

YOU COULD BE LIABLE FOR DEFAMATORY COMMENTS MADE BY A THIRD PARTY ON YOUR FACEBOOK PAGE

A recent High Court of Australia decision highlights what amounts to a defamatory publication in the context of using and maintaining a Facebook page. The decision in *Fairfax Media Publications Pty Ltd -v- Voller [2021] HCA 27 (8 September 2021)* involved the High Court of Australia being required to make a determination as to whether *Nationwide News Pty Limited and Australian News Channel Pty Ltd* which published newspapers in New South Wales and maintained public Facebook pages were publishers of certain defamatory comments posted by third parties on their respective Facebook pages.

The Respondent (Plaintiff) claimed that the Appellants (Defendants) had posted particular news stories referring to him, including posts concerning his incarceration in a Juvenile Justice Detention Centre in the Northern Territory which resulted in a number of third party Facebook users responding with comments that were defamatory of him. The Respondent alleged that the Appellant newspapers were publishers of those defamatory comments and thereby liable to the Respondent in an action for defamation.

The question before the High Court of Australia was whether the Respondent had established the “publication” element of the cause of action of defamation against the Appellants in respect of each of the Facebook comments by third party users.

In the case there was evidence before the Primary Judge which was largely uncontentious that an Administrator (of the Facebook page) could prevent or block the posting of comments by third parties through various means, although the Facebook platform did not allow all posts on the public Facebook page to be blocked. Individual comments could be deleted after they were posted, but this would not prevent publication. It was possible to “hide” most comments through the Application of a filter which would prevent publication to all except the administrator, the third party user who posted the comment and their Facebook “friends”. The Appellants had posted hyperlinks to news stories referring to the Respondent on their Facebook pages. In essence, clicking the hyperlink then took the reader to the full story on the Appellant’s news website. Readers were invited by options which appeared under the post to either “like”, “comment on” or “share” the post. The aforementioned options were standard Facebook page options and features available to Facebook readers.

An action for defamation is brought under the provisions of the Defamation Act. Since 2005 there has been essentially harmonization of defamation laws in Australia by the introduction of national uniform legislation, in the States and Territories known as the “*Defamation Act*”.

In the *Voller* decision, the High Court of Australia concluded in a majority decision (5:2), that the news organisations were publishers of the third party’s defamatory comments of the Respondent on their respective Facebook pages.

The majority reasoning of the High Court of Australia was comprised in two separate Joint Judgements, comprising *Kiefel CJ, Keane and Gleeson JJ* and secondly, *Gordon and Gageler JJ* in a second Joint Judgement.

An action for defamation does not require proof of fault. Defamation is a tort of strict liability. In that sense a Defendant may be liable even though no injury to reputation was intended and the Defendant acted with reasonable care.¹ The intention of the author of a defamatory matter is not relevant because the actionable wrong is the publication. It is often persons other than the Author who are liable as a publisher. A publisher’s liability does not depend upon their knowledge of the defamatory matter which is being communicated or their intention to communicate it². The liability of a person as a publisher “depends upon mere communication of the defamatory matter to a third party”.³ No question as to the knowledge or intention of the publisher arises. The communication may be quite unintentional and the publisher may be unaware of the defamatory matter but the person communicating the defamatory matter will nevertheless be liable.⁴

Publication for the purposes of the tort of defamation has been emphasised in Australia to be a “bilateral act – in which the publisher makes [matter] available and a third party has [that matter] available for his or her comprehension.”⁵ Publication of matter by means of the internet is complete when and where the matter is accessed by a third party in a comprehensible form.⁶ The common law has recognised through a long standing rule that every intentional participant in a process directed to making matter available for comprehension by a third party is a “publisher” upon the matter becoming available to be comprehended by a third party. All

¹ *Fairfax Media Publications Pty Ltd -v- Voller [2021] HCA 27.*

² *Ibid*

³ *Lee -v Wilson & Mackinnon [1934] HCA 60*

⁴ *Ibid; Fairfax Media Publications Pty Ltd -v- Voller [2021] HCA 27 at [28]*

⁵ *Fairfax Media Publications Pty Ltd -v- Voller [2021] HCA 27 at [61]*

⁶ *Ibid*

that is required is a voluntary act of participation in its communication.⁷ Defences to defamation are available to prospective Defendants, providing lawful excuses and justification. The Appellants could avoid liability as a publisher if the Defence of “innocent dissemination” could be established. The historical basis of such defence concerned people in selling newspapers and it is a requirement to establish that although whilst such person might be liable as a publisher, if they were able to show that they did not know that the newspaper was likely to contain a libel and the lack of their knowledge was not the result of their own negligence they would not be liable for the libel⁸. The innocent dissemination defence does not apply to the “primary” publisher but to “subordinate” or “secondary” publishers. The Appellants in this particular instance sought to rely on the recent application of that principle in particular in a recent Hong Kong Court of Appeal decision in the matter of *Oriental Press Group Limited -v- Fevaworks Solutions Limited [2013] HKCFA 47*. That case concerned Defendants who administered a website which hosted an internet discussion forum on which users posted defamatory matters.

Were the Appellants able to rely on the defence of innocent dissemination?

The Primary Judge in this instance found that in Australia there are over 15 million Australians who are Facebook users. The Appellants in the instant case had chosen to operate public Facebook pages in order to engage commercially with that significant segment of the population. The Primary Judge also found that the primary purpose of the operation of each of the Appellant’s public Facebook page was to optimize readership of the newspaper (whether hard copy or digital) or broadcast and to optimize advertising revenue. Each Appellant provided the forum for its publication and encouraged for its own commercial purposes, the publication of comments.

The majority⁹ found that having regard to those findings, the Appellants attempt to portray themselves as passive and unwitting victims of the Facebook functionality (algorithm) had an air of unreality having regard to the action that the Appellants had taken to secure the commercial benefit of the Facebook functionality and in those circumstances the Appellants had to bear the legal consequences and consequently were publishers.

⁷ *Fairfax Media Publications Pty Ltd -v- Voller [2021] HCA 27* at [32]; see also *Trkulja -v- Google LLC [2018] HCA 25*; *Webb -v- Bloch [1928] HCA 50*

⁸ *Emmens -v- Pottle (1885) 16 QBD 354*; *Fairfax Media Publications Pty Ltd -v- Voller [2021] HCA 27* at [37]

⁹ *Fairfax Media Publications Pty Ltd -v- Voller [2021] HCA 27* at [102]

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The minority of High Court Justices (Edelman and Steward JJ) considered that whilst the Appellants may have been publishers, the Facebook comments made by third party users on their sites had to bear more than a remote or tenuous connection to the subject matter posted by the Appellants. There was no evidence before the Primary Judge that the Appellants had intended to publish anything and everything unrelated to their posted news stories.

In conclusion, it follows from this decision that all businesses with Facebook pages or similar social media platforms should carefully monitor and administer third party comments on those platforms as failure to do so could give rise to potential defamation actions.

Interestingly, this decision is one where the finding was made by the High Court of Australia in the context of publication by commercial news organisations in the conduct of their normal business. That conduct entailed maximising commercial benefits through the use of the Facebook platform. It remains to be seen however whether in the context of an individual (private) Facebook page whether this decision might be distinguished.

At this stage diligence and oversight of your Facebook page and other similar social media platforms is strongly recommended so as to minimize the risk of defamation proceedings.

If you have any concerns in relation to defamation then please contact Roderick Hoffensetz on 07 3281 3088 or e-mail at rhoffensetz@hoffensetz.com.au.