

REPUTATION AND DEFAMATORY MEANING ON THE INTERNET

Communications, Contexts and Communities

The determination of the appropriate scope of protection of reputation in the tort of defamation is crucially dependent on the construction of defamatory meaning. With the continuing rise of Internet publications, it is important to assess the impact of the various modes of Internet communications such as Internet websites, hyperlinking, blogs, emails, Twitter, Facebook and other forms of social media on defamatory meaning. Such defamatory meaning is being constructed based on the unique contexts and social expectations that have been generated by the various modes of Internet communications. The potential impact on defamatory meaning can also be assessed from the perspectives of the diverse online communities.

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I. Introduction

1 The Internet has evolved rapidly from its humble beginnings in 1960s as a mere interconnection of computers amongst military personnel known as ARPANET,¹ its use in the 1980s of transfer control protocol/Internet protocol (TCP/IP) software for interconnection, to what is now regarded as an indispensable means of worldwide communication whether for private, public or commercial and non-commercial usage. Various epithets have been used by the courts to describe the Internet and its impact: it is “ubiquitous, borderless, global and ambient in its nature”² as well as “instantaneous, seamless, interactive, blunt, borderless and far-reaching”.³ Sundaresh Menon JC (as he then was) in *Lee Hsien Loong v Review Publishing Co Ltd*⁴ observed that:⁵

1 Advanced Research Projects Agency funded by the US Department of Defence.

2 See *Dow Jones v Co Inc v Gutnick* (2002) 210 CLR 575 at [80], *per* Kirby J.

3 *Barrick Gold Corp v Lopehandia* (2004) 71 OR (3d) 416 at [31], *per* Blair JA.

4 [2007] 2 SLR(R) 453.

5 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [1].

In what Thomas Friedman terms a ‘flattening world’, accessibility to instruments of mass media and communication – in particular, the Internet – is dramatically shortening the globe’s communicative synapses and greatly increasing the potential reach and impact of any individual idea or expression.

2 Globally, Internet usage is clearly on the rise.⁶ Internet penetration in Singapore society has also increased considerably judging from the official figures for both individual and business usage. The percentage of individual Internet users⁷ in Singapore has risen from 53% in 2003 to 72% in 2012, whilst the percentage of households with Internet access increased from 65% in 2003 to 87% in 2013.⁸ Perhaps not surprisingly, the younger members of the population registered significantly higher Internet usage rates compared with the older groups.⁹ For Internet usage by businesses, the overall figure was 86% in 2013. Businesses with a website(s) constitute 46% of the total businesses in 2013. As of 2012, the main mode of Internet communication in Singapore was social networking across the age groups,¹⁰ followed by instant messaging, reading blogs posted by others and Voice over Internet Protocol.

3 There has been a proliferation of Internet-based publications due to the sheer variety of Internet modes of communication such as e-mails, websites, blogs, Wikipedia, YouTube videos,¹¹ group chats, voice messaging and communications over iPhone and Android devices. With the continuing rise of Internet publications, it is important to assess its impact on the law of defamation. Menon JC in *Lee Hsien Loong v Review Publishing Co Ltd* cautioned that though “[s]uch accessibility [to the

6 See Simon Kemp, “Digital, Social and Mobile in 2015” *We Are Social* (21 January 2015) <<http://wearesocial.sg/blog/2015/01/digital-social-mobile-2015>> (accessed August 2015).

7 The survey was based on the respondents’ use of the Internet during the 12-month period prior to the survey.

8 See Infocomm Development Authority of Singapore website <<http://www.ida.gov.sg/Infocomm-Landscape/Facts-and-Figures>> (accessed August 2015).

9 For the age groups 7–14 (98%), 15–24 (99%) and 25–34 (98%), the Internet usage rates were close to 100% but were significantly lower for the age groups 35–49 (84%), 50–59 (51%) and 60 and above (16%): see Infocomm Development Authority of Singapore website <<http://www.ida.gov.sg/Infocomm-Landscape/Facts-and-Figures>> (accessed August 2015).

10 Age groups 7–14 (43%); 15–24 (73%); 25–34 (62%); 35–49 (40%); 50–59 (28%) and 60 and above (28%).

11 *Donovan v Gibbons* [2014] EWHC 3406 at [28] (video showing that the claimant had sold the defendant a dangerous pony as being unsuitable for children such that it entailed a “reckless preparedness to put the children at risk” was defamatory of the claimant in a personal and business sense).

Internet] gives rise to power which holds promise”, it also “portends abuse”.¹² As highlighted by Rowland:¹³

... the participatory nature of the Internet and the ease of anonymous communication may also foster anti-social, malicious and immoral behaviour. The impact of this aspect of Internet communication is such that others may be deterred from entering the conversation.

4 It is common knowledge that cyber-libel has also become a means of cyber-bullying that is perpetuated by adolescents and students.¹⁴ Defamatory remarks can be posted online by the authors personally; alternatively, the defendant can impersonate the online identity of the plaintiff and post messages that reflect adversely on the reputation of the plaintiff.¹⁵ Several cases involving Internet defamation via e-mails,¹⁶ websites¹⁷ and social media such as blogs¹⁸ and Facebook¹⁹ have been litigated in the last two decades before Singapore courts though the judicial focus has not been on the construction of defamatory meaning of Internet publications.

5 The central question for the modern tort of defamation is how the protection of reputation should be balanced against the freedom of speech which one has come to expect in the Internet era. Whilst Internet technologies are harnessed to promote free speech, one should, at the same time, be mindful of the potential harms to online reputations. The first point of contact in reputational protection is the determination of whether the statements published via the Internet are defamatory in nature. How is defamatory meaning constructed and interpreted? Does the medium of the Internet through which the material is being disseminated or published matter? If so, what is the impact of the specific Internet contexts and communities on the construction of meaning of the publication? The ascertained defamatory meaning not only affects the plaintiff’s *prima facie* case in defamation and the

12 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [1].

13 Diane Rowland, “Gripping, Bitching and Speaking Your Mind: Defamation and Free Expression on the Internet” (2006) 110 (3) Penn State L Rev 519 at 520.

14 Shaheen Shariff & Leanne Johnny, “Cyber-libel and Cyber-bullying: Can Schools Protect Student Reputations and Free-expression in Virtual Environments?” (2007) 16 Educ & LJ 307.

15 *Applause Store Productions Ltd v Raphael* [2008] EWHC 1781.

16 *TJ System (S) Pte Ltd v Ngow Kheong Shen (No 2)* [2003] SGHC 217 (e-mail imputing the possible commission of a criminal offence (namely, bribery) by the company or the company’s imminent prosecution for corruption of a police officer or public servant); *Ng Koo Kay Benedict v Zim Integrated Shipping Services Ltd* [2010] 2 SLR 860; *Segar Ashok v Koh Fonn Lyn Veronica* [2010] SGHC 168.

17 *Ng Koo Kay Benedict v Zim Integrated Shipping Services Ltd* [2010] 2 SLR 860.

18 *Lee Hsien Loong v Roy Ngerng Yi Ling* [2014] SGHC 230; *Zhu Yong Zhen v AIA Singapore Pte Ltd* [2013] 2 SLR 478.

19 *Golden Season Pte Ltd v Kairos Singapore Holdings Pte Ltd* [2015] 2 SLR 751.

question of whether the claim should be struck out for abuse of process,²⁰ but also the viability of the defences of justification and fair comment, all of which depend on the constructed meaning of the words accepted by the courts.

6 In general, the Singapore courts have not explicitly examined whether and how the Internet medium affects the construction of defamatory meaning. This exercise of construing defamatory meaning with the advent of the Internet is an ongoing project being undertaken in the English and common law courts generally, with no definitive conclusions thus far. On the whole, the courts have largely clung on to existing legal concepts and principles under the tort of defamation but have, from time to time, recognised the need to adapt to the different scenarios due to the Internet medium.

7 Hence, this article would essentially be an exploratory study into the construction of defamatory meaning set against the background of the evolving Internet technology. References will be made to existing legal approaches and techniques to determine defamatory meaning for traditional print media in comparison with how defamatory meaning is being constructed via the various modes of Internet communications. Further, the Internet has generated new ways for managing online reputations even as it allows reputations to be attacked.²¹ The article then discusses how the different Internet contexts impinge on the meaning of the publication through the use of signs, its characteristic language and expressions, and even anonymity.²² The Internet has also allowed the growth of online communities based on their special interests, characteristics and activities. This raises the question of whether some leeway should be given to the views of these online communities for ascertaining defamatory meaning. The potential impact on defamatory meaning will also be assessed from the perspectives of these diverse cyberspace communities.²³

II. The construction of defamatory meaning, reputation management and the modes of Internet communication

8 The main tests for defamatory meaning in Singapore are whether the impugned words tend to lower the estimation of the plaintiff in the eyes of right-thinking members of society generally;²⁴ subject the plaintiff to hatred, contempt and ridicule; and/or cause the

20 See para 16 below.

21 See paras 8–23 below.

22 See paras 24–47 below.

23 See paras 48–61 below.

24 *Sim v Stretch* (1936) 52 TLR 669.

plaintiff to be shunned or avoided. A less common legal test that the imputation induces an ill opinion of the plaintiff in the eyes of the third party has also been applied.²⁵ In order to determine defamatory meaning, the focus is on the perspective of the average or the moderate reasonable person in society. This “hypothetical reasonable man” in *Lewis v Daily Telegraph*²⁶ has been referred to in several local decisions:²⁷

There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs.

The Court of Appeal in *Review Publishing Co Ltd v Lee Hsien Loong*²⁸ cited *Skuse v Granada Television Ltd*²⁹ that the ordinary reasonable man is:³⁰

... not naive but *he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer, and may indulge in a certain amount of loose thinking.* But he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. [emphasis added by the Court of Appeal]

He steers the moderate path avoiding extremist views, according to Lord Reid in *Lewis v Daily Telegraph*:³¹

Ordinary men and women have different temperaments and outlooks. *Some are unusually suspicious and some are unusually naïve. One must try to envisage people between these two extremes* and see what is the most damaging meaning they would put on the words in question. [emphasis added by the Court of Appeal]

25 *Kay Swee Pin v Singapore Island Country Club* [2010] 4 SLR 288; *Segar Ashok v Koh Fonn Lynn Veronica* [2010] SGHC 168. See also *Skuse v Granada Television Ltd* [1996] EMLR 278 at 286 that:

... [a] statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally.

26 [1964] AC 234.

27 *Eg, A Balakrishnan v Nirumalan K Pillay* [1999] 2 SLR(R) 462 at [29]; *Cristofori Music Pte Ltd v Robert Piano Co Pte Ltd* [1999] 1 SLR(R) 562 at [26]; and *Chiam See Tong v Ling How Doong* [1996] 3 SLR(R) 942 at [47].

28 [2010] 1 SLR 52.

29 [1996] EMLR 278.

30 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [27], citing *Skuse v Granada Television Ltd* [1996] EMLR 278 at 285.

31 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [31], citing *Lewis v Daily Telegraph* [1964] AC 234 at 259.

9 The English court in *Lennon v Scottish Daily Record and Sunday Mail*³² has noted the general enhanced education of the population in the UK and that the:

... modern readership can be treated as more discriminating and better able to understand what they read. The ordinary reader must presumably now be credited with having achieved a level of education which was not widely accessible to earlier generations.

The same can be said about the general Singapore population which has enjoyed considerably high levels of literacy and education.³⁴

A. *Natural and ordinary meaning and innuendoes*

10 The plaintiff may plead defamatory meaning based either on the natural and ordinary meaning of the words, whether interpreted literally or inferentially, and true innuendoes based on the extrinsic facts known to particular members of the audience or readership. It is established law that a statement may be defamatory by virtue of its natural and ordinary meaning based on the general knowledge of the ordinary reasonable person.³⁵ The more widely the subject matter pertinent to the allegedly defamatory statement is disseminated, the more likely the material will be regarded as part of the general knowledge attributed to the ordinary reasonable person.³⁶ Such general knowledge can give rise to defamatory imputations published via the Internet as in *Lee Hsien Loong v Roy Ngerng Yi Ling*.³⁷ The defendant's publication of an article with images on his blog entitled "Where Your CPF Money Is Going: Learning from the City Harvest Trial" and a link to the article on his Facebook page took place in the midst of the trial involving City Harvest Church, which had been extensively reported in the local media. The Internet publication concerned the plaintiff, the Prime Minister of Singapore and the Chairman of the Government Investment Corp. The City Harvest Church trial was within the general knowledge of the ordinary reasonable person at the time of the publication and the case had become associated with the criminal misappropriation of funds in the mind of an ordinary reasonable person. Due to the association with or comparison between the case and

32 [2004] EMLR 18.

33 *Lennon v Scottish Daily Record and Sunday Mail* [2004] EMLR 18 at [39]–[40].

34 As of 2014, the literacy rate of Singaporeans (among residents aged 15 years and above) is 96.7% and the percentage of the population with secondary or higher qualifications (among residents aged 25 years and above) is 69.5%: see Department of Statistics Singapore, "Latest Statistics" <<http://www.singstat.gov.sg/statistics>> (accessed August 2015).

35 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52.

36 *Lim Eng Hock Peter v Lin Jian Wei* [2009] 2 SLR(R) 1004 at [89].

37 [2014] SGHC 230.

the governance of the Central Provident Fund (“CPF”), Lee Sei Kin J interpreted the words and images as importing the natural and ordinary meaning that the plaintiff is guilty of criminal misappropriation of the moneys paid by Singaporeans to the CPF.

11 One important issue to consider is whether the Internet has any impact on how the general knowledge of the ordinary reasonable man is ascertained. From a logical standpoint, there are no good reasons to exclude, as a rule, online materials, especially those that use collaborative technologies and consensus-driven content to assess common knowledge on a particular matter.³⁸ Considerations of accuracy, scope of coverage, objectivity, timeliness, authority and verifiability of the information, which are important for assessing print materials, may also be used for assessing Internet materials.³⁹ Wikipedia is a collaborative edited online encyclopaedia based on free open source software development via voluntary contributions from members of the public. Thus, it has been said that when “the wisdom of the crowd” is called for,⁴⁰ Wikipedia, as a product of collaborative work amongst the online editors coupled with the facility for the correction of errors, potentially offers an appropriate set of consensus views on a particular subject matter. According to Wikipedia policy, its aim is to:⁴¹

... create an encyclopedic information source adhering to a neutral point of view,^[42] with all information being referenced through the citation of reliable published sources, so as to maintain a standard of verifiability.

Taken in this light, it is not inapposite for references to be made to Wikipedia as a guide to the meaning of words or phrases used in allegedly defamatory statements. Though Wikipedia has been referred to, it is not a common judicial practice. In the US case of *Benz v Washington Newspaper Publishing Co LLC*,⁴³ an article in the *Washington Examiner* stated: “Now [the plaintiff] has hooked up, according to her gal pals, with porn king Mark Kulki.” The judge observed that “[i]n

38 Elizabeth F Judge, “Curious Judge: Judicial Notice of Facts, Independent Judicial Research, and the Impact of the Internet” (2012) *Annual Review Civil Litigation* 325.

39 Judicial Conference of the United States, *Guidelines on Citing to, Capturing, and Maintaining Internet Resources in Judicial Opinions/Using Hyperlinks in Judicial Opinions* (May 2009).

40 Jason C Miller & Hannah B Murray, “Wikipedia in Court: When and How Citing Wikipedia and Other Consensus Websites is Appropriate” (2010) 84 *St John’s L Rev* 633 at 644.

41 See Wikipedia policy <<http://en.wikipedia.org/wiki/Wikipedia:Libel>> (accessed August 2015).

42 See <http://en.wikipedia.org/wiki/Wikipedia:Neutral_point_of_view> (accessed August 2015).

43 Civil Action No 05-1760 (EGS) (29 September 2006).

contemporary slang, ‘hooking up’ can mean everything from a kiss to sexual intercourse” and had, in that regard, specifically referred to “<http://www.urbandictionary.com>”,⁴⁴ a crowd-sourced online dictionary of slang words and phrases, which suggests that the phrase was not necessarily derogatory. Nonetheless, in the ultimate analysis, the judge ruled that the statements were reasonably capable of defamatory meaning when read in the context of the article as a whole. Another relevant case is *Carey v Nationwide News Pty Ltd*⁴⁵ in which publications in the *Daily Telegraph* and the newspaper’s Internet site contained the imputations that the plaintiff is “apeish” and “sub-human”. The court, in determining defamatory meaning, had regard to the “List of Ethnic Slurs” in Wikipedia that “ape” means “black person” in the US and that the Wikipedia source lent the word “apeish” a defamatory sting in the context of the plaintiff’s aboriginal background.

12 Where the subject matter in question is highly specialised or does not attract a “crowd” or widespread collaboration in editing work, the argument for referring to Wikipedia as a source of the general knowledge of the people would not be as strong.⁴⁶ Caution should also be exercised where the words or phrase in question have underlying cultural connotations peculiar to a society which may not have been reflected in the Wikipedia source.

13 The common form of innuendoes is the identification innuendo where, for instance, the publication that a man has entered a house would appear harmless or neutral to the ordinary reader unless it is specially known to a group within the audience that the house was in fact a brothel.⁴⁷ With respect to true or legal innuendoes,⁴⁸ the reasonable man’s perspective remains the touchstone for defamatory meaning. As explained by HHJ Moloney QC (sitting as a judge) in *McGrath v Dawkins*:⁴⁹

Knowledge of legal innuendo facts may lead a particular group of readers to a different meaning from that apparent to the general

44 *Benz v Washington Newspaper Publishing Co LLC* Civil Action No 05-1760 (EGS) (29 September 2006) at fn 10.

45 [2014] NSWDC 73.

46 See Jodi L Wilson, “Proceed with Extreme Caution: Citation to Wikipedia in Light of Contributor Demographics and Content Policies” 16(4) *Vand J Ent & Tech L* 856 at 885–886 and 901–905 (that Wikipedia contributors are “overwhelmingly male” and most likely to be under 40 years old though there is a wide range of educational levels; and that a given Wikipedia article may not necessarily reflect the wisdom of the crowd or be representative of the target population).

47 *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234.

48 See *Cassidy v Daily Mirror Newspapers* [1929] 2 KB 331; *Grubb v Bristol United Press* [1963] 1 QB 309; and *Fullam v Newcastle Chronicle & Journal Ltd* [1977] 1 WLR 651.

49 [2012] EWHC B3 at [78].

public; but it must remain a meaning which a reasonable person knowing those facts would perceive. For example, if A tells B, a racist, that X is black (or tells him something about X which when added to other information about X in his possession leads him to conclude that X is black), then the racist may draw various adverse inferences about X's character and think the less of him. But that would not be the conclusion of a reasonable or right-thinking person possessed of the same knowledge; so A's words would not become defamatory by reason of his hearer's unreasonable prejudices.

14 If the words compare the plaintiff to an infamous historical figure, the judge would have to decide if that character is known generally by the audience. The distinction between general and special knowledge might lie in some specific cultural reference in the words or imputations which are adjudged to be known only to certain members of the audience. With respect to Internet communications, emoticons, to the extent that they are extrinsic facts known only to a community of Internet users, should be specifically pleaded.⁵⁰ The same applies to the varieties of acronyms used in Internet communications⁵¹ which may appear alien to a non-Internet user. That being said, the line between general *versus* special knowledge of the readers and the audience to be assessed as at the time of publication may be a fine one. The special knowledge of a specific group in the audience may over time become general knowledge known to the ordinary reasonable person in society. Internet-specific language and terms⁵² may become commonplace if used or referred to frequently in the mass media. Whether a specific group of Internet users possess special knowledge giving rise to innuendoes is a factual issue to be determined from the evidence adduced.

B. Threshold of seriousness of harm and abuse of process

15 The threshold of seriousness of harm to reputation is now made explicit under the UK Defamation Act 2013.⁵³ As observed by the English court, there is now no tort of defamation unless and until "serious harm to reputation" has either been caused or "is likely to" be

50 Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 3rd Ed, 2010) at para 8.25.

51 Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 3rd Ed, 2010) at para 8.26. Examples of the acronyms are "ROFL" (rolling on the floor, laughing); "IMHO" (in my humble opinion); and "HSIK" (how should I know?).

52 Such as "lol" (laugh out loud).

53 c 26.

caused by the publication.⁵⁴ This requirement is to be applied to all publications whether disseminated through Internet or non-Internet media. It is arguable that this threshold of seriousness, though not explicitly declared as applicable to Singapore by the courts or legislation, has developed as part of the common law *corpus*. In the old 1936 case of *Sim v Stretch*,⁵⁵ Lord Atkin had already stated that allegations of “exhibitions of bad manners and discourtesy” do not necessarily amount to defamation.⁵⁶ In modern times, the objectives of the threshold of seriousness to screen off frivolous and trivial insults and to discourage litigation for mere social banter⁵⁷ are no less important in the Internet space. In *Lukowiak v Unidat Editorial (No 1)*,⁵⁸ the court stated that the reasonable reader is now perceived by the courts as having “a stronger stomach and more discriminating judgment than was traditionally recognized”,⁵⁹ albeit in the context of a discussion on the defence of qualified privilege. How the context of a particular publication may be modified by the Internet medium and thereby affect the defamatory nature or otherwise of the publication will be discussed in the next section.⁶⁰ The Internet context can, for example, give rise to social expectations that certain remarks on the Internet should not be treated too seriously, or at least not sufficiently seriously for commencing a defamation lawsuit, but this is not an invariable rule by any means.

16 In connection with the threshold of serious harm, a defamation action may be dismissed under the abuse of process doctrine in *Jameel v Dow Jones & Co.*⁶¹ The doctrine states that there must be a real and substantial tort committed, which has been applied locally in *Yan Jun v Attorney-General*⁶² and *Kesavan Engineering & Construction Pte Ltd v S P Powerassets Ltd.*⁶³ In deciding whether to strike out the claim for abuse of process, the courts weigh the potential advantages for the parties if the matter continues to trial, the expenses for the parties and court resources. In many cases, the minimal publication of defamatory material and the impact on the extent of damages recoverable are the

54 *Ames v Spamhaus Project Ltd* [2015] EWHC 127 at [49]; *Endemol UK Ltd* [2014] EWHC 1063 (on fulfilling the threshold of seriousness before words are found to be capable of bearing a defamatory meaning).

55 (1936) 52 TLR 669.

56 *Sim v Stretch* (1936) 52 TLR 669 at 672.

57 *Thornton v Telegraph Media Group Ltd* [2010] EMLR 25 at [90]; *Daniels v British Broadcasting Corp* [2010] EWHC 3057 at [48]–[50]; *Cammish v Hughes* [2013] EMLR 13 at [38].

58 [2001] EMLR 46.

59 *Lukowiak v Unidat Editorial (No 1)* [2001] EMLR 46 at [47], *per Eady J.*

60 See paras 24–47 below.

61 [2005] QB 946.

62 [2014] 1 SLR 793.

63 [2011] SGDC 179. See also *Yan Jun v Attorney-General* [2014] 1 SLR 793.

main reasons for striking out the claim.⁶⁴ It should, however, be highlighted that the gravity of the allegation and its level of defamatory meaning are also relevant factors considered in such striking out applications.⁶⁵ Furthermore, the triviality of online postings is a factor for denying an application for a *Norwich Pharmacal* order⁶⁶ for the disclosure of the identities of users who have posted messages.⁶⁷

17 In addition, the Internet medium can serve as an antidote against the bane of a publication such that, in the final analysis, the defamatory nature of the publication is lowered below the threshold of serious harm. For instance, Bean J in *Cooke v MGN*,⁶⁸ when determining the likelihood of serious harm being caused to the claimants' reputation under the UK Defamation Act 2013, took into consideration the apology given by the defendant for the publication in order to "eradicate or at least minimise any unfavourable impression created by the original article in the mind of the hypothetical reasonable reader" who had read both. The judge found that the apology was far more accessible on Internet searches than the original article⁶⁹ and refused to infer any serious harm to the claimant's reputation.⁷⁰

C. *Internet communications and online reputation management*

18 The nature of Internet communications has evolved over time from static websites to "open, interactive, "many-to-many" communications" in contrast to the "one-to-many" model of mass communication for traditional print media and even radio and television broadcasts.⁷¹ Social media such as Facebook, Instagram, Snapchat and Twitter⁷² are indeed collaborative and interactive in nature and much of the content is user-generated.⁷³ It is common for blogs to share photographs and videos. Websites such as YouTube allow for

64 *Payam Tamiz v Google Inc* [2013] EWCA Civ 68; *Davidson v Habeeb* [2011] EWHC 3031; *Kordowski v Hudson* [2011] EWHC 2667.

65 *McGrath v Dawkins* [2012] EWHC B3 at [88] and [91].

66 *Norwich Pharmacal v Customs & Excise Commissioners* [1974] AC 133.

67 *Sheffield Wednesday Football Club v Hargreaves* [2007] EWHC 2375 at [17].

68 [2014] EWHC 2831.

69 *Cooke v MGN* [2014] EWHC 2831 at [44].

70 *Cooke v MGN* [2014] EWHC 2831 at [45].

71 *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at [57]–[59]; Jack Balkin, "Media Access: A Question of Design" (2008) 76 *Geo Wash L Rev* 933 at 936–939 and 949.

72 *Cairns v Modi* [2012] EWHC 756; *Mickle v Farley* [2013] NSWDC 295 (compensation of general and aggravated damages for defamation of teacher via tweets).

73 Jennifer Ireland, "Defamation 2.0: Facebook and Twitter" (2012) 17 *MALR* 53 at 54.

videos to be embedded in vlogs⁷⁴ and websites such as Amazon.com contain book reviews by users.⁷⁵ Traditional newspapers nowadays share their content on websites and blogs that permit comments and responses to editorials and op-eds and other user-generated materials. Facebook allows its users to share videos and links, create profiles, tag messages and photographs and through its facility for users to click on “like” to indicate their approval of certain postings.

19 Reputation-building by Internet users has been facilitated by the ease and lower costs of international communications.⁷⁶ The Internet has generated new methods by which individuals and businesses can manage their own reputations through self-help measures. The online actions of participants in newsgroup discussions such as posting intelligent comments and answering the queries of other users can aid in establishing one’s identity and building reputation.⁷⁷ Social marketing strategies for businesses seek to enhance corporate reputations and customer loyalty, and in this regard, social media have been used by companies as a principal determinant in formulating their marketing strategies.⁷⁸ Social media sites encourage users to share content and content owners benefit from advertising revenue which in turn depends on the number of site visitors. However, as reputations are built up through social media, they can just as well be diminished or destroyed by the same medium.⁷⁹ Reputations can be tainted by gripe websites,⁸⁰ and consumer reviews found in websites such as Yelp⁸¹ and TripAdvisor⁸² have given rise to defamation actions.⁸³ More recently, the English court awarded damages against the defendant for posting

74 A blog that has videos as its primary content: see Damien O’Brien, “Blogs and the Law: Key Issues for the Blogosphere” (2007) 12 MALR 141 at 152.

75 See *McGrath v Dawkins* [2012] EWHC B3.

76 *Ames v Spamhaus Project Ltd* [2015] EWHC 127 at [47], *per* Warby J.

77 Judith S Donath, “Identity and Deception in the Virtual Community” in *Communities in Cyberspace* (Marc A Smith & Peter Kollock eds) (Routledge, 1999) at p 31.

78 Rajagopal, *Managing Social Media and Consumerism: The Grapevine Effect in Competitive Markets* (Palgrave Macmillan, 2013) at p xiv.

79 Sarosh Khan, “The Threat Posed to Reputation by the Emergence of Social Web Technologies” (2012) 23(5) Ent LR 126.

80 See, *eg*, <<http://www.webgripesites.com>> and <<http://www.areputation.co.uk/websites-used-for-defamation.html>> (accessed August 2015).

81 The website <<http://www.yelp.com.sg>> focuses on reviews of restaurants and entertainment establishments.

82 <<http://www.tripadvisor.com.sg>> is an online service which provides recommendations for hotels, vacations, travel packages and flights.

83 See, *eg*, Justin Jouvenal, “In Yelp Suit, Free Speech *versus* Reputations” *Washington Post* (4 December 2012) (company defamation action against consumer for posting on Yelp) and *Clark v TripAdvisor LLC* 2014 SLT 418 (application for disclosure of information to identify person who posted allegedly defamatory materials on TripAdvisor refused).

defamatory remarks concerning a US lawyer, on the latter's Google Maps profile alongside other positive reviews of his law firm and the services offered, for being a "scumbag" who "pays for false reviews, loses 80% of his cases"⁸⁴.

20 Social media sites create systems for ratings and evaluations of another's online reputation. eBay allows for feedback and ratings concerning the prior commercial transactions of the sellers and buyers and "endorsements" are given by users of LinkedIn about another user regarding whom he has personal knowledge of his expertise or abilities. Online reputation management firms⁸⁵ use search engine optimisation to help businesses remove defamatory statements and negative content from the first pages generated by search engines and instead promote the visibility of positive content in the search results where possible. The social influence of social media users may be measured via websites such as Klout.com as well as Kred.com. Klout.com measures a user's reach across various social networks such as Facebook, Twitter,⁸⁶ Google+ and LinkedIn whilst Kred.com is focused mainly on Twitter and Facebook. These measures provide relevant information for the users and businesses to manage their reputations. One possible downside, however, might be errors or inaccuracies in the reputation systems or their metrics which can lead to unjustifiably low online reputation scores⁸⁷ that translate into real-life tangible losses. Online reputations can also be sabotaged by hoax and fake online campaigns.⁸⁸

21 Another important measure is sentiment analysis (or opinion mining) which refers to the identification and extraction of subjective information (such as the attitudes, emotions or judgements of the author or speaker) in source materials through the use of text analysis and computational linguistics. These opinions expressed by the speakers or authors may well be positive, neutral or negative (what is known as

84 *The Bussey Law Firm PC v Jason Page* [2015] EWHC 563, per Sir David Eady.

85 Examples of Singapore online reputation companies include <<http://www.reputation.asia/index.php>>, <<http://www.ascelade.com>>, <<http://www.onlinereputation.com.sg>> and <<http://www.crea8s.com>>.

86 This is done on Twitter by reference to the number of followers, the number of retweets and unique mentions: see Elyn M Angelotti, "Twibel Law: What Defamation and Its Remedies Look Like in the Age of Twitter" (2013) 13 J High Tech L 430 at 503.

87 For example, Warren Buffet, the renowned investor, initially scored a low 36/100 on Klout.com: see Michael Fertik & David Thompson, *The Reputation Economy* (New York: Crown Business, 2015) at p 186.

88 Eg, the hoax advertising campaign by Greenpeace against Shell via the fake website, ArticReady.com, about Shell "conquering" the Arctic to "fuel a brighter tomorrow" which led to massive reactions from social media websites and another hoax that Shell was contemplating legal actions for "potentially defamatory material on the internet": see Michael Fertik & David Thompson, *The Reputation Economy* (New York: Crown Business, 2015) at pp 177–181.

the “polarity” of the statements).⁸⁹ Sentiment analysis has been used to assess voters’ opinions in an election or on a certain political issue,⁹⁰ the attitudes of consumers towards certain products and brands or even to track extremists online for law enforcement purposes.⁹¹ With respect to Twitter in particular, Savage⁹² notes that it can serve as a “window” into the “moods, thoughts, and activities of society”. Algorithms are used to classify messages by filtering out the tweets on particular topics or issues. Though he acknowledges sample bias in that certain segments of the population use Twitter more than others, an understanding of how messages are propagated may provide people and businesses better strategies for managing their online reputations.

D. *The case of virtual worlds*

22 Finally, the Internet has created the three-dimensional virtual worlds which are basically shared spaces, whether text or graphics-based environments, where people come together from different locations to interact and perform a variety of actions.⁹³ One example is “Second Life” which mimics the real world, where the residents build their own domiciles, create and change identities and profiles, and even employ rating systems and reputation tools.⁹⁴ Virtual games have developed from the earlier multi-user dungeon systems (“MUDs”) to the more contemporary massively multiplayer online games replete with avatars, fantasy and voice tools for chatting amongst the players.⁹⁵ Popular virtual worlds and games include Active Worlds, Maple Story and Habbo Hotel.⁹⁶ The author is not aware of any specific defamation actions arising directly from statements made in the virtual world but the possibility of such a lawsuit in the near future cannot be excluded

89 It has been noted that there is often a lack of neutral commenting for most social media sites: see Jeremy Harris Lipschultz, *Social Media Communication: Concepts, Practices, Data, Law and Ethics* (Routledge, 2015) at p 112.

90 Andranik Tumasjan *et al*, “Predicting Elections with Twitter: What 140 Characters Reveal about Political Sentiment” Proceedings of the Fourth International AAAI Conference on Weblogs and Social Media (2010).

91 Daniel Trottier, “Police and User-led Investigations on Social Media” (2014) 23(1) *Journal of Law, Information and Science* 75 at 89.

92 Neil Savage, “Twitter as Medium and Message” (2011) 54(3) *Communicators of the ACM* 18.

93 Mia Consalvo, “MOOs to MMOs: The Internet and Virtual Worlds” in *The Handbook of Internet Studies* (Mia Consalvo & Charles Ess eds) (Wiley-Blackwell, 2011) at pp 326 and 328.

94 David S Ardia, “Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law” (2010) 45 Harv CR-CL L Rev 261 at 275.

95 T L Taylor, “Internet and Games” in *The Handbook of Internet Studies* (Mia Consalvo & Charles Ess eds) (Wiley-Blackwell, 2011) at pp 370–371.

96 Mia Consalvo, “MOOs to MMOs: The Internet and Virtual Worlds” in *The Handbook of Internet Studies* (Mia Consalvo & Charles Ess eds) (Wiley-Blackwell, 2011) at p 330.

entirely. Balkin argues that defamation can arise in theory if reputations in virtual communities were to be harmed.⁹⁷ The partition between the real world and the computer-mediated virtual environment is sufficiently porous.⁹⁸ Where real-world people invest time, money and energy in creating and maintaining the reputations of their avatars in the virtual worlds, they might consider any infringement of their in-world reputations in virtual communities (words accusing another avatar of cheating in the game, for instance)⁹⁹ to be significant. Communications in Second Life may be made via typewritten words, instant messaging or voice-to-voice communications. The terms of service, which prohibit the participants from posting defamatory statements that result in suspension or termination of their accounts, clearly contemplate possible defamation actions.¹⁰⁰

23 The reputation that is to be protected under the existing law of defamation should be the reputation of the individual user and not the avatar. It must be shown that defamatory words, even if they refer to the avatar, would tend to lower the reputation of the user who created the avatar in the virtual world. If there is, from the perspective of the reasonable audience or users, sufficient linkage between the identities of the avatars to the real-world persons, there is no reason why the defamed person cannot sue in defamation for the communications made in the virtual worlds under existing law. This reasonable connection by the audience may arguably be made where users link their avatars in virtual worlds to real-life profiles in social media such as Twitter and Facebook. With respect to defamatory meaning, the game environment and the rules of the game, as it were, governing the virtual games should be relevant in assessing the impugned words that are communicated, an important issue of the Internet context to which will now be discussed.

III. Defamatory meaning and the Internet contexts

24 McLuhan has famously argued that “the medium is the message”,¹⁰¹ that the use of a medium changes the world around us, and the content carried in that medium is interpreted in the context of this changed world. This article does not attempt to elucidate the societal

97 John Balkin, “Law and Liberty in Virtual Worlds” (2004) 49 NYL Sch L Rev 63 at 74.

98 Gregory Lastowka & Dan Hunter “The Laws of the Virtual Worlds” (2004) 92 Cal L Rev 1 at 10.

99 See Mia Consalvo, *Cheating: Gaining Advantage in Videogames* (Cambridge, Massachusetts: MIT Press, 2007).

100 Brian Seguin, “Defamation of Second Life Avatars: How the Laws of First Life People Could Be Invoked” Student Scholarship Paper (2010) at <http://erepository.law.shu.edu/student_scholarship/77> (accessed August 2015).

101 Marshall McLuhan, *Understanding Media* (New York: McGraw-Hill, 1964) at p 9.

transformations that have been wrought by the Internet. However, it is clear that the modes of Internet communications do impact on the *context* of the publication which in turn affects the *meaning* of the publication for the purposes of the tort of defamation. Burkell and Kerr¹⁰² note that:

... the use of electronic media for communication alters the social context within which these communications are both produced and received, and thus the *content* of communication can be understood only when this modified context is taken into account. [emphasis in original]

The author would also argue that the mode of Internet communications and the context can give rise to and/or modify *expectations* on the part of the participant, audience or reader of the online communications which in turn affect the *meaning* attributed to the statements. The basic principle is that the ascertainment of defamatory meaning is a bilateral process: inasmuch as the words used and the tone and expression of the communicator are important for communicating the meaning, they are ultimately irrelevant unless the words, tone or expressions are reasonably interpreted as such.

A. *Seriousness and credibility of Internet publications*

25 One factor to consider for determining defamatory meaning is the level of seriousness or credibility attributed to the statements made via the Internet. Statements on websites which are light-hearted and jocular in nature and replete with slang phrases in youthful, non-literal language may be similarly interpreted in a loose or figurative sense.¹⁰³ Electronic forums and bulletin boards for gossip and rumours are less likely to be taken seriously by the audience than those found in serious special purpose forums or bulletin boards.¹⁰⁴ The spontaneous, free-for-all interactive nature of the Internet has been compared to conversations

102 Jacquelyn Burkell & Ian R Kerr, “Electronic Miscommunication and the Defamatory Sense” (2000) 15(1) *Canadian Journal of Law and Society* 81 at 84.

103 *Knievel v ESPN* 393 F 3d 1068 (9th Cir, 2005) (photograph showing Knievel, a well-known sportsman, with his arms round his wife Krystal and another woman, and a caption that read “Evel Knievel proves that you’re never too old to be a pimp” which were published on the ESPN website were held not defamatory).

104 Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 3rd Ed, 2010) at para 8.16. Statements made in the former context are not likely to be regarded as assertions of fact but rather speculation or hyperbole: see *Doe v Cahill* 884 A 2d 451 at 465–466 (2005). Chat rooms and online forums have been compared to conversations in pubs (see Patrick Lim, “You Have 3 Friend Requests and 1 Criminal Conviction: Tackling Defamation on Facebook” (2010) 12(10) *Internet Law Bulletin* 169 at 170).

overheard on a street corner, bus or café.¹⁰⁵ The context of gaming might be important in construing the impugned words. It might be argued, for instance, that insults or barbs traded in the context of a virtual game should not, as a general principle, be taken seriously.

26 In what has been known as the “Twitter joke” criminal trial in *Chambers v Director of Public Prosecutions*,¹⁰⁶ the defendant, upon finding out that an airport from which he was taking a flight had closed due to adverse weather conditions, posted “tweets” on Twitter including: “Crap! Robin Hood Airport is closed. You’ve got a week and a bit to get your shit together otherwise I am blowing the airport sky high!” The decision of the County Court that the message was of a “menacing” character under s 127(1)(a)(3) of the UK Communications Act 2003¹⁰⁷ was overruled by the Divisional Court. The defendant had, not unsurprisingly, asserted that the “tweet” was a joke or meant to be a joke. The court correctly held that *mens rea* was clearly absent. Though this relates to a criminal rather than a defamation action, it aptly illustrates the cavalier casual attitudes towards publications on Twitter and its use as a forum for ranting and venting personal frustrations.

27 The above general propositions and examples do not imply that statements via the Internet cannot be taken seriously for the purpose of defamation law. In *Applause Store Productions Ltd v Raphael*,¹⁰⁸ for instance, Richard Parkes QC remarked that Facebook group pages could have been taken seriously by those who read them. In *Bryce v Barber*,¹⁰⁹ the court ruled that the defendant’s postings of indecent images of children on the claimant’s Facebook profile along with the comment “Ray, you like kids and you are gay so I bet you love this picture, ha ha” had clearly crossed the line. Similarly, in *Vaquero Energy v Weir*¹¹⁰ (“*Vaquero Energy*”), the defendant’s postings about the plaintiff corporation and its CEO in an online chat room that referred to the CEO as “insane, retarded, managing the company for his own benefit” and being comparable to Osama bin Laden were plainly defamatory. Hence, a careful assessment of the seriousness or triviality of the specific Internet contexts and their impact on defamatory meaning would be required.

105 Yuval Karniel, “A New Proposal for the Definition of Defamation in Cyberspace” (2008) 13(2) Comms L 38.

106 [2013] 1 WLR 1833.

107 c 21.

108 [2008] EWHC 1781 at [77].

109 2010 (HC) (unreported). See also Jennifer Ireland, “Defamation 2.0: Facebook and Twitter” (2012) 17 MALR 53 at 59.

110 [2006] 5 WWR 176.

B. *Anonymity of Internet publications*

28 The anonymity of Internet publications, an issue less common in traditional print publications, can also affect the perception of the credibility or otherwise of the impugned statements. One is often reminded of the cartoon by Peter Steiner which appeared in the *New Yorker* in 1993 featuring a dog speaking to another dog which was sitting in front of a computer and keyboard: “On the Internet, nobody knows you’re a dog.” Amongst other anecdotes and lessons to be drawn, the cartoon vividly illustrates that how one perceives the credibility of what is read on the Internet can be undermined by the anonymity behind the postings.

29 Kent J in *Vaquero Energy*¹¹¹ took the view that anonymous online posts were more likely to be believed than attributed ones, because if the author were named, the audience could take any known political bias into account. This general proposition is not persuasive. The focus should be on how the anonymous postings would be objectively construed by a reasonable audience and not the putative scenario in which the authors are named. Though anonymous, there may be other subtle identity cues from the language, whether intentional or otherwise, used by the anonymous Internet user.¹¹² Moreover, it is quite possible that anonymous authors may be perceived as less reasonable or measured.¹¹³ There is some objective evidence from surveys that anonymity in computer-mediated communications can undermine the credibility and influence of the source.¹¹⁴

30 Nevertheless, on this matter of the credibility and seriousness of the Internet context, there cannot be any hard and fast rules. Sensitivity to the factual matrix would be crucial. In *Barrick Gold Corp v Lopehandia*,¹¹⁵ L, a director of the defendant mining company, posted a

111 *Vaquero Energy v Weir* [2006] 5 WWR 176 at [17] (anonymity relevant in the context of assessing damages for defamation).

112 Judith S Donath, “Identity and Deception in the Virtual Community” in *Communities in Cyberspace* (Marc A Smith & Peter Kollock eds) (Routledge, 1999) at pp 38–39.

113 Hilary Young, “But Names Won’t Necessarily Hurt Me: Considering the Effect of Disparaging Statements on Reputation” (2011) 37 *Queen’s LJ* 1 at 13.

114 See Stephen A Rains, “The Impact of Anonymity on Perceptions of Source Credibility and Influence in Computer-mediated Group Communication: A Test of Two Competing Hypotheses” (2007) 34(1) *Communication Research* 100. The form of computer-mediated communications surveyed in the article was the electronic meeting system which is a computer-based technology that supports meeting functions such as decision-making and idea generation. See also Elizabeth F Judge, “Cybertorts in Canada: Trends and Themes in Cyber-libel and Other Online Torts” in *Annual Review of Civil Litigation* (Todd Archibald & Michael G Cochrane eds) (Toronto: Carswell, 2005) at pp 154–155.

115 (2004) 71 OR (3d) 416.

significant volume of messages on bulletin boards or message boards on websites alleging a litany of criminal offences and misconduct¹¹⁶ on the part of the plaintiff, an Ontario corporation. The postings were read by Internet users including people in Ontario, the plaintiff's shareholders, financial analysts and regulatory agencies including the Toronto stock exchange. Blair and Laskin JJA of the Ontario Court of Appeal noted that the impersonal and anonymous nature of the Internet resulted in the likelihood that the defamatory remarks were believed. The judges acknowledged that though the Internet's dialogue style may undermine the credibility of the content, the evidence in the case showed that the third party recipients took the matter seriously.¹¹⁷ Hence, the postings were found to be defamatory. Apart from the great potential of the Internet to damage reputation and its "absolute and immediate worldwide ubiquity and accessibility", the court also took into account "its potential for being taken at face value" in the assessment of damages.¹¹⁸

C. *Internet language and expressions*

31 Internet language and expressions, similar in some ways to the language and expressions used in traditional print publications, can influence the perceived credibility of the message. The lack of capitalisation of the letters may, for example, reflect the informality of the communication. On the other hand, the liberal use of capitalisation in the text may denote the harsh tone or attitude of the author. Where the written text contains spelling, grammatical or typographical errors, or the writing style is exaggerated, self-contradictory, rambling or emotional, the message is likely to be regarded as less credible and more likely to be discounted by an ordinary reasonable reader.¹¹⁹ At the end of the day, it is the judge's view of the reasonable interpretations of the reader or audience that matters.

32 Internet language can also shape the meaning interpreted by the readers or audience in a manner distinct from face-to-face

116 They comprise fraud, tax evasion, money laundering, manipulation of world gold prices for Barrick Gold Corp's own benefit, misrepresentation to government officials, improperly influencing government officials, obstruction of justice, pursuing organised crime, attempted murder, arson, and genocide and crimes against humanity: *Barrick Gold Corp v Lopehandia* (2004) 71 OR (3d) 416 at [15].

117 *Barrick Gold Corp v Lopehandia* (2004) 71 OR (3d) 416 at [38] (Doherty JA dissenting at [90]). Barrick Gold Corp received various complaints, inquiries and responses from concerned persons as a direct result of the defamatory postings: at [39]–[43].

118 *Barrick Gold Corp v Lopehandia* (2004) 71 OR (3d) 416 at [34].

119 Hilary Young, "But Names Won't Necessarily Hurt Me: Considering the Effect of Disparaging Statements on Reputation" (2011) 37 Queen's LJ 1 at 27.

communications. Internet communications taking place through chat rooms and instant messaging, unlike face-to-face communication, do not have the “benefits of physical clues as to implied meaning”¹²⁰ which can be gathered from facial gestures and body language. One has, therefore, to resort to “proxies” of such physical clues for ascertaining the meaning of the publication. These are the emoticons, acronyms and new Internet modes of communication used in chat rooms, bulletin board discussions and informal e-mails. The defamatory meanings may be found at two levels: as part of the general knowledge of users or extrinsic facts known only to a minority of internet users.

33 *Lord McAlpine v Sally Bercow*¹²¹ is a case of a tweet containing an emoticon that amounted to defamation. Shortly after a British Broadcasting Corp (“BBC”) report accused an unnamed “leading Conservative politician from the Thatcher years” of sexually abusing boys in the 1970s and 1980s, speculation about the identity of the politician was intense. It was at this juncture that Bercow tweeted “Why is Lord McAlpine trending? *Innocent face*”. Lord McAlpine was of course one of the conservative politicians during the Thatcher administration. He was later named as the sex abuser by the BBC but the BBC subsequently admitted it was a mistake. Lord McAlpine sued Bercow over the tweets for alleging that he was linked to sex abuse.¹²² Sally Bercow is the wife of the Speaker of the House of Commons, with over 56,000 followers on the day she tweeted those allegations. The defendant had argued that the words “innocent face” should be read literally, that is, the expression which the reader was being invited to imagine on the defendant’s face in asking the question was “deadpan” and that Bercow was asking in a neutral and straightforward manner. According to Tugendhat J, however, the tweet meant, in its natural and ordinary defamatory meaning, that the claimant was a paedophile who was guilty of sexually abusing boys. The learned judge stated:¹²³

In my judgment the reasonable reader would understand the words ‘innocent face’ as being insincere and ironical. There is no sensible reason for including those words in the Tweet if they are to be taken as meaning that the Defendant simply wants to know the answer to a factual question.

120 Diane Rowland, “Gripping, Bitching and Speaking Your Mind: Defamation and Free Expression on the Internet” (2006) 110 Penn State Law Review 519 at 527.

121 [2013] EWHC 1342.

122 However, Lord McAlpine was reported as saying that he was drawing a line under potential legal actions against Twitter users with fewer than 500 followers.

123 Alternatively, Tugendhat J would find defamatory meaning in the tweet based on an innuendo meaning understood by that small number of readers who were aware that the claimant had been a prominent Conservative politician in the Thatcher years.

The hypothetical reader, according to the judge, is the reasonable representative of users of Twitter who follow the defendant¹²⁴ and understand the words “trending” and “innocent face”. The “trending” list is generated by an algorithm that identifies the hottest emerging topics of discussion on Twitter as selected by the users.

34 It would appear, from a reading of the decision, that that the emoticon “innocent face” as well as the characteristics of the Twitter users had probably rendered the seemingly neutral question in Bercow’s tweet defamatory.¹²⁵ Whilst the purport of Bercow’s tweet is unlikely to be neutral as argued by the defendant’s counsel due to Twitter users’ awareness of Bercow’s knowledge, it is not categorically clear that the tweet meant that McAlpine was indeed the culprit. The maximum limit of 140 characters for tweets imposed by the technology could be relevant here. There is clearly a limit as to how much a tweet can explain the surrounding circumstances or context of the message itself. It is therefore not surprising that Twitter users utilise short forms or emoticons to communicate. If permitted to clarify or expand on the tweet, Bercow’s tweet could well state that the reason why McAlpine was trending was due to the rumours circulated by the BBC report (and that it did not mean to say he was in fact guilty of paedophilia and sex abuse as reported). If so clarified, the tweet would unlikely be held defamatory. However, such benefit of the doubt was not given by the judge to Bercow’s tweet that the emoticon in itself could not, on balance, have conveyed such a defamatory meaning. Hence, Twitter users should, in light of this decision, take particular note of the plausible negative nuances of meaning that can arise from their tweets.

D. *Internet publications as a form of casual conversation or live public debate*

35 The interactive nature of certain Internet modes of communication has further given rise to a different interpretation of impugned words from those found in traditional print publications. For publications arising from a series of threads in an Internet forum or bulletin board, for instance, the approach has been to describe the publications as a form of casual chat or public conversation, or alternatively a form of contemporaneous or live public debate. Such descriptions potentially affect the context in which the publications are viewed by the audience. To the extent that forum threads are treated as

124 *Lord McAlpine v Sally Bercow* [2013] EWHC 1342 at [58].

125 Sunniva Hansson, “Defamation in 140 Characters or Fewer – The Case of *McAlpine v Bercow*” (2013) 19(6) CTLR 172; Jennifer Agate, “McAlpine, the Attorney General and the Defamation Act – Social Media Accountability in 2013” (2013) 24 Ent LR 233.

casual conversations, in which the participants would likely “expect a certain amount of repartee or “give and take”, the more likely the publications will be regarded as non-defamatory.¹²⁶

36 This interpretation of comments contained in interactive blogs as a form of “conversation” or “debate” was specifically discussed in the Canadian decision of *Baglow v Smith*.¹²⁷ The defendant posted a comment on a website under a pseudonym in which he referred to the plaintiff as “one of the Taliban’s more vocal supporters”. The comment was posted in the midst of an exchange concerning the detention of Omar Khadr, the young Canadian held by American authorities in Guantanamo Bay. The plaintiff argued that the publication was defamatory and requested the removal of the posting but this was refused. Annis J dismissed the claim on the ground that “reasonably informed readers of these blogs” would not regard the comment as defamatory. Her Honour referred to Internet blogging as a form of “public conversation” which allows for each party to respond to such comments immediately or contemporaneously.¹²⁸ Further, the “live debate forum should be considered as a contextual factor to determine whether the statement is defamatory in so far as whether it is complete”¹²⁹ such that.¹³⁰

... derogatory, even defamatory remarks are expected to be parried in a live debate so as to remove the ‘sting of the libel’ and attenuate any threats of diminution of reputation.

She also took into account the expectations of the blogging audience who “would indeed want to hear a rejoinder of this nature where the parry and thrust of the debaters is appreciated as much as the substance of what they say”.¹³¹ Thus, Annis J ruled that:¹³²

A statement is not derogatory when made in a context that provides an opportunity to challenge the comment and the rules of the debate anticipate a rejoinder, unless the statement is wholly outside the scope of the debate or otherwise so outrageous as to prevent meaningful argument from continuing.

According to her Honour, the rules of engagement on the Internet, which may be regarded as social expectations or even social norms generally accepted by the audience or users, would therefore be

126 *Smith v ADVFN plc* [2008] EWHC 1797 at [13]–[17]. This was cited by Sharp J in *Clift v Clarke* [2011] EWHC 1164 at [36].

127 2011 ONSC 5131.

128 *Baglow v Smith* 2011 ONSC 5131 at [59].

129 *Baglow v Smith* 2011 ONSC 5131 at [61].

130 *Baglow v Smith* 2011 ONSC 5131 at [62].

131 *Baglow v Smith* 2011 ONSC 5131 at [64].

132 *Baglow v Smith* 2011 ONSC 5131 at [73].

important for determining defamatory meaning. With specific regard to the interactive nature of Internet blogs, her decision suggests that “impugning someone’s name on the broadcast evening news is different from impugning their name on a blog”.¹³³

37 The decision was, however, overturned by the Court of Appeal for Ontario in *Baglow v Smith*¹³⁴ which directed that the action proceed to trial. With regard to Annis J’s point about the context of the live debate negating defamatory meaning, the Court of Appeal did not make a concrete decision. It felt that it was an “issue that needs to be fleshed out at trial, quite possibly, again, with the assistance of expert testimony”.¹³⁵ In connection with the notion of social expectations, the court stated that such expert testimony would:¹³⁶

... provide the court – whose members are perhaps not always the most up-to-date in matters involving the blogosphere – with insight into how the internet blogging world functions and what may or may not be the expectations and sensibilities of those who engage in such discourse in the particular context in which that discourse occurs.

So both Annis J and the Ontario Court of Appeal, though they reached different outcomes, clearly agreed on the significance of social expectations and the contexts of the Internet medium.

38 The case was subsequently tried by Heidi Polowin J in 2014. The learned judge ruled that the statements were defamatory but the case was ultimately dismissed due to the defence of fair comment. The words that the plaintiff was one of the Taliban’s supporters meant that the plaintiff supported Islamist terrorism; this would lower the plaintiff’s reputation in the eyes of the reasonable person. Although the judge noted that political discourse on blogs may be “hyper-partisan” in nature compared to traditional media such as newspapers and television, words used in such political discourse may still be defamatory taking into consideration the *context* and the audience to whom the words were published.¹³⁷ Polowin J specifically referred to the case of *WIC Radio Ltd v Simpson*¹³⁸ in which the defendant’s words even in a “shock-jock” radio show comparing the plaintiff to Hitler, the Ku Klux Klan and skin heads, with the implication that the plaintiff would condone violence against gays, were held to be defamatory.¹³⁹ The

133 Bob Tarantino, “Online Defamation: Does Context Matter?” (2012–2013) 13(4) IECLC 25 at 27.

134 2012 ONCA 407, *per* Goudge, Sharpe and Blair JJA.

135 *Baglow v Smith* 2012 ONCA 407 at [38].

136 *Baglow v Smith* 2012 ONCA 407 at [29].

137 *Baglow v Smith* 2015 ONSC 1175 at [206] and [207].

138 [2008] 2 SCR 420.

139 *Baglow v Smith* 2015 ONSC 1175 at [208].

expert evidence also indicated that many people may still be shocked by personal attacks on blogs and that the credibility of online bloggers (such as the defendant) can be gained and become well known over time.¹⁴⁰ On the issue of blogs as a form of public “live” debate, however, the judge noted on the facts that, as the impugned words stood alone with little connection to the heated debate, there was therefore no expectation of a rejoinder to the defendant’s statement that the plaintiff was a Taliban supporter.¹⁴¹

39 Reynolds¹⁴² takes a generally anti-defamation approach that appears similar to *Annis J* in respect of blogs due to the context of the blogosphere, namely the low-trust culture and the less authoritative nature of blogs compared to mainstream print newspapers, and because blogs allow speedy corrections of factual errors and therefore afford self-help for potential victims of allegedly defamatory statements. On the other hand, Ciolli¹⁴³ notes that victims of defamation who do not have Internet presence may be disadvantaged in making responses to the defamatory remarks. The search engine may rank the victim’s response lowly relative to the blogs defaming him. Further, the content of the defamatory blogs may have been reposted in other blogs and social media, rendering the task of the victim to publish responses even more challenging. Hence, the underlying argument that the Internet mode of communication should be regarded as akin to a conversation or live public debate due to the assumption of the ease of response by victims, as mentioned by Reynolds, is not supportable. If courts were to accept that statements made in interactive blogs are akin to a “public debate” or “conversation” via the Internet such that they should not be treated as defamatory, it may unwittingly encourage vitriolic and acerbic comments in a heated debate that can harm a person’s reputation.

40 The above interpretations of particular Internet modes of communication are indirectly linked to the problem of the artificial distinction between libel and slander under the common law. Libel, as a form of written publication, is actionable without proof of special damage unlike slander (verbal defamation). Save for certain statutory and common law exceptions to slander,¹⁴⁴ the victim of a mere slander

140 *Baglow v Smith* 2015 ONSC 1175 at [211] and [212].

141 *Baglow v Smith* 2015 ONSC 1175 at [213].

142 Glenn Harlan Reynolds, “Libel in the Blogosphere: Some Preliminary Thoughts” (2006) 84 Wash U L Rev 1157.

143 Anthony Ciolli, “Defamatory Internet Speech: A Defense of the Status Quo” (2007) 25 Quinipiac L Rev 853 at 861–862.

144 The statutory exceptions in the Defamation Act (Cap 75, 2014 Rev Ed) are (a) words spoken and published which impute unchastity or adultery to any woman or girl (s 4); and (b) words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on at the time of the publication (s 5). The common law exceptions are (a) imputations that the plaintiff

(cont’d on the next page)

would be required to prove actual damage failing which he cannot recover damages. The policy reason for this is that written or permanent forms of publication have a greater capacity to harm reputation¹⁴⁵ than mere slanders. Based on this policy reason, Internet publications, to the extent that they are published in permanent form, should be treated as libel in common law even if they resemble conversations or debates. It is clear that many forms of Internet communications such as e-mails, web pages,¹⁴⁶ YouTube videos,¹⁴⁷ and bulletin board and forum postings would be stored in permanent form in a server or other devices and should be regarded as libel. Communications such as Internet Relay Chat, instant messaging and chat rooms might arguably be libel due to the use of texts which can be reviewed by the recipients.¹⁴⁸ The Defamation Act¹⁴⁹ stipulates that “[f]or the purposes of the law of libel and slander, the broadcasting of words by means of telecommunication shall be treated as publication in a permanent form”. The range of materials which may be regarded as “libel” under this section is wide as “words” has been defined as including “pictures, visual images, gestures and other methods of signifying meaning”.¹⁵⁰

41 Lidsky remarked that Internet communications are “a medium more pervasive than print, and for this reason they have tremendous power to harm reputation”.¹⁵¹ Not only are they more pervasive than print publications, Solove¹⁵² noted how the Internet makes “[i]nformation that was once scattered, forgettable, and localized ... permanent and searchable”. As a result, Internet publications have the potential for a long-term adverse impact on one’s reputation,¹⁵³ making the web a “very unforgiving medium”.¹⁵⁴ Tugendhat J in *Flood v Times*

committed a crime punishable with imprisonment (*Gray v Jones* [1939] 1 All ER 798); and (b) imputations that the plaintiff is suffering from a serious contagious disease (*Bloodworth v Gray* (1844) 7 Man & G 334).

145 *Gatley on Libel and Slander* (Patrick Milmo & W V H Rogers eds) (Sweet & Maxwell, 11th Ed, 2008) at para 3.7.

146 *Warman v Grosvenor* [2008] OJ 4462 (Internet website content and e-mails are libel); *Godfrey v Demon Internet Ltd* [2001] QB 201 (web content as libel based on s 201 of the UK Broadcasting Act 1990 (c 42)).

147 *Donovan v Gibbons* [2014] EWHC 3406 at [28] (as to which, see n 11 above).

148 Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 3rd Ed, 2010) at para 4.38.

149 Cap 75, 2014 Rev Ed.

150 Defamation Act (Cap 75, 2014 Rev Ed) s 2.

151 Lyrissa Barnett Lidsky, “Silencing John Doe: Defamation and Discourse in Cyberspace” (2000) 49 Duke LJ 855, cited in *Barrick Gold Corp v Lopehandia* (2004) 71 OR (3d) 416 at [32], per Blair JA.

152 Daniel J Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Yale University Press, 2007) at p 4.

153 *Clarke t/a Elumina Iberica UK v Bain* [2008] EWHC 2636 at [54]–[56].

154 *Clarke t/a Elumina Iberica UK v Bain* [2008] EWHC 2636 at [55], per Tugendhat J, quoting Siobhain Butterworth, “Unpublishing” *The Guardian* (20 October 2008).

*Newspapers Ltd*¹⁵⁵ noted that “[a]n old defamatory publication may permanently blight a person’s prospects”.¹⁵⁶ Further, reputation on the Internet is “likely to be based on a more comprehensive set of data (both true and false) and, for this reason, may be more difficult for the individual or firm in question to alter”.¹⁵⁷

42 That being said, the potential harm arising from publications is not the only rationale for the distinction between libel and slander. Another plausible factor is the level of care and formality attached to the publication of the statements. Where the user is not expected to take care in publishing statements due to the casual and informal nature of the medium, it is more likely to be treated as slander. In *Prefumo v Bradley*,¹⁵⁸ Corboy J noted that:¹⁵⁹

Emails, SMS messaging, Twitter, blogs and other forms of social media such as Facebook impact on the way people communicate and the language they use. Communications through those media often lack the formality and careful consideration that was once thought to mark the difference between the written and spoken word. The very purpose of the media is to enable people to communicate instantaneously, often in a language that is blunt in its message and attenuated in its form. That will affect both what is regarded as defamatory and the potential for harm ...

The dichotomy between the two competing rationales for the distinction between libel and slander can be seen in the example of communications via Twitter. On the one hand, tweets are permanent in nature, accessible through search engines and capable of being republished. On the other hand, there is a tendency for Twitter users to post a tweet without careful thought and deliberation, much like a “conversation with a friend”.¹⁶⁰

E. Reading Internet publications as a whole

43 The notion of interactive blogs or social media as a “conversation”, as discussed above, is also intimately connected to the general principle of law that impugned words are to be read in the

155 [2009] EWHC 2375.

156 *Flood v Times Newspapers Ltd* [2009] EWHC 2375 at [233].

157 Laura A Heymann, “The Law of Reputation and the Interest of the Audience” (2011) 52 BCL Rev 1341 at 1353.

158 [2011] WASC 251.

159 *Prefumo v Bradley* [2011] WASC 251 at [43], cited in *Rana v Google Australia Pty Ltd* [2013] FCA 60 at [78].

160 Patrick H Hunt, “Tortious Tweets: A Practical Guide to Applying Traditional Defamation Law to Twibel Claims” (2013) 73 La L Rev 559 at 587–588.

context of the statements as a whole.¹⁶¹ The case of *Charleston v News Group Newspapers Ltd*¹⁶² (“*Charleston*”) involved the superimposition of the photographs of the faces of well-known television actors upon virtually naked bodies of models who appeared to be engaged in pornographic poses. There was also a headline entitled “Porn Shocker for Neighbours Stars”. Such a scenario could conceivably take place in the Internet space. The entire publication, according to the court in *Charleston*, ought to be read as a whole together with the text. As the text referred to a computer game which could have carried out the superimpositions, the entire publication was held not to be defamatory.

44 Kirby J in *Chakravarti v Advertiser Newspapers*¹⁶³ disagreed, however, that the principle should serve as a default rule as it ignores the changing mode of communication in which reasonable readers should not be expected to read beyond headlines and photographs. Due to the continuous contribution of comments to interactive blogs or social media, one important issue that arises is the extent to which comments on a thread will be read by the reasonable reader given the ease of hyperlinks to related content on the Internet. The courts appear quite ready to regard Internet postings and comments as a single publication depending on how the reasonable reader would view them. In the recent Singapore decision of *Golden Season Pte Ltd v Kairos Singapore Holdings Pte Ltd*,¹⁶⁴ George Wei JC (as he then was) analysed a number of Facebook postings and the thread of comments as a “conversation” building upon previous threads. The reasonable reader of the threads of comments would likely view the postings and comments in that manner. Wei JC therefore treated the entire publication as constituting a single publication and acknowledged that the content and meaning of the posting evolves as threads of comments are added. In similar fashion, the English High Court in *McGrath v Dawkins*¹⁶⁵ adopted the “general approach of treating the final thread as a single publication for context and meaning purposes”¹⁶⁶ and further proffered a few useful guidelines concerning the interpretation of threads on website forums. For example, individual posts should be read in the context of the earlier posts, and that the meaning of the thread would change as and when a new post was added. As for the respective responsibilities of individual authors of the posts, HHJ Moloney QC took the sensible view that “an individual contributor cannot be held liable for a change in the meaning

161 *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65.

162 [1995] 2 AC 65.

163 193 CLR 519 at [134].

164 [2015] SGHC 38.

165 [2012] EWHC B3.

166 *McGrath v Dawkins* [2012] EWHC B3 at [53].

of his contribution, brought about by the later contributions of third parties which alter its context”¹⁶⁷

45 In the US case of *Finkel v Dauber*,¹⁶⁸ each Facebook post by adolescent users was analysed together with the other posts in order to determine whether they were defamatory. The posts included bizarre statements that the plaintiff was seen having sexual relations with a horse, contracted human immunodeficiency virus (“HIV”) from sharing needles with heroin addicts, contracted acquired immunodeficiency syndrome (“AIDS”) from a male prostitute and transformed into the devil. When the posts were read together, a reasonable reader would, according to the court, regard them as puerile attempts by adolescents to outdo each other.¹⁶⁹ For Twitter, where plugins facilitate the organisation of a follower’s page and allow users to make separate tweets according to topics, the tweets for a single topic might arguably be treated as a single publication.¹⁷⁰

46 In order to determine whether postings may logically be regarded as a single publication for the purpose of ascertaining its meaning, it is proposed that the following points be considered:

- (a) the attitudes and behaviour of the users towards materials disseminated via that Internet medium (eg, should the readers be expected to read the comments or threads in a chronological manner? Should reasonable readers be expected to click on the hidden comments that may contain the defamatory material?);
- (b) the gravity, significance and level of interest generated by the materials that have been disseminated originally;
- (c) the organisation of the postings, comments or tweets;
- (d) whether the terms in the publication invite or refer the reader to view the other links or materials; and
- (e) the relatedness in terms of the heading or content of the link to the materials that have been disseminated originally.

F. Defamatory meaning and reference to plaintiff

47 As a final point on Internet context, the mode of Internet communication may impact on the other elements of a *prima facie* case

167 *McGrath v Dawkins* [2012] EWHC B3 at [53].

168 29 Misc 3d 325; 906 NYS 2d 697 (NY Sup, 2010).

169 *Finkel v Dauber* 29 Misc 3d 325; 906 NYS 2d 697 at [9] (NY Sup, 2010).

170 Jennifer Ireland, “Defamation 2.0: Facebook and Twitter” (2012) 17 MALR 53 at 73.

in defamation (such as reference to plaintiff and publication) and simultaneously affect the defamatory meaning. In *Samuel Kingsford Budu v The British Broadcasting Corp.*,¹⁷¹ three articles would appear on the web in BBC's archives and the Google entry or snippet on a Google page when a search term was entered. After the articles were shown on the BBC's web page for a period, they were automatically archived such that they would only be accessible by conducting a search. The first article referred to an illegal immigrant who was offered a top management job. It was defamatory but did not refer to the claimant. As the claimant was not named in the first article, it was not accessible by a search on its own of the claimant's name. The first article was only accessible via the second and third articles which specifically referred to the claimant and contained links to the first article. The effect of the second and third articles would, however, dilute the defamatory meaning in the first article. This is because they collectively referred to the claimant's denials of the allegedly illegal status of his immigration with the statement that he had obtained discretionary leave from the Home Office. Thus, the notional reasonable reader would not conclude from the three articles read together that there were reasonable grounds that the claimant was an illegal immigrant given the detailed and factual denials by the claimant. The reader would not think that the second and third articles showed that the claimant posed a security risk either.

IV. Defamatory meaning and Internet communities

A. *The general societal and segmental community perspective*

48 In the context of traditional print materials, and in synchrony with the test in *Sim v Stretch*, the community of right-thinking members of society generally would be constituted by the members of the general community that is coterminous with the jurisdiction (eg, Singapore society generally). This is the perspective of the majority and moderate member of the society generally. The objective standard of the "right-thinking member of society generally" or the moderate reasonable man is premised on a notion of the legal responsibility of the publisher in which the defamatory meaning causing injury to the plaintiff's reputation arises only in so far as a *reasonable* man might infer such meaning from the words.¹⁷² In this way, the extremist or prejudiced views of a small segment of society may be avoided in the ascertainment of defamatory meaning. The current approach in Singapore and England is based on this majoritarian premise ascertained from the perspective of the "right-thinking member of society generally".

171 [2010] EWHC 616.

172 *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 173.

49 This test based on the “right-thinking member of the society generally” has, however, been critiqued for assuming that:¹⁷³

... there is a homogeneous community of ‘reasonable’ or ‘right-thinking’ people who would react in a uniform and predictable way to the allegations. Further, it gives courts authority to determine which communities are respectable for the purposes of recovery in a libel action. It is only explicable, it seems to me, in terms of the outmoded concept of reputation as a reflection of social rank and prestige.

50 In an exceptional case, the Singapore court has referred to the perspective of a substantial proportion of the English-speaking readership of a national newspaper containing a defamatory article about the plaintiff.¹⁷⁴ This segmented approach to determining whether the article was defamatory is justifiable based on the language abilities between the different segments of readership of the newspaper. This substantial segment of English-speaking readers did not understand the Chinese caption accompanying a photograph juxtaposed upon the defamatory article which would otherwise have rendered the article non-defamatory. This was not a case of divided perspectives in a pluralistic society due to differing value judgments concerning the impugned words, but a decision necessitated by differences in language capacity.

51 With regard to controversial societal issues, there may be marked differences in the perspectives adopted by the society generally and specific segments within the society. To determine defamatory meaning, certain jurisdictions such as the US have generally employed the perspective of a “considerable and respectable class”¹⁷⁵ of the community instead. The segmental community perspective has been applied to Internet publications in the US. In *Jews For Jesus Inc v Rapp*,¹⁷⁶ an article about the plaintiff (a Jew and the stepmother of an employee of the organisation Jews for Jesus) who had accepted Christian beliefs was published in the organisation’s newsletter and website. The Supreme Court of Florida applied the segmental community perspective of traditional Jews such as the plaintiff.

173 Eric Barendt, “What is the Point of Libel Law?” (1999) 52 *Current Legal Problems* 110 at 120.

174 *Chiam See Tong v Xin Zhang Jiang Restaurant Pte Ltd* [1995] 1 SLR(R) 856.

175 *Peck v Tribune Co* 214 US 185 (1909); American Law Institute, *Restatement (Second) of Torts* (American Law Institute Publishers, 1977) § 559. See generally Gary K Y Chan, “Defamatory Meaning, Community Perspectives and Standards” (2014) 19(1) *MALR* 46.

176 997 So 2d 1098 (Fla, 2008). The Supreme Court of Florida applied *Peck v Tribune Co* 214 US 185 (1909); and American Law Institute, *Restatement (Second) of Torts* (American Law Institute Publishers, 1977) § 559.

52 In jurisdictions such as Malaysia, Australia and South Africa, which do not subscribe to the segmental community perspective as a general principle, the courts have, however, adopted the perspective of a segment of the population in certain cases. For instance, the courts have adopted the perspective of a particular religious community,¹⁷⁷ or a particular segment of a pluralistic society with different value judgements on an important societal issue such as the practice of abortion.¹⁷⁸ In this way, minority views of the impugned words are given credence in determining defamatory meaning. The author has argued elsewhere¹⁷⁹ that whilst the general societal perspective which represents the majority view should remain the mainstream test for defamatory meaning, the segmental community perspective may be applied provided the following criteria are satisfied: (a) the size of the community is substantial and the views are not anti-social; (b) the community in question is one that is reasonably anticipated or was targeted by the publisher of the alleged defamatory publication;¹⁸⁰ and (c) the damages recoverable are limited to the reputational harm suffered in the eyes of that community.¹⁸¹ The onus should be on the plaintiff to specifically plead his case for the segmental community perspective to be applied in order to find defamatory meaning.¹⁸²

B. General societal and segmental community perspectives as applied to Internet publications

53 The author proposes that the same considerations should apply to Internet defamation cases. Barendt¹⁸³ stated that:

It may be right in the context of messages on the Net to modify the usual principle in English law that communications are assessed by general community standards; it might be more appropriate to assess them by the standards of those using the Internet.

There was no elaboration of the stand taken though.

177 *Mohamed v Jassiem* [1995] ZASCA 115.

178 *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682; *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd* [2010] 2 MLJ 492.

179 See generally Gary K Y Chan, "Defamatory Meaning, Community Perspectives and Standards" (2014) 19(1) MALR 46.

180 *Tsichlas v Touch Line Media (Pty) Ltd* [2004] 2 SA 112 (W) (that the place where the plaintiff suffered reputational harm as in *Mohamed v Jassiem* [1995] ZASCA 115 should be regarded as the place where internet defamation has taken place); *Breeden v Black* [2012] 1 SCR 666 (plaintiff allowed to sue in the jurisdiction in which his reputation was established).

181 Gary K Y Chan, "Defamatory Meaning, Community Perspectives and Standards" (2014) 19(1) MALR 46 at 62–63.

182 See Amy Kerstin Sanders, "Defining Defamation: Community in the Age of the Internet" (2010) 15(3) *Communication Law and Policy* 231.

183 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd Ed, 2005) at p 464.

54 Internet publications can be seen and read by a geographically dispersed audience comprising multiple communities of people or users who may hold different views and perceptions of the impugned words. The online communities may be defined by their shared interests or goals, degree of permanence and frequency of interaction, or a commitment to shared values, norms and meanings, and a shared history and identity.¹⁸⁴ These communities are not necessarily linked by geographical proximity or kinship ties, and may be defined in terms of social networks, or more precisely, computer-supported social networks such as the bulletin boards systems and MUDs.¹⁸⁵ The number of virtual communities and social networks has increased significantly,¹⁸⁶ extending the reach of existing communities in a manner unconstrained by physical and social space. In bulletin board discussions, for example, the participants may be grouped according to their topics of interest. Lipschultz has referred to the presence of Internet communities comprising subgroups of individuals or entities that exhibit tight interconnectivity such as Twitter users who regularly re-tweet each other's messages within the Twitter social network.¹⁸⁷ For the players of virtual worlds and games, communities or social networks may be formed via websites, forums and video sites to share knowledge and organise their activities.¹⁸⁸ Studies have referred to the social norms developing within the online groups and communities including social network sites.¹⁸⁹

55 Social media provides users with some measure of control over the audience to whom the allegedly defamatory statements are disseminated. Such control over the audience can also affect the notion of the appropriate community from whose perspective the defamatory meaning of the publication may be determined. With respect to websites, for instance, the publisher could password-protect their publications so that only members or certain persons could access the content. Facebook users can adjust the privacy settings of their profiles. Twitter users can restrict dissemination of tweets via private or public settings. Though it remains possible for the recipients of the postings

184 Lori Kendall, "Community and the Internet" in *The Handbook of Internet Studies* (Mia Consalvo & Charles Ess eds) (Wiley-Blackwell, 2011) at p 310.

185 Barry Wellman & Milena Gulia, "Virtual Communities As Communities" in *Communities in Cyberspace* (Marc A Smith & Peter Kollock eds) (Routledge, 1999) at p 169.

186 David S Ardia, "Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law" (2010) 45 Harv CR-CL L Rev 261 at 271-272.

187 Jeremy Harris Lipschultz, *Social Media Communication: Concepts, Practices, Data, Law and Ethics* (Routledge, 2015) at p 119.

188 T L Taylor, "Internet and Games" in *The Handbook of Internet Studies* (Mia Consalvo & Charles Ess eds) (Wiley-Blackwell, 2011) at p 376.

189 Nancy K Baym, "Social Networks 2.0" in *The Handbook of Internet Studies* (Mia Consalvo & Charles Ess eds) (Wiley-Blackwell, 2011) at p 399.

and tweets to disseminate them, the settings of the Facebook or Twitter user is one relevant factor for evaluating the groups or communities targeted or reasonably anticipated by the user who put up the original postings.

56 Even in traditional print media, the class of likely recipients is relevant to assess defamatory meaning. In *Drummond-Jackson v British Medical Association*,¹⁹⁰ for instance, the English court stated that the words should be understood “by the sort of people likely to read [the *British Medical Journal*]”.¹⁹¹ Courts have also viewed the publications from the perspective of the readers of a financial magazine which contained the allegedly defamatory publications who possessed a higher standard of education and intelligence and a special interest in financial matters.¹⁹² In *Sir Elton John v Guardian News & Media Ltd*,¹⁹³ the judge referred to the “educated readership” of the separate and pull-out *The Guardian Weekend* section which was illustrated in full colour, and which was itself divided into sections headed “Starters”, “Fashion”, “Food & Drink”, “Features” and so on and is distinct from the news section of the paper. The impugned words could not be understood by a reasonable reader of *The Guardian Weekend* section as containing the serious allegation pleaded. Instead, the reasonable reader would expect such a serious allegation to be made without humour, and explicitly, in a part of the newspaper devoted to news.

57 With respect to Internet publications, the English courts appear to have applied the perspective of the segment of the population or users in limited cases. In *McGrath v Dawkins*, for instance, thread comments imputing that the plaintiff is “a creationist, a dogmatist, a Christian, a Catholic, and a person who seeks God through one religion only” are not defamatory since those views are known to be shared by “many well-respected members of society” (which may form only a minority segment of the population), even if others “vigorously disagree” with those views.¹⁹⁴ In *McAlpine v Bercow*, discussed above, the court referred to the perspective of the users of the Twitter who follow the defendant, clearly a minority segment of society.

58 It should be highlighted that the plaintiff need not argue for the segmental community perspective in order to succeed in defamation.

190 [1970] 1 WLR 688; [1970] 1 All ER 1094.

191 *Drummond-Jackson v British Medical Association* [1970] 1 WLR 688 at 694; [1970] 1 All ER 1094 at 1099, per Lord Denning MR. See also *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519 at [133], per Kirby J and *Gillick v Brook Advisory Centres* (12 March 2002) (QBD) (unreported), per Gray J.

192 *Channing v South African Financial Gazette Ltd* 1966 (3) SA 470 (W) at 474.

193 [2008] EWHC 3066 at [22].

194 *McGrath v Dawkins* [2012] EWHC B3 at [63].

He could alternatively plead true innuendoes where the circumstances allow for them. To the extent that there are Internet communities of persons who possess special knowledge of particular facts or events, the plaintiff may argue for defamatory meaning based on legal innuendos. For instance, in *McGrath v Dawkins*, it was noted that the Dawkins website, which was aimed at a specialist audience of people on the science *versus* religion debate, made it easier for the claimant to make out a case for a legal innuendo meaning.¹⁹⁵ It ultimately depends on the level of knowledge of the users of the Internet medium. This would have an impact on the quantum of damages should the publication be limited to a smaller group of persons with special knowledge. There is no recourse to legal innuendoes, however, where the users of an Internet mode of communication are drawn from the general population who do not possess any special knowledge. For example, in respect of the Amazon website, whose readership is drawn from the general population who do not possess any special knowledge or information which would lead them to understand the word “creationist” differently from the public at large, true innuendoes are not applicable.¹⁹⁶

59 Policy reasons may at times incline the judge to view the impugned words through the eyes of society generally. This can override any attempts or arguments to use the segmental community perspective. The pre-Internet case of *Byrne v Deane*¹⁹⁷ has shown the potential schism of views between the so-called right-thinking members of society and particular groups within the community as to whether a statement about the plaintiff, a member of a club, acting as an informer to the police concerning the criminal acts of his fellow club members, is defamatory. In that case, the judges leaned in favour of the views held by the “general public” and the “ordinary good and worthy subject of the King” rather than the criminal classes and therefore regarded the statement as not defamatory. An analogy may be drawn with allegedly defamatory statements published in this modern information technological age. The following example by Burkell and Kerr is instructive:¹⁹⁸

Among computer hackers, being called a ‘break-in artist’ would be a compliment of the highest order, while among law enforcement officers or politicians, the same comment could be taken as insulting and even defamatory. If it is common practice within a community to trade derogatory and even insulting remarks, such comments will be interpreted differently than if those comments breach the established social norms.

195 *McGrath v Dawkins* [2012] EWHC B3 at [60].

196 *McGrath v Dawkins* [2012] EWHC B3.

197 [1937] 1 KB 818.

198 Jacquelyn Burkell & Ian R Kerr, “Electronic Miscommunication and the Defamatory Sense” (2000) 15(1) *Canadian Journal of Law and Society* 81 at 101.

60 The meaning of the epithet “hacker” has not remained stagnant over the years. It has evolved from depictions of a hacker as a computer expert in the past¹⁹⁹ to one of a computer addict and, subsequently, to a person being involved in serious criminal conduct and a threat to national security.²⁰⁰ The “hacker subculture” attempts to legitimise the activities of the hacker by recourse to terms such as ethical hacking, cyberactivism and hactivism.²⁰¹ However, hacking activities are regarded as antisocial activities criminalised under Computer Misuse and Cybersecurity Act.²⁰² In the recent case of *Public Prosecutor v James Raj s/o Arokiasamy*,²⁰³ in which the accused was convicted of hacking various websites, the judge emphasised that “Singapore is a major IT centre both regionally and globally. Cyber intrusions and threats pose considerable danger to the economy and the country”, thus reinforcing the underlying policy reasons against hackers and hacking. Subject to other specific contexts and surrounding circumstances, a statement about the plaintiff being a hacker would generally be regarded as defamatory even if minority online communities take a contrary view.

61 In a similar manner, “trolling” did not generate negative connotations in the late 1980s or early 1990s in the US. The term “trolling for newbies” was then regarded as a joke amongst long-time Internet users concerning new subscribers who raise or discuss topics that have been “overdone”; it was only later in the late 1990s that “trolling” began to be frowned upon as the online activities of a “seriously misinformed or deluded user”.²⁰⁴ At present, trolling, which involves the deliberate online posting of inflammatory or off-topic comments to provoke other users or disrupt communications, would likely be considered contrary to the social norms of the public generally and even amongst the class of avid Internet users. Trolling activities in the online environment are punishable and have been sanctioned against under the UK Malicious Communications Act 1988²⁰⁵ and

199 See Judith S Donath, “Identity and Deception in the Virtual Community” in *Communities in Cyberspace* (Marc A Smith & Peter Kollock eds) (Routledge, 1999) at p 40 (on the mass popularity of being a hacker in the 1990s and attempts by Usenet groups to distinguish themselves as hackers through language cues).

200 Wayne Rumbles, “Through the Looking Glass: Hacker Culture Reflected in Law and the Public Imagination” in *Cybercultures: Cultures in Cyberspace Communities* (Sabine Baumann ed) (Oxford: Inter-Disciplinary Press, 2012) at pp 121–142.

201 Wayne Rumbles, “Through the Looking Glass: Hacker Culture Reflected in Law and the Public Imagination” in *Cybercultures: Cultures in Cyberspace Communities* (Sabine Baumann ed) (Oxford: Inter-Disciplinary Press, 2012) at p 125.

202 Cap 50A, 2007 Rev Ed. Section 3 refers to a person who “knowingly causes a computer to perform any function for the purpose of securing access without authority to any program or data held in any computer”.

203 [2015] SGDC 36.

204 Sarosh Khan, “Can the Trolls Be Put Back under the Bridge?” (2013) 19(1) CTLR 9. 205 c 27.

Protection from Harassment Act 1997.²⁰⁶ In Singapore, the recent Protection from Harassment Act 2014²⁰⁷ sanctions against the use of threatening, abusive or insulting words or communications via the Internet which causes harassment, alarm or distress.²⁰⁸ Seen in this context, it is argued that a statement imputing a user to be a “troll” or a person with similar characteristics would be potentially defamatory in the eyes of reasonable Internet users.²⁰⁹

V. Conclusion

62 The construction of defamatory meaning for Internet publications is ever-evolving with the development of technology. This article argues that defamatory meaning can be properly analysed with reference to the different *communication* modes, the Internet *contexts* generated and the reasonable perspectives of Internet *communities* viewing the impugned publications. These three facets of the communication modes, contexts and communities and their impact on defamatory meaning should be further explored as the Internet continues to evolve.

63 With respect to the various Internet *communication* modes, how the general knowledge of the reasonable reader can be ascertained by reference to Internet resources such as Wikipedia to the extent that they represent the wisdom of the crowd may be considered, and the question of how true innuendoes may arise based on the special knowledge of users for a specific Internet medium may be analysed. It is recognised that online reputations can be built up, diminished and destroyed by defamatory remarks, even as the Internet medium itself has permitted individuals and businesses to mitigate the adverse impact and manage their online reputations.

64 The various Internet modes of communication may also impact on the *context* of the publication giving rise to social expectations which ultimately affect the defamatory meaning of the publication. The different Internet contexts can impinge on the following: the level of credibility and seriousness attributed to the publication, the assessment of anonymous postings, the interpretation of unique Internet language

206 c 40. Eg, “Facebook ‘Troll’ Sean Duffy Sentenced for Offensive Sophie Taylor Image” *BBC News* (16 March 2012) and “Twitter Troll Jailed for 56 Days after Mocking Tragic Bolton Midfielder Muamba” *Daily Mail Online* (27 March 2012).

207 Cap 256A, 2015 Rev Ed.

208 See ss 3 and 4 of the Protection from Harassment Act 2014 (Cap 256A, 2015 Rev Ed).

209 See Judith S Donath, “Identity and Deception in the Virtual Community” in *Communities in Cyberspace* (Marc A Smith & Peter Kollock eds) (Routledge, 1999) at p 45 (that being branded a troll is damaging to one’s online reputation).

such as emoticons, the readiness of courts to interpret postings and comments as a single publication viewed by the reasonable reader and the still evolving concept of Internet publications as a form of conversation or live debate that is distinct from the traditional print publication.

65 Lastly, with regard to the number of online communities which has increased significantly over the years, it is argued that there is merit in the general societal perspective to determining defamatory meaning based on the majority view in society. There is nonetheless a need to consider the minority segmental community perspective in view of the existence of multiple online communities. It is proposed that this segmental community perspective may be applied provided the plaintiff proves that he or she has suffered actual reputational damage based on the diminished views of the substantial members of the online community towards the reputation of the plaintiff as a result of the defamatory allegations and the defendant has, in publishing the defamatory allegations, reasonably anticipated or targeted that community. Though these online communities may have different perspectives towards the impugned publications which ultimately affect the plaintiff's reputation, it is suggested that strong policy reasons against recognising the perceived antisocial views of particular Internet communities should prevail over the application of the segmental community perspective.
