"Why is Lord McAlpine trending? *innocent face*" ....7 defamatory words

Speedread

That tweet, by Sally Bercow, the wife of the Speaker of the UK House of Commons, was enough for her to be liable for defamation to former Thatcher era Tory party official, Lord McAlpine. On its own the tweet means little. But in the context of media reports on child abuse in Wales, linked to an unidentified Tory official, and based on protocols well known to tweeters ("*trending*" and also emoticons), a court said in May 2013 that it had defamatory meaning: that Lord McAlpine was a paedophile who was guilty of sexually abusing boys living in care.[1] "*The tweet joined the dots and linked Lord McAlpine to the allegations.*" (In fact it was accepted he was not guilty of this as this was a case of mistaken identity).

To pen the tweet, Ms Bercow was largely picking up information in the media, online, and in tweeting history. That didn't matter: she would be liable in defamation for repetition of defamatory statements (unless the reportage defence[2] applied but Ms Bercow did not rely on that). Nor did it matter that a few days later, Lord McAlpine's name was widely disclosed in a notorious interview with Prime Minister Cameron.

There's no new law in this: this case is a reminder that online statements in blogs, Facebook, Twitter, online comments on press stories, and so on, even those that seem superficially innocuous, and repeat information from elsewhere, can have the author in hot water.

More than the author may be exposed in this way. The UK has just amended its law to deal with the defamation risk for hosting tweets, blog comments, and so on (in the Defamation Act 2013 (UK)). In other countries such as Australia and New Zealand, hosts such as Twitter, Facebook, websites, on-line newspapers, etc, face exposure for someone else's defamatory statement, as recent cases confirm.

Even account holders, such as an account holder on Facebook, can be liable for posts by third parties on their pages.

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What happened?

Sally Bercow has a high profile in the political and public life space, with around 50,000 twitter followers. To be admired is that, despite her husband being a Tory MP and Speaker of the House of Commons, she has aspirations to be a Labour MP.

Lord McAlpine was a leading Conservative Party official back in Margaret Thatcher's days including as the party's Deputy Chair and as a close aide to Margaret Thatcher. He's been out of the public eye for over 10 years.

Late last year, BBC ran a programme about abuse of children in a Wales care home. One of those children, now adult, accused a former Tory party official of abusing him. The BBC didn't name anyone, using descriptions instead such as "*a leading Conservative politician from the Thatcher years*" and "*a shadowy figure of high political standing*".

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John and Sally Bercow with their daughter

Lord McAlpine

The papers picked up the story, without naming Lord McAlpine.

In the end, however, the Judge noted that this was agreed to be a case of mistaken identity. The person who abused someone in the Wales care home was not the politician - Lord McAlpine - who that someone had believed him to be.

Twitter

The Twitter community also picked up the story. As is well known to many Twitter followers, the Twitter website has a "*Trends*" box, which identifies what is immediately popular. As Twitter explains, it "*helps you discover the hottest emerging topics of discussion that matter most to you. You can choose to see Trends that are tailored to you.*"

Paedophilia by high profile people of course already had a major focus with the BBC and Jimmy Savile problems, followed by other front page stories in the media, including the reference to a former senior figure in the Tory Party, when Ms Bercow posted her tweet in November 2012:

> *Why is Lord McAlpine trending?*
> *innocent face*

The fact that Lord McAlpine made it to "*Trends*" showed there was already extended tweeting about him.

Just as "*trending*" is part of well-known Twitter usage (well known to Twitter users that is, and that's what counts), so is the use of asterisks as in *innocent face*. That's like a stage direction or emoticon. As the judge said in the case, "*Readers*

are to imagine that they can see [Ms Bercow's] face when she asks the question in the Tweet." One of the issues for the judge to decide was whether the "*innocent face*" indicates sincerity (as contended by Ms Bercow) or insincerity and irony (as Lord McAlpine contended). The judge decided the latter applied.

A significant number of the followers of Ms Bercow's tweets re-tweeted her tweet to others (so its readership expanded more widely). Other tweeters, bloggers and writers probably defamed Lord McAlpine too. We don't know why he targeted Ms Bercow, but a common strategy is to target someone high-profile, *pour encourager des autres*.

Defamatory?

Whether a statement is defamatory is considered in context including surrounding information.[3] What is relevant is the hypothetical reasonable reader of the particular publication (followers of Ms Bercow's tweets in this instance) who is neither unduly suspicious nor naïve; a reader who can "*read between the lines*".

A subsidiary question is as to the severity of the defamation. Generally, for example, reporting that A is under investigation by the fraud squad is not taken to be a statement that A is fraudulent.

The judge didn't accept that the short tweet had largely "*neutral*" implications, as contended by Ms Bercow. In context, he said that the likely inference is that Lord McAlpine was the former senior Tory official in the BBC programme and media. Ms Bercow "*provided the last piece of the jigsaw puzzle*".

The Judge also noted that followers of Ms Bercow's tweets were likely to share her interest in politics and public life, and so be familiar with what was front page news at the time. The Judge noted that a Lord would typically be someone in public life, and often from a political background, so reference to Lord McAlpine in the tweet further drew the link. That being so, many followers could join the dots, thereby implicating Lord McAlpine.

Additionally, the defamatory inference was not just that he was under investigation, or something less serious, but that he *"was a paedophile who was guilty of sexually abusing boys living in care"*. In other words, the defamation was at the high end of severity.

We see plenty of online comments that sail close to the wind, and beyond. Care is needed. There but for the grace of God..... As Graeme Archer wrote in London's Daily Telegraph on 24 May:

> So, good: justice for the McAlpine One. I do think, though, that the case exemplifies a problem for humans that is ancient and universal, but which, thanks to technology, is more dangerous than ever. The tendency to rush to judgment, and the desire to be part of the crowd.
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> After all, Mrs Bercow was hardly alone in casting aspersions on Lord McAlpine: the Twittersphere had decided it knew who was the subject of the BBC's sensational report. Why not join in? The temptation is hard to resist (it's one reason I gave up on Twitter for a while; I'm not immune to the phenomenon). No one wants to be left behind; everyone wants to cast those stones.

Hosts and account holders might be liable too.

Just as in a hard copy world, the publisher and editor can be liable for a writer's defamation (and sometimes even the bookseller, the library and the printer can be liable), so too might online hosts, website operators, Twitter, Facebook, etc be liable.

Even account holders on sites such as Facebook might be liable for third party posts on their pages. If A has a Facebook page and does not take steps to delete a defamatory comment by B on her page, A can be liable for the defamation. (As with all of this article, the principles noted are of general application with modification in applicable countries (e.g. due to varying statute) such as the UK, Australia and New Zealand).

We've gone into detail on this in our articles, *Google win is little comfort for Google, media and content carriers*,[6] and *Websites, online media services, blogs, etc: reducing defamation liability for third party posts*.[7]

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1. *Lord McAlpine v Bercow* [2013] EWHC 1342

2. The so-called *Reynolds* defence, based also on the NZ case of *Lange v Atkinson*.

3. The judge dealt with the standard split between (a) plain and natural meaning (based on general knowledge) and (b) innuendo (based on extrinsic material). On both tests he said the tweet was defamatory.

4. Subject to laws as to innocent dissemination.

5. And in New Zealand, the more so in view of the way the innocent dissemination defence does not apply well to online activities.

6. http://www.wigleylaw.com/assets/Uploads/Google-win-is-little-comfort-for-Google-media-and-content-carriers.pdf

7. http://www.wigleylaw.com/assets/Uploads/Websites-online-media-services-blogs-etc-reducing-defamation-liability-for-third-party-posts.pdf