



Businesses liable for third party comments made on social media posts

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Social media is an important medium for businesses to market brands and products to a wider audience. Up until now, businesses have been relatively shielded from liability for defamation for third party comments made on social media pages that a business maintains. However, in light of the recent decision by the NSW Court of Appeal in *Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller* [2020] NSWCA 102, businesses who maintain internet discussion forums, including social media pages upon which third parties can engage in discussion, will need to become aware of and seek to guard against the risks of liability for defamation.

Key Background Facts

Dylan Voller was incarcerated in a Northern Territory juvenile detention centre. Fairfax Media Publications, Nationwide News Pty Ltd, and Australian News Channel Pty Ltd (**News Outlets**) reported on his detention at that facility including by way of publishing articles on Facebook between December 2016 and February 2017.

Facebook's users – members of the general public - left comments relating to those reports on the News Outlets Facebook pages. Mr Voller alleged that ten of those comments were defamatory, including one which falsely accused him of assaulting a Salvation Army worker. The News Outlets promptly removed these comments when they became aware of them.

Mr Voller began defamation proceedings against the News Outlets, and argued that they were liable as the publishers of the third party comments. A threshold element that must be established to make out a defamation cause of action is that the defendant is a 'first or primary publisher'. The trial judge considered the discrete element of whether the News Outlets were publishers of the third party comments, before the commencement of the full defamation proceedings. The trial judge found that the News Outlets were publishers. The News Outlets then appealed this decision to the NSW Court of Appeal.

Are the News Outlets Publishers liable for Third Party Comments?

The News Outlets argued that they were not publishers in respect of comments third parties make on Facebook pages the News Outlets administer. They contended that they did not make the defamatory posts available to the public, nor participate in the publishing process, and for this reason should not be held responsible for the defamatory content.

Furthermore, the News Outlets argued that since they had promptly removed the defamatory comments when it came to their attention, they cannot be regarded as adopting the position of those comments.

Decision

The Court of Appeal agreed with the trial judge and held that the News Outlets were publishers of the comments. The Court said that in the context of an internet platform, a party who encourages and facilitates the leaving of comments on a discussion forum is a publisher. The Court said that the News Outlets were publishers because:

- each had subscribed to a facility enabling them to have an 'official' Facebook page for the newspaper;
- each had expressly or impliedly encouraged discussion in the comments section; and
- each had the control to monitor and delete user comments.

The Court considered that in the context of establishing whether the News Outlets were publishers, it was immaterial that the relevant comments were promptly removed because the News Outlets had facilitated the publication of them in the first place.

Other Arguments Yet to Be Considered

Bauer Media, Seven West Media and Daily Mail Australia (**Media Companies**) attempted to intervene in the appeal, on the basis that they were parties interested in and affected by the proceedings.

The Media Companies sought to argue that a media outlet is an 'internet content host' under Schedule 5, cl. 91 of the *Broadcasting Services Act*. If this argument were successful, it would exempt media outlets from actively monitoring their content, and exempt them from civil and criminal liability where they are not aware of infringing content.

The Court did not allow the Media Companies to intervene. This denied them the opportunity to present this argument. The News Outlets are permitted to present this argument, but have not indicated if they will do so at this time. Hence, there are still arguments that have not been put before a court that could further influence the question of whether or not parties in the position of the News Outlets are publishers.

The implications of this decision

It remains to be seen, whether the Supreme Court will decide that the impugned posts were defamatory: the Court of Appeal only decided on the threshold "publisher" element of the defamation cause of action. The Supreme Court is yet to determine whether the other elements of the plaintiff's defamation claim are made out and whether the News Outlets are able to establish any of the defences available to them for defamation claims. Hence, the question of whether and the extent to which the medium of internet discussion forums and how an administrator manages third party comments made on them impacts liability for defamation, is yet to be fully explored.

The key take away at this stage, is that businesses are no longer be able to avoid the risk of defamation claims being made against them in respect of third party comments made on internet discussion forums they administer, on the basis that they are not a 'publisher' of those comments, and therefore do not fulfil a threshold element of a defamation cause of action.

Businesses should be actively monitoring their posts on internet discussion forums, and if necessary, removing any defamatory content. Where possible, third party comments should be moderated before being made available to the public, but not all internet platforms include this feature.

If you would like further information on assessing your business's risk profile in this area in light of this recent decision, and ways in which you may be able to mitigate that risk, please contact [Chris Kintis](#) on 02 8235 1251.