

## Websites, online media services, blogs, etc: reducing defamation liability for third party posts

### Speedread

2013 Australian and New Zealand cases continue evolution of the law, but it's still floating around. Exposure could ultimately reduce in relation to sites allowing third party content, such as comments on articles and blogs. But that's not clear yet. So our view remains that hosts should be cautious, as we said in our November 2012 article, *Google court loss: Shakeup for online defamation*:<sup>1</sup>

*"As to managing risk while still doing business online, a key step is to have a good system for taking down potentially defamatory material, especially after notice from someone else. Content should be reviewed regularly, the more so on sites that are inherently more risky."*

An additional point emerges from the NZ case: Facebook pages, on which defamatory material is posted, can make the account holder for that page liable in many instances.

April 2013 We'll deal with the March 2013 NZ case first and then the February 2013 Australian case.

Investigative journalist, Ian Wishart, collaborated in writing a book with the mother of the Kahui twins, whose non-accidental death had high profile.

Among other things,<sup>2</sup> a Mr Murray set up Twitter and Facebook accounts which had content that was critical of what Mr Wishart and the mother were doing.

Mr Wishart sued for defamation, in relation to material on the Twitter and Facebook pages, including posts by unnamed third parties. Mr Wishart said that Mr Murray was legally liable for those third party allegedly defamatory posts. Mr Murray applied to strike out that claim.

In a judgment dismissing that application,<sup>3</sup> the court undertook an extensive review of the Australian, US, English and New Zealand cases. (There are wide ranging and conflicting approaches in the cases (especially as between England and Australia, as we've noted in our earlier article)). The judge said, in comments applicable to many blogs, online media sites, etc: <sup>4</sup>

*"Those who host Facebook pages or similar are not passive instruments or mere conduits of content posted on their Facebook page. They will be regarded as publishers of postings made by anonymous users in two circumstances. The first is if they know of the defamatory statement and fail to remove it within a reasonable time in circumstances that give rise to an inference that they are taking responsibility for it. A request by the person affected is not necessary. The second is where they do not know of the defamatory posting but ought, in the circumstances, to know that postings are being made that are likely to be defamatory."*

That points to the prospect that the host will not necessarily be potentially liable in all instances.<sup>5</sup>

But:

- Exposure is wide anyway on that view, so hosts should be careful generally; and
- The law is still moving around and is some way off resolution (such as on appeals in Australian or New Zealand cases).

So our view as to what bloggers and hosts should do remains as quoted in the *Speedread* introduction to this article. As we said in our earlier article, we see a lot of defamatory material posted by third parties on blogs, online media sites, etc.

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Noteworthy too is how individuals and account holders with Facebook pages and similar sites can end up being liable for what is posted on the page by third parties: that is not a surprising outcome. Particularly on inherently risky pages, the FB or other page owner should review frequently and delete anything that's risky.

That the law hasn't settled yet is outlined in a new Australian case, *Rana v Google and Others* [2013] FCA 60. Mr Rana sued Google Australia, the US based Google Inc, and others, as to websites revealed on Google searches. Following New Zealand and Australia cases, the court tossed out the claim against Google Australia as it wasn't involved in the Google search function. The case against Google Inc may or may not be resurrected depending on amended pleadings to be filed. But the relevance here is that the Judge said that the law as to liability of providers such as Google is not yet settled.<sup>6</sup>

While the law is moving around, it's best to play it safe (and it may be best to do that anyway, especially on a high risk site).

1. <http://www.wigleylaw.com/assets/Uploads/Google-court-loss-Shakeup-for-online-defamation.pdf>
2. The judgment deals with other claims and issues
3. *Wishart v CR Murray and others* [2013] NZHC 540
4. At Para 117
5. Subject to the possibility of an innocent dissemination defence although that defence is heavily constrained in New Zealand in this context.
6. See Page 13. The court did not decide against the plaintiff on this ground, on an application to serve overseas, as it was not appropriate to do so at that procedural stage, as "the law in this regard is not settled".

**Wigley+Company**

PO Box 10842  
Level 7/107 Customhouse Quay, Wellington  
T +64(4) 472 3023 E [info@wigleylaw.com](mailto:info@wigleylaw.com)

and in Auckland  
T +64(9) 307 5957  
[www.wigleylaw.com](http://www.wigleylaw.com)

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