Case Comment: Cairns v Modi

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The facts

Chris Cairns, a former New Zealand international cricketer, brought proceedings against the former chairman of the Indian Premier League, Lalit Modi, for remarks that he had made on his Twitter account accusing Cairns of having taken part in match fixing or that there were strong grounds to believe that he had done so while playing in the rival Indian Cricket League. The defendant brought proceedings for an initial hearing on the grounds that a real and substantial tort had not occurred within the United Kingdom on the basis that the extent of publication within the United Kingdom was limited and that an action would be an abuse of process under the principle of *Jameel v Dow Jones & Co Inc*.[1]

It was remarked in *Jameel* that:

> "It would not be right to permit this action to proceed. It would be an abuse of process to continue to commit the resources of the English court … where so little is at stake."[2]

The claimant contended that the evidence of publication of the tweet was sufficient to pass the *Jameel* hurdle while in any event the question of substantiality was not merely down to the number of publications as it also required an assessment of the seriousness of the allegation and its capacity to damage the claimant.

The court took evidence from two experts in the field who provided evidence as to the number of individuals that would have seen the tweet. The defendant expert anticipated the number as 35, on the basis of the total number of followers, of whom a percentage were in the United Kingdom, of whom not all would have seen the remark when made. The claimant expert contended that the actual number was higher and closer to 100 on the basis of followers and other methods of dissemination.[3]

The judgment

Mr Justice Tugendhat held that the number of publications in the instance was not speculative and insufficient, as there was more to an abuse of process than simply the number of publishees. A claimant's primary concern in an action for defamation is vindication and not damages for harm suffered in the past. Vindication can come in the form of a retraction, verdict for the claimant or a public apology, and as a result the claimant can legitimately and reasonably pursue a claim where the publication has had a limited number of publishees and his aim is to prevent further dissemination.[4] The claimant resided in the United Kingdom and expected to return to live there again and therefore had a reputation to protect in the United Kingdom.

Tugendhat J. remarked that:

> "[A] claimant can legitimately and reasonably pursue a claim where the publication that has already occurred is limited, when his purpose is to prevent, or at least limit, further publications to a similar effect being made in the future."[5]

The sensationalist nature of the remark being made on Twitter along with the fact that the pair of individuals involved were prominent members of the cricket community meant that the likelihood of the content being republished was a great one.

As a result, the court held that there had been substantial publication of the defamatory remarks as it was anticipated that it went beyond the mere number of individuals that would have seen it following the defendant. At the same time as the purpose of an action was vindication, the fact that the publication might be borderline was not a decisive factor. As a result, the claimant was allowed the opportunity to bring proceedings against the defendant for the tweet.

Comments

The decision can be seen as hugely valuable in two contexts: one, for reaffirming that the primary purpose of actions of defamation is to vindicate the damage done to the claimant's reputation by remarks. One might suggest that the purpose of cases of defamation was starting to be perceived as primarily financial redress, especially in light of the development and potential damage done by the web. The development of the web has meant that the reach of a remark is far greater in terms of numbers than before, allowing a claimant the greatest opportunity to bring an action in the jurisdiction most friendly to him, traditionally the United Kingdom, for seeking financial redress, but Tugendhat J.'s words articulate that vindication and not damages is the key.

The second aspect to come out of the decision was the fact that the actual number of publishees of a particular defamatory remark was not key but the potential number being significant would be sufficient. The decision to move away from being able to articulate exactly how many publications of a defamatory remark occurred is a reflection of the continued modernity of technology. The extent of publication in the case of a tabloid magazine can be determined to an extent by the number of physical copies of the magazine in question sold; however, there

[1] *Jameel v Dow Jones & Co Inc* [2005] Q.B. 946 CA (Civ Div).
[2] *Jameel v Dow Jones* [2005] Q.B. 946 at 970.
[3] *Cairns v Modi* [2010] EWHC 2859 (QB) at [18]–[21].
[4] *Cairns v Modi* [2010] EWHC 2859 (QB) at [43].
[5] *Cairns v Modi* [2010] EWHC 2859 (QB) at [44].

simply is no way of knowing in respect of a tweet, where it can be retweeted by any individual, regardless of whether they follow the user or not, or can be searched for.

The move away from actual publishee numbers and the strengthening of the concept of vindication is a reflection of the development of social web technologies online. Their aim is that the largest number of people interact and collaborate with one another beyond traditional relationships. The ability to determine publishees is greatly reduced but, regardless, vindication needs to be settled. It is likely that this decision is going to be among the first as social web technologies continue to develop and the number of cases of defamation continue to rise.