

Voller v Nationwide News - [2019] NSWSC 766

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Supreme Court

New South Wales

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Medium Neutral Citation: **Voller v Nationwide News Pty Ltd; Voller v Fairfax Media Publications Pty Ltd; Voller v Australian News Channel Pty Ltd [2019] NSWSC 766**

Hearing dates: 6 – 8 February 2019

Date of orders: 24 June 2019

Decision date: 24 June 2019

Jurisdiction: Common Law

Before: Rothman J

Decision: (1) The Court answers the following question in the following manner:

“Whether the plaintiff has established the publication element of the cause of action of defamation against the defendant in respect of each of the Facebook comments by third-party users?”

Answer: Yes

(2) The defendant in each proceeding shall jointly and severally pay the plaintiff's costs of and incidental to the hearing of the separate question.

(3) Leave is reserved to the parties to make application within seven (7) days for any special or different order as to costs.

Catchwords:

DEFAMATION – Publication – Generally – Public Facebook Page – Liability of Media Company Owner of Public Facebook Page for comments by third-party users – probable that defamatory comments would be posted – Public Facebook Page operated for commercial interests of Media Company – Capacity to prevent and control postings – resources required – no assessment performed of likelihood of defamatory comments – Discussion of general test for primary or first publisher – liability of subordinate or secondary publisher – innocent dissemination – separate question asked – Media Company owners of Public Facebook Page held to be primary publisher

Legislation Cited:

[Defamation Act 2005 \(NSW\), s 32](#),
[Uniform Civil Procedure Rules 2005 \(NSW\)](#)

Cases Cited:

[Al Muderis v Duncan \(No 3\) \[2017\] NSWSC 726](#),
[Bleyer v Google Inc \(2014\) 88 NSWLR 670; \[2014\] NSWSC 897](#),
[Bunt v Tilley \[2007\] 1 WLR 1243; \[2006\] EWHC 407 \(QB\)](#),
[Byrne v Deane \[1937\] 1 KB 818](#),
[Crookes v Newton \[2011\] 3 SCR 269](#),
[Cubby Inc v Compuserve Inc \(1991\) 776 F Supp 135 \(SDNY\)](#)
[Dow Jones & Co Inc v Gutnick \(2002\) 210 CLR 575; \[2002\] HCA 56](#),
[Emmens v Pottle \(1885\) 16 QBD 354](#))
[Google Inc v Duffy \(2017\) 129 SASR 304; \[2017\] SASCFC 130](#)

[Lee v Wilson \(1934\) 51 CLR 276; \[1934\] HCA 60](#),
[Murray v Wishart \[2014\] 3 NZLR 722; \[2014\] NZCA 461](#),
[Oriental Press Group Ltd v Fevaworks Solutions Ltd \(2013\) 16 HKCFAR 366; \[2013\] HKCFA 47](#),
[Polias v Ryall \[2014\] NSWSC 1692](#),
[Sadiq v Baycorp \(NZ\) Limited \[2008\] NZHC 403](#),
[Tamiz v Google Inc \[2012\] EWHC 499](#),
[Tamiz v Google Inc \(2013\) 1 WLR 2151; \[2013\] EWCA Civ 68](#),
[Thompson v Australian Capital Television Pty Ltd \(1996\) 186 CLR 574; \[1996\] HCA 38](#),
[Urbanchich v Drummoyne Municipal Council \(1991\) Aust Torts Reports 81 – 127](#) ; (1998) A Def R 50-035 (Supreme Court (NSW), Hunt J, 22 December 1988, unrep)

Category: Principal judgment

Parties: 2017/219519:
Dylan Voller (Plaintiff)
Nationwide News Pty Ltd (Defendant)

2017/219538:
Dylan Voller (Plaintiff)
Fairfax Media Publications Pty Ltd (Defendant)

2017/219556:
Dylan Voller (Plaintiff)
Australian News Channel Pty Ltd (Defendant)

Representation: Counsel:
T Molomby SC/L Goodchild (Plaintiff)
J Hmelnitsky SC/M Lewis (Defendants)

Solicitors:
O'Brien Solicitors (Plaintiff)
Banki Haddock Fiora Lawyers (Defendants)

File Number(s): 2017/219519; 2017/219538; 2017/219556

Judgment

1. **HIS HONOUR:** The Court is required to deal with a question that has been separated to be answered prior to the remainder of the proceedings, if there be any. Essentially, each of the corporate defendants maintains a public Facebook page upon which it invites contributions from members of the public, who have a Facebook account.
2. It is alleged that some of those contributions are defamatory of the plaintiff and the preliminary question involves whether the defendant in each case is liable for the postings that are made by members of the public (also referred to in these reasons as "third-party users" or "commentators") onto its public Facebook page. Each of the corporate defendants is a media organisation and is in the business of disseminating material to the public by electronic or other means, or both.
3. When the hearing before the Court, as presently constituted, commenced (or immediately, prior thereto), it became clear that while the Court had previously separated an issue out for a separate question, in accordance with the *Uniform Civil Procedure Rules 2005 (NSW)* (hereinafter "UCPR"), no question or questions had been prescribed for answer.

4. At the outset of the proceedings, an issue arose as to the question for the Court and, in particular, whether the question intended to be separated by the Court, in its earlier directions, included the Court dealing with the defence of Innocent Dissemination; s 32 of the *Defamation Act 2005 (NSW)*. The terms of s 32 of the *Defamation Act* assume that “innocent dissemination” is a “defence” to the “publication of defamatory matter” and, in that regard, assumes that the innocent disseminator has published. This will be dealt with more fully later in these reasons.
5. Nevertheless, the parties, after short openings, were referred into conference to agree on the question to be asked of the Court. That agreed question is:

“Whether the plaintiff has established the publication element of the cause of action of defamation against the defendant in respect of each of the Facebook comments by third-party users that are alleged to be defamatory?”
6. To answer the foregoing question, it is unnecessary to determine, presently, whether the material on the public Facebook page is defamatory or whether defences exist that would exonerate the defendants or ameliorate the damages caused by the defendants, were they found to be liable. As stated, the defendants sought, at least initially, to have the issue of “innocent dissemination” answered, but agreed to the question above, perhaps on the basis, to which some authorities refer, that an “innocent disseminator” is not a publisher.
7. The question on which the parties agreed does not seem, directly, to raise whether the defence of “innocent dissemination”, arising under s 32 of the *Defamation Act*, is available. Nevertheless, there are certain aspects of the process by which the comments of third parties are placed, or remain, on the public Facebook page of the defendants that directly raises this aspect.

Facts and Evidence

8. The facts relevant to the allegedly defamatory material have probably been sufficiently outlined to enable an understanding of the issue before the Court. Each of the media companies that is the defendant in each of the proceedings has a public Facebook page on which it places a comment and which invites members of the public, who have Facebook accounts, whether subscribers or otherwise, to comment.
9. Those third-party comments contain material that is said to be defamatory and the fundamental issue for the Court is to determine whether each of the defendant media companies is liable for the defamatory material in the third-party comments. The content and terms of the alleged defamation, or the imputations that are said to arise, are irrelevant for present purposes.
10. More relevant, for the determination of the question by the Court, is the process by which the third-party comments are published to the world on a public Facebook page and the manner in which a public Facebook page operates. On that issue, there was significant evidence, including expert evidence, although much of it is uncontroversial.

11. It should be noted that the plaintiff does not allege, in any of the proceedings, that the defendant was negligent in allowing the third-party comments to remain on the public Facebook page. Nor does the plaintiff allege that any of the defendants were negligent or reckless in failing to delete the comments, once it was aware that the defamatory material was on their public Facebook page. Otherwise, the issue to be resolved in relation to the separate question relates to the operation of a public Facebook page and the operation of each of the defendants and not to the content of the publication.
12. The plaintiff relied upon two reports of Mr Ryan Shelley from Pepper Pty Ltd, dealing with the operation of Facebook, the media and, in particular, a public Facebook page. Essentially, the evidence before the Court is that media outlets, including each of the defendants, use Facebook as a channel for broadcasting news stories, or providing links thereto.
13. Typically, this is achieved by posting a link, on their public Facebook page on which a story is introduced with an image, a headline and a comment about the article. The comment about the article links back to the full article on the news website. The public is then invited to make comment on the publication either on the public Facebook page or the news website.
14. Media organisations measure the number of different visitors to their website (and to the public Facebook page), which may then be used to negotiate rates with potential advertisers. For that purpose, even more than is the case in traditional media publications, the content is required to be noticeable and generate engagement.
15. In relation to Nationwide News Pty Ltd, the public Facebook page generates approximately 39% of the monthly visitors to The Australian website. On 4 July 2017, approximately 53% of “unique” (by which it was intended to mean different and separate) monthly visitors came from the public Facebook page. The foregoing figure is a snapshot of the particular day and not a cumulative total.
16. As is common knowledge, Facebook and other social media utilise algorithms that measure the relevance of articles and correlate the articles with the comment. In relation to Facebook pages (including public Facebook pages), the algorithm utilises, as one criterion, the incidence of persons gaining access to a particular comment or article. Mr Shelley detailed examples of how the outcome operates, albeit in circumstances where the algorithm itself is commercially sensitive and not available, even to experts.
17. Essentially, Facebook measures the number of persons who show interest in the content (by, for example, liking an article, or sharing an article, or making comment on an article) and assesses a “genus” of the persons who show interest. It then publishes the article to all persons within that genus.

18. The same process occurs, for a public Facebook page of the kind with which the Court is here dealing in each of the three proceedings. Further, the content on Facebook may be searched and one could, if one were so minded, search for the plaintiff's name and the Facebook entries in relation to the plaintiff would be discovered.
19. During the course of the proceedings, a great deal of attention was concentrated on the hiding or deleting of comments. Administrators of public Facebook pages have the ability to hide comments or to delete comments. When an Administrator hides a comment on Facebook, the comment will only be able to be seen by the person who wrote it ("the commentator"), her or his friends on Facebook and the Administrator. When an Administrator deletes a comment on a public Facebook page, the comment will be permanently removed from the page and unable to be seen by anyone (including thereafter the Administrator).
20. Facebook, itself, can utilise a dictionary of known terms and delete or block, in advance, the publication of any comment that uses one of those words. Owners of a public Facebook page can choose to subscribe, at three different levels, to that list of deletions. Typically, words that are expletives, racist terms and the like, are blocked from comments utilising the dictionary to Facebook. Nevertheless, such a blocking mechanism can be overcome by the use of a synonym that is not otherwise the subject of such blocking mechanism.
21. In most instances, the dictionary is used to render a message containing a word in the dictionary hidden. This occurs when an Administrator hides a comment.
22. When an Administrator uses one or more of the tools available to the publisher of a public Facebook page to hide a comment, the comment will be visible in grey to the Administrator and to those people who are entitled to see it. Those people entitled to see it, other than the Administrator (or a person using the Administrator's identity) are the person who made the comment and Facebook friends of the person who has made the comment.
23. As a consequence, a person who has made a comment that has been hidden will be aware that the Administrator has moderated the comment, by hiding it. Persons, other than the Administrator, the commentator and the Facebook friends of the person who has made the comment, would be unable to see the comment at all.
24. If a comment has been hidden, by automatic operation of the tools in place for the public Facebook page, the Administrator may, at any later time, choose to change the status of the comment so that it is no longer hidden. Further, the tool that hides a comment, as a consequence of a rule that may be made by the Administrator, may be turned off or discontinued.

25. Over and above the foregoing, Facebook will advise the Administrator of a Facebook page, including a public Facebook page, that a comment has been made on the page and/or in relation to a specific article. This may be achieved by an email notifying the Administrator that a comment has been made and, a short while thereafter, an email containing the comment.
26. There is a second method of notification, which utilises the Facebook Business Manager Tool. This Tool was developed by Facebook and allows persons to manage their pages securely.
27. The Page Notifications Tab provides notifications about interaction such as: comments; likes; reactions; mentions; and shares. When the Notification is clicked by the Administrator or by a person operating the Facebook Business Manager's Notifications Tab, it opens the dialogue box showing a copy of the post and the comments that have been made.
28. There is a third notification method, usually referred to as the "Inbox", which works similarly to the Notifications within the Business Manager Tool. The Inbox lists: messages; comments; reviews; and visitor posts in a list on the screen. When the Administrator clicks on an item in the Inbox, the screen will show the event.
29. Mr Shelley was cross-examined. The cross-examination did not affect the substance of the evidence recited above. It is clear from the evidence of Mr Shelley, together with the evidence adduced by the defendants, on which the Court will shortly comment, that the publishers of a public Facebook page, including each of the defendants in these proceedings, may: block all comments on the public Facebook page totally; hide all comments on the public Facebook page, either for the purpose of ensuring only friends of the commentator could read the comment or for later "un-blocking" by the Administrator; could arrange for all comments to be sent separately from the Facebook page to the Administrator and have the Administrator release the comments. If "blocked" in advance, no comments could ever be made or seen and the process cannot be reversed.
30. Unlike the publication of a mass circulation daily, or the usual website or electronic version of a newspaper, the purpose of the public Facebook page is not to disseminate news. Rather, it is to provide a link to an article that may or may not be "news"; it may be "comment". Indeed, as will be seen from the summary of the relevant evidence adduced by the defendants, the purpose of a public Facebook page is to excite comments and interest from and by the public.
31. The defendants relied upon the affidavits of Sophia Han Thuy Phan (Fairfax); Brighthouse Ryan and Carl Pfeiffer (Nationwide News); and Timothy Love (Australian News Channel Pty Ltd). Each was the subject of cross-examination. It was obvious that the evidence in relation to one defendant, except staffing particulars and other discrete numbers, was relevant to each other defendant and was appropriate for use (either directly, on the operation of the public Facebook page, or by inference in relation to other matters) in relation to each defendant.

32. Ms Phan is the Social Media Editor for Fairfax and she described the Facebook page of the Sydney Morning Herald as the “official page of the Sydney Morning Herald newspaper on Facebook”. Its purpose, according to Ms Phan, was to share content and connect with users of Facebook.
33. Ms Phan administers the Sydney Morning Herald Facebook page. She and her assistant post content, including hyperlinks, upon which others may comment, whether or not they “follow” the Sydney Morning Herald Facebook page; or are registered with Fairfax or the Sydney Morning Herald; but, all of whom, must be users of Facebook.
34. Ms Phan notes that specific usernames may be banned or prevented from commenting on the public Facebook page (an observation to which the witnesses called by the other defendants also attested). Ms Phan also confirmed that a list of profanities or other words may be compiled, as a consequence of which any comment that contains one of those words or profanities will be automatically hidden. The list of profanities and other words that Facebook itself compiles renders the comment, containing such a word, blocked, i.e. deleted, and invisible to all.
35. Leaving aside the proposition that no comments be allowed on the public Facebook page at all or until they have been sent, independently, to the Administrator and then posted by the Administrator, Ms Phan makes clear that: Fairfax has no control over the contents of comments before they are posted by users; has no prior knowledge of comments posted by users; does not know in advance how users will comment in response to a preview hyperlink; cannot require users to seek approval from Fairfax prior to posting (except as excluded above); and cannot view, edit or otherwise determine the content of a comment, before it is posted. The foregoing, as stated, assumes that comments are permitted at all.
36. The evidence of all of the witnesses makes clear that the comments that are immediately visible by a person, who gains access to the Facebook page, will vary from time to time. First, the Facebook page will be updated with later comments, if any.
37. Secondly, if particular comments are liked, shared or further commented upon, the incidence of the original comment’s popularity will give a priority to that comment, which is an effect of the algorithm utilised by Facebook. A person may click on a particular comment or follow the trail of a particular comment and, in doing that, view other comments that are not immediately visible on inspection of the Facebook page screen.
38. Ms Phan, and the other defendants’ witnesses, testified to the capacity of the Administrator of the Facebook page to hide or delete a comment after it has been posted, if they become aware of the relevant comment. An Administrator becomes aware of the comment either by monitoring the Facebook page or by utilising the Facebook Administrator tools or by becoming informed of it by another person.
39. Notwithstanding the capacity of the Administrator to block a particular user, that user may, once it becomes known to her or him that she or he is blocked, open a different Facebook account and

make comment using that different Facebook account (at least until that different account is blocked, if it were to be). Ms Phan suggests that it would be “physically impossible” for her and her team to monitor every comment. There are two in the team. She does not attest to the number of persons that would be necessary to monitor the comments.

40. The Administrators of Fairfax post approximately 50 comments a day and, albeit as an estimate, each post can receive anywhere from 100 comments to thousands of comments, which can be posted at any time during the day or night. Further, the use of sub-threads of comments renders the monitoring of all comments even more difficult, particularly because any comment, whether on a sub-thread or otherwise, may be posted many days after the initial post by the Administrator.
41. Ms Phan testified that if she were ever in a position where she viewed a comment which she thought was, or was reasonably likely to be, illegal, an infringement of third party intellectual property rights, grossly offensive, or otherwise an infringement of Fairfax’s agreement with Facebook, she would take action, immediately, by hiding the post or deleting the relevant comment and, possibly, blocking the user who posted it. Which of those three actions would be taken would depend upon the nature of the concern raised. Ms Phan testified that she hides and /or deletes comments on a regular basis.
42. Ms Phan commented on the Shelley Report and noted that: if words are moderated, the moderated post will still be able to be viewed by the person making the post and that person’s Facebook friends; users may substitute letters for numbers thereby invalidating any moderation, e.g., the plaintiff’s surname, “Voller” could be written as “Voll3r”; there are too many words in the English language to include given that there is a 10,000 character limit imposed by Facebook on moderated comments; and users could “share” a post to their own wall and thereby publish it.
43. Apart from the last mentioned comment, all of the others were comments made by Mr Shelley, either in his report or in his oral evidence. The last mentioned comment or aspect does not seem to be particularly relevant. If a person “shared” a post from the Sydney Morning Herald Facebook page, it would be the person who shared the post that would be “publishing” it to those persons who gained access as a consequence of the sharing.
44. The evidence in chief of Ms Ryan was in or to the same effect as that of Ms Phan, the necessary changes being made as to the identity of the owner of the public Facebook page, being Nationwide News Pty Ltd. Ms Ryan is the Digital Night Editor at The Australian Newspaper and was, prior to July 2018, the Social Media Editor of Nationwide News.
45. Apart from reference to the use of emoji’s to reflect the reaction of commentators to either the original article published by The Australian on its public Facebook page or to comments from a third party user to the original publication, the evidence of how the public Facebook page operates; its purpose and the difficulties associated with these suggestions by Mr Shelley are in or to the same effect as Ms Phan’s evidence. The foregoing comment by the Court also applies to the lack of knowledge of both Ms Phan and Ms Ryan (and their team) to the comments about which complaint has been made by the plaintiff.

46. In the case of The Australian Facebook page, approximately 20 to 30 stories are posted each day and comments are made up to thousands of times per day. Evidence was also adduced by Nationwide News in relation to the public Facebook page of the Centralian Advocate, one of the publications about which complaint is made in the course of these proceedings.
47. The evidence of Mr Pfeiffer, called in relation to the Centralian Advocate's public Facebook page, is to similar effect to the evidence of Ms Phan and Ms Ryan. Mr Pfeiffer described the process of sharing stories with users of the Centralian Advocate Facebook page as one which involved the following steps: the hyperlink to the relevant story is entered into the "write something" section of the public Facebook page; an image may be added to the hyperlink together with a description or caption; whereupon the item is posted onto the page by selecting the option to "publish".
48. Once published, the commentary appears in the "Posts" section of the Centralian Advocate Facebook page and third-party users may interact with it in the same way as described in relation to the other public Facebook pages. However, the Centralian Advocate is and was a smaller operation.
49. The Centralian Advocate had one photographer; three journalists; a sports editor; one sub-editor; and Mr Pfeiffer. The Centralian Advocate publishes twice a week (Tuesdays and Fridays).
50. The evidence of Mr Pfeiffer was that he estimated between two and five posts were made by the Centralian Advocate to its public Facebook page each day, some of which attracted no comments and others of which received many. On average, a publication on the public Facebook page received between four and 10 comments. Mr Pfeiffer estimated that the Centralian Administrators collectively spent between one and three hours each day working on the Facebook page. The comments on the public Facebook page are monitored.
51. Mr Love attested to the operations of the Australian News Channel Pty Ltd and is the Head of Digital for that defendant. Australian News Channel has no less than six Facebook pages, two of which are the Bolt Report and Sky News Australia, on each of which latter two publications are matters about which the plaintiff complains.
52. Save for the differences associated with the different operations of each company and, in the case of the Australian News Channel, the different operations of each public Facebook page, the evidence of Mr Love is, again, consistent with and to the same effect as other defendants' witnesses.
53. Further, the process by which an article (in this case, usually a video) is published on the public Facebook pages is the same as in relation to other defendants. Further again, the process by which a comment may be blocked, either on the basis of its content or the identity of the commentator, is the same as for the other dependants, as is the process by which comments may be hidden.

54. The Sky News Editors and Bolt Report Editors post 60 to 80 times per day to the Sky News Australia Facebook page and each post can receive between no comments and up to 1800 comments on the Sky News Australia Facebook page. Mr Love explains that the continual monitoring, blocking and/or hiding Facebook comments on the public Facebook pages, to which these proceedings relate, would require a disproportionate amount of effort to the number of occasions that users have been blocked or comments deleted or hidden. However, obviously, there are far more work hours expended in posting these “articles” than in the other defendants’ operations and, therefore, the number of work hours required to monitor comments would proportionately be greater.
55. The wording of the affidavits on behalf of each of the defendant was conspicuously similar. The foregoing comment is not said as a criticism. The affidavits have, obviously, been crafted by a legal practitioner and the wording of each of them is, in part at least, identical. Of itself, that fact does not influence the Court in dealing with the veracity of the comments made on the facts stated in the affidavits. Generally, there is little that is controversial in the facts.
56. The cross-examination of each of the witnesses was efficient and concise. Mr Shelley conceded that it was impossible for a publisher of a public Facebook page to prevent in advance the publication of any comment fully, unless it operated in a way that did not allow any comments. The best that could be achieved by the publisher of a public Facebook page, which allowed comments, was to ensure that every post by a commentator was hidden, until monitored and approved by an Administrator.
57. The method of “blocking” comments was to list common words that, presumably, would be contained in a comment. If words such as “he”, “she”, “and”, “the” or “a” were the subject of blocking, to the extent that a publisher utilised the most appropriate tools on the website, and to the extent a comment utilised such common words (with a limit), all comments of that kind would be blocked, regardless of its content.
58. If the aim was not to block all comments, but, rather, hide them, as earlier described, that could be achieved, and, if the publisher desired to have the comments published, the comments could be monitored and “un-hidden”. There was a degree to which all of the witnesses, and counsel, utilised the term “blocking” and the term “hiding” (or their cognate forms) synonymously.
59. The cross-examination of each of the defendants’ witnesses concentrated on the likelihood of inappropriate comment to controversial postings by the defendant, as one aspect upon which the defendant could rely in terms of limiting the monitoring that might otherwise be necessary. The evidence, however, was that controversial comments could occasionally (although rarely) be excited by wholly innocuous postings by the media company.
60. Mr Love made it clear that the primary purpose of Australian News Channel was to interest readers and have them gain access either to the Australian News Channel website or some other

digital publication of the news, rather than the snippet on the public Facebook page. There is an assessment made of the risk associated with particular stories having an adverse effect on the person or persons who is or are featured in the story.

61. Mr Love accepted that the uploading of the editorial from the Andrew Bolt program was likely to provoke comments. One of the comments to the Bolt editorial is a matter about which the plaintiff complains.
62. Yet, on the evidence of Mr Love, no consideration was or is, as a system or otherwise, given to whether the sort of comment about which complaint has been made was a likely comment to the editorial, when the editorial was selected for placement on the public Facebook page. In other words, although Australian News Channel assessed its comment, it conducted no assessment of likely reactions.
63. Nor was there any consideration to the sort of comment that was likely to flow from the posting by the defendant, Australian News Channel, from the plaintiff himself stating that nobody deserved to be treated in the way that he was.
64. There are over 15 million Australian Facebook users which, when one omits from the Australian population those over 60 years of age and under 6 years of age, is significantly more than half of the Australian population. Mr Love agreed that nothing specific is done about considering the risk that people who are intolerant and irresponsible may be posting comments on the organisation's public Facebook page.
65. Mr Love accepted that the organisation could, effectively, block any comments by choosing a significant number of ordinary words that would be required to be contained in every comment. In doing so, Mr Love pointed to the resourcing issue that this would create. In his words, it would take the Australian News Channel some time to look through the 7,000 comments that they would receive every day to decide what was acceptable. The evidence suggests it takes no more than an average of 10 seconds (T, p 159 per Pfeiffer) to review a comment, in which case 7,000 comments per day (the greatest number of comments on any of the defendants' pages on any day) would require the equivalent of an additional 2.5 employees, assuming, contrary to the evidence, that no work hours are currently expended on the task.
66. If all comments were hidden, in the manner suggested, Mr Love saw that as a "free speech" issue and, although he was uncertain about it, an issue that may affect the Facebook algorithm, which may affect the organisation's overall performance on Facebook. The ultimate fear was that there would be overall fewer comments, because the blocked comment would not be seen and would not, as a consequence, excite further comments.
67. The organisation, Australian News Channel, monitors the popularity of the Facebook page (or each of its public Facebook pages) and compares it to the ratings received by other publications of a similar kind.

68. Ms Ryan was cross-examined (as were each of the witnesses) on essentially the same subject matters. Her evidence is to the effect that the Facebook page was operated for the benefit of Nationwide News, being an exercise to seek to increase the awareness of the publication, being The Australian Newspaper and increase the audience or readership of the newspaper. About half the articles that were published in The Australian were selected for placement on the Facebook page.
69. The link on the Facebook page would take a reader to The Australian Newspaper. Initially, when Ms Ryan first commenced in her current position, a reader could then read up to three articles from The Australian without payment. About halfway through the period of her employment, the number of articles that a reader could read without payment reduced to one article.
70. Again, Ms Ryan attested to the existence of two filters: one operated by Facebook known as “Profanity Filter”, which an owner of a public Facebook page could opt into at three different levels (“off”, “medium”, or “strong”); and one operated by the owner itself known as “Page Moderation”. The Facebook filter generally operated in relation to certain well-known profanities and would exclude from the public Facebook page any comments that contained one of those profanities. Again, Ms Ryan sometimes used the term “blocked” to include a comment that was “hidden” to the general public.
71. Monitoring each comment and deleting it requires a significant effort. Less effort is required if the comment is to be hidden because automatic filters can operate. Again, Ms Ryan testified that by utilising the filtering mechanisms to catch common words, such as all of the pronouns and the like, the vast bulk of comments, and possibly all of the comments, would be hidden.
72. If all the comments were hidden pending approval, the original article, placed on the page by the media owner, would appear in exactly the same way as it would otherwise. Further, any member of the public could share the article in exactly the same way as it may be shared otherwise; liked in the same manner; but there would not be any visible comments, except to the Administrator of the page, the third-party commentator in relation to the comment placed by her or him and Facebook friends of the commentator.
73. In answering the question as to why such a course was not implemented, Ms Ryan said:
- “Because it would involve someone sitting and un-hiding comments all day. It would, people would still be able to post pictures, memes. They would still be able to post comments without using the filter. I think people would get frustrated with their comments not appearing on the page. It, ... in my opinion it wouldn’t make sense.” (T, p 102.)
74. If, on the other hand, the assumption made by Ms Ryan did not operate and no one ever “unblocked” or rendered the comment “un-hidden”, it would require no additional staff, but there

would not be any comments that could be seen by the public, other than the defined class of members of the public that were Facebook friends of the person placing the comment or blog on the public Facebook page.

75. At the moment, according to Ms Ryan, if Nationwide News posted a controversial article on, perhaps, a controversial person, where the staff assessed that members of the public had a certain level of vitriol towards that person or that situation, the staff will monitor that article and its comments closely, or more closely, and hide and/or delete comments, where needed. Ms Ryan explained that the reference to monitoring more closely meant perhaps five or six times a day. Nevertheless, it would involve looking at each of the relevant comments.
76. Ms Ryan was asked some questions about the article that was placed by Nationwide News on the public website and accepted that the article was not favourably disposed to the plaintiff, but could not say whether any member of staff at Nationwide News assessed whether posting the article would excite members of the public to comment adversely about the plaintiff. Apparently, no system is in place for such an assessment or for action to be taken if, notwithstanding the absence of a system, an assessment were to have been made.
77. Ms Ryan accepted that seemingly defamatory material was a “thoroughly predictable” result of posting the relevant article onto the public Facebook page. Further again, Ms Ryan was unable to say whether any monitoring occurred of the comments in relation to the plaintiff.
78. As the evidence of Ms Ryan makes clear, it is important to Nationwide News that there are comments on the webpage, amongst other reasons, because it motivates others to comment and the greater the number of comments, then the rating for the public Facebook page becomes higher, which, in turn, markets the page to a greater number of members of the public and, in turn, markets the newspaper to a greater number.
79. This latter aspect was emphasised in the cross-examination of Ms Phan, who testified to the fact that one of the leading reasons to have a public Facebook page was to engage the interests of Facebook users in order to optimise the number of persons that may, by that process, subscribe to an electronic version of one of the media publications produced. Nevertheless, Ms Phan was a difficult witness who was somewhat obfuscatory, if not obdurate: see, for example, T, p 132.47 to 133.8. Ms Phan seemed to know little, or could recall little about the purpose or operation of the public Facebook page from the perspective of Fairfax.
80. Mr Pfeiffer was in a slightly different position to the other witnesses in that the Centralian Advocate is a much smaller operation and, in terms of the public Facebook page, some of the postings derive from articles in stablemates of the Centralian Advocate. In deciding whether to place an article on the Facebook page, the Centralian Advocate staff have in mind the purposes of expanding the readership of the newspaper or its digital counterpart; the attraction of the interests of Facebook users; motivating Facebook users to click on the full material and engage

with the digital article in full; motivating users to share it with other people in their Facebook group; and motivating users to comment on the article. This is the same as, or so similar to, the other operations that no distinction may properly be made.

81. The operation of the public Facebook page is exactly the same as every other public Facebook page, at least those about which evidence was given in these proceedings. This includes the capacity to block comments; the capacity to hide comments; the existence of a Facebook list of “banned” words, the effect of which was to delete the whole comment, containing it; and the capacity to have a list of other words that resulted in comments being hidden, which list was compiled by the owner of the Facebook page.
82. The staff that had been engaged as journalists would monitor the social media sites of the Centralian Advocate. The editor, Mr Pfeiffer, was also involved in that process.
83. In the case of the Centralian Advocate, the public Facebook page was used as a link not only to the Centralian Advocate but to the Northern Territory News. The Centralian Advocate considered the effect of the posting, which it placed on the Facebook page, might have on a person featured in the article. In that regard, the media outlet gave its posts a similar assessment to that done for published articles, namely, how people are portrayed; making sure that the story was fair and balanced; and seeking to portray both sides of an argument, if it were an emotive issue.
84. Mr Pfeiffer agreed that the story relating to Mr Voller was an emotive issue that could and did trigger very strong positions on both sides, including quite unreasonable positions.
85. Earlier in these reasons, I have summarised the evidence of Mr Pfeiffer to the effect that there were about 2 to 5 hyperlinks posted each day; each hyperlink receiving between 4 and 10 comments per day. The number of comments would diminish as time passed, but the initial post by the media outlet remained on the public Facebook page indefinitely.
86. The estimate of 4 to 5 comments per day on a post by the media outlet is a reference to the first week after the initial posting. The only difficulty with monitoring the comments in that circumstance was when, on occasion, the comment would be posted outside of work hours, which occasioned difficulty in the monitoring process. That difficulty would evaporate if all comments were hidden until reviewed and, if appropriate, “un-hidden”.
87. On the calculations proffered by Mr Pfeiffer, it would take, one or more staff members, an hour of work per week to monitor the normal number of comments that came through. That hour would cover the 50 comments, on a conservative (i.e. highest) basis, that were received on all of the posts that were relevantly placed on the public Facebook page that week. Mr Pfeiffer was the most open and forthcoming of the witnesses called by the defendants.

88. For the purpose of the separate question that is before the Court, the parties were agreed that the evidence in one proceeding would be evidence in all of the proceedings. That agreement, which is both sensible and commendable, applies only to the separate question. For obvious reasons, each defendant may have a different position in relation to the remainder of the proceedings and the defences that may be available.
89. Overall, there was some confusion caused by the witnesses' use of the term "block" and the term "hide" almost interchangeably. Strictly, the terms deal with a different effect and it is necessary to look at the use of the term in the context of the answer being given to determine precisely what it is to which the witness is referring.
90. From the foregoing evidence, there are a number of factual conclusions that can be reached:
1. The public Facebook pages operate similarly but not identically to an individual Facebook page;
 2. Each defendant's page operates relevantly identically and for the same purposes;
 3. Each of the defendant companies posts an extract or snippet of a story with a hyperlink, and usually a photograph or video, which will, if followed, take a reader of the public Facebook page to the original article on the website or in the digital publication of the newspaper/broadcaster;
 4. With some minor exceptions, which are presently irrelevant, if any comments are to be permitted to the snippets or on a page, it is impossible to delete in advance all comments to a particular extract;
 5. It is possible to hide comments that contain particular words or triggers upon which the program operating the public Facebook page would operate to hide the whole comment;
 6. By using a list of extremely common words, which any comment would be difficult to avoid, it is possible to hide, in advance, all, or substantially all, comments;
 7. Comments that have been hidden, either in advance or otherwise, can be "un-hidden" by the Administrator of the page;
 8. The public Facebook page of each of the media defendants is published for a number of purposes associated with the success of the company and its media publications, including: promulgation of summaries of articles of interest; exciting the interest of Facebook users; increasing the number of subscribers to the digital media publication or newspaper; and increasing the profile of the public Facebook page and the initial media publication, which affects advertising revenue;
 9. A hidden comment is unable to be seen by the public, but shows up as a light grey (or lighter tone) comment to the Administrator, the person who posted the comment, and Facebook friends of the person who posted the comment;

10. A comment that is blocked, deleted or hidden will be published on the commentator's personal Facebook account and visible to her or his Facebook friends thereon, but will be difficult to find on that page, unless the reader knows to look for it;
11. Certain initial posts by the media outlet would be expected to excite adverse comment about a person who is the subject of the post, including comment that is unreasonable, factually incorrect and damaging to the reputation of the person involved;
12. The publications of these relevant original posts by the media companies (i.e. posts to which the comments alleged to be defamatory relate), if any assessment were to have been made (which it was not), would have been assessed as likely (i.e. more probably than not) to give rise to nasty and defamatory comments;
13. It is impossible for the defendants, or any of them, to edit or delete a comment by a third party user, prior to its placement on the public Facebook page, except by hiding it and un-hiding acceptable comments in accordance with (vi) and (vii) above;
14. The defendants could, if sufficient staff resources were allocated, monitor comments, whether published or hidden, and hide, delete or "un-hide" those comments;
15. With the exception of the Centralian Advocate, no defendant applies sufficient staff to perform the task to which (xiv) above refers;
16. The Centralian Advocate employs sufficient staff for that purpose, but does not undertake the task described in (xiv) above, by utilising the process described in (vi) and (vii) above;
17. The existence and number of comments (including "likes" and "shares") from third-party users is an important (and, more probably than not, the most important) aspect of the public Facebook page, as it affects the Facebook algorithm and increases the profile of the Facebook page and the consequential popularity of the Facebook page, thereby increasing readership in the digital newspaper/broadcast and augmenting advertising sales on both the Facebook page and the digital newspaper/broadcast.

Legal Precedent

91. It is fair to say that the issues before the Court in this matter relate to an emerging area. Many defamation proceedings have been taken in relation to social media. Plaintiffs have sought damages against persons who have defamed them in emails and on websites. In most, if not all, of such proceedings, it is the owner of the website (or email address) who has been the publisher of the defamatory material: see, for example, *Al Muderis v Duncan (No 3)* [2017] NSWSC 726; *Polias v Ryall* [2014] NSWSC 1692.
92. On a few occasions, plaintiffs have sought damages in defamation against a publisher of a search engine that produces, on a search, an article otherwise available on the Internet that is

defamatory of the plaintiff: see, for example, *Google Inc v Duffy* (2017) 129 SASR 304; [2017] SASCFC 130.

93. It is necessary to start from some basic, perhaps trite, propositions. It is often said that publication occurs when a person gains access to an online document. The basis for such a proposition, which, to some extent, has become lore, is the reasons for judgment in *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575; [2002] HCA 56 (“Gutnick”).
94. The statement oversimplifies, although, for most purposes, accurately, the reasons for judgment of the High Court. Further, the statement pays little or no regard to the issue with which the High Court was there concerned.
95. In *Gutnick*, supra, the High Court was dealing with whether a Victorian plaintiff could sue, in the Supreme Court of Victoria, a United States corporation for libel, in circumstances where the United States Corporation posted a newsletter, the server for which was in Virginia, on the World Wide Web and made it available to subscribers around the world. Given that the matter raised in these proceedings is one that relates to emerging circumstances and principles, it is important to recite some of the fundamental features to which the High Court referred in *Gutnick*.
96. First, the High Court made the obvious point that defamation law balances the interest in freedom of speech and the free exchange of information and ideas, on the one hand, and, on the other hand, the maintenance of an individual’s reputation in society and that individual’s right to redress from unwarranted damage to that reputation: *Gutnick*, supra, at [23].
97. Next, the High Court reiterated that, like all torts, a cause of action arises from damage and, without damage, no action arises. In Australia, as in most common law countries and many States of the United States (often referred to as the “per se States”), damage is assumed, once it is shown that a publication is defamatory.
98. It matters not whether the publisher of the defamatory material intended injury to reputation or acted with reasonable care: *Gutnick*, at [25], citing *Lee v Wilson* (1934) 51 CLR 276; [1934] HCA 60. While referring to Pollock (Law of Torts, 13th ed. (1929)) with some muted approval to the effect that defamation may have gone wrong by making the damage and not the insult the cause of action, the High Court makes clear, as was done in Pollock, that it is now too late to deny that focus of the law. Yet, it is the publication of the material, not its composition, which is the actionable wrong: *Lee v Wilson*, supra, at 287, per Dixon J (as his Honour then was), cited with approval in *Gutnick*, at [25].
99. In the words of the plurality in *Gutnick*:

“Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it

would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act – in which the publisher makes it available and a third party has it available for his or her comprehension.” (*Gutnick* , at [26])

100. The High Court, in the reasons for judgment of the plurality (Gleeson CJ, McHugh, Gummow and Hayne JJ) then discussed the consequential “bilateral nature of publication” and, as a consequence, raised the question as to where the tort of defamation is committed, in circumstances where the publisher acts in one place and presents the defamatory material in a comprehensible form in another place, and each place is a different jurisdiction. The judgment also deals with the single publication rule and its effect on the answer to the proper jurisdiction for the cause of action. It is unnecessary to deal with that issue.

101. Their Honours, in the plurality judgment, then discuss the effect, if any, of the technological change associated with the Internet and the World Wide Web. The Court determined that, in principle, the same issues as to dissemination on a broad basis have arisen in the past with mass circulation newspapers and radio and television broadcasts. The Court concluded:

“However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.” (*Gutnick* , at [39] .)

102. Ultimately, the Court determined that, ordinarily, an action for defamation, based as it is on the location of the place where the damage to reputation occurs, will occur where the defamatory material is available in comprehensible form, assuming, in that respect, that the person defamed has a reputation in that place.

103. As a consequence of the principles to which the High Court refers in *Gutnick* , it is the publication of the material in comprehensible form in a location where there exists persons with whom the plaintiff has a reputation that occasions an actionable defamation. It is not defamatory, as such, merely to compile a statement that, if it were ever published, would be defamatory.

104. Thus, a book that is printed and distributed to booksellers, but withdrawn before any person is able to purchase and/or read the book, cannot give rise to damage to reputation or an action in defamation. For the foregoing example, I leave aside as trivial, the publication of the manuscript to the publisher, or proof-readers, or, to the extent that it was read by them, to any person involved in the printing of the book.

105. Applying the foregoing principle to the issue of the public Facebook page, it is not the compiler of a comment that publishes as a result of her or his authorship. It is the publisher of a comment in a comprehensible form or legible form that publishes the comment. The difficulty therein arises as

a result of the circumstance that the third-party commentator, who has compiled the comment, publishes it by loading it onto the public Facebook page, which is comprehensible because the media company has rendered it relevantly public.

106. Thus, if an author of a comment, which is defamatory, were to post that comment on a public Facebook page, publication occurs by virtue of the fact that the owner of the public Facebook page allows access to the comment by the publication of the page and allows access by other third-party users to the comments on the page.
107. It is necessary to deal with a number of authorities that have dealt with the publishers of search engines and Facebook pages. The defendants seek to draw comfort from the comments of McCallum J (as her Honour then was) in *Bleyer v Google Inc* (2014) 88 NSWLR 670; [2014] NSWSC 897, in which her Honour deals with the principles adumbrated by Hunt J in *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports 81 – 127; (1998) A Def R 50-035 (Supreme Court (NSW), Hunt J, 22 December 1988, unrep).
108. As may be obvious from the title of the judgment delivered by her Honour, the plaintiff was seeking damages for defamation against Google Inc, the U.S. company providing a search engine, known as Google, for the results of a search, the results of which Google provided to (for the purposes of the proceedings before her Honour) three people. The judgment issued by her Honour dealt with Google's application that the proceedings be stayed permanently or, alternatively, summarily dismissed as an abuse of process.
109. In the course of her Honour's reasons for judgment, her Honour dealt with the judgment of Hunt J in *Urbanchich*, to which earlier reference has been made. In so doing her Honour, after referring to [44] of the reasons for judgment in *Gutnick*, referred to a passage from the judgment of Hunt J in *Urbanchich*.
110. With respect to her Honour, I agree with the result to which her Honour came and, largely with the reasons therefor. However, to derive comfort from the judgment of Hunt J in *Urbanchich* was, in my respectful view, to misconceive that which was before Hunt J. Her Honour, at [76] of *Bleyer*, recited the following passage from the reasons for judgment of Hunt J:

“In a case where the plaintiff seeks to make the defendant responsible for the publication of someone else's defamatory statement which is physically attached to the defendant's property, he must establish more than mere knowledge on the part of the defendant of the existence of that statement and the opportunity to remove it. According to the authorities, the plaintiff must establish that the defendant consented to, or approved of, or adopted, or promoted, or in some way ratified, the continued presence of that statement on his property so that persons other than the plaintiff may continue to read it - in other words, the plaintiff must establish in one way or another an acceptance by the defendant of a responsibility for the continued publication of that statement.”

111. The reasons for judgment of Hunt J concerned the pictorial depiction of the plaintiff in *Urbanich* as a Nazi. That depiction was in a poster that was glued to the property of the defendant, Drummoyne Municipal Council and, it seems, others.
112. The publication of the defamatory material bore no relationship to the location at which it was posted. The publication was performed by whoever glued the poster to whatever wall or bus shelter was available. Drummoyne Municipal Council was not building bus shelters for the purpose of hosting posters, defamatory or otherwise, and it neither agreed to nor encouraged the display of posters of any kind on their property.
113. The damages that were sought against Drummoyne Municipal Council were damages that depended upon that defendant publishing the material and that, in turn, depended upon Drummoyne Municipal Council continuing the publication. In order to shift home to the Council that responsibility, the plaintiff was required to establish that the defendant consented to or approved of, or adopted or promoted, in some way the continued presence of the poster on its property.
114. One of the other differences in relation to a public Facebook page is that the comment compiled or authored by the third-party user is not published until such time as the owner of the public Facebook page allows persons to read it, or, in the words of the High Court in *Gutnick*, it is the owners of the public Facebook page that would render the material comprehensible and allow it to be downloaded.
115. The owner of a public Facebook page of the kind with which the Court is here dealing is able to assess its original post as one which is likely to give rise to one or more defamatory comments. There may be some posts that, on initial assessment, would be unlikely to give rise to defamatory comments.
116. Further, the Owner/Administrator of a public Facebook page, of the kind here relevant, is capable of rendering all or substantially all comments hidden, which would mean they were unable to be downloaded or accessed by any person with a Facebook account, except the administrator, the third-party commentator and Facebook friends of the third-party commentator. Thus, the extended publication of the comment is wholly in the hands of the media company that owns the public Facebook page.
117. It is necessary to deal with two judgments of intermediate Courts of Appeal, and with judgments in the United Kingdom and Hong Kong. I turn first to the judgment of the Full Court of the South Australian Supreme Court in *Google Inc v Duffy* (2017) 129 SASR 304; [2017] SASCFC 130.
118. In *Duffy*, the Full Court of the Supreme Court of South Australia had cause to deal with the liability of Google, when used as a search engine, to which earlier reference has been made. Six articles that were said to be defamatory were published on one or more primary websites,

between December 2007 and January 2009. Other websites published material derived from the primary websites.

119. In July 2009, the plaintiff, in the proceedings, became aware that a search of her name through Google resulted in the display of extracts, being defamatory material. As a consequence, the plaintiff notified Google of the defamatory material and requested Google to remove the material (or at least ensure that a search through its search mechanisms did not locate the material).
120. The Court, in its reasons for judgment, discussed the principles that should apply in the circumstances that were before it and some of the fundamental first principles upon which it relied to reach that conclusion. By majority, the Full Court dismissed the appeal, from the judgment at first instance, which had held that Google was liable for the defamation associated with the extracts (or summaries) of the primary website and subsequent websites that it published in producing the search results.
121. While not relevant for present purposes, it should be noted that the websites to which Google gave a link when Dr Duffy's name was searched were defamatory. The Court, both at first instance and on appeal, also found (or confirmed) that the result of the search, itself, being the few lines that were said to summarise the websites obtained by the search, were themselves, in part, defamatory.
122. In the course of his dissenting judgment, Chief Justice Kourakis said at [89]:

“The participants in the publication may play primary or secondary roles. Authors and editors are primary participants. The principal of an enterprise which creates or procures and then disseminates words or images is a primary participant in the process of publication and is commonly referred to as the publisher. Historically printers have also been regarded as primary publishers but that rule has been doubted in modern times. Both publishers and printers are generally liable as primary participants even though they print and publish the work through their servants and agents.”

123. And continued, in relation to that aspect, in the following way:

“In the broader sense, any facilitation of publication might be said to be participation in it. However, there must be closer limits on the scope of liability as a secondary participant. To draw an analogy with accessory liability in crime, it is notable that some participation may result in liability as an accessory before the fact but not as a principal in either the first or second degree. So too in the tort of defamation not all facilitation will result in liability, even as a secondary participant, in the publication. Much depends on the degree of causal connection between the facilitating act and the publication of the material.” (*Duffy*, at [91])

124. The fact that Kourakis CJ was in dissent does not detract from the principles stated by him, in which, for all matters relevant to these proceedings, were agreed by the majority. In his reasons for judgment, Kourakis CJ differentiated between primary and secondary participants and dealt,

at least in some respect, with innocent dissemination. At [100] of his reasons for judgment, Kourakis CJ referred to the modern dichotomy between acts and accompanying states of mind and referred to the principle that knowledge of the presence of defamatory material was an element of the tort, but one which is conclusively presumed against primary participants.

125. Nevertheless, that presumption also applies to secondary participants, but can be rebutted for a secondary participant, who shows that she or he did not know and could not reasonably have known that the defamatory material had been disseminated or that disseminated material contained defamatory words: *Duffy* at [100]. His Honour refused to overturn or find differently from the decisions in *Emmens* (a reference to *Emmens v Pottle* (1885) 16 QBD 354) and *Vizetelly* (a reference to *Vizetelly v Mudie's Select Library Ltd* (1900) 2 QB 170) as establishing rules that are now too well established to be overruled. It is worth noting that each of the judgments in *Emmens* and *Vizetelly* concerned secondary participants in the publication of defamatory material.
126. The Chief Justice continued and sought to describe the first two elements associated with liability for defamatory material by a secondary participant at [102] of his reasons for judgment, in which he said:

[102] I would therefore reframe the first two elements identified by the Judge as follows:

- 1 the defendant participates in the publication to a third party of a body of work containing the defamatory material;
- 2 the defendant does so knowing that the work contains the defamatory material. That knowledge is presumed conclusively in the case of a primary participant, but may be rebutted by a secondary participant who does not know and could not reasonably have known of the presence of the material.

[103] Irrespective of whether lack of knowledge is expressed as a standalone defence or an element of the liability of a secondary participant, the defendant carries the onus of establishing that it did not know, or could not reasonably have known, that the publication contained the defamatory statement. It is more consistent with the historic irrebuttable presumption of malice to hold a secondary participant liable for all of the contents of the publication, without requiring the plaintiff to prove that the defendant knew, or ought to have known, that the work contained the defamatory words or symbols. However, the defence of innocent dissemination may be established by showing both that participation in the publication is secondary and that the participant's ignorance of the defamatory material was not negligent."

127. His Honour also dealt with a series of first instance cases, in the UK, an example of which is *Bunt v Tilley* [2007] 1 WLR 1243; [2006] EWHC 407 (QB), which dealt with the liability (or, more accurately, the lack of liability) of Internet service providers (ISPs) through which individual defendants had made defamatory posts on webpages hosted by others. The Chief Justice distinguished such a situation from that which was then before the South Australian Supreme Court, with which distinction, with great respect, I agree.

128. Further, Kourakis CJ dealt with the concept of a “passive medium”, which was a description afforded an ISP by Eady J in *Bunt*, supra. However, Kourakis CJ referred to the concept as one that was likely to mislead, when referring to electronic media, because almost everything occurs by operation of one or other pre-programmed results or the application of a mathematical algorithm.

129. Nevertheless, his Honour the Chief Justice further distinguished, in terms that dealt with their approval of the process, persons who were administrators, webpage masters, providers and managers of Internet forums or web-based bulletin sites. In that passage, which is apposite to the discussion of the issues now before the Court, Kourakis CJ said:

[141] Webpage masters of internet forums or web-based bulletin sites which receive communications electronically but then make them readable in an organised manner by visitors to their webpages are in a very different position. Hosts of those webpages more closely facilitate the publication of material, on their sites because:

- they invite communications on a particular subject matter (indeed, comment and discussion is the very purpose of such sites);
- they have a greater capacity to read both by virtue of the form it is in and the more limited quantity of material they receive in comparison to the data for which telecommunications cable provider or an ISP is a conduit; and
- they have a practical capacity to control the content of their website.

[142] Accordingly, the hosts of webpages which invite discussion have been found to be publishers at common law in *Godfrey v Demon Internet Limited*, and *Metropolitan International Schools Ltd (trading as SkillsTrain and/or Train2Game) v Designtecnica Corp (trading as Digital Trends) (Metropolitan International Schools)*.

[143] In *Oriental Press Group Limited v Feaworks Solutions Ltd*, (*Oriental*) Ribeiro PJ explained the reasons for treating providers, administrators and managers of what was effectively an internet forum (I will refer to them as forum hosts) as publishers and distinguishing them from the proprietors of the golf club in *Byrne* as follows:

[50] Once the nature of the *Byrne v Deane* principles is grasped, it becomes clear that they do not apply to internet platform providers like the respondents. The provider of a discussion forum is in a wholly different position from that of the occupier of premises who is not in the business of publishing or facilitating publication at all, but who has had imposed on him the defamatory act of a trespasser.

[51] The respondents plainly played an active role in encouraging and facilitating the multitude of internet postings by members of their forum. As described in Section B of this judgment, they designed the forum with its various channels catering for their users’ different interests; they laid down conditions for becoming a member and being permitted to make postings; they provided users browsing their website access to the discussion threads developed on their forum; they employed administrators whose job was to

monitor discussions and to delete postings which broke the rules; and they derived income from advertisements placed on their website, a business model which obviously benefits from attracting as many users as possible to the forum.

[52] The respondents were therefore, in my view, plainly participants in the publication of postings by the forum's users and in that sense they were publishers from the outset, it being in issue whether they were first or main publishers or merely subordinate publishers...

[53] In this context, I respectfully part company with the reasoning (adopted on an interlocutory basis) of the English Court of Appeal in *Tamiz v Google Inc*. It is reasoning which proceeds on the basis that successful invocation of the defence of innocent dissemination results in the defendant being deemed not to have published at all. For the reasons previously given, I do not accept that premise. Nor am I able to accept the distinction drawn between the notice board and graffiti analogies, nor the suggestion that 'the provision of a platform for blogs is equivalent to the provision of a notice board'. As indicated above, my view is that the provider of an internet discussion platform similar to that provided by the respondents falls from the outset within the broad traditional concept of 'a publisher', a characteristic not shared by a golf club or other occupier who puts up a notice board on which a trespassing message is posted.

...

[146] A forum host is the principal of an enterprise, whether large or small, which encourages and elicits contributions from others whether for commercial, personal or ideological reasons. On the criteria identified by Ribeiro PJ, which broadly approximate the criteria identified at [141] above, if there were a capacity to block postings until they were vetted, there would be a strong case for holding that forum hosts are primary publishers. However, it is inconsistent with the very nature of on-line real-time interactive webpages to exercise that degree of editorial control. The exercise of editorial control in advance of a complaint that material is defamatory is antithetical to that forum of communication. The decision of *Oriental* must ultimately be founded on the public utility of communications of that kind. In the context of those legal policy considerations, the fact that it is people other than the hosts who author and post on the webpage, at any time of the day or night, and on every day of the year, is sufficient reason to distinguish a forum host from the proprietor of a newspaper or television station and to treat them as secondary participants. Of course the manager of a webpage which commonly attracts defamatory material may, prospectively, be attributed with notice, or treated as the primary publisher of, defamatory comments he has knowingly or recklessly encouraged or allowed." (Citations omitted.)

130.

The last paragraph, recited above, needs some explanation in light of the evidence that has been adduced in these proceedings. First, as is clear from the conclusions, which the Court, as presently constituted, has stated, it is possible for the defendants in each of these proceedings to

vet all comments by compiling a list that would render all comments, or substantially all comments, hidden and unable to be read by anyone other than the Administrator, the third-party commentator and Facebook friends of the third-party commentator.

131. Further, it is not clear from the discussion of Kourakis CJ (nor was clarification necessary for the purposes of his Honour's discussion) whether the forum, of which the forum host to which his Honour is referring was the host, was part of the business of the host and the publication of which was the business of the host. There are examples of forums solely conducted for the purpose of enabling discussion of a particular subject matter, e.g. professional forums dedicated to the use of or the side-effects of particular drugs, and which are not conducted for the commercial purposes of the Owner.
132. Lastly, the last sentence, at [146] of *Duffy*, bears particular relevance to the impugned material on the defendants' public Facebook pages in circumstances where, on the finding of this Court, the initial post by the defendant would, if assessed, be assessed as likely to produce defamatory comment. Kourakis CJ also made it clear, that the public policy interest in treating a webpage host as a subordinate publisher, as distinct from a primary publisher, would be greater if the webpage host had no capacity to vet postings in advance of their placement.
133. It is necessary to deal with the analysis by Kourakis CJ of the judgment in the UK in *Tamiz v Google Inc* [2012] EWHC 499 or, on appeal, in *Tamiz v Google Inc* (2013) 1 WLR 2151; [2013] EWCA Civ 68, as this was a judgment that concerned summary dismissal of the proceedings and whether there was an arguable case that Google was a publisher. The trial judge had rejected Google's contention that it could only be a publisher if it had authorised or accepted responsibility for the publication and Kourakis CJ confirmed the view of the trial judge.
134. Chief Justice Kourakis also confirmed the view expressed by the trial judge that:

“The appropriate test remains whether the defendant has participated in the publication. I agree with the decisions to this effect of Morland J in *Godfrey v Demon Internet Ltd*, Beach J in *Trkulja v Google Inc LLC (No 5)*, the Hong Kong Court of Final Appeal in *Oriental Press Group Limited v Fevaworks Solutions Ltd* and (subject to the issue of actual v constructive knowledge) the New Zealand Court of Appeal in *Murray v Wishart*. (Citations omitted.)”
135. The foregoing does not decide, as was the comment of Kourakis CJ, whether Google was a primary or secondary participant in the publication. Nor, for present purposes, does it matter, because Google was in a very different position from that of the defendants in these proceedings.
136. However, it should be noted that Kourakis CJ concluded that Google is best classified as a secondary participant, because its summaries are reproduced from other publications and pages on the Internet: *Duffy* at [158] (upon which finding his Honour was in dissent). Further, Kourakis CJ held that Google had knowledge of the probable content of future search results, once a person

notified it of the existence of defamatory material in the results of a search already produced and should be allowed a reasonable time to take down references to the defamatory material, based on the public policy favouring the dissemination of information generally: *Duffy* at [159].

137. It is important to understand the significant distinction between the production of a Google search and the publication of comments on a public Facebook page. As earlier stated, it is possible for a public Facebook page to be produced that would not allow any comments.
138. Further, while it is not possible to edit or delete third-party comments in advance (assuming any comments are allowed), it is possible, by the listing of common pronouns and other common parts of speech, to hide all (or substantially all) comments from third-party users and to vet comments prior to them being rendered available for third-party users. Google searches merely provide results of articles otherwise published, in readable form, on the Internet, but summarises, usually by extract, the gist of an article.
139. There would be an inordinate number of searches and an inordinate number of articles which could be the subject of search. It would, as Kourakis CJ noted, be impossible, in any meaningful way, to attribute to Google advanced knowledge of the contents of every document published on the Internet.
140. I turn then to the judgment of the New Zealand Court of Appeal in *Murray v Wishart* [2014] 3 NZLR 722; [2014] NZCA 461. This judgment was discussed by Kourakis CJ in *Duffy*, supra. *Murray v Wishart* was a judgment on appeal from the High Court of New Zealand in which the appeal was allowed in part.
141. As Kourakis CJ noted, the judgment of the New Zealand High Court was an interlocutory judgment and the judgment of the Court of Appeal in New Zealand was an appeal from an interlocutory order. Nevertheless, the Court quashed the order of the High Court in relation to the “fifth cause of action”, which cause of action related to third-party statements on the Facebook page hosted by the first appellant, Mr Chris Murray, ruling that this cause of action was untenable and, in its reasons, taking the view that Mr Murray could not be responsible for third-party statements or comments that were published on his Facebook page. It is necessary to summarise the facts upon which the judgment depended.
142. Mr Wishart, the respondent in the appeal, is the author of a book called *Breaking Silence*, which seeks to establish that a woman, Ms King, was innocent of the murder of her twins, aged three months. The coroner had found that the twins died while in the sole custody of their father, who had been charged with their murder and acquitted.
143. During his trial, the father suggested that Ms King had inflicted the fatal injuries and the allegation had been given some currency and ventilation. The book was published, at least in part, to seek to restore Ms King’s reputation.

144. Mr Murray learned of the impending publication of the book and established a Facebook page called “Boycott the ... King book”. On that Facebook page he posted comments criticising Mr Wishart and Ms King, as did numerous other people. Many of the comments were defamatory, or, relevantly, allegedly so.
145. The Statement of Claim that was issued sought, in what became the fifth cause of action, to sue for damages against Mr Murray (and the webpage host) for comments made in third-party statements by persons posting onto the webpage. It was this fifth cause of action, or the comments thereon by the New Zealand Court of Appeal, that is relevant for the present proceedings.
146. There are two relevant aspects of the reasons for judgment in *Murray v Wishart*, which it is necessary to discuss. First, it is necessary to discuss how the Facebook page, which was the subject of the proceedings in *Murray v Wishart*, operated.
147. It is clear, or seems clear, from the contents of the reasons for judgment at [86] and following, that the Facebook page with which the New Zealand Court of Appeal was concerned was a “private [individual] Facebook page”; and not a “public Facebook page”, like the defendants in these proceedings published. Part of the affidavit upon which the Court of Appeal relied, being the affidavit of Mr Murray, referred to his Facebook page as an “individual Facebook page”, over which the creator is unable to exercise meaningful editorial control, except as to comments posted by the creator herself or himself.
148. The affidavit also states (recited at [86] of the reasons for judgment), that there is no function on Facebook by which “a site creator can vet comments before they are published”. Once aware of the comments published, the creator or administrator can retrospectively remove individual comments and block specific Facebook users.
149. Apparently, Mr Murray, while not able to vet, or control in advance, any comments that may have been posted by third-party users, did monitor the site and took frequent and active steps to remove postings that he considered defamatory or otherwise inappropriate. He also blocked particular individuals whose views he considered unacceptable.
150. As a consequence of the findings, confirmed by the New Zealand Court of Appeal, including that Mr Wishart and his supporters were blocked from commenting on the Facebook page, the trial judge took the view that it was tenable that Mr Murray was a publisher of the statements made by third-party users on the Facebook page. Further, the trial judge noted that Mr Murray, as a publisher, may be able to avail himself of the innocent dissemination defence: in New South Wales under s 32 of the *Defamation Act 2005 (NSW)*. The availability of that defence was not an appropriate basis upon which, in the view of the trial judge, the Court could strike out a cause of action.
151. As described by the Court of Appeal at [91] of its reasons, the trial judge’s finding that Mr Murray ought to have known of the third-party statements “was a very important part of the finding ... that the claim Mr Murray was a publisher of the third-party statements was tenable”. As a

consequence, the Court of Appeal was called upon to determine whether the appropriate test for liability was the “ought to know test”: *Murray v Wishart* at [91] .

152. The New Zealand Court of Appeal discussed, as did Kourakis CJ, the long-standing judgments in *Emmens* , supra, and *Byrne v Deane* [1937] 1 KB 818. It is unnecessary for the Court, as presently constituted, to comment separately on those earlier judgments, given the attention paid to them in the other judgments to which I have referred.
153. In the reasons of the New Zealand Court of Appeal, there was also a discussion of the liability of a debt collection agency for statements about credit worthiness that had been published by a prior owner of the business and placed on the website at that time by the prior owner. Actual knowledge was said to be necessary in order to sheet home liability to the subsequent owner: *Sadiq v Baycorp (NZ) Limited* [2008] NZHC 403. There was also an interesting, but not directly relevant, discussion of the responsibilities of a building owner for defamatory graffiti inscribed on the exterior of the building: see also the discussion, above, of *Urbanchich* .
154. The New Zealand Court of Appeal distinguished the US cases in which the issues of publication on a wall were discussed. The distinction between the results in the cases turned on an “invitation” to the public into the place where the wall could be viewed. Further, in the US case of *Cubby Inc v Compuserve Inc* (1991) 776 F Supp 135, (SDNY), defamatory statements were contained in an online newspaper.
155. Because of the corporate structure of the newspaper, its printer, its publisher and a third party who had the power to review, delete, edit and generally to control the content thereof, the third-party was held to be an independent contractor and the defendant had no greater editorial control over that which was contained in the newspaper than a public library or bookstore. The difficulty, pointed out by the New Zealand Court of Appeal, with reliance upon such a proposition is that the common law as it has been applied, at least since *Emmens* , supra, involves the proposition that a library and a bookstore (together with a news vendor) would be publishers, but would have available to them the innocent dissemination defence.
156. Lastly, of significant relevance, was the discussion by the New Zealand Court of Appeal of the judgment of the Court of Final Appeal of Hong Kong in *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366; [2013] HKCFA 47 (“*Oriental Press*”).
157. The New Zealand Court of Appeal distinguished and disapproved the analogy between the host of a Facebook page with which they were presently concerned and a news vendor. The host of a Facebook page, they commented, provides the actual medium of publication and the role of a Facebook page host in the publication is completed before publication occurs. On the other hand, a news vendor is a publisher only because the vendor has a role in distributing the newspaper itself.
158. Further, the New Zealand Court of Appeal distinguished the reasons for judgment of the Court of Final Appeal of Hong Kong as based upon a conclusion as to the basis of the judgment in *Byrne v*

Deane, supra. In *Oriental Press*, the Court of Final Appeal of Hong Kong rejected the analogy of the notice on the wall situation, described in *Byrne v Deane*, because it took the view that the judgment in *Byrne v Deane* was distinguishable because the notice on the wall in the club amounted to a trespass.

159. In contrast, posting a message on a Facebook page, in response to an invitation, is a lawful activity, solicited by the host. The New Zealand Court of Appeal did not consider that the fact of trespass was in the least bit determinative of the outcome in *Byrne v Deane*. *Byrne v Deane* concerned an anonymous notice posted on the wall of a golf club, in circumstances where the rules of the club provided no notices should be posted, without the consent of the Secretary. The UK Court of Appeal made it clear that the club had the power to remove the notice, but did not, and the defendants were responsible for the publication on that basis.
160. With respect to the New Zealand Court of Appeal, in my view, it has treated the issue of “trespass” too literally. As earlier stated, at [112] herein, the building owner/Council/club is not providing its property for a purpose that includes hosting posters and is not agreeing to or encouraging the display of posters of any kind on their property.
161. It is necessary to discuss at further length the judgment of the Court of Final Appeal of Hong Kong in *Oriental Press*, to which reference has already been made. From an Australian perspective, the judgment is useful, because it discusses the common law position, including an analysis of the judgments of the High Court of Australia and the Supreme Court of Canada.
162. The majority judgment was that of Justice Ribeiro PJ, a permanent judge of the Court, with whom Chief Justice Ma and Justices Chan, Litton and Gleeson agreed. Justice Litton was a non-permanent judge from Hong Kong and Justice Gleeson, also a non-permanent judge, is the former Chief Justice of Australia. The other judges are permanent judges of the Court.
163. Again, in that case, the nature of the defamatory statements is irrelevant for present purposes. The defendants in those proceedings, like the proceedings currently before the Court, were, at least in part, newspaper and digital news publishers.
164. The Internet forum, with which the Court dealt in *Oriental Press*, was an Internet or website address and was not a public Facebook page. Any person could browse the website, but only persons who were registered as members were able to post messages on the forum.
165. Membership of the forum was dependent upon acceptance of rules, one of which was a prohibition on postings with objectionable content, including defamation. A registered user of the forum was given a forum nickname and was assigned a password. If the member were to violate the rules, the member might have her or his membership suspended or terminated.
166. The evidence in the proceedings in Hong Kong was that there could be as many as 30,000 users online at any given time and that, during peak hours, over 5,000 postings could be made each

hour. Two administrators were employed to monitor forum discussion for 6 to 8 hours per day; their job being to remove objectionable content by deleting objectionable postings or discussion threads and to field complaints: *Oriental Press* .

167. The Court referred to the judgment of the High Court of Australia in *Webb v Bloch* (1928) 41 CLR 331; [1928] HCA 50 and *Gutnick v Oriental Press* at [18] . It also referred at [20], in the same manner, and to the same effect, to [18] of the judgment of her Honour, Abella J, in *Crookes v Newton* [2011] 3 SCR 269.
168. The Hong Kong Court of Final Appeal also discussed the issue of innocent dissemination and referred to the judgments in *Emmens* , supra; *Vizetelly*, supra; and to the judgment of Gaudron J in *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 586; [1996] HCA 38 (“*Thompson*”).
169. The Hong Kong Court of Final Appeal determined that a person who might rely upon the defence of innocent dissemination was, nevertheless, a publisher and the innocent dissemination of material did not negate the status of a person in that situation as a publisher: *Oriental Press* at [30], [31] and [32] . I respectfully agree with that analysis.
170. The Hong Kong Court of Final Appeal also analysed the legal principles associated with liability in relation to noticeboards and graffiti: see *Oriental Press* at [34] and following. With great respect to the Hong Kong Court of Final Appeal, I respectfully agree with their analysis in relation to innocent dissemination as requiring the persons to be publishers and their analysis of the authorities dealing with the principles associated with graffiti and noticeboards. It is unnecessary to recite or to summarise that analysis. That analysis is, in my view, the only one available from the terms of s 32 of the *Defamation Act* .
171. The reasons for judgment in *Oriental Press* , at [46] and following, deals with the differences between innocent dissemination, on the one hand, and, on the other hand, the notice board line of cases. At [47], the Court said:

“[47] As analysed above, the innocent dissemination defence is a common law doctrine developed to mitigate the harshness of the strict publication rule. While it does not avail the first or main publishers it brings relief to subordinate publishers who have knowingly participated in the process of disseminating the article concerned. The defence is therefore applicable to persons who are admittedly publishers, although playing a subordinate role, allowing them to be exonerated from liability if they discharge the burden of showing that they did not know that the article which they had helped to disseminate contained the offending content and that such lack of knowledge was not due to any lack of reasonable care on their part.”
172. The Hong Kong Court of Final Appeal then contrasts the occupiers in noticeboard and graffiti cases and refers, expressly, to the judgment of Greene LJ in *Byrne v Deane* , supra. The Court comes to the view, with which, in part, I respectfully disagree, that the rules in this area are not

concerned with relieving the liability of a person who is a publisher, but, rather, identifying whether or not an occupier is constituted a publisher. The builders or owners of a wall or bus shelter do not participate in publication until they endorse the use of the facility for publication by another. To that extent I respectfully agree with the analysis. However, a person who is a subordinate publisher is relieved from liability by the same rules. However, liability is not an issue with which I am dealing; publication is.

173. In those circumstances, the Court reiterated that the onus, in relation to the noticeboard and graffiti cases, rests on the plaintiff to prove that the occupier was not aware of the defamatory material. Obviously, that proof may be by direct evidence or by inference.
174. Importantly, in dealing with the relationship between the respondents in the appeal and the third-party commentators, the Court made reference to the active role of the media establishments. At [51] and following, the Court said:

[51] The respondents plainly played an active role in encouraging and facilitating the multitude of internet postings by members of their forum. As described in Section B of this judgment, they designed the forum with its various channels catering for their users' different interests; they laid down conditions for becoming a member and being permitted to make postings; they provided users browsing their website access to the discussion threads developed on their forum; they employed administrators whose job was to monitor discussions and to delete postings which broke the rules; and they derived income from advertisements placed on their website, a business model which obviously benefits from attracting as many users as possible to the forum.

[52] The respondents were therefore, in my view, plainly participants in the publication of postings by the forum's users and in that sense they were publishers from the outset, it being in issue whether they were first or main publishers or merely subordinate publishers. I accept Mr Thomas SC's submission that they were in a substantively different position from the occupiers in the notice board and graffiti cases. The relevant question in the present case is whether, as publishers, the respondents are entitled to rely on, and have established, the defence of innocent dissemination, relieving themselves of the strict publication rule which would otherwise be applicable. The question is not whether, originally being non-publishers, they have, when fixed with knowledge of the defamatory postings, demonstrated their consent to and adoption of those postings, turning themselves into publishers."

175. I too respectfully disagree with the reasoning of the English Court of Appeal in *Tamiz v Google Inc*, supra, for the reasons already given and for the reasons given by Justice Ribeiro PJ at [53] in *Oriental Press*.
176. Most importantly, for the issue before the Court in these proceedings, the Hong Kong Court of Final Appeal discussed the crucial question of whether the respondents in that case are subordinate publishers entitled to rely on the defence of innocent dissemination or whether, in the circumstances before the Hong Kong Court, they were primary publishers.

177. The reasons for judgment of the Hong Kong Court of Final Appeal rely on the history of distinctions in this area being based upon the fundamental proposition that, prior to the advent of the Internet and webpages, defamation laws rested upon the analysis that the publication was from one to many. Thus, a primary publisher of the newspaper disseminated the material to many readers, but was one entity (albeit that there may be other defendants who are liable by virtue of their authorship of a particular article). Similarly, radio and television broadcasts are published by one person and disseminated to many.
178. The same can be said of defamations that occur in email publications. The reasons for judgment of Justice Ribeiro PJ relied, amongst other judgments, on the judgment of the High Court in *Thompson*, supra, and in particular the joint judgment of Brennan CJ, Dawson and Toohey JJ at 589-590.
179. The Hong Kong Court of Final appeal judgment then contrasted publications that may occur on the Internet, which may involve a qualitatively different process, and which, in the words of Justice Ribeiro PJ at [59], are “characterised by open, interactive, ‘many-to-many’ communications made and accessed on platforms provided by internet intermediaries”. His Honour then discussed the respondents in those proceedings as being part of the class of “new intermediaries” of that kind.
180. As a consequence, they were not the originators of the defamatory comments, but the defamatory comments were the result of the respondents having facilitated the speech of others in a forum hosting a large volume of communications. His Honour, with which the other judges of the Court agreed, then dealt with the usual authorisation issue, contrasting the authorisation to which the High Court of Australia referred in *Thompson*, when a television channel retransmitted a broadcast previously disseminated by another television channel, as against the notion that the provider of an Internet platform facilitating many comments was authorising in a “sweeping, undifferentiated authorisation on each of them to post whatever unlawful and objectionable postings they may choose to post”.
181. The foregoing proposition, the Court said, was inherently improbable. As a consequence, the Court rejected the appellants’ submission that the media respondents authorised the comments.
182. The Court then dealt with the submission that the media respondents acted as the first or main publishers of the impugned defamatory material and the “but for” argument that, if the server were not to operate, the comment would never have been published. In the analysis, the Hong Kong Court of Final Appeal made it clear that one could not, in determining liability, ignore the originators of the comment who were “upstream” from the owner of the website.
183. With respect, the depiction of the owner of an Internet forum as a primary publisher does not absolve persons upstream from a liability they may otherwise possess. The journalist may have a liability, notwithstanding that the publication occurs in a newspaper: *Webb v Bloch* (1928) 41 CLR 331 at 363.

184. Similarly, the writer of a letter to the editor may be liable in defamation for comments that are made in the letter, even though the newspaper that printed the letter would, also, be a primary or first publisher.
185. Another example of such a situation is where, for example, a person is interviewed by a television current affairs or news journalist and makes defamatory comments, which are reproduced in the television broadcast. Each of the interviewee and the broadcaster are liable as primary publishers and, if the interviewee provided the interview in the expectation that it would be published by the television broadcast, liable for the damages occasioned thereby.
186. While I have spent more time than is probably necessary, or appropriate, in analysing the judgment of the Hong Kong Court of Final Appeal, I have done so because of its obvious relevance to the issues presently before the Court. The Hong Kong Court of Final Appeal set out criteria by which the determination of whether a person or persons should be classified as a primary or first or main publisher should be discerned. It did so at [75] and [76], which are in the following terms:
- “[75] As the authorities on the innocent dissemination defence show, in a newspaper setting, the journalist, editor, printers and (vicariously) the newspaper proprietor are all treated as first or main publishers. In my view, this is because they are persons whose role in the publication process is such that they know or can be expected easily to find out the content of the articles being published and who are able to control that content, if necessary preventing the article’s publication. It is because they occupy such a position that the law has held them strictly liable for any defamatory statements published.
- [76] In my view, the abovementioned characteristics supply the criteria for identifying a person as a first or main publisher. They are (i) that he knows or can easily acquire knowledge of the content of the article being published (although not necessarily of its defamatory nature as a matter of law); and (ii) that he has a realistic ability to control publication of such content, in other words, editorial control involving the ability and opportunity to prevent publication of such content. I shall, for brevity refer to them as ‘the knowledge criterion’ and ‘the control criterion’ respectively.” (Emphases in the original.)
187. With great respect to the reasons for judgment of Justice Ribeiro PJ, there is a degree of vagueness in the first criterion of a first or main publisher, as stated in [76] above. It is not absolutely clear, from the comments of his Honour, whether the knowledge, or the capacity easily to acquire the knowledge, is intended to be knowledge prior to publication or subsequent to publication. I take the view that it is so intended.
188. This vagueness is exacerbated by the second criterion, which refers to a realistic ability to control publication of such content. Again, is that intended to apply at a time prior to its publication? Again, I take the view that it is. Further, given the view I take, it seems that the second criterion, if it were to apply to circumstances prior to publication, would suffice to render the owner of the webpage a primary, first or main publisher: see the extract from *Thompson*, below. If there is control of content, then knowledge may be acquired by the use of sufficient resources. For reasons that will become obvious, I need not deal with that issue further.

189. As was made clear in *Oriental Press*, the issue of control (and knowledge) was a fundamental issue in the judgment of the High Court in *Thompson*, supra, in which, in the reasons for judgment of the plurality, the High Court said, at 589-590 :

“It is true that Channel 7 did not participate in the production of the original material constituting the program. But Channel 7 had the ability to control and supervise the material it televised. Channel 7’s answer is that time did not permit monitoring the content of the program between its receipt at Black Mountain and its telecast from the studios in the Australian Capital Territory. That may well be so but it by no means follows that Channel 7 was merely a conduit for the program and hence a subordinate disseminator. It was Channel 7’s decision that the telecast should be near instantaneous, a decision which was understandable given the nature and title of the program but which was still its decision.”

Are the Defendants Publishers?

190. The foregoing is a sufficient analysis of enough of the authorities in the area. The question, which the Court must answer, is whether the defendant in each of the proceedings is a publisher. The simple answer to that question is in the affirmative.
191. The more difficult issue is whether, as a publisher, they are a primary or main publisher and, on each aspect, the reason they should be so categorised. The secondary issue, not strictly raised by the question, but argued by the parties and dealt with in the evidence, is, if the defendants are subordinate or secondary publishers, can they rely on the defence of innocent dissemination?
192. As can be seen from the foregoing analysis of the reasons for judgment in this area, the principles are in the process of emerging. No doubt it will be for others in the judicial hierarchy to determine the policy reasons on a final basis. Unfortunately, that does not relieve the Court, as presently constituted, from stating the effect of the law as it understands it currently exists and, to the extent that is within the ambit of the binding and/or highly persuasive authorities, that which it should be.
193. From the foregoing, it is fundamental that there is a significant difference between the operation of a public Facebook page and the operation of a website or, even more so, a Google search facility. In the judgments that have dealt with the liability of Google, it is clear that the operation of Google as an “index” has been a central factor in the determination of liability for that which was initially on the Internet. Last, Google (and other search engines) are not liable as primary publishers of that which a person utilising the search mechanism discovers as a result of its operation.

194. On the other hand, a summary by Google, in its own words, of the effect of the primary source, is first published by Google and Google is a primary publisher of that material. As a consequence, Google (and other search engine providers) are liable, as primary or first publishers, of their own summary material and cannot avail themselves of the defence of innocent dissemination.
195. The provision of a link to the original primary source material is not, itself, the publication of the defamatory material in the primary source and search engine providers do not need to take advantage of the defence of innocent dissemination. The issue as it applies to websites (as distinct from a public Facebook page) is different.
196. It seems that, hitherto, none of the authorities have dealt with a public Facebook page. The closest analogy is that provided in *Oriental Press*. While the judgment of the Court of Final Appeal of Hong Kong is not strictly binding, in my view, it is highly persuasive and it purports to state the principles applicable under the common law.
197. It is unnecessary for the Court, as presently constituted, to deal any more conclusively with the issues and principles espoused in *Duffy*, supra. Moreover, the outcome of the appeal in *Duffy* is, given the very different circumstances, largely irrelevant. For my own part, I prefer the outcome suggested by Kourakis CJ, rather than the majority. But it matters not.
198. In *Duffy*, there can be little doubt that the summary was produced (whether electronically or otherwise) by Google and first published by Google. Of itself, that separates the issues in *Duffy* from that which is currently before the Court.
199. Further, there is some force in the submission that imposing an “ought to know” test on a subsidiary or subsequent publisher puts that publisher in a worse position than a subsidiary publisher who does know and, therefore, on the authorities to which the Court has referred, has a reasonable time after knowledge is gained to remove the defamatory material. If a test of “ought to know” is imposed, then, on one view, no reasonable time is allowed.
200. On the other hand, where a subsidiary publisher is in a position where it ought to know that defamatory material is to be published, then the reasonable time would commence from the time at which it ought to have known. In other words, if the “ought to know” test were applied, it must involve the capacity of the subsidiary publisher to remove defamatory material within a reasonable time from when it ought to have known.
201. While the foregoing may be interesting, it is not directly relevant to the issues with which the Court is currently concerned. I do not in these proceedings apply an “ought to know” test. Fundamentally, the issue before the Court is whether each of the defendants is a publisher and, if so, whether it is a primary or first publisher.

202. For the reasons given by the Court in *Oriental Press*, I also do not seek to apply the “but for” test. In any event, given that a comment on the public Facebook page will also result in that comment appearing on the Facebook page of the third-party user that has made the comment, the comment will have been published, notwithstanding any deletion or hiding that occurs on the public Facebook page. The Court will deal with that which flows from that circumstance later in these reasons.

Conclusion

203. The operation of a public Facebook page is fundamentally different from the operation of a website and, relevantly, different from the operation of an individual Facebook page. In the case of a “public” website onto which third-party users make comments, there is no capacity, at least on the facts stated in other judgments, for the administrator or owner of the public website to block or hide comments made on the website, except after the fact. Thus, in a public website, there is no capacity, physical or otherwise, to vet comments or to prevent them from being published to the world.
204. On the other hand, on an individual Facebook page, there is a capacity to ensure, by use of privacy settings, that only Facebook friends can add to the timeline or comments, but not to block all comments to any posting.
205. A public Facebook page is, on the foregoing basis, unique. It allows the publication of the Facebook page and comments by the Administrator, but allows the Administrator to forbid all comments by others. Further, by the use of a list of prohibited words that includes words that would be necessary to render any comment intelligible, such as all pronouns; the definite and indefinite articles; and all conjunctions and prepositions, the Administrator is able to hide all comments, pending the monitoring of such comments.
206. In *Oriental Press*, the Facebook page in question in those proceedings was not a Public Facebook page and does not come within the description above. Nevertheless, the number of postings there described, or any number approaching same, would render practically impossible the monitoring of all comments on a public Facebook page, prior to them being “un-hidden”, without the allocation of extraordinary resources, at least by Australian standards. That, on the evidence before the Court, is not the situation here.
207. As earlier recited, the High Court in *Gutnick*, referred to the striking of a balance between society’s interest in freedom of speech and the free exchange of information and ideas, on the one hand, as against, on the other hand, the maintenance of a person’s reputation in society. However, the operation by the defendant, in each of these proceedings, of their public Facebook page has little to do with freedom of speech or the exchange of ideas.

208. Any third-party user is able to share a posting by the host media company and comment, to their heart's content, on their own individual Facebook page, on the snippet provided by the media company. Further, each third-party user is able to see the full article or original article (assuming, in the relevant case, that any appropriate fee is paid) without making comment.
209. Rather, the media companies' use of a public Facebook page is about their own commercial interests. As already indicated, the primary purpose of the operation of the public Facebook page is to optimise readership of the newspaper (whether hardcopy or digital) or broadcast and to optimise advertising revenue. The exchange of ideas on the public Facebook page is a mechanism (or one of the mechanisms) by which that is achieved.
210. Moreover, as the prior discussion on first principles explains, it is not the compiling of a comment that gives rise to damages in defamation; it is its publication. Where a third-party user comments on the relevant public Facebook page, that is the first time that the comment is in "comprehensible form" to the vast bulk of readers and it is from that publication that the comment is downloaded onto the computer of the person who is gaining access to the public Facebook page.
211. Moreover, it is the comment's presence on the public Facebook page, which allows all third-party users to gain access. If the comment were made on the commentator's own private Facebook page, only her or his friends would view it and probably none of them would look for it or find it.
212. The foregoing is not the application of the "but for" test. It is the necessary consequence of the proposition that it is not the compiling of a message that amounts to the publication of the message; it is the placement of the message in a form that is comprehensible and able to be downloaded and the consequence that it is the ownership of the public Facebook page that attracts a reader. Of course, it is the third-party user that places the comment on the page.
213. Only the defendant company in each proceeding has effected that result in relation to anyone other than the third-party user and the Facebook friends of that third-party user. It has done so by not hiding all comments, subject to later approval or "un-hiding".
214. Thus, any comment has been published to any person, other than a Facebook friend of the third party user who has commented, who downloads or gains access to the comment, only by the media company that administers the public Facebook page. On that basis, in relation to each reader of the public Facebook page, who is not the Administrator or a Facebook friend of the third-party commentator, the defendant media company is the first and only publisher of the comment (leaving aside upstream participants).

215. I turn then to the issue of those persons, who are Facebook friends of the third-party user who has made a comment on the public Facebook page of the defendant media company. Those persons are capable, with some effort, of gaining access to the comment on the Facebook page of the third-party-user commentator.
216. The difficulty is that the comment, placed on the public Facebook page, will not, ordinarily, be immediately or easily seen on the third-party user's own individual Facebook page, without a search of that page. So, unless the third-party user's Facebook friends already knew that a comment had already been made, it is unlikely, if not practically impossible, for the third-party users to see the comment other than on the public Facebook page.
217. More importantly, the placement of the comment on the third-party user's individual Facebook page is an automatic program-generated result of placing the comment on the public Facebook page. It seems, on the basis of the principles already described, that, in those circumstances, the comment on the third-party user's individual Facebook page is in the same category as the results of the search engine, without a summary.
218. That is not to say that the third-party user would not be liable for the publication, only that the publication of the comment on the third-party user's individual Facebook page would be a subsidiary, subordinate or secondary publication. Of course, that may make little difference, given that the third-party user will, axiomatically, know that the comment has been made and, therefore, the defence of innocent dissemination would not, ordinarily, be available.
219. Further, the Facebook friends of the third-party user, who comments, are able to read the comment by virtue of their status as such "Friends"; not by virtue of the status of the public Facebook page. If the media companies were unable to hide a comment from the commentator's "friends", then the media company, in that respect, would probably be a secondary or subordinate publisher, applying the tests in *Duffy* at [102], [103] and *Oriental Press* at [76].
220. It is unnecessary and inappropriate for the Court, as presently constituted, to re-frame or lay down any general principle. The Court is applying the principles already adumbrated.
221. In *Webb v Bloch*, supra, at 365, Isaacs J made it clear that it is the reservation and capacity to exercise the "final right of approval" that renders the distributor or medium of publication liable for any defamation of another. That proposition was clarified and reinforced in *Thompson*, supra.
222. In the passage, recited in these reasons at [189], from pp 589-90 of *Thompson*, the High Court clarified that a person is a primary publisher, not, in that case, because it participated in the production of the libel, but because it broadcast the libel, in circumstances where it had control and supervision of the material it broadcast and it is no answer that "time did not permit monitoring".

223. Here, on the evidence before the Court, each defendant had the means effectively to delay the publication of the third-party comments and to monitor whether any were defamatory, before releasing them to the general readership.
224. Each defendant was not merely a conduit of the comment. It provided the forum for its publication and encouraged, for its own commercial purposes, the publication of comments.
225. Moreover, in the *Emmens* and *Vizetelly* sense, each defendant was aware that comments on its initial posting were likely and more probably than not would include defamatory material. Each, on the evidence, had “reason to suppose that it [the comments] was likely to have contained libellous matter”: *Thompson* at 585 ; see also *Duffy* at [141], [143] ; and [146]. Each defendant has the capacity effectively to block a comment on their initial post that is, likely to attract or, “commonly attracts defamatory material”.
226. It matters little which of the various tests are utilised. I prefer the test in *Oriental Press* , but acknowledge that the tests vary little and do not result in inconsistent outcomes when the facts to which they are applied are properly understood. I apply each of the tests at [102] and [103] of *Duffy* , and in *Oriental Press* at [76] , in light of the comments in *Thompson*.
227. On that basis, the defendant in each of the proceedings is, in relation to the general readership, in the position where “they know or can be expected easily to find out the content of the articles being published and ... are able to control that content, if necessary preventing the article’s publication” before its publication to the general readership: *Oriental Press* at [75] . This assumes the capacity to hide all comments on these particular postings and to monitor those comments and “un-hide” acceptable ones.

228. Following paragraph cited by:

Bailey v Bottrill (No 2) (27 June 2019) (McWilliam AsJ)

46. The recent decision of *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 (*Voller*), delivered by Rothman J on 24 June 2019, should also be noted. That case concerned a public Facebook page and defamatory comments that might be posted on the Facebook page, rather than any hyperlinked material uploaded or posted by the operator of the page. His Honour found (at [228]) that the relevant media companies who operated each of the public Facebook pages in question were a first or primary publisher in relation to the general readership of the Facebook page each operated.

Applying the authorities to the appellant’s Facebook page

In conclusion, the Court, as presently constituted, is satisfied, on the balance of probabilities, that the defendant media company in each proceeding is a first or primary publisher, in relation to the general readership of the Facebook page it operates. As a consequence of that classification, the defence of innocent dissemination would not arise. That latter aspect is not, strictly, necessary to answer the question that has been posed.

229. If the Court is wrong in that classification, or if one is dealing with the Facebook friends of the commentator, then each would be a subordinate or secondary publisher, and the answer to the question posed would still be in the affirmative. Plainly, the defendants have each participated in the publication of the relevant comment. In that circumstance, the question would arise whether the plaintiff has shown that the defendant in each proceeding is liable for the publication, bearing in mind the defence of innocent dissemination.
230. In my view, the principles in *Byrne v Deane*, supra, need some clarification. When 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.
231. A defendant cannot escape the likely consequences of its action by turning a blind eye to it. Where a defendant’s assessment of the consequences of allowing comment, if performed, would have been that defamatory material will be published and, if that defendant is a subordinate publisher, the defendant is promoting, ratifying and consenting to the publication of the defamatory material, even though its precise terms may not be known. The defendant, in that situation, is on notice: see *Duffy* at [146].
232. Lastly, in that respect, I note that the defendant media company has opened and continues to operate a public Facebook page for its own commercial ends. In doing so, it assumes the risks that comments made on that page will render it liable under various laws that may prevent, render unlawful, or render actionable in damages various statements: *Thompson* at 589-590, supra.
233. That risk may be ameliorated by the suggestion, given during the course of submissions and evidence, that all comments be hidden, in the manner described in these reasons for judgment, and “un-hidden” after it has been monitored. Given that the comments about which complaint is made in these proceedings are comments on an initial post that was more likely than not to give rise to defamatory comments, there seems to be no public policy reason why liability should not be sheeted home to the media company that is the defendant in each of the proceedings, at least, if it be a subordinate publisher, for its general readership (i.e. excluding the Facebook friends of the commentator).
234. The Court makes the following orders:
 1. The Court answers the following question in the following manner:

“Whether the plaintiff has established the publication element of the cause of action of defamation against the defendant in respect of each of the Facebook comments by third-party users?”

Answer: Yes

2. The defendant in each proceeding shall jointly and severally pay the plaintiff's costs of and incidental to the hearing of the separate question.
3. Leave is reserved to the parties to make application within seven (7) days for any special or different order as to costs.

Amendments

25 June 2019 - [172] Explanation of earlier correction.

24 June 2019 - [172] "I respectfully agree" amended and replaced with "I respectfully disagree".

Decision last updated: 25 June 2019

Cited by:

Burns v Gaynor (No 2) [2019] NSWDC 552 (10 October 2019) (Gibson DCJ)

Voller v Nationwide News Pty Ltd; Voller v Fairfax Media Publications Pty Ltd; Voller v Australian News Channel Pty Ltd [2019] NSWSC 766

Burns v Gaynor (No 2) [2019] NSWDC 552 (10 October 2019) (Gibson DCJ)

55. While Mr Burns submits that the first defendant has several thousand followers on Facebook, the likelihood that they read Mr Smith's post amongst the many others (including those of the plaintiff himself, who participated in the debate) needs to be considered in light of the fact that it was one of many and online for approximately a week after notification. The law in relation to liability for the Facebook posts of others is a complex area of competing decisions, the most recent being *Voller v Nationwide News Pty Ltd; Voller v Fairfax Media Publications Pty Ltd; Voller v Australian News Channel Pty Ltd* [2019] NSWSC 766.

Bailey v Bottrill (No 2) [2019] ACTSC 167 (27 June 2019) (McWilliam AsJ)

Voller v Nationwide News Pty Ltd [2019] NSWSC 766

Wake v John Fairfax & Sons Ltd

Bailey v Bottrill (No 2) [2019] ACTSC 167 (27 June 2019) (McWilliam AsJ)

46. The recent decision of *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 (*Voller*), delivered by Rothman J on 24 June 2019, should also be noted. That case concerned a public Facebook page and defamatory comments that might be posted on the Facebook page, rather than any hyperlinked material uploaded or posted by the operator of the page. His Honour found (at [28]) that the relevant media companies who operated each of the public Facebook pages in

question were a first or primary publisher in relation to the general readership of the Facebook page each operated.

Applying the authorities to the appellant's Facebook page