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Media companies now liable for defamatory comments posted on their Facebook pages by readers

A decision of the NSW Court of Appeal in the case of ***Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller [2020] NSWCA 102*** has today upheld a decision of the NSW Supreme Court in ***Voller v Nationwide News Pty Ltd; Voller v Fairfax Media Publications Pty Ltd; Voller v Australian News Channel Pty Ltd [2019] NSWSC 766*** in June last year, holding that a number of Australian media companies can be liable for defamatory comments posted on their Facebook pages by readers in response to news articles published by the media companies.

The case concerned Dylan Voller, an indigenous Australian youth who, as a teenager in 2015 and 2016, was detained in Don Dale Juvenile Detention Centre, Alice Springs Juvenile Detention Centre and Alice Springs (Adult) Correctional Centre in the Northern Territory for car theft, robbery and assault.

In July 2016, footage of the then 17 year old youth shirtless, shackled to a restraining chair and with his head covered by a mask in Alice Springs (Adult) Correctional Centre in March 2015 was featured in the “Australia’s Shame” episode of Four Corners broadcast on ABC television, reporting on the mistreatment of a number of indigenous Australian boys in custody in the Northern Territory. It resulted in widespread public outrage, and prompted then Prime Minister Malcolm Turnbull to announce a Royal Commission into the treatment of youths in the Northern Territory child protection and juvenile detention system.

Dylan Voller was released from prison in 2017, and subsequently sued the Sydney Morning Herald, The Australian, The Centralian Advocate, Sky News Australia and The Bolt Report for defamation over 10 comments posted by readers in response to news articles published on the media companies’ Facebook pages in 2016 and 2017.

In 2019, the judge in the NSW Supreme Court, at first instance, held that the media companies could be considered to be publishers of the third party comments.

The Court of Appeal today upheld that decision and held that the media companies did have enough control over comments posted on their Facebook pages by members of the public in response to news articles, and were considered to be publishers of those third party comments.

The Honourable John Basten JA said (at paragraph 47) that *“They facilitated the posting of comments on articles published in their newspapers and had sufficient control over the platform to be able to delete postings when they became aware that they were defamatory”*.

The Court has not yet ruled on whether the comments published on their Facebook pages are defamatory, or

whether Dylan Voller should be entitled to any compensation for those comments.

However, the case will have much broader implications on how media companies use social media, because it may not be possible or practicable for publishers to moderate comments posted by members of the public before those comments are published, and if some comments are to be allowed it is impossible to delete in advance all comments to a particular article. The Court acknowledged that *“It is impossible ... to edit or delete a comment by a third party user, prior to its placement on the public Facebook page, except by hiding it and un-hiding acceptable comments”*, but suggested that media companies could use a word filter specifying common words to effectively “pre-filter” those comments so that they are only visible to the owner of the Facebook page and the user (being the person posting the comment) and their friends.

This is a massive decision, making owners of public Facebook pages liable for comments published on their Facebook pages by members of the public.

This decision does not go as far as to say that Facebook or other social media platforms should be liable. What it does is to say that the owners of PUBLIC Facebook pages (as opposed to private, individual, Facebook pages) can be liable for defamatory statements made by others (ie: their readers) for comments posted by the readers/users on the Facebook pages of those owners (in this case, the media companies) in response to articles posted by those FB page owners. The Court specifically differentiated public Facebook pages from private, individual Facebook pages, so it seems unlikely that individuals operating private Facebook pages will become liable for comments made on their Facebook page by friends or others.

This will provide fertile ground for lawyers! Legislation may well follow to clarify this. The federal government has been flagging possible legislation to make Facebook and other social media providers liable for what they allow to stay up on their platforms, but at this stage there have not been any court cases making those platforms liable. There have been a few cases in Australia where plaintiffs have sought to make Google liable for defamation in relation to search results and summaries in search results, but those have not yet found Google liable. Insurers will probably seek to avoid and limit their liability, and cause changes for media companies to control/monitor/hide comments on their Facebook pages by readers.

Whatever happens, it will be interesting to see how media companies react and how they modify their social media practices, in order to seek to limit their liability for comments made by their readers.