

SOCIAL MEDIA USERS AND OPERATORS BEWARE! HIGH COURT CONFIRMS THAT FACEBOOK PAGE OPERATORS ARE 'PUBLISHERS' OF THIRD PARTY COMMENTS

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By: Christien Corns, Sam Rappensberg, Kimberley Wittner

The majority of the High Court of Australia has dismissed the appeal of three media organisations from the decision of the New South Wales Court of Appeal and affirmed they were 'publishers' of comments left by third party users on content 'posted' to their respective Facebook pages.

It is important to note that the judgment of the High Court **does not** hold the three media organisations liable to the plaintiff Dylan Voller in defamation. Mr Voller has instead now overcome one of the first 'hurdles' plaintiffs face in bringing defamation claims. The decision nevertheless has significant implications for social media users in particular.

BACKGROUND

Mr Voller claims that Fairfax Media Publications Pty Ltd, Nationwide News Pty Limited and Australian News Channel Pty Ltd (the Media Organisations) each defamed him, on the basis that they 'published' defamatory comments left by third parties on content 'posted' by the Media Organisations to their respective Facebook pages regarding Mr Voller.

To bring a claim in defamation, one of the first 'threshold' issues Mr Voller must meet is that of 'publication' - that is, did the Media Organisations 'publish' the alleged defamatory comments to a person other than Mr Voller?

The Media Organisations took up this 'threshold' issue, no doubt with a view to 'knocking out' Mr Voller's defamation claims early.

The New South Wales Supreme Court and Court of Appeal each held that the Media Organisations were 'publishers' of the third party comments, such that Mr Voller's defamation claims satisfied the 'publication' threshold. This issue has now been considered and determined by the High Court.

THE HIGH COURT DECISION

The majority (5 to 2) of High Court found that the Media Organisations were 'publishers' of the third party comments left on their Facebook pages.

Kiefel CJ and Keane and Gleeson JJ jointly held that the Media Organisations were 'publishers' of the third party comments in this case, because they **facilitated, encouraged and in doing so, assisted**, the publication of the third party comments.

Gageler and Gordon JJ held that by utilising the Facebook platform and administering and 'posting' content to their public Facebook pages, the Media Defendants encouraged and facilitated the 'publication' of third party comments on their content.

The Media Defendants' submissions to the effect they were 'innocent disseminators' of the third party comments and should not be treated as 'publishers' of those comments were strongly rejected by Gageler and Gordon JJ. The common law and statutory 'innocent dissemination' defences available to the Media Organisations will be determined upon Mr Voller establishing that he was defamed by the third party comments.

Edelman and Steward JJ each dissented and allowed the Media Organisations' appeals in part, setting out alternate constructions of the 'publication' threshold to be met by Mr Voller.

Edelman J would require Mr Voller to establish that the third party comments in question were connected to the matter 'posted' by the Media Organisations in a way that is *"more than remote or tenuous"*.

Steward J would require Mr Voller to establish that the third party comments in question were *"procured, provoked or conduced"* by 'posts' made by the Media Organisations.

WHAT'S NEXT?

It's not over for Mr Voller and the Media Organisations!

This substantial litigation has only seen the 'threshold' issue of publication determined in Mr Voller's favour. He must now return to the New South Wales Supreme Court to prosecute the remainder of his defamation claims.

The focus of the Media Organisations will likely turn to the defences available to them - most notably here, the common law and statutory 'innocent dissemination' defences.

IMPLICATIONS - WHAT DOES ALL THIS MEAN FOR SOCIAL MEDIA USERS?

Those utilising social media (especially those with greater financial resources to meet any adverse judgment) need to be mindful of not only what content they 'post' or upload, but also the comments left by third parties in response.

A failure to prevent or moderate the publication of defamatory third party comments in response to your 'posts' or uploads online may result in exposure to liability in defamation.

Mr Voller has not yet successfully prosecuted his claims in defamation against the Media Organisations, but the time and cost expended in litigation such as this are undesirable especially if it can be avoided by proactively managing the 'defamation' risks associated with social media platforms.

The simplest means for social media users to manage their 'defamation' risk may be to simply 'turn off' comments.

Users who rely on social media engagement as part of their business model however will need to be proactive in managing their 'defamation' risks online - risks can be minimised by implementing various filter and/or 'comment approval' mechanisms to prevent or limit the publication of defamatory comments and by actively monitoring the comments left on your 'posts' or uploads for defamatory content.

Some may view the application of 'publication' principles that predate the internet in this matter as a reflection of their strength, persuasiveness and 'timeless' nature. Others will likely be critical of this approach, on the basis that those principles do not contemplate or embrace the nuances associated with 'publications' made on online platforms.

To this end, the implications of this judgment will undoubtedly be considered as part of the 'Stage 2 Reforms' to uniform defamation legislation across Australia, which will address the liability of digital platforms (including social media and 'search' platforms) and their users for defamatory content 'published' on those platforms. Stage 1 reforms are already live - see our article in that regard [here](#).

The High Court's judgment can be accessed [here](#).

KEY CONTACTS



CHRISTIEN CORNS
PARTNER

MELBOURNE
+61.3.9640.4248
CHRISTIEN.CORNS@KLGATES.COM



SAM RAPPENBERG
SENIOR ASSOCIATE

MELBOURNE
+61.3.9205.2073
SAM.RAPPENBERG@KLGATES.COM



KIMBERLEY WITTNER
LAWYER

MELBOURNE
+61.3.9640.4250
KIMBERLEY.WITTNER@KLGATES.COM

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