

High Court confirms Facebook page operators are liable for defamatory third-party comments

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

AT A GLANCE:

- Fairfax Media Publications, Nationwide News and the Australian News Channel are currently being sued in separate proceedings by Dylan Voller over third-party comments made about him on their Facebook pages.
- Voller alleges that the media companies were publishers of the third-party comments for the purposes of his defamation claims.
- Before determining whether the Facebook comments were defamatory, the NSW Supreme Court ordered that the question concerning publication be decided separately.
- On 8 September 2021, the majority of the High Court (5-2) upheld two decisions of the lower courts and confirmed that media companies are liable for defamatory comments left on their social media posts.
- This is a significant decision for all organisations that use social media platforms and their insurers.

BACKGROUND

Fairfax Media Publications, Nationwide News and the Australian News Channel (Media Companies) are currently being sued in separate proceedings by Dylan Voller. Each defendant published stories about Voller's incarceration in a juvenile justice detention centre, which they then shared on their respective Facebook pages where it is alleged that third-party Facebook users made defamatory comments about Voller in the "comments" section.

Relevantly, Voller alleges that the media companies were "publishers" of the third-party comments for the purposes of his defamation claim against each of the Media Companies.

Before determining whether the Facebook comments were in fact defamatory, the NSW Supreme Court ordered that the question concerning publication be decided separately from the balance of the proceedings. The question was whether Voller *"has established the publication element of the cause of action of defamation against the [Media Companies] in respect of each of the Facebook comments by third-party users"*.

The primary judge (Rothman J) answered in the affirmative, as did the NSW Court of Appeal when the original decision was appealed. Significantly, at the time the alleged defamatory comments were posted to Facebook, the comments section could not be "turned off" or blocked on Facebook by the Media Companies.

Comments could only be deleted after they were posted (meaning they were still published), or the administrator could "hide" comments from the wider Facebook community (but they could still be visible and published to the Facebook users' friends and the administrator).

It was also accepted that the number of comments is an important aspect of the use of a public Facebook page because comments increase the profile and popularity of the page, which in turn increases the readership of the digital newspaper or broadcast, and the revenue from advertising on both the page and the digital newspaper or broadcast. Comments are therefore an important social media feature for media companies.

THE HIGH COURT'S DECISION

The Media Companies' Arguments

The Media Companies appealed the decision to the High Court arguing, amongst other things, that:

- To be considered publishers, they must have been instrumental to, or a participant in, the communication of the alleged defamatory matter. However, they did not make the defamatory comments available to the public, did not participate in their publication, and were not in any relevant sense instrumental in their publication – they merely administered a public Facebook page on which third parties published material.
- Their position was analogous to a supplier of paper to a newsagency, or owners/occupiers of premises in which unauthorised third parties affixed defamatory statements on the wall. In the latter case, the courts regard them as publishers only if, after becoming aware of the statements, the occupier allowed the defamatory comments to remain in place and the circumstances justified an inference that they had accepted responsibility for the continuing publication of the statement by adopting or ratifying it.
- The common law requires that the publication of a defamatory matter be intentional, that the publisher intends to communicate the matter complained of, and that it is something more than “mere dissemination”. The Media Companies submitted that they did not possess such an intention and did not have knowledge of the defamatory comments.
- Innocent dissemination should be regarded not as a defence that excuses the defendant from liability, but to allow it to demonstrate that there was no publication at all.

The Decision

By a majority of 5-2, the High Court upheld the decisions of the lower courts and confirmed that the Media Companies published the third-party comments on their Facebook pages in the relevant sense.

Notwithstanding the dissenting judgments, all Justices confirmed that defamation is a tort of strict liability. As it was eloquently put by Chief Justice Kiefel and Keane and Gleeson JJ: “[a]n action for defamation does not require proof of fault. Defamation is a tort of strict liability, in the sense that a defendant may be liable even though no injury to reputation was intended and the defendant acted with reasonable care.”

Majority Judgments

Chief Justice Kiefel and Justices Keane and Gleeson held that “[t]he intention of the author of the defamatory matter is not relevant because the actionable wrong is the publication... A publisher's liability does not depend upon their knowledge of the defamatory matter which is being communicated or their intention to communicate it”. What is required to be a publisher is “mere communication of the defamatory matter to a third person” and a “voluntary act of participation in its communication” meaning they were instrumental in, or contributed in any extent to, the publication.

Their Honours dismissed the appeal with costs and affirmed the decision of the Court of Appeal that the acts of the Media Companies in facilitating, encouraging and thereby assisting the posting of comments by the third-party Facebook users rendered them publishers of those comments.

In their joint judgment, Justice Gageler and Gordon agreed that intention, knowledge (of defamatory content) and degree of participation are irrelevant to determining whether someone is a publisher or not.

They determined all that is required is “an intention to facilitate, or provide a platform for, communication of the allegedly defamatory matter”. They held that the Media Companies, by creating and administering a Facebook page and posting content on that page, encouraged and facilitated the publication of comments from third-parties and were therefore publishers of those comments.

Dissenting Judgments

Justices Edelman and Steward dissented on the issue of whether the Media Companies were “publishers” of the third-party comments, and they took a different view of what was required to voluntarily participate in the publication of defamatory content.

Justice Edelman found that “publication” will be established where the comment has a more than remote or tenuous connection to the subject matter posted by the author of the post and is a genuine comment on the story written in response to the invitation to leave a comment, irrespective of whether the appellants knew of, or could have known of, the comment at the time it was published. He did not accept that the Media Companies be found liable as publishers of defamatory comments where such comments are irrelevant to the subject matter of the story.

Critical to this reasoning, his Honour accepted that by operating a Facebook page, the Media Companies invited comments to be made on the story but such invitation “did not manifest any intention, nor any common purpose with the author of the comment, to publish words that are entirely unrelated to the posted story.”

Justice Steward considered that media outlets should only be exposed to liability regarding comments that they had “procured, provoked or conduced”, as distinct from merely facilitating. The latter was a more apt description of what the Media Companies had done by creating a Facebook page, creating a post on it, and allowing third-party access to that Facebook page to post a comment.

OBSERVATIONS & IMPLICATIONS

The consequence of the High Court’s decision, which was foreshadowed in the reasons of Justice Steward, is that:

“... all Facebook page owners, whether public or private, would be publishers of third-party comments posted on their Facebook pages, even those which were unwanted, unsolicited and entirely unpredicted. Indeed, it might extend to cases where a Facebook page is hacked and then has posted on it entirely unwelcome, uninvited and vile defamatory comments.”

Of course, the decision is not limited in its application to media companies. It applies to any person or entity who operates a page on Facebook or other social media platforms.

The decision confirms that, by using and administering a social media platform, a person or organisation is creating a vehicle by which the community can engage with that person or organisation by leaving comments. The danger is that, in such environments, social media users often do away with the formalities of communicating with strangers, and people tend to speak more “freely” and impulsively, which has obvious implications under defamation law.

Clearly, this decision leaves insureds vulnerable to claims in defamation, notwithstanding the fact that they have no direct control over who leaves comments on their social media pages.

From an insurance perspective, the decision again underscores the need for insureds to ensure they are appropriately protected under any relevant policy of insurance, especially where social media platforms are an integral part of their business.

From a risk management perspective, organisations need to constantly monitor their social media content and may well be financially justified in employing someone to specifically review and, if appropriate, remove comments. Another strategy may be to disable the “comments” section completely, however for some businesses, such as media companies, this approach may affect readership and revenue.

While the issue of publication has been resolved by the High Court, we await the lower courts’ decisions on whether the comments left by readers in the Voller matter are defamatory.

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