

Google not liable for defamatory content on its Blogger.com platform

Conflicting decisions from the English High Court

Tamiz v Google Inc [2012] EWHC 449 (QB) Eady J (2 March 2012) and *Davison v Habeeb* [2011] EWHC 3031 (QB) HHJ Parkes QC (25 November 2011)

In a significant ruling for free speech and the question of intermediary liability, the English High Court (Mr Justice Eady) has ruled that Google is not a publisher at common law of arguably defamatory posts on its Blogger.com platform, even after it had been put on notice by the claimant.

Eady J's decision on this point appears to conflict with earlier decisions of the High Court, which have held that Google was arguably liable as a publisher in apparently similar circumstances (*Davison v Habeeb*¹, which is subject to an application for permission to appeal) and that Demon Internet was a publisher of Usenet newsgroups that it hosted (*Godfrey v Demon* [1999] EWHC QC 244).

The decision was based on Mr Justice Eady's finding that Google was not a publisher at common law of the content. Moreover, even if it were, he went on to hold, Google would have had defences under s.1 of the Defamation Act 1996 and under article 14 of the E-Commerce Directive. The decision on the E-Commerce Directive is important, as it concludes that if an intermediary is merely on notice that content is *defamatory*, this does not entail that the intermediary will lose its defence. More is generally needed by way of notice.

Pending clarification by a higher court, this is a significant decision for the protection of intermediaries in a position similar to Google (i.e. those who merely provide the means through which information is stored, transferred and accessed). However, in our view, the decision probably does not apply to intermediaries who have a closer connection to the publication of the content e.g. the operators of blogs and message boards. Such intermediaries are still likely to be

potentially liable, especially once on notice.

The case is very unlikely to be the last word on the liability of intermediaries.

We summarise the *Tamiz* decision below and then comment on its likely implications.

Background

Previous cases have held that an ISP² and Google³ (in relation to its natural search results) are not publishers of defamatory content at common law. Even if Google was the publisher, it potentially had defences available to it under s.1⁴ of the Defamation Act 1996 and Regulation 19 of the E-Commerce Regulations⁵.

Facts

The claimant alleged that certain posts on a Blogger.com blog entitled "London Muslim" were defamatory of him. The blog related to allegations that he had resigned as a Conservative Party candidate for local elections after making inappropriate remarks. The posts in issue included allegations of dealing in drugs and theft from an employer. As the posters were anonymous, the claimant notified Google of his complaint. Google itself did not take the content down. However, it notified the blogger of the complaint and the blogger voluntarily removed the posts (along with the original blog). The claimant, nonetheless, issued proceedings against Google. As Google Inc is out of the jurisdiction (the claim against Google UK failed) the claimant had to obtain permission to serve out. The Master granted permission, and Google applied to the High Court for that decision to be set aside. Google's application was on the following grounds:

1) Google was also the overall winner in *Davison* (see below)

2) *Bunt v Tilley*

3) *Metropolitan v Google*

4) S.1 protects persons who (a) were not the author, editor or publisher of the statement complained of, (b) took reasonable care in relation to its publication, and (c) did not know and had no reason to believe that they did caused or contributed to the publication of a defamatory statement.

5) Regulation 19 implements Article 14 of the EU E-Commerce Directive, which provides that a host will not be liable for damages or any criminal sanction if it does not have actual or constructive knowledge of the unlawful information and, on obtaining such knowledge, it acted expeditiously to remove the information.

- There was no real and substantial tort
- Google was not a publisher at common law
- Google had a defence under s.1 and/or Regulation 19

The decision

An arguable publication within the jurisdiction

Although some of the posts complained about were mere “vulgar abuse” and hence not defamatory, the allegations of criminal conduct were arguably defamatory. Mr Tamiz argued that a sufficient number of third parties read the posts in England. The judge went on to consider if Google was potentially liable for those posts.

Not a publisher at common law

There was no allegation that Google was liable before it had been notified by Mr Tamiz. The question was whether the notification turned Google into a publisher at common law. Preferring the High Court’s (i.e. his own) decision in *Bunt v Tilley* to the earlier decision in *Godfrey v Demon*, Eady J held that Google was in an analogous position to the ISPs who “truly fulfil no more than the role of a passive medium for communication” so “cannot be characterised as publishers”. He felt that it was a “significant factor” that Google “is not required to take any positive step, technically, in the process of continuing the accessibility of the offending material, whether it has been notified of a complainant’s objection or not ... its role, as a platform provider, is a purely passive one.” Furthermore, the fact that Google was able to technically remove the offending posts was not sufficient to convert its role into that of a publisher. Eady J was persuaded by the following analogy in making his finding: “It is no doubt often true that the owner of a wall which has been festooned, overnight, with defamatory graffiti could acquire scaffolding and have it all deleted with whitewash. That is not necessarily to say, however, that the unfortunate owner must, unless and until this has been accomplished, be classified as a publisher.”

Thus, Google was not a publisher at common law, regardless of whether it had been put on notice of the complaint, and so was not liable. The judge went on to consider the defences, on the assumption that his primary finding was wrong.

The Section 1 defence applied

Google was not the “author, editor or publisher” of the allegedly defamatory statements as its role was simply providing access to a communications system which was used by others to transmit

statements without Google’s control. It fell within the wording of section 1(3)(e) of the Defamation Act 1996.

Google also took “reasonable care” by passing on the claimant’s complaint to the blogger. Even though Eady J acknowledged that the response was “somewhat dilatory”, he felt it was not, in the circumstances, “outside the bounds of a reasonable response”. Those circumstances included the huge number of posts on the Blogger.com pages and the impracticality of Google investigating whether the allegations were true or whether a defence applied to them.

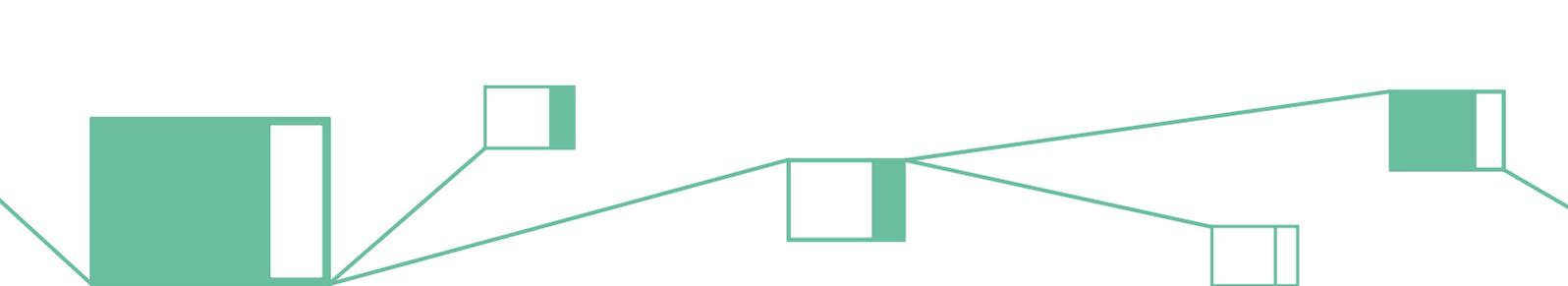
Finally, even though Google would have had reason to believe (following notification) that the comments were **defamatory**, Eady J felt this was “far from saying” Google “would have known, or had reason to believe, that it had **done anything to cause or contribute to the publication** of any of these statements [emphasis added]”.

Therefore, the s.1 defence applied. The judge also accepted Google’s argument that the period between notification and take-down (between approximately 3-5 weeks depending on the posts) was very limited, such that Google’s potential liability was too trivial to merit maintenance of the proceedings (and “the game would not be worth the candle”, citing *Yousef Jameel*).

No notice of “unlawful material” under the E-Commerce Directive

Even though Google had been put on notice of the complaint about the allegedly defamatory posts, the notice did not mean that Google had knowledge or awareness of “unlawful material”. As such, if it had needed to, Google could have relied on the E-Commerce Directive exemption for hosts. It is not enough in defamation cases for the notice to allege simply that the content is defamatory. Of course, defamatory material will not necessarily be “unlawful” material because defences (such as justification, honest opinion or privilege) might be available. A claimant would have to go further and demonstrate why the material is unlawful to satisfy the standard in the Directive. The claimant had provided Google with no explanation as the extent of the alleged inaccuracy and inadequacy of any defence. Google was not required to take his “protestations at face value”. He needed to do more to make Google aware of why the material was unlawful.

In conclusion, the court declined jurisdiction and set aside the Master’s order for service out.



Implications

Comparisons with *Godfrey v Demon Internet (1999)* and *Davison v Habeeb (2011)*

Eady J appears to have overruled or distinguished the decision in *Godfrey* where the ISP which continued to store defamatory postings on a Usenet news server, after having been asked to remove it by the claimant, was held to be the publisher of the postings from that point on. It is not clear how Google's role in hosting blogs on Blogger.com can be distinguished from Demon Internet's role in hosting the relevant Usenet groups. In *Godfrey*, the judge held that Demon "chose to store" the postings within its computers. This may well impute too much volition into Demon's role, given it had no initial control over what was submitted to the Usenet groups. Even so, Google, it could be argued by analogy, also "chose to store" the comments on the blog once it had been put on notice and not removed them.

Eady J's decision in *Tamiz* also does not appear to sit comfortably with the decision in *Davison* three months earlier. In *Davison*, the judge held that it was arguable that Google was a publisher at common law in relation to blogs on Blogger.com⁶. This was on the basis that the platform was like a "gigantic virtual notice board". HHJ Parkes QC considered the 1937 case of *Byrne v Deane* by analogy in support of his decision. In that case, a golf club became potentially liable as publishers for allowing allegedly defamatory words posted on the wall of the club (the rules of which prohibited notices being placed in the club) to remain there after they had seen it. Eady J chose a different analogy to support his decision: that of a wall on which defamatory graffiti is sprayed. Those analogies share two key characteristics: the content was unsolicited and was initially displayed without the alleged publishers' knowledge. Nevertheless, the analogies were relied on to support contrasting decisions. If the golf club was liable as a publisher when on notice, even though it had not solicited the content, it can be argued by analogy that Google could be a publisher at common law given it solicits content by operating Blogger.com; that is what it is there for. Clearly, though, it cannot be argued that a 1937 case relating to a golf club should necessarily apply by analogy to an internet intermediary.

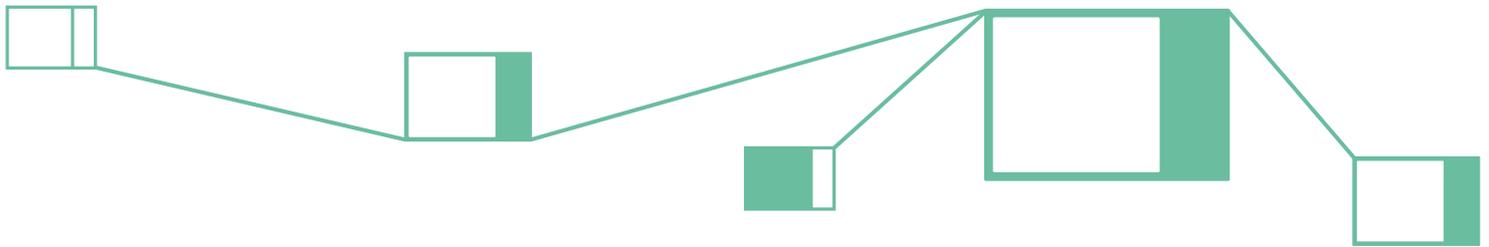
Eady J's decision seems rooted in policy (as influenced by the Human Rights Act) and a desire to adapt the law to modern technology, rather than an analysis of all the potentially analogous earlier cases. He prefers the reasoning in his earlier decisions in *Bunt* and *Metropolitan*, which considered service providers in different factual positions to those in *Godfrey* and *Davison*. It would, therefore, be helpful if the higher courts can clarify this apparent tension in the test for when intermediaries are liable for publication at common law, particularly once they are put on notice.

Two types of intermediary

There is of course a whole spectrum of intermediaries and, as Eady J says, the outcome of cases will be fact-sensitive. In our view, the case law (e.g. *Bunt*, *Metropolitan*, *Davison* and *Tamiz*) suggests there is an important legal difference between two kinds of intermediaries on the question of whether they are publishers at common law. Claimants will need to take this into account when they are deciding which intermediary to take action against.

1. The first kind is made up of passive ISPs and similar platform providers, who would not normally be liable for content that is hosted on their servers, whether or not on notice. Taking action against them for defamation, even if it could be an obvious place to start, is unlikely to help claimants. This type of intermediary may not be liable for defamation even if it is on notice and does not take down the content (like the safe-harbour given to intermediaries under US law).
2. The second kind are the entities behind the websites which host and even encourage people to post content (in the *Tamiz* case, perhaps the operator of the blog on which the users' comments were posted). Newspapers' online comment pages may fall into this category. They may play a more direct and active role in publishing and have closer control over the third party content that appears on their websites than Google's role in its search facility and Blogger.com. This decision does not immunise this kind of website operator from potential liability, particularly once it is on notice and the liability may turn on the defences in s.1 or Regulation 19.

6) The overall result against Google was the same as in *Tamiz*. The judge set aside the order for service out on Google Inc due to there being no realistic prospect of the claimant establishing that her notification had fixed Google with actual knowledge of unlawful information or made it aware of facts or circumstances from which it would have been apparent that the information was unlawful.



The distinction between types of intermediaries may not, however, always be easy to draw; large online social media services such as Twitter and Facebook seem to share some characteristics of both. It is possible that, like Google, they are more on Eady J's "passive platform provider" side of the line (assuming his line of reasoning is followed by higher courts). Where an intermediary is held to be a publisher at common law (whether before or after being put on notice), it will then need to establish a s.1 and/or Regulation 19 notice-and-takedown defence if it wishes to avoid having to prove a substantive defence.

Malicious falsehood, privacy and confidentiality

If an intermediary is not a publisher at common law for the purposes of defamation law, it seems likely that it would not be a publisher for the purposes of other 'publication torts' such as malicious falsehood, privacy and confidentiality. This is a relatively untested area but cases exploring it seem inevitable.

Notice

What is needed to put a host on notice of "unlawful material" in defamation cases? The CJEU's decision in *L'Oréal v eBay* said that a host would have the requisite constructive knowledge if it was aware of facts or circumstances "on the basis of which a **diligent economic operator** should have identified the illegality in question [emphasis added]". So, the claimant does not have to make out his case entirely but he would need to attempt to demonstrate why the allegations were defamatory, untrue and could not be otherwise defended.

Defamation reform

The decision is particularly topical as it was released the week before the Government published its response to the draft Defamation Bill ([see our summary here](#)). The Government has proposed reforming the liability of intermediaries. It has proposed that online intermediaries such as ISPs should have a liaison role in trying to resolve defamation disputes before they reach court. The Government suggests that intermediaries would

be required to pass correspondence between the parties, so they can resolve the matter between themselves, or to take the material down if they are unable to locate the relevant parties.

Injunctions and a comparison with intellectual property cases

This ruling reveals a possible gap in the harmonised EU position on when injunctions can be ordered against intermediaries. Article 11 of the IP Enforcement Directive and Article 8(3) of the Copyright Directive (2001/29) require member states to allow for injunctions to be granted against intermediaries where their services are used to infringe intellectual property rights, regardless of the intermediaries' liability for that material. So if the complaint against an ISP was that a blog contained material which infringed copyright (and, let's assume that the ISP was not liable for that copyright infringement), EU law could potentially still require a court to grant an injunction against the ISP to remove that material and to prevent further infringements. EU law contains no equivalent injunction requirement for other unlawful material (e.g. defamatory statements or private or confidential information). All EU law says on the point is that the E-Commerce Directive defences for intermediaries (which apply generally to "unlawful material") do not prohibit member states granting injunctions against intermediaries. It does not specify when those injunctions should be granted. In England, it would be left to the inherent jurisdiction of the court to grant injunctions against intermediaries for non-IP unlawful material but this is an untested area. Article 10 freedom of expression concerns suggest, however, that such injunctions, even if possible, would be rarely granted.

Click for a copy of the [High Court's judgment](#).

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