Crisp Newsletters

A landmark change to Australian defamation law regarding social media

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The High Court of Australia has recently ruled that media companies may be treated like"primary publishers" of comments left on their social media posts by third parties and thus liable for any defamation they constitute,[1] *a signifcant finding for the the law of defamation and its nexus with online activity. Going forward, parties should be more conscious and cautious of their digital presence and the ramifications it may have for their business pusruant to this momentous decision. In this newsletter we look at the case of* Fairfax Media Publications Pty Ltd; Nationwide News Pty Limited; Australian News Channel Pty Ltd v Voller *and how those who operate social media pages can best prepare themselves for the legal challenges it has introduced going forward.*

In summary:

This case was the result of the now notorious conduct of NT prison guards against a youth detainee who pursued action against news media companies (Defendants) that made social media posts which herded defamatory comments posted by third-parties against him. For many social media users, this decision confirms and enables third-parties to publish content on your social media posts, which if defamatory, may find you responsible and liable for any legal action in defamation as the 'primary publisher' of such content.

Background

From late 2016-early 2017, the Sydney Morning Herald, The Australian and Sky News (owned by the three appelant media companies, respectively) all published articles regarding the incarceration of Dylan Voller in the Northern Territory Don Dale Youth Detention Centre, posting links to the articles on their Facebook pages. Members of the public left what Mr Voller alleged to be defamatory comments on these Facebook posts, with the 24-year-old bringing proceedings against the three companies for this.[2]

[1] *Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller* [2021] HCA 27.

[2] Ibid [2].

Aside from the central question of whether the comments actually constituted defamation, the separate question of whether the media companies could be held liable for them arose. At trial, the Supreme Court of NSW – and the Court of Appeal after it – answered this in the affirmative, holding the companies to be the 'publishers' of the posts and thus liable for the comments left by third parties on them.[3] This contentious question was consequently brought to the High Court on appeal by the companies.

Who will be deemed to be a 'publisher' in defamation law?

Dismissing the appeal, the majority of the Court held that a publisher is someone who makes the defamatory material available to third parties[4] a finding that was consistent with Trkulja v Google LLC[5] and Webb v Bloch[6] Although the media companies argued that they could not be the publisher of these comments as they had not been centrally involved in the communication of the comments,[7] the Court found that all that is necessary to be a publisher in the context of Facebook posts is intentional participation in the communication process[8] – the companies'creation of a public Facebook page, posting their articles to those pages and thereby encouraging and facilitating for Facebook users to engage with and comment on them was taken to constitute this.[9] The Court further held that it was immaterial that Facebook did not allow comments to be disabled – the companies could not claim to misunderstand Facebook's functionality whilst simultaneously reaping its commercial benefit.[10]

In coming to this decision, the Court's majority decided not to relax the strict common law test when determining who will be held to be the publisher for the purposes of defamation liability. Although their honours acknowledged the changing nature of communication in the digital age ("a shift from 'one to many' publication to 'many to many' publication"[11]), they did not believe that this warranted a lowering of legal standards[12]. Their reasoning for this was twofold: firstly, the time-honoured

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[3] *Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller* [2020] NSWCA 102 (1 June 2020), [47].

[4] *Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller* [2021] HCA 27, [32].

[5] Trkulja v Google LLC [2018] HCA 25

[6] Webb v Bloch [1928] HCA 50

[7] Ibid [13].

[8] Ibid [32].

[9] Ibid [105].

[10] Ibid [102].

[11] Ibid [86].

[12] Ibid.

principle that defamation law seeks to protect against damage to reputation regardless of the ease by which this may be done in the digital era, and secondly, Parliament – not the courts – is best suited to examine and amend the law in line with technological and sociological change and the freedom of communication.[13]

The potential defence of innocent dissemination

Because the Court only considered the separate question of whether the media companies were the publishers of the comments and not the central question of whether they were actually defamatory of Mr Voller, it left open whether the appellants could rely on any defences – most notably, innocent dissemination. The defence of innocent dissemination aims to shield parties such as newsagents, booksellers, librarians, internet service providers (ISP) and now, too, social media page administrators, who unknowingly publish defamatory material.[14]

For this defence to be established, it must be shown that the person published the defamatory comments merely as a 'subordinate distributor' (a non-primary distributor and non-author without editorial control[15]) and neither knew, nor ought reasonably to have known, that the material was defamatory.[16]

With the publication question answered by the High Court and the defamation case now proceeding in the Supreme Court of NSW, the media companies will now have the chance to raise this defence and give the Supreme Court the chance to consider its application in the context of social media.

Who this impacts

This case established that media companies are publishers of the comments, for the judgements of Kiefel CJ, Keane and Gleeson JJ, confirmed that "publication" is any act of participation in the communication of defamatory material to a third party which is sufficient to make a party a 'publisher' of content on social media. However, there remain unresolved ramifications on the scope of Facebook users who could be affected by such a decision. Post-case analysis has allowed us to the form the position that regardless of whether you are an individual Facebook user or an online community group, if you post content onto a social media platform that encourages or invites

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[13] Ibid [89].

[14] *Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller* [2021] HCA 27, [37].

[15] *Defamation Act 2005* (NSW) s 32(2).

[16] Ibid s 32(1).

defamatory third-party comments – in other words, fit the definition of a publisher - you may potentially be liable for those remarks.

However, the consequences of this decision on P&C groups and community organisations are, for now, regulated by the introduction of the Model Defamation Amendment Provisions 2020, introduced 1 July 2021. Significantly, Stage 1 of the reforms legislate a 'serious harm threshold' under which the plaintiff has to prove they have suffered, or are likely to suffer serious harm to their reputation as a result of the published comments – the aim of which is to distinguish serious and trivial defamation cases.

What you should consider

If you are concerned about the risk of defamation claims, you could turn off public comments on some or all of your social media pages. Certain platforms such as Facebook and Instagram now allow you to automatically disable comments based on offensive keywords that they contain, making this choice even easier.

If you are an organisation that is large enough to hire a social media/brand/marketing manager, it may be prudent to discuss with them and their team investing time and resources moderating comments, weighing the potential threat of a defamation claim against the costs of compliance.