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Observations on the High Court's *Voller* Judgment

Introduction

On 8 September 2021, the High Court of Australia handed down its decision in *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27 (***Voller***). The Court held that a person may be a publisher of third party comments on their social media posts for the purposes of defamation. The decision is likely to have significant implications for businesses and organisations in Australia that run public Facebook pages. **Eli Fisher**, Network Ten ViacomCBS, and **Dominic Keenan**, Allens, have summarised the judgment and called on some of the leading defamation lawyers in the country for their comments on this important judgment.

The Factual Background

The respondent in this matter was Dylan Voller, a young man who attracted national attention after *Four Corners* aired footage of abuse he had suffered at Don Dale Youth Detention Centre. The appellants in this matter were Fairfax Media Publications Pty Ltd, Nationwide News Pty Limited and Australian News Channel Pty Ltd.

The appellants operate public Facebook pages in relation to their respective outlets. Posts made by the appellants on these pages may be 'liked', 'shared' and importantly commented on by third parties. Between December 2016 and February 2017, the appellants posted content relating to the respondent's incarceration. The content posted by the appellants was not itself defamatory of the respondent. However, the respondent sued the appellants for defamation based on third party user comments on these posts.

The Procedural History

The respondent initiated defamation proceedings in the Supreme Court of New South Wales. The parties agreed that the question of whether the appellants were publishers of the third party comments should be decided separately.

At first instance, the Court held that publication by the appellants could be established in this case. On appeal, the New South Wales Court of Appeal found in favour of the respondent and upheld the first instance decision on the question of publication.

The appellants appealed the decision to the High Court.

The Appellants' Argument

The appellants argued that publication requires an intention to communicate the matter complained of. In making this argument the appellants relied on a line of cases involving the defence of innocent dissemination which they argued support the conclusion that publication is dissemination with intention.

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CAMLA

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Editors' Note

Our dear CLB readers,

Welcome to the final edition of the CLB for 2021.

In this edition, we're pleased to bring you the annual wrap-ups from **Martyn Taylor**, President of CAMLA, and **Calli Tsipidis**, Chair of the CAMLA Young Lawyers Committee, reflecting on CAMLA's year, the events we held, the content we distributed and how CAMLA is moving into 2022. As Martyn steps down from the role of President after a number of years, the CAMLA board would like to thank him for his leadership as President of CAMLA, including during the uncertain years of the pandemic, and welcome Gilbert + Tobin's **Rebecca Dunn** to the role in 2022.

In this edition, **Eli Fisher** (Network Ten ViacomCBS, co-editor) hosts a panel on the two major privacy reforms sweeping Australia – the exposure draft of the Online Privacy Bill and a Discussion Paper on the review of the Privacy Act that commenced in October 2020. The star-studded panel features Sainty Law's **Katherine Sainty**, Bird & Bird's **Sophie Dawson**, Norton Rose Fulbright's **Ross Phillipson**, RPC's **Ashleigh Fehrenbach**, Macquarie Group's **Olga Ganopolsky**, Salinger Privacy's **Anna Johnston** and McCullough Robertson's **Rebecca Lindhout**. In an in-depth panel piece, our experts explain what these changes may mean for organisations that collect and use personal information, and where Australia stands from an international perspective.

We have an assortment of brilliant, insightful articles to keep you going over the holidays. Thomson Geer's **Conor O'Beirne** takes us through the drama of the urgent application for judicial review of the CASA decision to prevent the Melbourne Media Helicopter from flying above the Melbourne CBD during the recent protests there. **Ian Bloemendahl** and his team at Clayton Utz consider the protection of anonymous sources in a social media context, following the recent *Kumova v Davison* decision. **Sarah Gilkes** and **Ben Cameron** at Hamilton Locke summarise the latest developments in the *Epic Games v Apple* dispute. Salinger Privacy's **Anna Johnston** comments on the OAIC's recent 7-Eleven decision. And Banki Haddock Fiora's **Ben Regattieri** and **Marina Olsen** take us through the scope of the Federal Court's jurisdiction in defamation matters.

The Courts have been kept busy in the lead up to the end of the year with important developments in the media, defamation and data arenas. Eli Fisher and **Dominic Keenan** (Allens), along with a crew of defamation gurus have analysed the outcome of the High Court's decision in *Voller,* sharing their perspectives on what this means for the meaning of a "publisher" for the purposes of defamation law. Be sure to check out the observations on this important judgment of USYD's **David Rolph**, Thomson Geer's **Marlia Saunders**, Senior Counsel **Matt Collins AM QC**, JWS's **Kevin Lynch**, Senior Counsel **Sue Chrysanthou SC**, Addisons' **Justine Munsie**, Network Ten ViacomCBS's **Ali Kerr**, and Bird & Bird's **Sophie Dawson**.

MinterEllison's **Tess McGuire** and **Annabelle Ritchie** share the latest on the *Dutton v Bazzi* case and in the UK, the team at **RPC** dive into the Supreme Court's decision on *Lloyd v Google*, a case which will have significant ramifications for UK data protection.

Also inside, we have reports from a number of the CAMLA Young Lawyers Committee representatives. We report on the CAMLA AdTech webinar, hosted by **Eli Fisher** and **Sophie Dawson** (Bird & Bird). We also report on the "Governing in the Internet Age" webinar with the **Hon. Paul Fletcher MP** and moderated by **Rebecca Lindhout**, Special Counsel at McCullough Robertson.

We are especially excited to provide a summary transcript from the excellent Defamation Law: Judges Panel seminar moderated by **Dauid Sibtain** (Level 22 Chambers) and **Marina Olsen** (Banki Haddock Fiora) for those who are unable to attend. Thank you to Dauid and Marina, and to Banki Haddock Fiora for hosting this fascinating discussion with **Judge John Sackar**, **Judge Judith Gibson** and **Judge Michael Lee**. If you were unable to attend the seminar, be sure to check out the summary transcript inside.

COVID-19 has continued to demonstrate a need to adapt and change with technology. In an interview, **Zeina Milicevic**, IP Partner at MinterEllison, shares her insights with **Ashleigh Fehrenbach** (RPC, co-editor) on how both law firms and the courts have had to adapt to a new environment. Zeina also discusses the recent developments in artificial intelligence and virtual hearings – along with some sound career advice.

Before we move into 2022 and all the promise that the new year brings, CAMLA was saddened to hear of the recent loss of **Ian Angus**, a powerhouse in the media law world. We have included an obituary from long-time colleague **Leanne Norman**. Our thoughts are with Ian's family, and we hope that they truly appreciate the great, positive and enduring impact that Ian had on generations of media lawyers in Australia.

We're already looking forward to 2022 and will kick off the new year with an announcement of the winner of the **CAMLA Essay Competition** at the **CAMLA Young Lawyers Networking Event**. There's still time to enter with entries closing on 21 January 2022. Well done to everyone who has already entered!

We take this opportunity to thank and acknowledge both CAMLA's **Cath Hill** and MKR Productions' **Michael Ritchie** for their huge amounts of work this year in helping us produce this publication. You two are a major force driving the ongoing success of the CLB.

Finally, thank you to all the contributors and our readers.

All the best for the festive season. See you next year!

Eli Fisher and Ashleigh Fehrenbach

The Majority Decisions

The majority in two separate judgments dismissed the appeal.[1] The majority rejected the argument that publication requires intention. They held that facilitating, encouraging and assisting the posting of comments by third-party users rendered the appellants publishers.[2] Crucially, this means that businesses may be held liable for third party comments on their social media posts.

Their Honours considered the case law identified on innocent dissemination. In doing so, they rejected the contention that a successful defence of innocent dissemination negates the element of publication in a claim for defamation.[3] Properly understood as a defence, innocent dissemination protects a defendant from liability where the elements of the cause of action would otherwise be made out.

The Dissenting Judgments

Edelman and Steward JJ wrote separate dissenting judgments. Both concluded that the parties had erred in their assumption that the appellants were either publishers of all comments on their posts, or publishers of none.

Edelman J held that to establish publication, the respondent would need to prove that any third party comment had a connection to the subject matter of the post made by the appellant that was more than remote or tenuous.[4] This approach would protect an alleged tortfeasor from liability where the third party comment is completely unrelated to the original post.

In contrast, Steward J held that publication of third party comments could only be found where the comments had been 'procured, provoked or conduced' by posts made by the appellants.[5]

The Observations

DAVID ROLPH (Professor, University of Sydney)

The High Court's decision in *Voller* was not entirely unexpected. Liability for publication in defamation law has always been broad and strict and the High Court's decision confirms that. *Voller* shows the perils of using a separate question to determine an issue. The question of publication in this case is arguably connected to other issues, such as the effect of the *Broadcasting Services Act 1992* (Cth) Sch 5 cl 91 The fact that the media outlets were unaware of the third party comments at the time they were posted was not made as central an issue in the courts below as it should have been. So before the High Court, the media outlets had to argue that liability for publication required an intention to publish, which they argued they could not have had, given their absence of actual knowledge. Given the weight of authority supported the proposition that liability for publication in defamation is strict, not fault-based, this was always going to be a difficult argument to make.

From a doctrinal perspective, the High Court's decision in *Voller* clarifies some basic points, which seemed to have caused considerable confusion in recent years: that liability for publication is strict and that innocent dissemination is a defence at common law, not a plea of no publication. Dicta to the contrary in lower court decisions, such as in the *Duffy v Google* litigation in the Supreme Court of South Australia, are inconsistent with the High Court's decision in *Voller*. From a practical perspective, *Voller* raises many questions about the extent of the application of the principle it identifies. Clearly, it applies to media outlets which use social media pages to post content and encourage and invite third party engagement. How it applies beyond commercial outlets, to other organisations and even private individuals, remains to be established, although many organisations and individuals are already taking steps to manage the risk that they may be publishers of third party comments. What constitutes encouragement and invitation, whether it is subjective or objective, whether it has to be express or may be implied: all of these are questions which will need to be worked out. Courts have struggled with the application of established principles of defamation law to internet technologies. Given the uncertainty about the extent of application of the principle in *Voller*, it may be that legislative intervention is required.

SOPHIE DAWSON (Partner, Bird & Bird)

The problems which Australia is grappling with are not new. Voller represents an orthodox application of defamation law principles, to internet intermediaries, but as the experience of other jurisdictions shows, there has long been a need consider legislative reform in this area. In the early 1990s, when the internet was still in its relative infancy, the question of internet intermediary liability was already starting to confront US Courts. Cubby, Inc. v. CompuService Inc., a case decided in 1991, determined an internet service provider which hosted defamatory content on a forum, could be liable for that material on the basis of traditional innocent dissemination principles. This case ultimately drove the enactment of a statutory immunity for internet intermediaries via section 230 of the Communications Decency Act, providing protection to platforms for material not produced by them. The US digital economy flourished in the wake of that reform. It has now also been several years since the 2013 UK reforms, which provided a safe harbour for internet platforms. From a policy standpoint, Australia has only really started engaging with these issues in the last few years - most recently with the Social Media (Anti-Trolling) Bill 2021, about which we could easily write a separate article. If for no other reason than clarity one hopes this is just the start of the conversation around defamation reform in relation to the internet.

1 The primary judgment was written by Kiefel CJ, Keane and Gleenson JJ. Gagler and Gordon JJ agreed with the primary decision and provided additional comments.
2 Voller [55] (Kiefel CJ, Keane and Gleeson JJ).
3 Voller [49] (Kiefel CJ, Keane and Gleeson JJ); [76] (Gageler and Gordon JJ).
4 Voller [144] (Edelman J).
5 Voller [184] (Steward J).

MARLIA SAUNDERS (Partner, Thomson Geer)

I agree with David that the outcome in *Voller* was not entirely unexpected, but it is disappointing. The result is that media organisations are publishers of third party comments on their Facebook pages, even though they had no knowledge of the comments, had no ability to disable the "comments" function or pre-moderate the comments, and were not notified of the existence of the comments before the legal proceedings were commenced. The lack of knowledge issue was emphasised at length in the courts below, with counsel for the media outlets before Justice Rothman making submissions to illustrate the impact of imposing of liability for third party comments on page owners by reference to the NSW Supreme Court's own Facebook page which, unbeknownst to the Court, featured a number of defamatory comments in response to sentencing judgments posted by the Court. However, both Justice Rothman and the majority in the High Court seemed more persuaded by the fact that Facebook pages are run for the commercial benefit of the media organisations, with Justices Gageler and Gordon saying "Having taken action to secure the commercial benefit of the Facebook functionality, the appellants bear the legal consequences". In my view, whether or not the page is used for a commercial purpose should not be a relevant consideration to establish whether the page owner is a publisher.

I agree with Justice Steward's observation that the outcome of the majority's position in this case is that "all Facebook page owners, whether public or private, would be publishers of third party comments posted on their Facebook pages, even those which were unwanted, unsolicited and entirely unpredicted". Unless or until the legislature steps in to fix this, I think that courts will apply the decision to many different types of Facebook pages. The majority held that creating and providing a Facebook page, posting content on the page and giving third party users the option to comment on the content amounts to sufficient participation in the process of publication to be a publisher of a third party comments posted on their page as soon as the comment appears and is accessed and comprehended by another person. Now that Facebook provides the functionality to switch off comments on individual posts, it's likely that page owners will be using this regularly in an attempt to mitigate risk. Unfortunately, this will have a chilling effect on freedom of expression and legitimate public debate. A solution that forces the original commentator to take primary responsibility for what they post would be a better outcome from a public policy perspective.

ALI KERR (Senior Legal Counsel, Network Ten ViacomCBS)

"Disappointing", you say, Marlia? I wholeheartedly agree. And I have it on good authority that the sentiment in newsrooms and production meetings around the country was even stronger. Distribution of news, and reality content in particular, via social media is central to meeting our audience's demand for information. Dare I say: it's not possible to compete in the local media market unless your brand and content are everywhere, easily accessible and always up to date, 24/7.

Sue, you may feel that there is nothing to see here, but having to wait till a final hearing to determine if an innocent dissemination defence is available for third party comments leaves the media in limbo. Potentially very expensive limbo. In the absence of legislative reform, the tools available to limit exposure include: making an assessment of the likelihood that a particular story will generate defamatory comments and possibly not posting it to socials; limiting news coverage; turning comments off on social platforms that offer that functionality; limiting free speech; and ticking off faithful followers; or perhaps utilising key word filters, which as I type are currently not working on Facebook and won't be reinstated till the glitch is fixed. Trying to bring a cross-claim against Joe Public for his/her comment has to date not been pursued presumably on the basis that it would be time consuming, costly and requires Joe Public to exist and have a pot of gold. The High Court's *Voller* decision has led to CNN taking the bold step of denying Australian Facebook users access to its page to avoid defamation exposure. Who will be next?

As Dr Collins QC articulated, the internet is a communications revolution, not just the next cog in the evolution of communication and content distribution. And at the current rate of evolution, a revolution has never been more attractive.

KEVIN LYNCH (Partner, Johnson Winter & Slattery)

I agree with Marlia – the *Voller* decision confirms it is possible to be both disappointed and unsurprised at the same time. It's a bit like getting socks on Father's Day.

There are two practical observations that follow.

Firstly, the law as regards publication is much the same now as it was before the decision was handed down in September, or indeed when someone posted a notice on a bus shelter in the 1990s, stuck a poem on a golf club wall in the 1930s, or pointed to a roadside placard in the 1890s. These are some of the parallels that were drawn upon in establishing liability for the publication of third party Facebook comments concerning Mr Voller. Disappointing, yes, but also a call to arms for Stage 2 of the review of the uniform defamation legislation.

Secondly (and relatedly), it follows from the legal orthodoxy of the *Voller* decision that it may not be the paradigm-shifting decision that much of the reaction and commentary would suggest. It is understandable that administrators of commercial Facebook pages are concerned about the potential liability highlighted by the *Voller* decisions and are seeking advice to balance the risks. But at the same time, to risk a half-baked observation, the two years since his Honour Justice Rothman's first instance decision do not seem to have seen a flood of social media comment cases.

This might be because there are aspects of a successful defamation action that are still ahead of Mr Voller which also need to be assessed by any person considering an action over a social media comment. Defences (including innocent dissemination, which I suspect will be a live issue), the extent of publication and the quantum of damages may yet chip away at Voller's prominent separate question win.

DR MATT COLLINS AM QC (Senior Counsel, Aickin Chambers)

The genius of the common law has always been that it evolves to accommodate changed circumstances.

Defamation law is no exception. Duty and interest qualified privilege emerged to protect the publication of false statements without malice on occasions warranted by the common convenience and welfare of society. Innocent dissemination developed because of the harshness of holding secondary distributors liable for the innocent publication of others' defamatory content. More recently, courts across the common law world have developed, at least in form, liberalised defences for reasonable or responsible communications on matters of public interest.

As a matter of legal orthodoxy, the reasoning of the majority in *Voller* is impeccable—it is a correct application of the test for publication as it was stated by Sir Isaac Isaacs in *Webb v Bloch* (1928) 41 CLR 331. But intermediaries in the publication of online content cannot be sensibly equated to the committee that commissioned the defamatory circulars with which Sir Isaac was concerned. The internet is a communications revolution, not merely the latest evolution of antecedent media of communication.

For so long as courts reason by reference to flawed analogies—email as the equivalent of the postcard from the seaside; search engines as the modern-day card catalogue at the public library, etc—the common law will remain hopelessly behind the technology and the application of principle will continue to generate dubious results. Reforms to recalibrate the cause of action with a view to achieving its objective of balancing the protection of reputation with freedom of expression will continue to be hostage to legislative reform projects that come about, if we are lucky, once in a generation.

It did not need to be this way. More than a decade ago in England, Sir David Eady persuasively reasoned that to be held responsible as a publisher in modern circumstances, there needed to be human participation in the process of publication (or continuing publication) of the relevant words: *Bunt v Tilley* [2007] 1 WLR 1243; *Metropolitan International Schools Ltd v Designtechnica Corp* [2011] 1 WLR 1743. To my mind, that solution is preferable to the outcome in *Voller*: elegant, and achieving both certainty and justice.

SUE CHRYSANTHOU SC (Senior Counsel, 153 Phillip Barristers)

The decisions in *Voller* in the Supreme Court of New South Wales, the Court of Appeal and finally the High Court of Australia each contain recitations of the law of publication as it has been known in Australia and other common law jurisdictions for over a century. The outcome of the question posed as to whether media organisations are liable as publishers of material appearing on their own Facebook pages was predictable and predicted by defamation lawyers - the application of those principles to the medium of Facebook was obvious and has come as no surprise to persons who are familiar with the relevant principles. Importantly, the overreaction to the case in certain circles is misguided and mischievous given the decision has no impact on the defence of innocent dissemination and the statutory protection under the *Broadcasting Services Act*. In *Voller* the plaintiff did not put the media defendants on notice that third party comments on their Facebook pages were defamatory prior to commencing the proceedings. If the comments were deleted shortly after proceedings were served, the media organisations have arguable defences and the High Court has not deprived them of those defences which may well yet succeed. If the third party comments were not immediately deleted, the position is really no different to letters to the Editor which have been included in newspapers for centuries and for which media organisations have always been held to account - subject to defences such as comment of a stranger. So really, not much to see here folks.

JUSTINE MUNSIE (Partner, Addisons)

Sue Chrysanthou's comments refer to the truly unresolved issue in *Voller*; one that is yet to raise its head at all in the case so far. While the High Court decision for many, or on many levels, might be seen as orthodoxy 2.0, the consideration of the media's available defences is apt to create truly new ground. Assuming some or all of the plaintiff's imputations survive any challenge by the media defendants, then the time will come for the media to file their defences and the real question of liability will come to be considered. Given that the plaintiff did not notify the media defendants about the offending Facebook comments prior to commencing the proceedings, it is likely the defendants were unaware of the comments. In those circumstances, they may be able to rely on either or both of the defences of innocent dissemination (at common law and as provided in the Uniform Defamation Law) or the defence for internet content hosts set out in the Broadcasting Services Act. The defences apply to certain types of publishers who have no knowledge of the defamatory content which has been published. The Broadcasting Services Act provisions go further by making clear that internet content hosts are not required to monitor for such content.

In the continuation of the *Voller* case, the NSW Supreme Court is therefore likely to determine issues such as whether the media defendants were merely "subordinate distributors", not primary distributors of the Facebook comments, whether they are "internet content hosts" for the purpose of the Broadcasting Services Act and whether they were in fact unaware of the defamatory nature of the content published by third party users. While we wait for this second part of the case to run, media publishers must decide how best to limit their liability for third party comments on social media in the meantime. Do they now use new Facebook functionality and turn off comments altogether on their posts and therefore shut down discussion and debate? Or do they allow comments to continue unmonitored so they claim down the track that they were unaware of any offensive comments? Or do they continue to bear the risk and cost of walking the tightrope of freedom of expression by allowing third party comments but monitoring and moderating in the hope that problematic material is weeded out?