

- > see that the user has commented on the post, pushing it to an increasing number of users. Accordingly, that user's behaviour is properly described as "active" rather than "passive". An inflammatory, albeit not defamatory post, could be said to constitute reason enough to suspect that some of the ensuing comments were defamatory. In such circumstances, a commenter might be considered to have had constructive knowledge of the defamatory material contained in the post, and their "active" involvement in the dissemination of the matter would be sufficient to render them a publisher, under the *Duffy* line of reasoning.

Would the user who created the original post be in the same position as the commenter above? The original poster's action (assuming this individual has made no further comments) was to create the post to which the defamatory material was "affixed". This type of involvement seems to be publication by omission, and akin to that of a notice board proprietor or Facebook wall administrator. Accordingly, if such an analogy is made, the reasoning in *Von Marburg* would suggest that they would only be liable with actual knowledge of the defamatory comment attached to their post.

6. CONCLUSION

Duffy and *Von Marburg* are not harmonious and appear to have crystallised a variance in the defamation law of South Australia and Victoria. However, as outlined above, this divergence merely reflects a controversy that has developed since *Emmens* and *Byrne*, and has evolved through the search engine cases. As the New Zealand Court of Appeal observed in *Murray*, the operation of varying knowledge tests in the context of social media means that unassuming users of platforms such as Facebook could be drawn into defamation litigation, on the basis that they "ought to have known" of the relevant defamatory material. Further judicial consideration is needed and perhaps the High Court will eventually provide an authoritative statement on the correct approach. However, there is a risk that differing expressions of the relevant knowledge test in the context of different online platforms will see the proliferation of platform specific rules, which on any account is undesirable given the pace of technological development.⁴⁹

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48 Victor Luckerson, 'Here's How Facebook's News Feed Actually Works', *Time*, 9 July 2015, accessed from <http://time.com/3950525/facebook-news-feed-algorithm/>.

49 See generally, above n 28, 631.