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DEFAMATION LAW FOR THE DIGITAL AGE: THE HIGH COURT DECIDES MEDIA COMPANIES ARE "PUBLISHERS" OF THIRD PARTY FACEBOOK COMMENTS

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Legal Briefings – By **Christine Wong and Greta Ulbrick.**

The High Court in *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27 (***Voller***) found that media companies were "publishers" of third-party Facebook users' comments made on their Facebook pages. In creating Facebook pages and posting content on them, media companies had facilitated, encouraged and assisted the publication of third-party comments on their pages.

The decision opens the door to **any organisation or person** with a public social media page being liable for potentially defamatory comments of third parties. This is irrespective of whether the organisation or person actually knows of the (alleged) defamatory matter, or intends to convey it. All that is required is a voluntary act of participation in communication.

WHAT DOES THIS MEAN FOR COMPANIES?

BUILDING_LAW_RGB_IL.PNG 	The **important issue of liability remains unresolved**. The question of whether the companies can rely on the statutory defence of innocent dissemination will likely now be decided by the NSW Supreme Court. The separate question of whether the protections under the Broadcasting Services Act applicable to internet content hosts are enlivened in these circumstances has not yet been resolved in these proceedings.
FEEDBACK_FORM_RGB_IL.PNG 	Companies should consider increasing efforts to **monitor and moderate public pages** where third party comments can be posted. This may include considering whether potentially defamatory content should be removed, particularly if companies have notice of such material.
GROUP_PEOPLE_RGB.PNG 	**Consider implications of ongoing law reform.** States and Territories are considering law reforms directed at modernising Australia's defamation laws for the digital age. **Stage 1** of that reform commenced on 1 July 2021 with the Model Defamation Provisions in NSW, Victoria, South Australia, Queensland and the ACT (with other jurisdictions to follow). A key change is the introduction of a threshold of seriousness, requiring plaintiffs to establish "serious harm to reputation". **Stage 2** of the reforms is ongoing. It includes consideration of statutory protection for "internet intermediaries", which may capture situations such as that in *Voller* in the future. The ALRC is also considering how defamation law should apply in the internet age, subject to the outcome of the Stage 2 reforms

WHAT WERE THE FACTS IN VOLLER?

The case concerned a number of media companies and Dylan Voller, who was detained as a 17 year old in a highly publicised incident at Don Dale Youth Detention Centre. Between December 2016 and February 2017, the media companies posted news items on their Facebook pages regarding Mr Voller's incarceration. That resulted in third parties posting comments that were critical of Mr Voller.

Mr Voller commenced defamation proceedings alleging those comments carried defamatory imputations, and that the media companies were liable as publishers of the comments.

PRIOR DECISIONS

The first instance judge, Rothman J, heard the issue of whether the media companies were "publishers" as a separate question. His Honour found they were primary publishers, and therefore not entitled (as they otherwise would be) to plead the defence of innocent dissemination.

On appeal to the NSW Court of Appeal, the media companies contended that they only "administered", rather than "published", the Facebook pages. The Court dismissed the appeal and confirmed the principle in *Trkulja v Google* (2018) 263 CLR 149 (***Trkulja***) that "*a person who participates and is instrumental in bringing about publication of defamatory matter is potentially liable for having done so notwithstanding that others may have participated in that publication in different degrees*".

Additional media companies sought leave to intervene, raising a further issue as to whether the defamation claim, made under NSW law, was subject to the *Broadcasting Services Act 1992* (Cth), Sch 5, cl 91. Clause 91 provides that a state law is of no effect if it subjects an 'internet content host' to liability in circumstances where the host is not aware of the nature of the content. Leave was declined by the Court of Appeal so this issue remains unresolved.

IN THE HIGH COURT

On the question of whether the media companies were "publishers", by a 5-2 majority, the High Court upheld the NSW Court of Appeal's approach. The Court confirmed the principle in *Trkulja* and said that a publisher is someone who "*has been instrumental in, or contributes to any extent to, the publication of defamatory matter*". All that is required is "*a voluntary act of participation in its communication*" (at [32]).

By creating the Facebook pages and posting content on them, the media companies had met this standard. Their acts in facilitating, encouraging and assisting third-party Facebook users to post comments rendered them publishers of those comments (at [55]).

Steward and Edelman JJ dissented on the test for "publication" in this context. They considered that the test was whether particular third party comments had been "procured, provoked or conduced" by the media companies' posts.

The media companies also argued (drawing on case law in relation to the common law defence of innocent dissemination) that no publication had occurred because there was no intention to communicate the defamatory matter. The High Court rejected this. There is no requirement to demonstrate an intention to communicate defamatory material in order to make out publication.

The question of "publication" having been answered, the matter will return to the NSW Supreme Court for adjudication of the substance of the case. We expect the media companies to contend that they are subordinate publishers in which case the protections of the innocent dissemination defence may apply.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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