Not-so-fair Comments - The Risks of Playing Host to Other People's Views

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Introduction

Facebook, LinkedIn, Twitter and other social media platforms have opened up a new world of opportunity to communicate and share with broad audiences. But with that opportunity comes responsibility, the scope of which is still being defined.

In addition to considering the legal implications of their own posts, social media users are obligated to monitor comments that other users leave on their posts and pages, and delete any that may be defamatory – as highlighted by a recent South Australian District Court decision. If they don't, they risk legal liability and damages awards as secondary publishers of those comments.

The District Court's decision is also a pertinent reminder of the legal responsibility administrators of social media 'group' pages have for posts made by members. It highlights the importance of implementing policies and procedures for monitoring and removing inappropriate posts.

Social media publications

As social media publication continues to be tested in the Courts, we are gradually learning that posting on social networks is not quite as free of consequence as chatting with friends at the pub. It's now clear that social media is a permanent and provable form of publication that attracts legal responsibilities and consequences.

We have learned to take care in assessing the legal implications of our personal posts. But what about comments and posts that *other people* share with us, on our own pages and pages we host?

Defamation law in Australia has long imposed liability on parties who did not actively or intentionally author defamatory content, but were part of the chain of events that led to it being communicated to an audience.

The High Court confirmed as far back as *Lee v Wilson & McKinnon* (1934) 51 CLR 276[1] that '*the communication may be quite unintentional, and the publisher may be unaware of the defamatory matter. If, however, the publication is made in the ordinary exercise of some business or calling, such as that of booksellers, newsvendors, messengers, or letter carriers, and the defendant neither knows nor suspects, nor using reasonable diligence ought to know or suspect the defamatory contents of the writing, proof of which facts lies upon him, his act does not amount to publication of a libel*' (emphasis added).

This passage emphasises that a defendant considered to be a 'secondary or subordinate participant' in publication of defamatory matter must prove, in order to avoid liability, that she or he "*did not know and could not with the exercise of reasonable diligence have known of the defamatory matter*".[2] This has been confirmed and enshrined since enactment of the national uniform defamation acts in the statutory innocent dissemination defence.[3]

These principles have been applied by the Courts to the modern age of online publication to find that "*a search engine operator or website forum host is only a secondary publisher*", and can avoid liability for defamatory publications it is involved in by proving that it had *'no actual or constructive knowledge of the defamatory matter'*.[4]

A number of cases have now confirmed these principles in respect of Google,[5] but Facebook and social media remain largely a frontier that lawyers can only advise on based on analogy and extension of principles.[6] This makes the recent South Australian decision in *Johnstone v Aldridge*[7], while only a single judge decision of the State's secondary Court, noteworthy.

The case

In this case, the plaintiff sued over two Facebook posts which were actively authored by the defendant on his personal Facebook profile, together with comments added by other users to the first post.

The defendant was considered liable for the comments as a secondary publisher, as they were published 'through the medium of the defendant's [Facebook] profile'. The Court held that *'by publishing the post with the comments box attached*

1 288 per Dixon J.

2 *Duffy v Google* (2015) 125 SASR 437, [169] – [170],

3 See, eg, section 30 of the *Defamation Act 2005* (SA).

4 Ibid, [236]-[237], citing *Murray v WIshhart* [2014] 3 NZLR 722 and *Oriental Press Group Limited v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 336.

5 See, eg, *Duffy v Google* and *Trkulja v Google LLC* [2018] HCA 25.

6 Although interlocutory decisions in *Von Marburg v Aldred* [2015] VSC 467 and *Wishart v Murray* [2013] 3 NZLR 247 have confirmed the likelihood of that extension applying.

7 [2018] SADC 68.

the defendant provided a forum for persons who might have been minded to add their comments to the post for others to read'.[8]

The Facebook profile was public, with almost 6000 followers, and the Facebook posts related to a development dispute between the parties.

The first post indicated that the plaintiff was:

- intent on closing all farmers markets in Australia to improve his own sales;
- would, if successful, cost thousands of good hardworking Australians their jobs, farms and businesses; and
- was greedy.

It was 'liked' 9,088 times, and 'shared' 12,959 times, and received approximately 4500 comments which were, in the words of the Court, "*critical of the plaintiff and some referred to him in contemptuous terms*" bordering on mere vulgar abuse. Critically, at least some of the comments were considered responsive to the post, which resulted in them *'adopting and emphasising*' the defamatory imputations carried by the post itself, and prevented them from being read as mere non-defamatory vulgar abuse or invective.[9]

The second post imputed, more seriously, that the plaintiff had made threats of violence, sexual assault and death to the defendant, his family and others. It received 149 'likes', 43 'shares' and 33 comments.

By the time of the trial, the defendant was self-represented. He denied publication, and accused third parties of 'tampering' with his posts, without evidence (and in fact, expert evidence made this claim inherently unlikely). The Court found that he was not a credible witness. He also ran fair comment and extended political discussion qualified privilege defences, which were rejected.

He denied publication of the comments, saying that he had no control over their content and it was 'impracticable' for him to remove them. However, he conceded that he was aware of the potential for his posts to generate many comments, some of which may be inappropriate, and that he had a practice of delegating control of his Facebook page to his wife and an employee when he was unavailable to allow ongoing monitoring.

The Court accepted that the task of reviewing the comments would have been time consuming and might have involved considerable inconvenience, but considered that "*there was nothing physically preventing the defendant… from discovering the contemptuous and disparaging nature of at least some of the comments*", and the inconvenience *"was not so great as to make it unrealistic or unreasonable to expect [the Defendant] to do so, and particularly as he recognised that the post might attract inappropriate comments, the defendant must be taken to have accepted the responsibility to monitor them and to remove those which were inappropriate or suffer the consequences… Volume cannot create its own shield*".[10]

In those circumstances, it found that the defendant most likely knew that a proportion of the comments included material that was complained about. He was held liable for the publication of the comments as a secondary publisher.[11]

The Court awarded the plaintiff a single combined sum of $100,000 in general damages in relation to the two posts and the comments, including aggravated damages. In reaching that figure, it took into account the extent of the publications, the gravity of the imputations, the impact on the plaintiff, and the unjustifiability and impropriety of the defendant's conduct, noting that he appeared to be aware that they were false. While not expressly referenced in this context, the adverse credibility findings made against the defendant likely contributed to the Judge's preparedness to award aggravated damages. The judgment does not discuss the attribution of any portion of that sum to the various aspects of the publication, but it is clear that the posts themselves formed a very significant part of the overall liability. As a result, it is difficult to assess the level of damages that might have attached to publication of the comments alone (if the original post is defensible, for example).

Implications

The Court's analysis in *Johnstone v Aldridge* provides some helpful lessons for social media users. In particular, it is clear that they cannot hide behind volume, or the onerousness of the task of monitoring comments and third party posts, in order to avoid their responsibility for those posts. Rather, only circumstances which *'physically prevent'* a host from monitoring comments appear to be considered a possible lawful excuse for failing to remove those that are defamatory.

Having said that, it is important not to overreact. This decision also suggests that a host who could show he or she *did* take objectively reasonable and diligent steps to monitor and address defamatory posts would likely be able to defend a claim in relation to any honest oversights (provided they were promptly addressed once drawn to his or her attention). As a result, it assists the vast majority of social media users, who act ethically and in good faith, to more confidently understand and mitigate risks and continue to enjoy the many benefits of social media responsibly.

8 Ibid, [180].
9 Ibid, [2070-[208].
10 ibid, [185].
11 Ibid, [186]-[188].

The New South Wales Supreme Court will have the opportunity to shed further light on this issue in the three *Voller* matters[12], where the plaintiff has sued solely on comments posted by third parties on the Facebook pages of three media outlets, and the question of publication is intended to be determined as a preliminary issue. These matters are likely to provide further guidance to social media users, both commercial and private, on how much diligence is required to 'host' online discussions in order to avoid liability.

- In the meantime, prudent and responsible users of social media can protect themselves against risk of liability for comments posted by others by (in addition to avoiding defaming individuals, small business or not-for-profits in their own posts, of course!):
- setting up a regular schedule of reviewing 'alerts' generated by the platform for any comments on the users posts, or posts in which the user is 'tagged' that are of concern. Once daily should be considered an absolute minimum;
- either removing immediately, or adopt a system of allowing a user a finite and short time frame in which to themselves amend or retract, any inappropriate comments identified (with removal remaining a back-up option);
- ensuring that any messages, comments or other communications received which raise concerns about posts, comments or other content and considered, addressed and responded to;
- exploring the available settings within the social media platform and, if allowed by the platform:
    - requiring approval prior to comments or posts being published to the user's page, either for all posts or in circumstances considered likely to be controversial;
    - posting as a 'pinned' or permanent post a summary of the policies adopted to put users on notice as to the approach you will be adopting, which may include a preferred means of being contacted or notified of any concerns;
    - if administering a group, requiring group members to confirm acceptance of those policies prior to allowing them to join; and
- if particular users appear to cause frequent problems, consider blocking them, removing them from the group, or reporting them to the platform host.

For all of the fantastic opportunities to connect that social media presents, it also raises new situations where it's not always clear how the law might be applied. Cases like this one continue to clarify and confirm the practical implications of what have become day-to-day activities, and how people can best use social media ethically and responsibly.

12 Voller v Fairfax Media Publications Pty Ltd (2017/219538); Voller v Nationwide News Pty Ltd (2017/219519); Voller v Australian News Channel Pty Ltd (2017/219556). See [2018] NSWSC 608.