#Trending: The Rise of Social Media and the Challenges for Australia's Defamation Law

Penelope Bristow, finalist in the 2018 CAMLA Young Lawyers Essay Competition, provides an overview of the application of defamation law in the context of social media.

I Introduction

Social media has changed the way we communicate, and is now used by around 80% of people in Australia.[1] The rise of social media has been accompanied by an increase in the number of online defamation cases.[2] Australia's defamation laws are struggling to keep pace. This is because social media platforms are fundamentally different from previous forms of media and internet publishing: content is primarily created by individual users and there is no editorial 'filter' between the creator and publication.[3] Further, the information posted to social media can be scrutinised, searched and broadly disseminated without the original poster's knowledge or consent.[4]

However, people still tend to view social networking sites as virtual venues rather than as publications.[5] This perception is apt to mislead, as summarised by Kenneth Martin J in *Douglas v McLernon (No 4)*:[6]

> There still manifests a perception in some members of the community that the laws of defamation do not apply to publications made over the internet. Consequently, there is a lingering misapprehension that anything at all can be posted concerning another person over the internet no matter how defamatory or scandalous the uploaded material may be and that the posted material will enjoy a complete immunity. That perception is wrong…

Although it is clear that defamation law applies to social media, the novel and evolving nature of such platforms presents a number of issues. What amounts to publication online? When is defamatory material considered to be published online? How should damages be assessed in online defamation cases? Indeed, the application of existing defamation law to publications made on social media is often inadequate and unsatisfactory. Although there have been calls for reform,[7] little progress has been made to enact change.

II Brief Overview of Australia's Defamation Law

The purpose of defamation law is to vindicate and protect against reputational damage.[8] To be liable for defamation requires the publication of material which is likely to lower the plaintiff in the eyes of a reasonable member of the community.[9] Publication may occur by way of a positive act, or by omission.[10] Publication by a positive act requires the defendant to intentionally assist in the publication of the defamatory material.[11] In the context of social media, publication by positive act may include posting or commenting on Facebook,[12] posting or commenting on LinkedIn,[13] or tweeting on Twitter.[14] Publication by omission requires the defendant to have impliedly ratified or adopted the defamatory material through inaction.[15] In the context of social media, a 'secondary publisher' may include the administrator of a Facebook page,[16] or a search engine.[17]

1 Sensis, *Sensis Social Media Report 2017* (June 2017) 3.

2 Judith Gibson DCJ, 'From McLibel to e-Libel: Recent issues and recurrent problems in defamation law' (Paper presented at the State Legal Convention, New South Wales, 30 March 2015); Walter MacCallum, 'Defamation actions and social media: Where are the risks?' (2015) 67 *Governance Directions* 677, 677. See also *Rothe v Scott (No 4)* [2016] NSWDC 160, [141] (Gibson DCJ).

3 Jennifer Ireland, 'Defamation 2.0: Facebook and Twitter' (2012) 17 *Media and Arts Law Review* 53, 54.

4 Ibid.

5 Patrick Lim, 'You have 3 friend requests and 1 criminal conviction: tackling defamation on Facebook' [2010] (3) *Internet Law Bulletin* 169, 170.

6 [2016] WASC 320, [1].

7 See, eg, Communications Alliance Ltd, Submission to the Attorney General, *Review of the Defamation Act 2005*, 5 May 2011; Joint Media Organisations, Submission to the Attorney General, *Review of the Defamation Act 2005*, 25 February 2016.

8 David Rolph, *Defamation Law* (Thomson Reuter, 2016) 600, 606-607; Ryan Turner, 'Internet defamation law and publication by omission: a multi-jurisdictional analysis' (2014) 37(1) *UNSW Law Journal* 34, 40.

9 *Sim v Stretch* [1936] 2 All ER 1237.

10 *Frawley v New South Wales* [2007] NSWSC 1379, [8]-[9] (Berman AJ).

11 *Webb v Bloch* (1928) 41 CLR 331, 364 (Isaacs J).

12 See, eg, *Dabrowski v Greeuw* [2014] WADC 175; *Mickle v Farley* [2013] NSWDC 295; *Polias v Ryall* [2014] NSWSC 1692.

13 See, eg, *Jeffrey v Giles* [2013] VSC 268.

14 See, eg, *Lord McAlpine v Bercow* [2013] EWHC 1342; *Cairns v Modi* [2010] EWHC 2859.

15 *Frawley v New South Wales* [2007] NSWSC 1379, [17] (Simpson J).

16 See, eg, *Von Marburg v Aldred* [2015] VSC 467; *Murray v Wishart* [2014] 3 NZLR 722.

17 *Google Inc v Duffy* [2017] SASCFC 130.

III Issues in Applying Existing Defamation Law to Social Media

A. Trying to Fit a Square Archaic Peg into the Hexagonal Hole of Modernity:

What Amounts to 'Publication' Online?

The concept of publication is especially vulnerable to disruption by social media.[18] Indeed, '[t]he rapid expansion of the internet coupled with the surging popularity of social networking services like Facebook and Twitter have created a situation where everyone is a potential publisher.'[19] Existing defamation law has not delivered entirely satisfactory conclusions. Take, for example, the posting of hyperlinks and the hosting of webpages.

1. *Posting a Hyperlink to Defamatory Material*

Hyperlinks are ubiquitous on the internet: they appear in articles, blogs, social media, advertising, and search engine results. On social media, users often post or share links to other websites or online articles. Without hyperlinks, 'the web would be like a library without a catalogue; full of information, but with no sure means of finding it'.[20] However, hyperlinks also facilitate the spread of defamatory material.[21] Can a hyperlink be said to 'publish' the material it connects to?

Australian courts have not yet considered whether hyperlinks 'publish' material. The Supreme Court of Canada in *Crookes v Newton* held that '[a] hyperlink, by itself, should never be seen as publication of the content to which it refers, even if the hyperlink is followed and the defamatory content is accessed'.[22] This conclusion was supported by the fact that the defendant had no control over the content capable of being accessed through the hyperlink. An exception was recognised where the defamatory material was repeated in the hyperlink text itself.

Importantly, however, the decision represented a departure from existing Canadian defamation law. Traditionally, the form of publication was irrelevant:[23] any act which had the effect of transferring the defamatory material to a third person was sufficient.[24] In coming to its decision, the majority acknowledged that a strict application of this rule would be like 'trying to fit a square archaic peg into the hexagonal hole of modernity'.[25] Certainly, the same could be said for other areas of defamation law when applied to social media, and Australian courts should feel emboldened to mould our defamation law to better deal with the challenges thrown up by social media.

In any event, it will be difficult to fashion a 'one-size-fits-all' approach to hyperlinks, due to their functional diversity. For example, even if the decision in *Crookes v Newton* is taken as a guide, it was confined to user-activated hyperlinks and did not consider the approach to take to embedded or automatic hyperlinks. This complexity creates unavoidable challenges for legal uniformity.

2. *Hosting a Page on which Defamatory Material is Posted*

Suing individuals who post defamatory material to a social media page may be futile due to the anonymity of the internet and the difficulty of enforcing an award.[26] A more lucrative and attractive option is to sue the host of the social media page, which may be a large corporation.[27] As a result:

> The unity between legal responsibility and moral fault for the publication of defamatory material may diverge as claimants pursue litigation against corporate entities with peripheral engagement in the act of publication rather than the primary or direct publisher.[28]

In *Von Marburg v Aldred*,[29] the plaintiff submitted that the administrator of a Facebook page could be said to have 'published' posts and comments made to that page by other Facebook users. In the preliminary hearing, Dixon J set out a number of relevant principles. His Honour held that to allege that the host of a Facebook page is a primary publisher of defamatory material on that page, the plaintiff must show that the host was either instrumental in the act of publication, or that the host had the ability to control whether publication occurred. Alternatively, to allege that the host of a Facebook page is a secondary publisher, the plaintiff must show that the host:

(i) acquired knowledge of the existence of the impugned publication;

(ii) had sufficient responsibility for the content of the Facebook page, whether as owner, sponsor, administrator or moderator to exert control over its content; and

18 Stephanie Rigg, 'The Duke and his manservant in a world of online defamation: Rethinking the multiple publication rule in 21st century Australia' (2016) 21 *Media and Arts Law Review* 424, 424.

19 *Crookes v Newton* [2011] 3 SCR 269, [38] (Abella J).

20 Ibid, [34] (Abella J).

21 Ibid, [105] (Deschamps J).

22 *Crookes v Newton* [2011] 3 SCR 269, [44] (Abella J).

23 Ibid, [16] (Abella J).

24 *Stanley v Shaw*, 2006 BCCA 467, 231 B.C.A.C. 186.

25 *Crookes v Newton* [2011] 3 SCR 269, [36] (Abella J).

26 Turner, above n 5, 61.

27 MacCallum, above n 2, 678.

28 Turner, above n 5, 40.

29 [2015] VSC 467. See also *Murray v Wishart* [2014] 3 NZLR 722.

(iii) failed to remove the communication in circumstances which support the conclusion that the host is responsible for, or has ratified, the continuing publication of that communication.

This treatment of internet intermediaries has the potential to widen the divergence between legal responsibility and moral fault for the publication of defamatory material. This divergence was acknowledged by submissions made to the 2010 review of the *Defamation Act 2005* (NSW). Many media organisations raised the need for a 'safe harbour' provision to provide certainty to online intermediaries as to their liability for defamatory material produced by third party content providers.[30] Seven years later the issue is still a live one and little progress has been made. As observed by Kourakis CJ in *Google Inc v Duffy*:

> The degree of control which is sufficient to attract liability will continue to arise in relation to other social media platforms like Facebook, Twitter and Instagram. The related public policy question of the degree to which the managers of those platforms should be given, and exercise, censorial responsibility over content based on their judgment as to what is defamatory… will also continue to throw up difficult issues.[31]

B. Continuous and Perpetual Publication Online:

When is Defamatory Material Considered to be Published?

Currently, each jurisdiction in Australia has a limitation period of one year, running from the date of publication.[32] The 'multiple publication rule' provides that each communication of defamatory material amounts to a separate publication: each time the material is published a new cause of action accrues and a new limitation period begins to run.[33]

In *Dow Jones & Co Inc v Gutnick*,[34] the High Court of Australia held that every time a webpage containing defamatory material is accessed, a new cause of action accrues against the publisher.[35] As a consequence, 'the limitation period [for online defamation] is effectively open-ended, with a fresh limitation period starting to run each and every time defamatory material is accessed online.'[36] In this way, the one year limitation period can be extended indefinitely by showing that the relevant content has been accessed within the preceding twelve months. In the context of social media, a single like, share, favourite, or re-tweet may be sufficient to 'reset' the clock.

Consequently, the continued application of the 'multiple publication rule' to online publications, including posts made to social media, casts an unacceptably wide net of potential liability.[37] The generosity that the rule bestows upon plaintiffs is accompanied by a correspondingly significant burden on social media users.[38] This is because the multiple publication rule allows for the possibility of 'continuous' or 'perpetual' publication in online archives.[39] For this reason, there have been calls to adopt a 'single publication rule' in Australia,[40] similar to that adopted in the United Kingdom,[41] or the United States.[42] Again, this issue demonstrates the problems associated with the application of existing defamation law to social media.

C. Their Evil Lies in the Grapevine Effect:

How should Damages be Assessed in Online Defamation Cases?

Damages awarded for defamation serve three purposes: 'consolation for the personal distress and hurt caused to the appellant by the publication, reparation for the harm done to the appellant's personal and (if relevant) business reputation and vindication of the appellant's reputation.'[43] The quantum of damages should reflect the injury to the plaintiff's reputation.[44] If defamatory matter emerges from its lurking place at some future date, the plaintiff must be able to point to a sum awarded as sufficient enough to convince a bystander of the baselessness of the charge.[45]

30 See, eg, Communications Alliance Ltd, Submission to the Attorney General, *Review of the Defamation Act*, 5 May 2011, 3; Joint Media Organisations, Submission to the Attorney General, *Review of the Defamation Act 2005*, 25 February 2016, 2.

31 [2017] SASCFC 130, [149].

32 See, eg, *Limitation Act 1969* (NSW) s 14B; *Limitation of Actions Act 1974* (Qld) s 10AA; *Limitation of Actions Act 1936* (SA) s 37; *Limitation Act 2005* (WA) s 15; *Limitation of Actions Act 1958* (Vic) s 23B.

33 *Duke of Brunswick v Harmer* (1849) 117 ER 75; *R v Carlisle* (1819) 1 Chit 451, 453.

34 (2002) 210 CLR 575.

35 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, [44] (Gleeson CJ, McHugh, Gummow and Hayne JJ)

36 Anne Flahvin, 'The Future of the 'Multiple Publication' Rule' (2009) 28(2) *Communications Law Bulletin* 13, 13.

37 Rigg, above n 24, 425.

38 Itai Maytal, 'Libel Lessons from Across the Pond: What British Courts Can Learn from the United States (2010) 3 *Journal of International Media & Entertainment Law* 121, 123, quoting Patrick Milmo and WVH Rogers (eds), *Gatley on Libel and Slander* (Sweet & Maxwell, 10th ed, 2004) 6.2.

39 Ireland, above n 20, 66.

40 See, eg, Communications Alliance Ltd, Submission to the Attorney General, *Review of the Defamation Act*, 5 May 2011, 3; Joint Media Organisations, Submission to the Attorney General, *Review of the Defamation Act 2005*, 25 February 2016, 2. See also Matthew Collins, 'Five years on: A report card on Australia's national scheme defamation laws' (2011) *Media and Arts Law Review* 317, 339.

41 *Defamation Act 2013* (UK) s 8.

42 *Wolfson v Syracuse Newspapers Inc* 254 App. Div. 211 (1938); *Firth v State* 98 N.Y.2d 365.

43 *Carson v John Fairfax and Sons Ltd* (1993) 178 CLR 44.

44 Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118, 151 (Windeyer J); *Corneo v Kurri Kurri and South Maitland Amusement Co Ltd* (1934) 51 CLR 328, 343 (Rich, Evatt and McTiernan JJ).

The assessment of damages in defamation cases involving social media is particularly difficult. Defamatory publications on social media have an increased capacity to spread, or re-surface at some later date: 'their evil lies in the grapevine effect.'[46] The grapevine effect is 'the realistic recognition by the law that, by the ordinary function of human nature, the dissemination of defamatory material is rarely confined to those to whom the matter is immediately published.'[47] Certainly, the dissemination of defamatory material on social media is now devastatingly quick and easy. The defamatory material can be shared to hundreds or thousands of other users with the click of a button, and can be re-discovered and re-posted later due to the internet's vast memory.

In assessing damages in social media defamation cases, Australian courts have taken divergent approaches, particularly when considering the implications of the size and reach of the internet. One approach appears to be that the sheer number of social media pages militates against an inference that defamatory material has been viewed by anyone at all. This was the approach taken in *Sims v Jooste [No 2]*,[48] where Martin CJ at [17] opined that:

> Because of the vast number of internet sites, and the vast number of web pages accessible through those internet sites, in the absence of evidence it cannot be inferred that one or more persons has undertaken the steps required to identify and access any particular web page available through the internet merely from the fact that material has been posted on an internet site.

A more common approach taken by the courts is to conclude that the grapevine effect is greater on social media, due to the ease and speed with which users can share and re-post information.[49] Indeed, for these reasons, courts have on some occasions inferred a greater readership of defamatory material than could be proven on the facts.[50] However, on other occasions, the confined readership of a post (e.g. to family and friends) has been held to increase the plaintiff's hurt and distress, compared to if the post had been shared with strangers.[51] These opposing approaches create uncertainty, and it is clear that a uniform approach is required.

V Future Challenges

Although Australia's current defamation law is ill-equipped to adequately deal with the issues caused by social media, reform presents its own challenges. The internet has been recognised as a 'site of constant reinvention',[52] and the 'reality of the internet means that we are dealing with the inherent and inexorable fluidity of evolving technologies.'[53] For these reasons it may be undesirable to introduce rigid technology-specific rules. As observed by Kirby J in *Dow Jones & Co Inc v Gutnick*,[54] such rules would have a limited lifespan and soon be rendered obsolete.[55]

However, some immediate change to the existing law is necessary. In particular, Australian courts should not be afraid of departing from a strict application of our existing defamation law, so as to better address the unique issues raised by social media. Legislative intervention is arguably required in some areas. For example, the introduction of a 'single publication rule' and a 'safe harbour' provision for internet intermediaries is long overdue. Social media will continue to change the way we communicate. It is clear that Australia's defamation law must change too.

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45 *Cassell & Co Ltd v Broome* [1972] AC 1027, 1071. See also *Crampton v Nugawela* (1996) 41 NSWLR 176, 195 (Mahoney ACJ); *Roberts v Prendergast* (2014) 1 Qd R 357, 357 [33] Gotterson JA).

46 *Mickle v Farley* [2013] NSWDC 295, [21] (Elkaim DCJ).

47 *Belbin v Lower Murray Urban and Rural Water Corporation* [2012] VSC 535, [217] (Kaye J).

48 [2016] WASCA 83.

49 See, eg, *Dabrowski v Greeuw* [2014] WADC 175, [27] (Neuberger LCJ).

50 See, eg, *Cairns v Modi* [2010] EWHC 2859, [29] – [30] (Tugendhat J).

51 See, eg, *Polias v Ryall* [2014] NSWSC 1692.

52 Lelia Green, *The Internet: An Introduction to New Media* (Berg, 2010) 1.

53 *Crookes v Newton* [2011] 3 SCR 269, [43] (Abella J).

54 (2002) 210 CLR 575.

55 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, [125].