

Dylan Voller defamation proceedings: why the High Court's decision impacts your Club and use of social media pages

If you allow fans and followers to comment on your social media posts, you are the “publisher” of what they say and could be liable for defamatory material. That is the key outcome of the High Court's recent decision in *Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller* [2021] HCA 27.

The case was novel because the plaintiff (Dylan Voller) successfully argued *the hosts* of Facebook pages – in this case, well-resourced broadcasters – are responsible for defamatory third party comments on those pages. In more conventional defamation proceedings, you would see an action against the individual authors of the comments.

The facts

Dylan Voller came to prominence following a 2016 Four Corners episode regarding him and the “Don Dale” juvenile detention centre in the Northern Territory. In separate defamation proceedings, he sued three media outlets (Fairfax media, ACN and Nationwide news) for comments made about him by members of the public on their Facebook pages for the Sydney Morning Herald, The Australian, Sky News, The Bolt Report and The Centralian Advocate between July 2016 and June 2017. The allegedly defamatory comments were made in reply to the broadcasters' Facebook posts that had links to news stories about Mr Voller and his treatment at Don Dale. At the time, it was not possible for the broadcasters to disable the comment function on Facebook, however each of the allegedly defamatory comments were subsequently deleted by the broadcasters. To successfully sue the broadcasters (rather than the third-party commenters), Voller had to establish that the broadcasters were “publishers” of the third-party comments. Mr Voller won in the NSW Supreme Court and Court of Appeal.

The outcome in the High Court

The High Court rejected the broadcasters' argument – that they should not be liable for defamatory posts on Facebook pages that they controlled, because the publication of defamatory matter must be intentional (i.e. they needed to have known of the defamatory matter and intended to convey it) – finding: (a) under Australian law a defendant may be a publisher *even though they did not intend to damage or injure someone's reputation*, and that a publisher can defame even if they are unaware of the defamatory matter; and (b) by hosting a public Facebook page with material and links which allowed for third-party comments (even if the comment function was a standard and unalterable feature of Facebook pages), the broadcasters were found to be “publishers” of third-party Facebook comments *because they facilitated and encouraged the communication*.

Key takeaways

The key takeaways for Clubs are:

- The decision has far-reaching implications. It impacts *all people and business* operating a public social media page (be that Facebook, Twitter, Instagram, TikTok etc) or forum/website with a public comments function.
- There is little doubt the decision covers Clubs and their use of social media pages to engage with fans through the posting of news stories that facilitates and encourages likes and comments from fans and followers. In doing so, Clubs could become a “publisher” of the comments for the purposes of an action in defamation.
- All businesses – including Clubs – will need to consider their options for hiding or continuously moderating comments and content, noting that, following the decision, Facebook introduced new functionality which allows a page administrator to turn off comments. That could involve hiring dedicated resources to moderate content. Whether Clubs do turn off comments will

involve balancing the risk of losing a powerful tool (and the associated commercial utility) against the risk of being the subject of a defamation suit because of adverse third-party comments.

- It is no excuse that moderating every single third-party comment would significantly increase an organisation's costs. Social media is an important business tool both operationally and for marketing purposes. By choosing to host and take the "commercial benefit" of a social media site, the High Court said business bears the legal consequences. In practical terms, larger organisations may have the resources to monitor and remove problematic posts quickly, but for individuals and smaller organisations (like Clubs) without the resources to continuously monitor content, their risk from third party posts might be more difficult to control or mitigate.

What next?

While the case clearly has far-reaching ramifications, Clubs should not hastily shut down their social media pages. Crucially, the High Court only decided the question of whether the broadcasters were publishers. It did not decide if the defence of "innocent dissemination" was available to the broadcasters, which could become critical in future cases where a page administrator, rather than a third-party making comments on the page, is sued. That defence is available under state law and provides that a publisher of defamatory material will not be held liable if they acted in the capacity of a "subordinate distributor" of the material, and neither knew, nor ought reasonably to have known, the material was defamatory. Since the High Court appeal arose from the determination of only the limited publisher question, the matter could return to a lower court to assess whether the broadcasters are innocent disseminators or have other defences. That outcome would give Clubs and other hosts of social media pages a better idea of the risk, and what level of monitoring they would need to impose.

Additionally, the meaning of "publication," and the issue of businesses being sued for the defamatory comments of their users on social media pages, is currently under review by state and territory legislators, so the position may be altered by statute in the future.

In the meantime, if your Club has social media pages which allows comments on your posts, you should consider disabling the comment function (where the relevant platform has that functionality), particularly if you form the view that the material is potentially controversial. You might also consider reviewing your practices for monitoring third-party comments and the training of your social media team in flagging and (if necessary) escalating potentially problematic comments to ensure you can manage risk and have respectful, non-defamatory engagement with your fans and followers.

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