Comment is Free[1], But at What Cost?
An Evaluation of the Impacts of *Voller* on the Concept of Defamatory Publication

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In June 2020, the NSWCA in Voller[2] upheld the finding at first instance that media entities are publishers of comments made by the general public on their Facebook posts. This paper evaluates this finding by exploring the complex interaction between the strict liability of publication in defamation and general tort principles concerning the imposition of liability for acts and omissions regarding the comments of third parties. It queries whether imposing a presumption of liability for the comments of third parties is both principally and practically sound. It advocates for an approach that is inclusive of both the modern nature of the internet and the longstanding concepts of defamation law.

Introduction

Prior to the rise of the internet, the law of publication in defamation had received little academic attention. As elucidated in the unanimous High Court judgment of *Trkulja v Google LLC ('Trkulja')*, concerning the liability of search engines as publishers, '[i]n point of principle, the law as to publication is tolerably clear. It is the application of it to the particular facts of the case which tends to be difficult.'[3] Professor David Rolph suggests that as publication has tended to be an uncontroversial issue, the principles are not 'as well-understood as they might be.'[4] This essay attempts to address these concerns by returning to the fundamental principles of publication and applying them to the case of *Voller.*[5] It aims to add to the conversation *Voller* has generated in the media[6] and legal[7] industries with a theoretical examination of the imposition of tortious liability for the comments of third parties. It does so in four parts. First, it explores the principles of publication with reference to the liability of entities for the comments of third parties, separating this analysis into liability for omissions and positive acts. Second, it sets out the findings and reasonings of the *Voller* trial and evaluates the possibility that emerged from the judgment as imposing liability for publication due to omission. Third, it examines the principle and practical consequences arising from the finding in the appeal judgment that liability for publication was established by the positive act of issuing invitations. Fourth, it suggests that the way forward for dealing with the complex issue of liability for publishing the comments of third parties is to return to fundamental principles.

Part 1: Concepts of publication in a digital age

In order for the tort of defamation to be complete, there must be publication of the defamatory matter, consisting of communication in a comprehensible form to a person other than the plaintiff.[8] The common law imposes strict liability for the publication of defamatory matter[9]: any person who voluntarily disseminates defamatory matter is prima facie liable as a publisher.[10] This liability clearly and frequently

1 In 1921, the Manchester Guardian editor CP Scott wrote to mark the centenary of the paper: 'Comment is free, but facts are sacred.' See CP Scott, 'CP Scott's Centenary Essay,' *The Guardian,* (online, 24 October 2017) <https://www.theguardian.com/sustainability/cp-scott-centenary-essay>

2 Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller (2020) 380 ALR 700 ('*Voller No 2*').

3 *Trkulja v Google LLC* (2018) 263 CLR 149, 163-164 [39] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); cited in *Voller No 2* 380 ALR 700, 713 [48] (Basten JA).

4 David Rolph, 'Deconstructing Rothman's Voller decision' *Gazette of Law and Journalism* (online, 12 July 2019) [3] <http://glj.com.au.ezproxy2.library.usyd.edu.au/deconstructing-rothmans-voller-decision/>

5 *Voller v Nationwide News Pty Ltd; Voller v Fairfax Media Publications Pty Ltd; Voller v Australian News Channel Pty Ltd* [2019] NSWSC 766 ('*Voller No 1*'); *Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller* (2020) 380 ALR 700 ('*Voller No 2*') (Collectively '*Voller*'). At the time of publication, the most recent appeal is currently awaiting judgment before the High Court of Australia: See *Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Ltd v Voller; Australian News Channel Pty Ltd v Voller* (High Court of Australia, Case No S236/2020, S237/2020, S238/2020) ('*HCA Appeal*'). In the *HCA Appeal,* the media entities raised for the first time the argument that proof of intention is required to establish publication of the defamatory matter. This is at odds with the approach taken in this essay: that the publication requirement of the tort of defamation is one of strict liability. Professor David Rolph, considering the issue in light of the submissions to the HCA, also prefers the view that liability for publication is strict: see David Rolph, 'Liability for the Publication of Third Party Comments: *Fairfax Media Publications Pty Ltd v Voller*' (2021) 43(2) *Sydney Law Review* (advance).

6 See e.g. Michael Bradley, 'Voller case keeps giving media companies reasons to hate social media,' *Crikey* (online, 03 June 2020) <https://www.crikey.com.au/2020/06/03/dylan-voller-facebook-defamation-appeal/>; Nick Bonyhady, 'A chilling effect': Media companies forced to keep stories off Facebook,' *Sydney Morning Herald* (online, 8 December 2019) <https://www.smh.com.au/politics/federal/a-chilling-effect-media-companies-forced-to-keep-stories-off-facebook-20191204-p53gx5.html>; Venessa Paech, 'The Voller case emphasises the power imbalance between publishers and platforms, but publishers aren't trying hard enough,' *Mumbrella* (online, 04 June 2020) <https://mumbrella.com.au/the-voller-case-emphasises-the-power-imbalance-between-publishers-and-platforms-but-publishers-arent-trying-hard-enough-630210>

7 See e.g. Brett Walker, 'Voller defamation case highlights law's struggle to keep pace in digital age, says ANU Law expert', *Australian National University* (online, 11 July 2019) <https://law.anu.edu.au/news-and-events/news/voller-defamation-case-highlights-law%E2%80%99s-struggle-keep-pace-digital-age-says-anu>; Paul Dimitriadis and Imogen Loxton, 'No Comment: The Decision in Voller and liability for comments on public Facebook pages,' *Ashurst* (online, 27 August 2019) <https://www.ashurst.com/en/news-and-insights/legal-updates/no-comment---the-decision-in-voller-and-liability-for-comments-on-public-facebook-pages/>;

8 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600 [26] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Webb v Bloch* (1928) 41 CLR 331, 363.

9 *Godfrey v Demon Internet Ltd* [2001] QB 201, 207 (Morland J), citing *Day v Bream* (1837) 174 ER 212; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600 [25] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

10 *Goldsmith v Sperrings* [1977] 1 WLR 478, 505 (Bridge J); *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 647 (Callinan J).

arises from positive conduct.[11] It is also possible to arise from omissions in failing to prevent the dissemination of defamatory matter.[12] It is crucial to examine liability for both omissions and positive acts distinctly in relation to internet intermediaries; the relevance of such will become apparent when examining the reasoning in *Voller*.

Publication of third party communication by omission

The long-standing principle of publication by omission was established *Byrne v Deane*, where the majority of the English Court of Appeal found that the proprietors of a golf club could be held liable as publishers of an allegedly defamatory matter anonymously posted to the clubroom wall.[13] Central to this finding of liability was the fact that Byrne had made the proprietors aware of the statement, they had the power to remove it, they failed to do so within a reasonable time, and as a result they consented to and were responsible for the publication.[14]

With the proliferation of actors and therefore potential publishers in the online sphere, the principle in *Byrne v Deane*[15] and the ability to impose tortious liability for the statements of third parties is particularly relevant. Prior to *Voller*[16], this issue had manifested in the form of claims against internet service providers (ISPs). The finding of liability extends back to the English case of *Godfrey v Demon Internet Ltd*, where Morland J held that the ISP was a publisher of defamatory comments posted anonymously on a newsgroup, where the ISP refused the plaintiff's requests to take down the comments.[17] Central to the reasoning was the knowledge of the ISP and the ability to take down the matter – this extended their liability from a mere passive facilitator of internet services to a host of the content.[18] In contrast, it has been found by the English court that where ISPs host the websites containing the defamatory material, but do not host or control the defamatory material itself, they are mere passive facilitators and not liable as publishers.[19]

Publication of third party communication by positive conduct

The issue of imposing liability for publication by search engines 'straddles the divide between publication by omission and positive act.'[20] Generally, the conduct of disseminating search results has been identified as a positive act.[21] There have also been differing and somewhat conflicting outcomes on the finding of liability: liability was not found where the search engine possessed a lack of control of user's search terms,[22] compared to the finding of liability where search terms were automated.[23] In *Trkulja*, the court found Google was a publisher as Google set up the search engine system to work precisely as it intended.[24] In the prevailing NSW case of *Bleyer v Google,*[25] McCallum J disagreed with this approach and instead applied the English authority of *Tamiz v Google ('Tamiz')*[26] to find that Google is not liable as a publisher for results produced by a search engine *prior to notification*.[27] The aspect of notification therefore has been emphasised as crucial to establishing liability for positive acts as well as omissions.

A way forward

An examination of the case law demonstrates that there is no blanket rule as to whether an internet intermediary is a publisher of third-party defamatory matter.[28] The relevant question in determining liability should not be if the entity is or is not a publisher, but rather: did the entity engage in conduct that constitutes publication?[29] Emanating from this is the need to identify whether the conduct was an act or an omission.[30] The need to apply this question with precision becomes particularly relevant when examining the *Voller* decisions.

Part 2: The Voller Trial

The facts

Dylan Voller, the plaintiff, is a former detainee of Don Dale Youth Detention Centre. He was a subject of the *Four Corners* program 'Australia's Shame',

11 *Webb v Bloch* (1928) 41 CLR 331, 364; See also David Rolph, 'Publication, Innocent Dissemination And The Internet After Dow Jones & Co Inc v Gutnick' (2010) 33(2) *UNSW Law Journal* 562, 569; David Rolph et al*, Media Law: Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2015) 214.

12 *Byrne v Deane* [1937] 1 KB 818; See also David Rolph, 'Publication, Innocent Dissemination And The Internet After Dow Jones & Co Inc v Gutnick' (2010) 33(2) *UNSW Law Journal* 56, 569; David Rolph et al, *Media Law: Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2015) 214.

13 *Byrne v Deane* [1937] 1 KB 818.

14 See *Byrne v Deane* [1937] 1 KB 818, 829-30 (Greer LJ), 838 (Greene LJ).

15 [1937] 1 KB 818.

16 *Voller No 1* [2019] NSWSC 766; *Voller No 2* (2020) 380 ALR 700.

17 [2001] QB 201.

18 Ibid 205 (Morland J).

19 *Bunt v Tilley* [2007] 1 WLR 1243.

20 Ryan J Turner, 'Internet Defamation Law And Publication By Omission: A Multi-Jurisdictional Analysis' (2014) 37(1) *UNSW Law Journal* 34, 37.

21 *Bleyer v Google* (2014) 88 NSWLR 670; *Trkulja v Google (No 5)* [2012] VSC 533 (Beach J); c.f. *Trkulja v Google LLC* (2018) 263 CLR 149.

22 *Metropolitan International Schools Ltd (t/a Skillstrain and / or Train2Game) v Designtechnica Corporation (t/a Digital Trends)* [2011] 1 WLR 1743.

23 *Trkulja v Google (No 5)* [2012] VSC 533; c.f. *Trkulja v Google LLC* (2018) 263 CLR 149.

24 *Trkulja v Google (No 5)* [2012] VSC 533 [16] (Beach J).

25 (2014) 88 NSWLR 670.

26 [2013] 1 WLR 2151.

27 *Bleyer v Google* (2014) 88 NSWLR 670, 685 [83] (McCallum J).

28 See *Tamiz v Google Inc* [2013] 1 WLR 2151.

29 *Tamiz v Google Inc* [2013] 1 WLR 2151; David Rolph et al, *Media Law: Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2015) 15; Turner (n 20) 35.

30 In *Frawley v New South Wales* [2007] NSWSC 1379, [8]–[9] Berman J describes publication as committed 'intentionally' and through 'inactivity'; Turner (n 20) 35.

31 Caro Meldrum-Hanna, 'Australia's Shame', *Four Corners* (online, 25 July 2016) <https://www.abc.net.au/4corners/australias-shame-promo/7649462>

which broadcasted graphic footage of the mistreatment of Mr Voller in detention.[31] Subsequently, Mr Voller received significant media attention, including articles published by the defendants — Nationwide News, Fairfax Media and the Australian News Channel ('the media entities') — and posted to their respective Facebook pages.[32] Mr Voller sued the media entities for allegedly defamatory comments made on these posts by members of the general public in 2016 and 2017.[33] The case raised the novel issue of whether owners of public Facebook pages are liable as publishers for comments made by third parties on their Facebook posts.[34] This question was answered in the affirmative at first instance[35] and on appeal.[36]

The Judgment: Justice Rothman

Rothman J held that it was the media entities who published the comments as the entities made the defamatory statements available in a comprehensible form.[37] Referring directly to the principles in *Byrne v Deane*[38], his Honour stated '[w]hen a defendant commercially operates an electronic bulletin board and posts material that, more probably than not, will result in defamatory material, the commercial operator is 'promoting' defamatory material and ratifying its presence and publication.'[39]

His Honour's judgment on publication, integrated with his consideration on the availability of a defence of innocent dissemination,[40] focused substantially on evidence given at trial regarding the *ability* of Facebook pages to control comments of third parties by deleting, hiding and filtering them.[41] His Honour emphasized that the existence of a commercial benefit received by the media entities in posting on Facebook constituted an assumption of risk.[42] Further, his Honour stated that a media entity can determine before posting which articles are likely to generate controversy, and that in these circumstances the defendant was aware that comments on the post would *likely include* defamatory material.[43] By this reasoning, liability appears to attach before the entities have specific awareness of the exact defamatory comments that were complained of. His Honour also found that the media entities were primary publishers and therefore could not argue innocent dissemination.[44]

The Impacts: Publication by omission?

With respect, his Honour's judgment did not consider the precise act of publication and whether it consisted of a positive act or omission.[45] The judgment did not contain specific discussion regarding whether the media entities had knowledge as to the presence of the specific defamatory comments.[46] This resulted in the judgment being interpreted as imposing liability for the *omissions* of media entities in failing to monitor comments generally.[47] Without the element of knowledge essential to the precedential establishment of liability for third party communications, his Honour's judgment 'appear[ed] to create the only form of strict liability for the tort of a stranger known to the common law.'[48] With respect, further issues with the imposition of liability arise when considering the emphasis placed by his Honour on commerciality.[49] A tort of strict liability does not consider the intention of the defendant, therefore to impose liability connected to the consideration of the commercial purpose of the media entities is at odds with the notion of strict liability for publication at its core.

Part 3: Voller on Appeal

On appeal, all three judges upheld the finding that the media entities were publishers.[50] Their Honours found that the primary judge erred in considering innocent dissemination and that it should be available for consideration as a defence.[51]

The Judgment: Justice of Appeal Basten

Basten JA concluded that the media entities were publishers.[52] His Honour applied the Hong Kong judgment of *Oriental Press*[53], stating it was cited with approval in *Trkulja*,[54] to distinguish occupier cases from the present circumstances of an internet

32 *Voller No 1* [2019] NSWSC 766.
33 Ibid.
34 Ibid.
35 Ibid.
36 *Voller No 2* (2020) 380 ALR 700.
37 Ibid [99], [105], referring to *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600 [26].
38 [1937] 1 KB 818.
39 *Voller No 1* [2019] NSWSC 766 [230].
40 *Defamation Act 2005* (NSW) s 32.
41 *Voller No 1* [2019] NSWSC 766 [19]–[24], [57], [205].
42 Ibid [209], [232].
43 Ibid [225].
44 Ibid [6]-[7].
45 Rolph, 'Deconstructing Rothman's Voller decision' (n 4).
46 Raised at appeal: *Voller No 2* (2020) 380 ALR 700, 724 [108].
47 Rolph, 'Deconstructing Rothman's Voller decision' (n 4).
48 Ibid [11].
49 *Voller No 1* [2019] NSWSC 766 [209], [232].
50 *Voller No 2* (2020) 380 ALR 700, 700 (Meagher JA and Simpson AJA, Basten JA agreeing).
51 Ibid.
52 Ibid 712 [45] – [47].
53 *Oriental Press Group Ltd v Fevaworks Solutions Ltd (2013) 16 HKFAR 366* [50] – [54].
54 *Trkulja v Google LLC* (2018) 263 CLR 149.

provider, holding a discussion forum.[55] In doing so, his Honour rejected the defendant's argument that a crucial requirement in the occupier cases was knowledge of the defamatory statement.[56] Although his Honour did not state this explicitly, this seems to imply that his Honour found that by virtue of being an internet platform provider hosting a discussion forum, knowledge was not required to establish liability for the comments of third parties.[57] There was little engagement from his Honour as to the precise conduct of the media entities, with the finding that liability attached to the facilitation of posting of comments and having sufficient control over the platform to be able to delete comments.[58]

The Judgment: Justice of Appeal Meagher and Acting Judge of Appeal Simpson

Their Honours found that the media entities were publishers by virtue of their act in subscribing for the Facebook page and encouraging the making of comments by third parties, 'which when posted on the page were made available to Facebook users generally.'[59] Their Honours analogised the role of internet liabilities to a talk-back radio station broadcasting live commentary from listeners[60] and rejected the argument of the media entities that the imposition of liability was a novel one.[61] Their Honours distinguished the circumstances from the occupier cases such as *Urbanchich*[62] and *Frawley*[63] where the occupier had not expressly or impliedly *invited* the use of its property as a means of communication.[64] The media entities, on the other hand, actively invited the public to comment on their news items and as a result accepted liability from the time they made their Facebook pages available.[65] Liability therefore arose not from an *omission* in failing to moderate the comments, but in the *positive act* of setting up the Facebook pages from the outset.[66]

Returning to the key issue

It was crucial for the judgments in *Voller* to precisely identify the act or omission amounting to publication.[67] The relevant question therefore is not: is a news page liable for the comments of third parties? The question should be conceived as: what conduct did the news organisations (i.e. the media entities) engage in to justify the imposition of liability for publication? With respect to their Honours, making broad statements about the liability of internet intermediaries more generally, and comparing this broadly to occupiers[68], and even radio shows,[69] is directed at the first question, not the second. The judgment of Meagher JA and Simpson AJA did identify the act of setting up the page and inviting comments. With respect to their Honours however, this involved a broad reference to the entity as a Facebook page as opposed to the specific acts of the media entities, most notably the fact that they did not have specific knowledge of the defamatory comments.

The Aftermath: Principle and practical concerns with publication by invitation

The concept of publication by invitation raises both principle and practical concerns. Theoretical issues can be traced back to the longstanding tortious principles concerning the imposition of liability for the acts of third parties.[70] As a general rule, holding an individual liable for a harm committed by another is 'incompatible with basic moral and legal principles.'[71] Exceptions to this rule need to be justified not only as a matter of principle, but within the particular context of the tort system.[72] Within the context of defamation as a tort, the common law has avoided imposing liability for the publication of others, unless specific criteria can be satisfied.[73] The result of *Voller* is to invert this trend to establish a presumption of liability for third party comments on public Facebook pages.

There are range of practical effects that flow from this presumption of publication by invitation. First, the judgment establishes a presumption of liability for *any* public Facebook page for *any* comment on *any* post. This is because, as the High Court elucidated in *Dow Jones & Co Inc v Gutnick,* the principles of publication are medium-neutral.[74]

55 *Voller No 2* (2020) 380 ALR 700, 712 [45] – [46].
56 Ibid.
57 Ibid.
58 Ibid 712 [47].
59 Ibid 725 [112].
60 Ibid, 722 [93].
61 Ibid, 724 [105].
62 *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports 81–127 ('*Urbanchich*').
63 *Frawley v New South Wales* [2007] NSWSC 1379.
64 Ibid 724 [107].
65 Ibid 724-725 [109].
66 Ibid 725 [111]; David Rolph, 'Voller unpacked,' *Gazette of Law and Journalism* (online, July 7 2020) <https://glj-com-au.ezproxy2.library.usyd.edu.au/voller-unpacked>
67 *Tamiz v Google Inc* [2013] 1 WLR 2151; David Rolph et al*, Media Law: Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2015) 15; Turner (n 20) 35.
68 *Voller No 2* (2020) 380 ALR 700, 712 [45] – [46] (Basten JA).
69 *Voller No 2* (2020) 380 ALR 700, 722 [93].
70 Rolph, 'Voller unpacked' (n 69).
71 Claire McIvor, *Third Party Liability in Tort* (Hart Publishing, 2006) 2.
72 Ibid.
73 *Speight v Gosnay* (1891) 60 LJQB 231.
74 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 630 [125] (Kirby J).

The Court's focus on the commercial benefit received by the media entities therefore does not preclude future courts applying *Voller* from establishing liability for those who do not receive such a commercial benefit. Second, the publication by invitation concept establishes liability from the outset of setting up a Facebook page or post. If media entities and other owners of Facebook pages therefore are liable for third party comments before they are even commented, surely this would disincentivise them to moderate comments as doing so would not absolve them from liability?[75]

Third, issues arise as to what constitutes an invitation.[76] If the relevant act is setting up a public Facebook page from the outset as opposed to failing to deal with comments, have the Facebook pages also 'invited' the general public to post on their wall? Does the comment need to be tied to a post of the Facebook page? Do individual, as opposed to public Facebook pages not 'invite' their friends to comment by adding them, setting up a profile and posting? Applying this concept of invitation extending back to *Byrne v Deane*, would simply the provision of a noticeboard in a clubhouse constitute an invitation, and therefore liability be established even without the central element of knowledge?[77]

Fourth, the finding brings into question whether a defence of innocent dissemination[78] would apply. The finding that it was the media entities who rendered the comments in a comprehensible form through their positive act will surely present difficulties in the attempt to prove that they were subordinate distributors.[79]

Internet publication cases

Theoretical issues also arise in relation to the application of case law specific to publication in an internet age. The emphasis placed on setting up Facebook pages from the outset and inviting comments as the sole basis for imposing liability is in line with the reasoning in *Trulkjia* that liability attached to Google setting up the search result system.[80] This is contrary to the NSW approach in *Bleyer v Google*[81], which disagreed with this reasoning of Beach J in *Trulkjia*[82] and emphasized the requirement of notice in establishing liability.[83]

Part 4: Applying the fundamentals to deal with the future

This essay contends therefore, that there must be a crucial element to establish liability for the comments of third parties: notification of their presence. To have such a requirement does not align with the publication by act analysis in *Voller*, as it has been demonstrated that liability is established before the comments themselves are posted. The way going forward therefore, should be to invert the presumption of liability and revert to the fundamental concepts regarding publication of the statements of third parties by omission. The appropriate starting point should be to return to the very basic principles in *Byrne v Deane* and a standard of knowledge short of actual knowledge should not be accepted.[84] On this basis, with respect, liability should not have been imposed in *Voller.* Classifying third party comments as an omission requiring notification aligns practically with the mandatory requirement of issuing a concerns notice before commencing litigation, to come into effect with the *Defamation Amendment Bill 2020* (NSW).[85] It also appears to be consistent with the knowledge requirement in Sch 5 cl 91 the *Broadcasting Services Act 1992* (Cth). It is possible therefore, to return to the fundamental principles of publication to ensure that the imposition of liability in the age of the internet reflects the very purpose of defamation as a tort.

Conclusion

This essay has demonstrated that the requirement of actual knowledge is crucial to ensure that the strict liability element of publication in a cause of action for defamation adheres to the fundamental principles of tort law. In determining liability for the comments of third parties on Facebook, it is crucial to identify precisely the conduct that amounts to publication. In cases analogous to *Voller,* identifying the conduct as publication by invitation presents a range of principle and practical issues. The correct approach therefore should be to return to the fundamental principles of publication by omission, requiring knowledge to establish liability. With the *Voller* appeal awaiting judgment in the High Court of Australia, we may soon receive some clarity on the issues the case presents.[86] In the meantime, the author contends that returning to the fundamentals is the best method to move to the future, as it encompasses both the modern nature of the internet and longstanding concepts of defamation law.

75 Rolph, 'Voller unpacked' (n 69) [43].

76 Ibid [36].

77 *Byrne v Deane* [1937] 1 KB 818; similar analogy posited in Rolph,'Voller unpacked' (n 69) [34].

78 *Defamation Act 2005* (NSW) s 32.

79 Ibid s 32(1).

80 *Trkulja v Google (No 5)* [2012] VSC 533 [16] (Beach J); c.f. *Trkulja v Google LLC* (2018) 263 CLR 149.

81 (2014) 88 NSWLR 670.

82 *Trkulja v Google (No 5)* [2012] VSC 533 [16].

83 *Bleyer v Google* (2014) 88 NSWLR 670, 685 [83] (McCallum J).

84 *Byrne v Deane* [1937] 1 KB 818; Turner (n 20) 52.

85 s 12B. The Bill has received royal assent but not yet come into force.

86 *Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Ltd v Voller; Australian News Channel Pty Ltd v Voller* (High Court of Australia, Case No S236/2020, S237/2020, S238/2020).