



## **Liability Of Mobile Service Providers For Defamatory Material Transmitted By Users Of Its Network**

**By Ky-Ann Y. Lee**

1. On February 29, 2008 a Joint Select Committee commissioned by Prime Minister Bruce Golding produced its report on their review of defamation laws in Jamaica (*The Report*).
2. One of the Committee's recommendations was to recognize the "various media by which statements could be published which would include wired and wireless means as well as new media e.g. streaming webcasts and podcasts".
3. Since then at least one mobile service provider has written to the Joint Select Committee expressing its concern as a service provider with the potential liability in defamation for the transmission of defamatory material by users of its telecommunication network.
4. This article examines the validity of the concerns of mobile providers and its potential liability at common law for defamation by users of its wireless network.

### **WHO IS A SERVICE PROVIDER?**

5. A service provider is generally defined as "an organization that provides some kind of communication service, storage service or processing service or any combination of the three...". A mobile service provider utilizes telecommunication networking as a platform for (among other things) users to transmit information either by SMS messaging (or text messaging) or by emails or instant messaging. For the purposes of this article, mobile publication is in reference specifically to SMS text messaging.

### **DEFAMATION DEFINED**

6. The law of defamation protects an individual's reputation. Defamation can either be in the form of a libel or a slander. Libel is defamation published in some permanent form; slander is oral defamation or defamation published in transient form. Most foreign jurisdictions do not distinguish between slander and libel but in Jamaica such a distinction stands.
7. To be held liable for defamation at common law, the defamatory material must be published to one person other than the person who is alleging that they have been defamed. Publication therefore occurs when a person negligently or intentionally takes part in, or authorizes the communication of material.
8. In Jamaica, outside of the common law, there are two statutory instruments which govern the law of defamation. There is the Defamation Act and the Slander and Libel Act. Both laws derive from archaic UK legislation and fail to account for modern developments such as the internet and mobile telephone service.

## **DOES IT APPLY TO SERVICE PROVIDERS**

9. In examining this question, one of the primary issues which arise is, how would defamatory material published over a mobile network be classified – is it slander or is it libel?
10. As SMS messages are in a permanent form written for possible infinite publication there is a suggestion that it is comparable in nature to that of a book and therefore is libelous and not slanderous and therefore actionable by a claimant without proving loss.
11. However, whether a mobile provider can be regarded as publisher for the purpose of liability turns largely on the role it plays in communicating the material.
12. It is clear that the person who actually sends the SMS and those persons who subsequently forward the message can be liable for the defamatory publication, but the role of the service provider is much different. It has been suggested that the person who provides the means for communication may not be held liable as a publisher unless he or she was aware of the content communicated or assumed a general responsibility for the content.
13. A good example of the application of the law of defamation to service providers is the recent litigation surrounding defamation committed via the internet and whether an internet service provider can be held liable.
14. In an English High Court Case, it was held that an internet provider which performed no more than a “.....*passive role in facilitating postings on the internet could not be deemed to be a publisher at common law.....there had to be knowing involvement in the process of the publication of the relevant word.....it is not enough that a person merely plays a passive instrumental role in the process.....*” Surely, however a case could be built if the mobile provider was made aware of the defamatory content, had the means to stop it (without breaking any further laws) and failed to do so.
15. The Judge in that case clearly drew an analogy between internet service providers and the postal service on the ground that they do not participate in the process of the publication but merely act as facilitators in a similar way to the postal service. Like the postal service, a mobile service provider's main responsibility is transmission and they have no active knowledge of the content.
16. The Judge stated that, “.....*in determining responsibility for publication in the context of the law of defamation it seems to me to be important to focus on what the person did, or failed to do, in the chain of communication.....the state of the defendant's knowledge can be an important factor. If a person knowingly permits another to communicate information which is defamatory where there would be an opportunity to prevent publication there would seem to be no reason in principle why liability should not accrue.....*”.

## **CONCLUSION**

17. Based on the cases decided by the Court to date, it would seem that if one applies the same principles to mobile service providers that are applied to internet service providers, and there appears to be no reason why this should not be done, then, once the mobile service provider has no knowledge of the content being transmitted, they should not be held liable for defamation. However, in the absence of any decisions of the Court specifically on this point the

question remains open until a claim is brought in the Court for defamation against a mobile service provider.

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