

Implications of the High Court's decision in *Fairfax Media Publications Pty Ltd v Voller*

By Nathan Sloan

Introduction

The issue of defamation is becoming increasingly prominent in a local government context. Given the burgeoning social media landscape, it is becoming ever easier for members of the public to post defamatory material on social media platforms, such as Facebook and Twitter. This means that public Facebook pages administered by local governments, elected members and officers may increasingly have defamatory third party comments posted on their pages.

The High Court case of *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27 (**Voller**) has effected significant and far-reaching consequences in the law of defamation, especially with respect to the scope of the meaning of 'publisher'. Relevantly, the High Court's decision also carries important consequences for local governments, as local government officers and councillors must now more carefully examine the manner in which they administer their public Facebook pages in order to avoid exposing themselves to potential liability.

Defamation and Publication

At common law, a cause of action in defamation will arise in circumstances where defamatory matter of, and concerning, a plaintiff, is published by being communicated to someone other than the plaintiff (*Webb v Bloch* (1928) 41 CLR 331, 363). Accordingly, there are two essential elements which are involved in a cause of action in defamation.

These are firstly, publication, and secondly, defamatory meaning.

Publication at common law will occur where defamatory matter is communicated, by whatever means, to someone other than the plaintiff (*Consolidated Trust Co Ltd v Browne* (1948) 49 SR (NSW) 86, 88). The publication of defamatory matter may occur by almost any method of communication, including by spoken word, printed matter, video and social media. In order for a person to be liable in defamation, they must be found to have 'published' the defamatory material, that is, they must be found to be a 'publisher'. The test for what constitutes a 'publisher' was originally formulated by the High Court in *Webb v Bloch* (1928) 41 CLR 331, which essentially provides that a person who has been 'instrumental in, or contributes to any extent to, the publication of defamatory matter' is a publisher.

Once the first element of defamation can be satisfied, it must then be shown that the material in question contains a defamatory imputation. A publication will be considered defamatory if it is likely to cause ordinary reasonable members of society to think less of the plaintiff, shun or avoid the plaintiff or subject the plaintiff to hatred, public ridicule or contempt.

Meaning of ‘publisher’

The case of *Voller* concerned the scope of the meaning of the concept of ‘publisher’.

The appellants, Fairfax Media Publications Pty Ltd, Nationwide News Pty Ltd and Australian News Channel Pty Ltd, were a group of media companies responsible for creating, monitoring and administering several public Facebook pages. The appellants would post content on these Facebook pages and provide hyperlinks to articles hosted on their own media websites. The appellants would invite third-party Facebook users to comment on the content of these posts, which would then be available to be viewed by other Facebook users.

The respondent alleged that some third party comments made on the appellants’ Facebook pages were defamatory and argued the appellants should collectively be held liable as being ‘publishers’ of those third party comments. In response, the appellants contended they could not be held liable as ‘publishers’ of those third party comments on the basis that they did not have knowledge of the comments. In other words, an element of intention was required.

The High Court ultimately held that the appellants were publishers of the third party comments. The High Court found that the appellants became a ‘publisher’ of third party comments ‘as and when those comments were accessed in a comprehensible form by another Facebook user’. The appellants’ liability for those comments arose by reason of their ‘participation’ in the process by which those comments came to be accessible by other Facebook users, which occurred as a result of the creation of the public Facebook page and the posting of content to that page, which encouraged and facilitated third party comments.

Importantly, the Court held that liability as a publisher does not depend on knowledge of the defamatory matter being communicated. The Court found that the concept of knowledge is not relevant to establishing whether publication is proved because any act of participation in the communication of defamatory matter to a third part is by itself sufficient to render someone a publisher. Further, the Court found that the degree of active and voluntary participation is irrelevant, provided that some kind of involvement can in fact be proved.

As a result, the appellants were held liable in defamation as publishers of defamatory third party comments made in respect of public Facebook pages on the basis that every active and voluntary participating in the process of making matter available for comprehension by a third party is a publisher, regardless of the participant’s knowledge of its participation.

Implications for local government

The decision of the High Court has particular significance in a local government context. As there has been an increasing trend of elected members operating public Facebook pages, in the event a third party posts defamatory material on an elected member’s page, the member would be considered a ‘publisher’ of the defamatory material by virtue of the fact that the member created the page, administered it and posted content to that page encouraging comment.

Members who operate and administer public Facebook pages must therefore be careful to ensure that they are vigilant in monitoring public Facebook pages and that they remove defamatory material as quickly as possible in order to avoid potential liability in defamation. The same applies for local government officers and local government bodies more generally.

Conclusion

The *Voller* case is an important recent High Court case which not just altered the landscape in the law of defamation but also has significant implications for local governments. The effect of *Voller* was that it expanded the scope of the meaning of the concept of 'publisher' to include administrators of public Facebook pages, meaning that administrators can now potentially be liable for defamatory comments made by third parties even where an administrator has no actual knowledge their page contains the defamatory content. Local government elected members and officers should have regard to the Court's decision, as they may now be liable for defamatory comments on public Facebook pages they administer.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information on matters discussed in this Update please contact Nathan Sloan by email to nsloan@mcleods.com.au.

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