

Publishers of third-party comments

Vincci Chan reports on *Fairfax Media Publications Pty Ltd and others v Voller* [2021] HCA 27

The High Court has found that, for the purposes of a defamation action, the owners of Facebook pages are ‘publishers’ of comments made by third-parties on those pages.

Background

The appellants were media business entities. Each maintained a public Facebook page on which they posted news content and provided hyperlinks to news stories on their websites. They invited comment on their posts from Facebook users from the public. Comments made appeared on the appellants’ Facebook pages and could be seen by other Facebook users.

The respondent, Mr Voller, was the subject of certain news stories. He claimed that, following the appellants posting those news stories on their Facebook pages, third-party Facebook users posted comments defamatory of him. Mr Voller claimed that the appellants were liable as publishers of those comments. Whether the appellants had ‘published’ the comments was determined as a separate question. The appellants took the view that if it was found that they had not ‘published’ such comments, the proceedings ought to be dismissed.

At first instance, Rothman J held that the appellants had published the Facebook comments. Each of the appeals from that decision was dismissed.

Arguments in the High Court

The appellants contended that publication of defamatory matter required an intention to communicate the words complained of, rather than merely making those words available. Authorities relied on by the appellants included:

- cases concerning the statutory defence of innocent dissemination – the appellants argued that these cases found that establishing the defence results in no publication; and
- ‘graffitied wall’ cases – the appellants contended these established a rule for publication based on the intention of occupiers.

The High Court’s findings

By majority, the High Court dismissed the appeals with costs. Kiefel CJ, Keane and Gleeson JJ provided joint reasons, as did Gageler and Gordon JJ. Edelman and Steward JJ delivered separate dissenting judgments.

Kiefel CJ, Keane and Gleeson JJ noted that the *Defamation Act 2005* (NSW) referred to ‘publication of defamatory matter’ but did



not define ‘publication’. Therefore, resort was needed to the general law (at [9]-[10]). Their Honours reiterated the position, described in *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at [26], that publication is a bilateral act by which the publisher makes defamatory material available, and a third party has it available for their comprehension, and is the process by which a defamatory statement is conveyed. Their Honours noted also that, in the law of defamation, harm is understood to occur when a defamatory publication is made to a third party (at [23]).

Their Honours rejected the appellants’ interpretation of the authorities summarised above and also the appellants’ submission that publication required an element of intention. Their Honours noted that defamation is a tort of strict liability, not requiring proof of fault or lack of reasonable care. The author’s or publisher’s intention is not relevant because the actionable wrong is the publication itself (at [27]-[28]).

Consequently, Kiefel CJ, Keane and Gleeson JJ found that the appellants’ acts in facilitating (providing the vehicle for publication), encouraging, and thereby assisting the posting of comments by third-party Facebook users rendered them publishers of those comments (at [55]).

Gageler and Gordon JJ agreed with the conclusions of Kiefel CJ, Keane and Gleeson JJ and added the following:

- Publication via the Internet is complete when and where the matter is accessed by a third party in a comprehensible form (at [61]);
- One is a publisher of defamatory matter if ‘by an act of any description’ they ‘intentionally assisted in the process’ of communicating the matter with defamatory imputation to a third party, regardless of whether they know that the matter contains such content. This is a strict rule that remained unmodified with

the advent of, relevantly, the Internet (at [68]-[69], [87]-[90]);

- Each appellant became a publisher of each comment posted on their respective Facebook pages when that comment was accessed in a comprehensible form by another Facebook user. This was by reason of their intentional participation in the process by which the comment had become available to be accessed, i.e., contracting with Facebook for their public pages and posting content on them, giving Facebook users the automatic option to ‘comment’ on the posts, which in turn gave other Facebook users automatic access to the comments in comprehensible form (at [98]); and
- Accordingly, the appellants’ conduct was distinguishable from the ‘graffitied wall’ cases where the defendants played no role in facilitating publication before becoming aware of the defamatory matter (at [103]).

In dissent, Edelman J considered that an act of publication must be accompanied by an objective or manifested intention to act. Where a defendant does not perform any act of publication personally, they can still be liable for defamation based on assisting someone who does perform such act if they assist with a common intention to publish. However, in his Honour’s view, by merely creating a Facebook page and posting on it with an invitation to comment on the post (which could not be disabled), the appellants did not manifest any intention or common purpose with the comments’ author to publish words entirely unrelated to the post; the ‘comment’ button was not an invitation to third parties to write any words about anything (at [111], [133], [142]).

Steward J agreed with Kiefel CJ, Keane and Gleeson JJ in rejecting the appellants’ ‘intention test’ for publication. However, His Honour considered that what constituted participation in an act of publication is a question of fact. Not every facilitator of a communication is necessarily a participant in its publication. Some acts may be so passive that they cannot constitute publication. His Honour considered that it was difficult to conclude that a person had participated in the publication if they could not practicably control the making of the defamatory post, had no knowledge of its content and did no more than participate in an electronic Facebook conversation. More was needed than the mere act of posting on Facebook for the conclusion that the page administrator was a publisher of all subsequent responses. (at [162]-[163], [166]-[167], [173]).

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