹⁷

⁹⁵ (n 83) paras 16 and 17.

⁹⁶ (n 92)

⁹⁷ Matthew Collins, ‘Defamation and the Internet’ (PhD Thesis, 1999) <<https://minerva-access.unimelb.edu.au/handle/11343/35329>> accessed 28 July 2014 — (page 57) In direct contrast to Mr Justice Eady, the author wrote that defamatory chatroom comments are libel rather than slander for precisely the reason that chatroom conversations may be “printed out, stored indefinitely, or forwarded electronically to others.” And unlike Mr Justice Eady, the author attached great significance to the possibility of reviewing previous comments.

However, by his unprecedented remarks in *Smith*, Mr Justice Eady has surely surprised the commentators in finding that data storage is not determinative at all.

His Lordship suggested that in the context of defamation law, newspaper articles are “more permanent”⁹⁸ than forum posts. However, it is submitted that a thing is either permanent, or it is not; a thing cannot be everlasting and fleeting at the same time. Therefore, by “more permanent”, the judge surely meant to convey that newspapers are more likely to be *perceived* as permanent by the newspaper reader, unlike the reader of forums, who *perceives* what she reads as existing only for the moment that she is accessing it — irrespective that posts are stored online and can be recalled later. Forum posts, experienced in this transient manner, would almost certainly be regarded as casual chatter by most people. It is thus arguable that His Lordship draws a distinction between ‘real’ permanence and ‘perceived’ permanence, whereby a reader’s *perception* bears the greatest significance to the libel-or-slander question. And this view appears to have been endorsed by Mrs Justice Sharp in the subsequent case of *Clift v Clarke*,⁹⁹ where forum posts were held to be no more than “pub talk” which “[no] sensible reader would construe in any other way.”¹⁰⁰

Coming now to His Lordship’s reasons for refusing Nigel Smith’s application:

“Many would be surprised to see any of this made the stuff of libel proceedings — the object of which is to restore reputation”¹⁰¹ stated the judge, recognising that the

⁹⁸ (n 95)

⁹⁹ [2011] EWHC 1164.

¹⁰⁰ (n 99) para 36.

¹⁰¹ (n 83) para 23.

claimant himself had behaved in an aggressive manner towards others on the forum. From this, it can be inferred that context matters. A claimant cannot hope to succeed by picking out the plums and leaving the duff behind, so to speak.

The judge then drew a distinction between genuinely defamatory statements and “mere vulgar abuse”¹⁰² from the “heyday of slander actions.”¹⁰³ This distinction was prompted by the fact that one defendant had posted that the claimant is a ‘dickhead.’ From this, it can be inferred that insults are insults. The act of typing a mere insult into a chatroom or forum does not elevate it to defamation status — much less libel.

Finally, the judge stated that “claims have been made [here] in respect of postings which are so obviously, in their context, either mere vulgar abuse or fair comment.”¹⁰⁴ And by this juncture, there can be no disputing that “context” refers to the spoken-word context — to which the tort of slander applies, not libel, thus requiring proof of special damage (which, incidentally, Nigel Smith was unable to show).

On careful reflection, therefore, one forms the view that in assessing the potential merits of these claims, the judge was putting the message before the medium¹⁰⁵ instead of the other way around. Putting the medium first would have been to risk engaging the presumption of damage in favour of a vexatious litigant.

In summary, the past decade has seen libel law undergo significant reform at the hands of the judges. Consequently, traditionalists may now refute the archaic, over-

¹⁰² (n 83) para 29.

¹⁰³ (n 83) para 17.

¹⁰⁴ (n 83) para 106.

¹⁰⁵ (n 15)

simplified conception of libel law that is still to be found in many textbooks.

Nevertheless, it should be recognised that the *Jameel* and *Thornton* reforms were not about making libel law more internet-compliant; rather, these reforms were primarily aimed at bolstering free speech by making it harder to get any claim off the ground. Thus, it would be disingenuous to say that *Jameel* and *Thornton* have brought libel into line with the internet. The fiction still very much prevails that printed words are more harmful than spoken ones, online and offline, as supported by the re-affirming of presumed damage recently.¹⁰⁶ But three-and-a-half centuries after *King v Lake*¹⁰⁷ first established the tort of libel, what authority prohibits a distinction between analogue and digital text, and the different ways in which readers perceive the two? In the submission of this author, no authority prevents such a distinction being made; only ill-founded assumptions.

For instance, the traditional argument based on *Takenaka* (that forum comments can be likened to e-mails) tends to come undone without the ‘intuitive’ assumption that typed defamation, whatever its context, is always a form of libel. As demonstrated, cases such as *Smith* and *Clift* are exposing the fallacy behind this assumption, and a high-ranking precedent may be all that is now needed to unravel it.

Therefore, one might feel that in light of recent developments, it does not make sense to regard defamatory e-conversation as a form of libel, thus to be regulated by libel law.

Note that the ‘cyber’ developments discussed under this heading will prove relevant throughout the rest of this paper.

¹⁰⁶ (n 71)

¹⁰⁷ (n 29)

Applying the new ‘serious harm’ threshold

To date, only one case has been decided under the 2013 Act,¹⁰⁸ and this concerned a printed newspaper article which was alleged to be defamatory.

Mr Justice Bean was confronted by the following dilemma: Is Section 1(1) merely intended to codify the changes made by *Jameel* and *Thornton*? Or is it intended to raise the bar higher, thus making it even harder to bring a claim?

His Lordship was inclined to the latter view,¹⁰⁹ and cited the following as an example from which the Court may infer serious harm: “If a national newspaper with a large circulation wrongly accuses someone of being a terrorist or a paedophile, then ... the likelihood of serious harm to reputation is plain.”¹¹⁰ But in much less extreme circumstances, a claimant may have to adduce evidence of actual or probable serious harm in order to proceed.¹¹¹

And so, how might this affect internet cases concerning chatrooms and forums?

Applying the new threshold to *Takenaka* (which concerned defamatory e-mails), it now appears unlikely that such a claim would succeed. This is because the claimant had not suffered actual serious harm by the date of the trial. He had not lost his job, nor had his marriage been impacted by the allegations of infidelity. Per *Cooke*, therefore, if serious harm cannot be proven by looking backwards in time, then its

¹⁰⁸ *Cooke and another v MGN Ltd & Trinity Mirror Midlands Ltd* [2014] EWHC 2831.

¹⁰⁹ (n 108) para 37.

¹¹⁰ (n 108) para 43.

¹¹¹ (n 110)

likelihood must instead be established by looking forwards.¹¹² However, it would have seemed strange to argue that although the claimant’s marriage and employment were secure at the date of trial, even so, this was likely to change in the future. Indeed, a lack of serious harm by the date of trial (many months after publication) could itself be proof that future harm is no longer plausible.

Hence, it is improbable that *Takenaka* could survive the ‘serious harm’ threshold, and by analogy, it is improbable that similar allegations posted to a chatroom or forum would be actionable — save without compelling evidence to support the claim.

Part 4: social networking

The previous part considered chatrooms and forums. In a way, the interaction facilitated by these platforms is the lifeblood of the internet. As *Brown* and *Marsden* have observed, bulletin boards pre-date the “commercial internet”,¹¹³ and thus, they signify a time online when anyone could interact with anyone, before “walled-garden, invitation-only”¹¹⁴ platforms (i.e. social networks) became the dominant feature, driven as these are by mass advertising revenues.

¹¹² (n 108) para 31.

¹¹³ *Regulating Code: Good Governance and Better Regulation in the Information Age* (MIT 2013) 117.

¹¹⁴ (n 113) 118.

Today, there are more than 200 social networking sites.¹¹⁵ These are ‘places’ in cyberspace (if one is inclined to accept that view) where people can go to interact. However, social networking differs from general e-conversing in one major respect; namely, the strong sense of community it creates among users. This is not to say that chatrooms and forums are devoid of such a sense. Indeed, private chatrooms and forums with exclusive membership are an obvious corollary to the more public kind, although, even on public forums, regular contributors tend to be guided by informal rules of ‘netiquette’¹¹⁶ — which demonstrates mutual and valued respect among users. But social networking goes further; it is more personal, and for this reason, it has a greater potential to defame.

The most popular social networking sites are Facebook, Twitter and LinkedIn.¹¹⁷

Facebook requires users to create an online profile displaying digital photographs and details of one’s employment, hobbies, favourite music, relationship status (etc). The object is to join the ‘Friends’ lists of others — who may, or may not, be known to the user offline. It is technically possible for a user to open an account with a fake name and no personal information whatsoever. In practice, though, it is unlikely that such a mysterious figure would be accepted into the ‘Friends’ lists of others. Undoubtedly, a big part of Facebook’s success has been the way it enables offline friendships to continue online, irrespective of physical distance. In sum, any user can

¹¹⁵ (n 33) 24.

¹¹⁶ BBC WebWise, ‘What is netiquette?’ (10 October 2012) <<http://www.bbc.co.uk/webwise/guides/about-netiquette>> accessed 30 July 2014.

¹¹⁷ eBizMBA - eBusiness Guide, ‘Top 15 Most Popular Social Networking Sites’ (Aug 2014) <<http://www.ebizmba.com/articles/social-networking-websites>> accessed 27 August 2014.

log-in at any time to see what any of their friends are up to.... and to read what mutual friends are writing about each other.

LinkedIn is popularly described as the “Facebook for professionals.”¹¹⁸ It works in much the same way, but serves as a platform for connecting with colleagues and other members of one’s chosen profession. However, whilst Facebook is a place for (e.g.) drunken photographs and tales of mischief, such ‘fun’ material would not be deemed suitable for LinkedIn, where careers news is more the sort of thing that is expected. Hence, a reader’s perception of posted material is likely to differ depending on which social network displays it.

There is scope for an interesting discussion about whether a “pub talk” doctrine¹¹⁹ should be extended to social networks in order that defamatory posts be treated more like slander than libel. Traditionalists would surely argue *no*, and would point to sites such as LinkedIn, where communications are published to a professional audience — not necessarily the same people one would expect to find bantering in a pub. Such an argument has force, and effectively turns the cyber-lawyer’s preference for perception over reality against him. In response, however, cyber-lawyers might argue that an audience familiar with LinkedIn is also likely to be attuned to the nature of social networking in general. Hence, such an internet-savvy audience is unlikely to let one inappropriate post lower their estimation of a colleague.

¹¹⁸ e.g. Simon Chester, Daniel Del Gobbo, ‘Social Media Networking For Lawyers’ (ABA, January 2012) <http://www.americanbar.org/publications/law_practice_magazine/2012/january_february/social-media-networking-for-lawyers.html> accessed 30 July 2014.

¹¹⁹ (n 100)

Cases could be cited to support both points of view, but due to this paper's restricted word limit, it is instead proposed to focus on one specific social networking site, which is becoming known for the large amount of libel litigation it generates.

Twitter bridges the gap between the private "walled-garden"¹²⁰ nature of Facebook and the public "open-to-anyone"¹²¹ nature of forums. It defies the prediction of the World Wide Web's inventor, *Tim Berners-Lee*, that "the more this kind of architecture gains widespread use, the more the Web becomes fragmented, and the less we enjoy a single, universal information space."¹²² Thus, the open 'architecture' of Twitter combined with its high popularity and greater potential to defame makes it most conducive to answering the question: Is libel law compatible with the internet?

Twitter differs from most social networking sites in that visible conversation is not confined to cliques of users who have already agreed to be 'Friends' with one another. On Twitter, anyone is free to 'Follow' anyone, and to engage with anyone's posts — known as 'tweets.' Moreover, tweets appear by default in the public domain, so can (technically) be seen by followers and non-followers alike. And because tweets are public by default, they can be retrieved from the internet by searching for keywords on sites such as Google.

Twitter's appeal is heightened by the fact that many celebrities and public figures have taken to using it in order to improve their popularity. This means that regular followers can interact with big personalities in a way that was hitherto undreamed of.

¹²⁰ (n 114)

¹²¹ (n 114)

¹²² (n 113) 124.

Examples range from President Barack Obama, with 45.9 million followers,¹²³ to the singer Kylie Minogue with 2.13 million followers,¹²⁴ to the relatively unknown author of this paper, with a modest 32 followers and growing.

The ‘intuitive’ assumption (i.e. that typed defamation is always a form of libel) runs so deep with respect to Twitter that the popular nickname, ‘twibel’,¹²⁵ has emerged for cases of Twitter libel. And so, the question for now becomes: Should defamatory tweets be regarded as a form of libel, thus to be regulated by libel law?

Arguing as a traditionalist

In short, a traditionalist’s answer is likely to be *yes*.

In 1997, Professors Barendt, Lustgarten, Norrie and Stephenson collaborated on a book entitled: *Libel and the Media: The Chilling Effect*.¹²⁶ The writers were clearly sympathetic to the plight of traditional news outlets wishing to reveal information, acknowledging: “It is no defence to argue that the journalist (or editor) did not believe the article was defamatory and had no reason to believe it could be. Nor can the defendant argue that there was every reason to believe that the story was true.”¹²⁷

So journalism was a risky business demanding high certainty prior to publishing.

¹²³ Barack Obama (Twitter Profile) <<https://twitter.com/BarackObama>> accessed 27 August 2014.

¹²⁴ Kylie Minogue (Twitter Profile) <<https://twitter.com/kylieminogue>> accessed 27 August 2014.

¹²⁵ Eilyn M Angelotti, ‘Twibel Law: What defamation and its remedies look like in the age of Twitter’ (2013) 13 JHTL 430.

¹²⁶ (OUP 1997)

¹²⁷ (n 126) 6.

But as the writers also acknowledged: “[If] absolute certainty were required for everything controversial, there would be no newspapers worth reading.”¹²⁸ So it was accepted that good journalism necessarily courted risk, and that being sued for libel occasionally was a hazard which came with the job. Naturally, the risk could be offset through payment of insurance premiums.

Barendt and colleagues also observed that libel liability is not confined to traditional news outlets: “Anyone who publishes a libellous allegation may be liable [including] a reader who passes on a copy of the libellous article to a friend, though it is most improbable he would be sued, bearing in mind the range of media defendants to choose from”¹²⁹ — presumably referring to authors, editors, proprietors, printers, distributors, sellers and others involved in bringing news to the attention of the public, who are likely to be insured against litigation.

But Twitter changes everything.

As a publishing platform, Twitter potentially transforms every internet user into a “citizen journalist” who threatens the traditional media’s “hegemony as gatekeeper of the news.”¹³⁰ At the push of a button, the author of a 140-character tweet becomes, in effect, his own editor, printer and distributor, thus leaving the victim of his words with nobody to sue but the author, or the “reader who passes on a copy of the libellous article to a friend.”¹³¹ While some may find this abhorrent, it has always been the

¹²⁸ (n 126) 77.

¹²⁹ (n 126) 7.

¹³⁰ Shayne Bowman, Chris Willis, ‘We Media: How audiences are shaping the future of news and information’ (American Press Institute, July 2003) (page 7) <http://www.hypergene.net/wemedia/download/we_media.pdf> accessed 29 August 2014.

¹³¹ (n 129)

position of the law; it is not a state of affairs which has arisen in response to tweeting.

But those who do find it abhorrent can take comfort from the *Jameel* and *Thornton* reforms, which now make it harder for anyone to get a libel claim off the ground.

Clearly, citizen journalism is not intrinsically bad. Examples of ordinary citizens breaking major news to the world include the IT consultant in Pakistan who tweeted about the armed raid which killed Bin Laden,¹³² the passenger of a New York ferry who tweeted the first image of the Hudson River plane crash,¹³³ and citizens around the UK who were tweeting about a 5.3 magnitude earthquake for over an hour before any traditional news outlet reported it.¹³⁴ Undoubtedly, such examples demonstrate Twitter's potential to make the world more informed, accountable, and ultimately fun. It puts the power of publication in the hands of *Joe Public*. But this power is great, and with great power comes great responsibility. It is thus no argument to contend that the responsibility should be relaxed (or completely eradicated) simply because more people now have the power.

The following three cases illustrate the High Court's willingness to find against those who misuse the power of the tweet.

¹³² BBC News, 'Bin Laden raid was revealed on Twitter' (2 May 2011) <<http://www.bbc.co.uk/news/technology-13257940>> accessed 29 August 2014.

¹³³ Claudine Beaumont, 'New York plane crash: Twitter breaks the news, again' (*The Telegraph*, 16 January 2009) <<http://www.telegraph.co.uk/technology/twitter/4269765/New-York-plane-crash-Twitter-breaks-the-news-again.html>> accessed 29 August 2014.

¹³⁴ Josh Catone, 'Earthquake in UK? News Broken on Twitter' (*ReadWrite*, 26 February 2008) <http://readwrite.com/2008/02/26/earthquake_in_uk_news_broken_on_twitter> accessed 29 August 2014.

*Cairns v Modi (2012)*¹³⁵ was England’s first twibel trial, in which a well-known sports official was sued by a professional cricketer after the former tweeted a false allegation that the cricketer was involved in match-fixing. The judge awarded £90,000 for damage to reputation, even though it was accepted that the tweet was published to just 65 readers in England and Wales.¹³⁶ Mr Justice Bean stated that “although publication was limited, that does not mean that damages should be reduced to trivial amounts.”¹³⁷ And His Lordship then referred to the spreading of the ‘poison’, which tends to occur more rapidly in the 21st century.¹³⁸

In *McAlpine v Bercow (2013)*,¹³⁹ the wife of the Speaker of the House of Commons was sued by a former House of Lords peer after insinuating in a tweet that he was the unnamed politician at the heart of a paedophile report shown on BBC’s *Newsnight*. The parties settled the case for £15,000¹⁴⁰ after the judge made a finding of liability. Mr Justice Tugendhat was willing to infer that a substantial number of persons who saw the televised report will have also read the defamatory tweet, published shortly after the broadcast, which referred to the claimant.¹⁴¹ His Lordship acknowledged

¹³⁵ [2012] EWHC 756.

¹³⁶ (n 135) para 122.

¹³⁷ (n 135) para 123.

¹³⁸ (n 137)

¹³⁹ [2013] EWHC 1342.

¹⁴⁰ Kunal Dutta, ‘Lord McAlpine libel row with Sally Bercow settled in High Court’ (*The Independent*, 22 October 2013) <<http://www.independent.co.uk/news/uk/crime/lord-mcalpine-libel-row-with-sally-bercow-settled-in-high-court-8896773.html>> accessed 29 August 2014.

¹⁴¹ (n 139) para 30.

that the defendant is well-known to the public, as reflected by the number of persons following her Twitter account (over 56,000).¹⁴²

In *Appleyard v Wilby (2014)*,¹⁴³ a member of the public with an avowed aversion to the police was sued by a sergeant for tweeting and posting online that the sergeant was complicit in the Jimmy Savile sex abuse scandal. The judge ordered that the defendant (who failed to appear) was to pay £60,000 for damage to reputation, and to desist from publishing further allegations. Mr Justice Bean rejected any notion of guilt by association: “Saying that the claimant ... used to have tea with Jimmy Savile is not at all the same as saying that the claimant condoned his predatory activities. Yet that, in essence, is what the defendant has done.”¹⁴⁴ And His Lordship had regard to the “grapevine effect” within a small community such as the claimant’s,¹⁴⁵ where gossip tends to spread more quickly. However, in determining the award size, it was emphasised that the defendant was an “accuser of poor credibility.”¹⁴⁶ Accordingly, a judgment on this point from the Hong Kong Court of Final Appeal (persuasive in England, though not strictly binding) was applied to justify a “significant reduction” in what would otherwise have been the award.¹⁴⁷

¹⁴² (n 139) para 10.

¹⁴³ [2014] EWHC 2770.

¹⁴⁴ (n 143) para 5.

¹⁴⁵ (n 143) para 18.

¹⁴⁶ (n 143) para 17.

¹⁴⁷ (n 143) para 18.

In summary, Twitter goes beyond a mere platform for friendly interaction; it is a journalistic medium, and like any journalistic medium, defamation actions in respect of it should be for libel rather than slander, always.¹⁴⁸ If one person attacks another by spreading a lie or untruth via Twitter, from a legal perspective, that is no different than if a tabloid newspaper or gossip magazine published the same thing in print.¹⁴⁹ Of course, recent developments in libel law mean that such attacks cannot properly be called ‘defamatory’ unless the victim is likely to suffer significant reputational harm,¹⁵⁰ plus the tort committed must be real and substantial, not merely trifling.¹⁵¹ Moreover, following the recent *Appleyard* case, it now appears that a tweeter’s own credibility will be taken into account when determining the true extent of any harm.¹⁵²

Hence, one might feel that Twitter libel (or twibel) has a safe and solid basis in law.

Responding as a cyber-lawyer

Before discussing Twitter, it is necessary to revive a few previous arguments.

Doing so will clarify one’s critical perspective, leading to a more effective response.

¹⁴⁸ (n 126) 2.

¹⁴⁹ (n 41)

¹⁵⁰ (n 75)

¹⁵¹ (n 73)

¹⁵² (n 146)

It was submitted, during this paper’s introduction, that the internet has given rise to a type of ‘cyber-culture’ in which people instinctively know to question sensational data encountered in cyberspace. Support for this view can be found in *Smith*, where the judge suggested that those who participate in online discussions know to expect a certain amount of repartee,¹⁵³ whilst it is often obvious to observers that participants’ remarks are ill thought out.¹⁵⁴ Thus, it seems fair to assume that much would be lost on one who is not familiar with cyberspace — bearing in mind that cyber-interaction goes beyond social networking.¹⁵⁵ This is not to say that online defamation should be tolerated simply because it occurs online. Rather, in recognition of the dynamism of digital environments, courts should adopt a less strict approach to the one taken in libel trials. A claimant should thus be required to produce evidence of the harm which he claims to have suffered. This is because, as Professor Kenyon writes, the mode, manner and occasion of publication affect how carefully most recipients will read.¹⁵⁶ Therefore, recipients who are familiar with cyberspace will surely be attuned to its “ephemeral nature”,¹⁵⁷ and will not think too deeply about a slight upon someone’s character which happens to pass through their Twitter feed.

In part two, it was argued that whether one chooses to regard cyberspace as a place or otherwise, the term at least conveys the sense of an increasingly ‘online’ society

¹⁵³ (n 91)

¹⁵⁴ (n 95)

¹⁵⁵ See, e.g. Kim Barker, ‘Online Games and IP: Battle of the Forms to Social Norms: Reconceptualising and Re-layering?’ (*SCRIPTed*, 10(3), October 2013) <<http://script-ed.org/?p=1153>> accessed 30 August 2014 — Besides social networking sites, there are massively multiplayer games and virtual worlds. Social norms tend to be “fluid” in these environments due to a convergence of different nationalities and social groups.

¹⁵⁶ *Defamation: Comparative Law and Practice* (UCL Press 2006) 25-26.

¹⁵⁷ (n 156)

where technology is changing the way people interact. Part two's conclusion was that libel judges must "get hip" to the change if reputational harm is to be determined accurately by them in the future.¹⁵⁸

So what relevance do these points have here?

Section 11 of the Defamation Act 2013 abolishes the presumption that defamation cases are to be tried by jury. This has been the *de facto* position for some years,¹⁵⁹ but Parliament has now decreed that in every case, a judge alone shall decide whether a published statement is defamatory — save in wholly exceptional circumstances.¹⁶⁰ Arguably, therefore, each libel judge now has a duty, prompted by the new statute, to become a 'netizen'¹⁶¹ (partaking in a broad range of online activities) so courtrooms do not lack the cyber-culture element which would otherwise be imparted by jurors.

But even the most internet-savvy judge would still be constrained by the tort itself, which requires that damage be presumed wherever publication can be inferred — meaning that evidence of publication is not necessarily needed.¹⁶² The trouble with this approach is that publication can (and inevitably will) often be inferred due to the popularity of sites such as Twitter. Thus, a defendant's best hope today is that his

¹⁵⁸ Some internet libel judgments betray subtle signs that the judge was not fully familiar with the technology he was considering. For example, in *Smith* (at para 108) Mr Justice Eady confuses posting comments to a forum with "blogging" — something no regular internet user would do. And when *Smith* was later appealed, Lord Justice Ward remarked that comments were usually posted "under a pseudonym or an avatar, whatever that means..." — [2010] EWCA Civ 657 at para 2.

¹⁵⁹ *McGrath v Independent Print Ltd* [2013] EWHC 2202 at paras 12 and 25.

¹⁶⁰ (n 24) 160.

¹⁶¹ 'Netizen' is the popular nickname for a 'citizen' of cyberspace, who spends a lot of time using the internet and is thus familiar with its main features.

¹⁶² (n 78)

words will not be deemed serious enough to exceed the threshold for ‘defamatory.’¹⁶³

But is this a sufficient safeguard to prevent internet speech being punished unduly?

In 2011, Doctor Roy Baker published the findings of empirical research conducted in Australia.¹⁶⁴ The object of Baker’s research was to discover whether libel judges and lawyers “tend to over-estimate the propensity of the general public to think less of people to whom the media impute a range of acts.”¹⁶⁵ Accordingly, 15 hypothetical media reports (all potentially defamatory) were revealed to 8 libel judges and 28 libel lawyers.¹⁶⁶ The same reports were then revealed to 64 residents, 300 students, plus a sample of 4040 adults randomly surveyed by phone. Similar research conducted in the past had produced a phenomenon known as the “third-person effect”,¹⁶⁷ whereby a person exposed to a persuasive mass media publication generally perceives it as being more likely to influence others than himself. Baker’s research was groundbreaking, however, in that it focused on the perception of trained libel specialists.

The outcome was surprising. A number of judges and lawyers (particularly lawyers) thought that articles were defamatory in contradiction to a majority of the public¹⁶⁸ — whose view, after all, is the crucial one. And it was found that libel lawyers with the most experience were the ones most likely to make this critical error of judgment.¹⁶⁹

¹⁶³ (n 76)

¹⁶⁴ *Defamation Law and Social Attitudes: Ordinary Unreasonable People* (EE 2011).

¹⁶⁵ (n 164) 211.

¹⁶⁶ (n 164) 3 — These reports pertained to racism, homosexuality, abortion, drug abuse, etc.

¹⁶⁷ W. Phillips Davison, ‘The Third-Person Effect in Communication’ (1983) 47 *POQ* 1.

¹⁶⁸ (n 165)

¹⁶⁹ (n 165)

Therefore, Baker’s research suggests that the longer one is exposed to the practice of libel law, the more distorted one’s perception of “community attitudes” becomes.¹⁷⁰

To date, no other work has disputed Baker’s findings, although a similar study in Alabama suggested that most people perceive televised news to be more influential than news published on the internet.¹⁷¹ This is hardly surprising considering the more regulated nature of television. Interestingly, though, the same study found that an internet reader is more likely to be influenced by an article if it contains links to other websites on the same topic.¹⁷² This might suggest that internet readers are inherently suspicious of unfounded statements, generally believing only what can be verified. However, no evidence supports that a savvy internet reader would credit others with this same desire for verification, so Baker’s research is valid both online and offline, and it may be taken as applying to even the most internet-savvy judge.

Baker’s findings are kinder to judges than to lawyers, though it must be highlighted that Baker surveyed a smaller number of judges. Plus, in Australia, as in all common law countries, the lawyers of today are the judges of tomorrow.

And so, as to whether the English threshold of ‘defamatory’ serves as a sufficient safeguard against undue liability, the answer would appear to be *no* — not if Baker’s findings are an accurate reflection of reality. Hence, proof of special damage is a better safeguard against injustice, as this would offset the risk of distorted judicial

¹⁷⁰ (n 165)

¹⁷¹ Jonathan Howard Amsbary, Larry Powell, ‘Factors Influencing Evaluations of Website Information’ (2003) 93 PR 191.

¹⁷² (n 171)

perception in libel trials — made worse, no doubt, by the so-called “grapevine effect” which publication online is thought to accelerate.^{173 174}

Before moving on, one’s critical perspective can be summarised thus:

Judges are now solely responsible for gauging the way “right-thinking members of society generally”¹⁷⁵ will react to untrue statements. In the UK, around 90% of the population has joined the ‘online’ society.¹⁷⁶ Yet, evidence exists that the judiciary is less in tune with the internet than most people.^{177 178 179} Consequently, judges are more likely to be impressed by the internet’s vast potential reach than by its truly “ephemeral nature.”¹⁸⁰ However, even assuming that all libel judges are internet-savvy (as indeed they should be), once publication to others has been inferred from the facts (as it often must be), there is precedent for then assuming that the ‘poison’ has been widely and rapidly disseminated,¹⁸¹ thus making it hard for any judge to

¹⁷³ (n 145)

¹⁷⁴ (n 138)

¹⁷⁵ (n 4)

¹⁷⁶ Google Public Data: Search: “UK internet users statistics” — accessed 2 Sep 2014.

¹⁷⁷ (n 158)

¹⁷⁸ The Telegraph, ‘What’s a website, asks judge at internet trial’ (18 May 2007) <<http://www.telegraph.co.uk/news/uknews/1551934/Whats-a-website-asks-judge-at-internet-trial.html>> accessed 2 September 2014.

¹⁷⁹ Ian Cram, ‘The Tweet That Bombed: The Twitter Joke Trial, Judges and the Internet’ (*The Guardian*, 27 July 2012) <<http://www.theguardian.com/law/2012/jul/27/twitter-joke-trial-judges-internet>> accessed 2 September 2014.

¹⁸⁰ (157)

¹⁸¹ (n 138)

deny that society will be influenced by the statement. This “third-person effect”¹⁸² is surely harder to avoid when public figures and celebrities are involved.

Coming now to discussion of Twitter.

The first thing traditionalists tend to do is to liken tweets to a form of journalism — the people using Twitter thus becoming “citizen journalists” by default. But what authority requires citizens who exercise their democratic rights to the full to be judged against professional standards? Moreover, at what point can a person who expresses their views (good or bad) be said to cross a line from citizen to “citizen journalist?” The answer, one submits, is that no such authority exists, nor can any such line be drawn. It is but another assumption held by the conservative camp that free speech becomes freedom of the press the moment it stops being organic.

In the 1947 case of *R v Caunt*¹⁸³ (when seditious libel was a criminal offence), Counsel for the Prosecution made the following submission to the jury:

“What was said was not something which was said in the heat of a meeting under heckling, or as between rival speakers. It is something which was written from the seclusion of an editorial chair by a man whose business in life it is, as an editor, to mould public opinion; a man whose business in life is to choose words carefully.”¹⁸⁴

¹⁸² (n 167)

¹⁸³ Official Shorthand Transcript of trial held at Liverpool Assize Court on Monday 17th November 1947 — published by Morecambe Press (*An Editor on Trial*).

¹⁸⁴ (n 183) 8.

In light of this submission, one has to wonder: If, as a traditionalist would assert, the mere act of publishing defamatory material is what matters, not the professional status of the material's author, then why in *R v Caunt* did the prosecution place such emphasis on the professional status of the editor sitting in the dock?

There is but one answer: Because a professional journalist is more blameworthy than a regular citizen who writes. Therefore, the view that tweeters must be likened to journalists is refuted by the cyber-lawyer in this debate.

The next point of response centres on the *Jameel* and *Thornton* reforms.

Traditionalists would say that tweeters who fear 'The Writ' can take comfort from the fact that libel claims have never been so difficult to instigate. However, in making such statements, traditionalists rely on yet another assumption; namely, that judges will forever gauge what is 'defamatory' correctly. And yet, the "third-person effect" has been shown to impair judges as much as anyone. This phenomenon means that even if a judge does not consider a particular tweet to be defamatory, he or she may feel compelled to find liability on the basis that "right-thinking members of society" are more likely to be influenced than they. Potentially, this creates an absurd scenario in which judges second-guess what a jury might think..... even though Parliament has, in effect, abolished jury trial in defamation cases.

It is submitted that the safest and surest way to avoid this absurd scenario is to make claimants prove their losses. Then, there can be no doubt as to whether a defamatory tweet has reduced a claimant's position.

In English libel law, the third-person effect has arguably permeated the line of authority governing the award of *damages*. For instance, there is a sound principle

that a claimant's award should be exemplary (not merely compensatory) in any case where "a newspaper quite deliberately publishes a statement which it either knows to be false, or which it publishes recklessly, careless whether it be true or false"¹⁸⁵ — which is to say, newspapers must not be allowed to profit from blatant untruths which they spread either maliciously or negligently. In such cases, an unusually high sum of money awarded to the claimant serves as a deterrent against mendacious journalism. However, a principle has emerged in ordinary libel cases whereby the sum of money awarded must clearly demonstrate to the community that the claimant's reputation has been vindicated.¹⁸⁶ What this essentially means is that winning one's libel case is not enough; the money awarded must be sufficient to deter right-thinking people from surmising that a false statement or allegation might have had a ring of truth to it. Yet, surely, this is a contradiction in terms, in that no right-thinking person would try to second-guess a High Court judgment which clears the claimant's name.

In the Twitter libel case of *Cairns v Modi (2012)*,¹⁸⁷ it was held that just because a tweet may have been received by a small audience, that does not justify reducing compensation to a "trivial amount."¹⁸⁸ In this context, however, the word 'trivial' imparts an assumption; namely, that right-thinking people regard the sum of money involved as being at least as important as the trial's outcome, if not more important. But what evidence supports that most people would tend to form this view?

The third-person effect becomes more apparent when similar cases are compared.

¹⁸⁵ *Manson v Associated Newspapers Ltd (1965)* 1 WLR 1038 at 1040-41.

¹⁸⁶ *Ley v Hamilton (1935)* 153 LTR 384 at 386.

¹⁸⁷ (n 135)

¹⁸⁸ (n 137)

In *Appleyard v Wilby* (2014),¹⁸⁹ the judge took issue with the disreputable character of the defendant tweeter, calling him “an accuser of poor credibility.”¹⁹⁰ Indeed, the judge was motivated to invoke a foreign judgment to justify reducing the claimant’s award by a “significant” amount to £60,000 (or else it would have been higher).¹⁹¹ On the face of things, therefore, *Appleyard* appears to allay concerns that tweeting will lead to disproportionate awards of damages. However, in the Australian case of *Mickle v Farley* (2013),¹⁹² a judge, on similar facts, awarded \$105,000 (or £59,000¹⁹³) but without making a reduction due to the accuser’s poor credibility. It is interesting to see how the English judge went to some length to apply a reduction, whilst the Australian judge did the opposite — he increased the award for egregiousness.¹⁹⁴ Yet, in both cases, the outcome was virtually the same. Could the third-person effect have impaired one or both of these judgments?

Appleyard concerned a police officer who was (reportedly) disgraced in the eyes of his community because of tweets linking him to the Jimmy Savile sex abuse scandal. *Mickle* concerned a teacher who was (reportedly) disgraced because of tweets accusing her of usurping the position of a fellow teacher, a gentle man known and loved in the community, who was absent from work due to poor health.

¹⁸⁹ (n 143)

¹⁹⁰ (n 146)

¹⁹¹ (n 147)

¹⁹² [2013] NSWDC 295.

¹⁹³ XE Currency Converter <<http://www.xe.com/currencyconverter/>> accessed 5 Sep 2014.

¹⁹⁴ (n 192) paras 17–20.

In both cases, the issue was the extent to which a community worker's reputation had been diminished by lies (tweeted by defendants with an obvious grudge).

The defendant in *Appleyard* was found to be a poor accuser because of his well-known grudge against the police, which manifested in the form of a website with an avowed anti-police theme. The defendant in *Mickle* was a poor accuser (arguably) because he had an obvious motive for defaming the claimant — he was the embittered son of the teacher whose job had been taken, and this was well-known to the whole community since he was also a former student of the school, having attended at the same time that his father worked there. In both cases, the judges referred to the “grapevine effect” made worse by the ‘online’ factor.^{195 196}

The amount of the reduction in *Appleyard* is unclear, but a fair estimate is probably around one third — meaning the award would have been £90,000 were it not for the tweeter's poor credibility. But this begs the question: If any tweet is serious enough to warrant compensation in the thousands, and if the public attaches at least as much importance to the award as to the outcome, why, then, diminish an award's healing properties by attaching a “significant” reduction to it? Why not simply award an amount in the first place which reflects the true damage in light of all circumstances?

The answer, one submits, is because the third-person effect is so deeply interwoven with libel case law today that quite often, a large award is required, *if only in theory*, to discharge the heavy burden of implicit judicial assumptions — even if the award is then reduced for whatever reason.

¹⁹⁵ (n 145)

¹⁹⁶ (n 192) para 21.

Hence, there is good cause for supposing that the third-person effect distorts liability *as well as damages*; so *Jameel* and *Thornton* are not guaranteed to protect tweeters from undue liability.

A final point can be made with respect to the *Lord McAlpine* case,¹⁹⁷ in which a tweet that was said to be defamatory read as follows:

Why is Lord McAlpine trending? *Innocent Face*

The term ‘trending’ refers to a feature of the Twitter site that informs users which topics are currently most popular. Lord McAlpine was trending due to a recent BBC television broadcast on paedophilia — which had not named him, and rightly so, since no evidence linked Lord McAlpine to the allegations.

The words “*Innocent Face*” (placed between two stars) are recognised on Twitter as an ‘emoticon’ — meant to convey the expression on a tweeter’s face while typing. And it was this part of the statement which ultimately led to liability.¹⁹⁸ However, Doctor Hilary Young argues that the form in which a message is expressed is relevant to whether its meaning is defamatory.¹⁹⁹ In particular, she points to spelling, grammatical and typographical errors as all detracting from a message’s credibility.²⁰⁰

¹⁹⁷ (n 139)

¹⁹⁸ (n 139) para 84.

¹⁹⁹ Hilary Young, ‘But Names Won’t Necessarily Hurt Me: Considering the effect of disparaging statements on reputation’ (2011) 37 QLJ 1 at 12.

²⁰⁰ (n 199)

This is relevant because all tweets are restricted to 140 characters (about 24 words), meaning that, very often, words have to be misspelt, and grammar omitted, to fit the author's message into the limited space provided. Also, the use of symbols to convey 'emoticons' arguably constitutes a typographical error (albeit deliberate) which surely puts most tweets on a par with mere 'text-speak'²⁰¹ rather than conventional English, thereby detracting from their supposed journalistic quality.

In summary, it is submitted that tweets should not be regarded as a form of libel, thus to be regulated by libel law. Clearly, tweets are more akin to slander, and would be more soundly regulated under the rubric of that tort.

Applying the new 'serious harm' threshold

It is likely that the cases of *Appleyard* and *McAlpine* would satisfy the higher threshold due to the *obiter* remark of Mr Justice Bean, that the likelihood of serious harm to reputation is plain if a newspaper with a large circulation (or a tweeter with a large following?) wrongly accuses someone of being a paedophile.²⁰² However, it is less certain whether *Cairns*, a case about cricket match-fixing, would be actionable without tangible evidence of harm suffered.

²⁰¹ 'Text-speak' is the popular nickname for mobile phone shorthand, whereby letters are often substituted for numbers. Thus, "see you later" might be typed "C U L8R."

²⁰² (n 110)

Conclusion

From start to finish, this paper has argued that complaints about internet defamation should be approached in the same way as complaints about slander, not libel.

As seen, libel law operates on a presumptive (and assumptive) basis which can be summarised thus: Libel law has an inherent tendency to always assume the worst.

The justification for this lies not in the message, but in the medium of communication.

Libel law has its roots in the ancient court of Star Chamber,²⁰³ whose task it was to ensure that a worrying new technology, the printing press, would not lead to revolt. Pure anomaly brought criminal libel and civil defamation together — and the rest, as they say, is history. In the three centuries since, judges and legislators have sought to rationalise the anomaly rather than repair it, and clearly, this continues with the internet today. It thus falls to academics to state the obvious:

“For laws to apply and be appropriate for online issues, they must be suited to the online environment rather than stretched to fit.”²⁰⁴

Therefore, the answer to the big question is *no* — libel law is not compatible with the internet. Internet speech deserves a tort of its own.

As for the new Defamation Act, this ought to strengthen free speech generally, though online benefits will be incidental in the main. Over time, a large number of celebrity Twitter trials should help to expose the third-person effect, proving that this Act was but another temporary fix to avoid making a real and substantial reform.

Change must come.... this century or next. Let us hope it is the former.

²⁰³ Lawrence McNamara, *Reputation and Defamation* (OUP 2007) 85.

²⁰⁴ (n 155) *Barker*

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