

*'Intuition suggests that the remarkable features of the internet (which is still changing and expanding) makes it more than simply another medium of human communication. It is indeed a revolutionary leap in the distribution of information, including about the reputation of individuals. It is a medium that overwhelmingly benefits humanity, advancing as it does the human right of access to information and to free expression. But the human right to protection by law for the reputation and honour of individuals must also be defended to the extent that the law provides.'*¹

These were the remarks of Justice Kirby in High Court decisions of *Dow Jones & Company Inc v Gutnick* and are as true today as they were in 2002.

These comments were made before the introduction of the (Uniform) *Defamation Act 2005* and three years before Facebook, Twitter or Instagram even existed.

Since then, social media and the use of the internet have evolved in a manner that neither the legislators nor Kirby J could have foreseen, allowing defamatory material to be published and accessed in unprecedented ways.

It was therefore unsurprising, and long overdue, when the first amendments to the *Defamation Act* came into effect on 1 July 2021.² Subsequently, and unrelated to those amendments, the High Court has delivered two decisions relating to the issue of liability of publishers – in both instances involving online publications.

This article will address these Judgments and provide a timely reminder to business owners of their responsibility for protecting the reputation of others and their right to protect their own reputation online.

Fairfax Media Publications Pty Ltd v Voller [2021] HCA 27

Voller concerned the Plaintiff, Dylan Voller. He argued that a number of media outlets (including Fairfax) who host Facebook pages were responsible for defamatory third party comments, posted by third party users, on those pages.

Rothman J at first instance dealt with the preliminary question of whether "*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?*"³

Indispensable in determining this issue was the Court's understanding as to the involvement of the various players (third party users, hosts and Facebook) in the comments on these platforms. The Court found:

1. Each media host published a link on its public Facebook page on which a story was introduced with an image, a headline and a comment. The link allowed people to access the full story.
2. The host measured the number of visitors to its Facebook page and their website for the purpose of negotiating rates with advertisers.
3. Facebook alerted the host each time a third party user commented or liked one of their publications.

¹ *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575, [164]

² These amendments have not yet been legislated in WA or NT

³ *Voller v Nationwide News Pty Ltd; Voller v Fairfax Media Publications Pty Ltd; Voller v Australian News Channel Pty Ltd* [2019] NSWSC 766, [5]

4. The Administrator of the host's Facebook page had the ability to hide or delete comments. If a comment was hidden, it was only seen by the person who had written it, that person's "friends" and the Administrator. It would then appear in grey so the person who wrote it was aware that it has been moderated. The Administrator could choose at a later time to make it visible. If it were deleted, then no one could see it.
5. The host was able to interact with comments by liking, reacting, mentioning or sharing the third party user's publication.
6. The host could ban or block specific usernames, profanities or offensive words.
7. Facebook could rank particular comments that are liked, shared or further commented on and give priority to that comment.
8. Evidence was given that the Administrator of Fairfax's Facebook page posted approximately 50 comments a day and each post could receive anywhere from 100 to thousands of comments.⁴

Rothman J found the media outlets to be primary publishers of the defamatory comments posted by the third party users. That decision was appealed to the Full Court where it was affirmed that the media outlets were publishers of the material.

The Full Court however, and importantly, did not make any finding as to whether the media outlets were primary or secondary publishers of the material and whether the defence of innocent dissemination was available to them, as the Full Court did not consider that issue formed part of the question posed of them.⁵ That point of law remains undetermined.

The Full Court's decision was appealed to the High Court. Kiefel CJ, Keane and Gleeson JJ formed the plurality in affirming the media outlets liable as publishers, and made the following comments (emphasis added):

*'The Court of Appeal was correct to hold that the acts of the appellants in **facilitating, encouraging and thereby assisting the posting of comments** by the third-party Facebook users rendered them publishers of those comments.'*⁶

*The primary judge found that over 15 million Australians are Facebook users. The appellants chose to operate public Facebook pages in order to engage commercially with that significant segment of the population⁷ ... Having regard to those findings, the appellants' attempt to portray themselves as **passive and unwitting victims of Facebook's functionality has an air of unreality**. Having taken action to secure the **commercial benefit** of the Facebook functionality, the **appellants bear the legal consequences**.*⁸

*In sum, each appellant **intentionally** took a platform provided by another entity, Facebook, **created and administered a public Facebook page**, and posted content on that page. The creation of the public Facebook page, and the posting of content on*

⁴ A full list of the factual conclusions regarding the operation of the Facebook pages is at para [90] of the judgment.

⁵ Secondary publishers of defamatory material may rely on the common law or statutory defence of innocent dissemination where they prove they "neither knew, nor ought reasonably to have known, that the matter was defamatory". The onus is on the secondary publisher to prove the defence and, where (and for as long as) the defence would otherwise apply (e.g. in the case of a search engine in respect of defamatory search results algorithmically generated) the secondary publisher will not be liable for any publication of such defamatory material until put on specific notice of it by the defamed person and given reasonable time to consider and remove it.

⁶ *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27, para [55]

⁷ *ibid*, [100]

⁸ *ibid*, [102]

*that page, encouraged and facilitated publication of comments from third parties. The appellants were thereby publishers of the third-party comments.*⁹

Google LLC v Defteros [2022] HCA 27

The plaintiff was a Melbourne solicitor who specialised in criminal law. In June 2004, he and a Melbourne gangland figure were charged with conspiracy to murder and incitement to murder of Carl Williams, his father and body guard. In August 2005, the charges were withdrawn against the plaintiff, and his co-accused was murdered the day before his trial. This was highly publicised.

In early 2016, he became aware that an internet search of his name produced search results including the below snippet of an article published by The Age on 18 June 2004:

"Underworld loses valued friend at court -SpecialsGanglandKillings ...

www.theage.com.au > Features > Crime & Corruption ▼

June 18 2004 - Pub bouncer-turned-criminal lawyer George Defteros always prided himself on being able to avoid a king hit – The Age Online"

He issued proceedings against Google for defamation in which Google denied being the publisher as well as a number of other defences.

The Victorian Supreme Court was asked to determine whether Google was the publisher in terms of the search results and the hyperlinked material (comprising the 2004 article).

The question of whether Google was liable for a defamatory search result and hyperlinked material had been answered in the affirmative in the SA Full Court in *Google Inc v Duffy* [2017] SASFC 130. However, the Victorian Court considered a different issue:

*"does Google publish defamatory material on a third-party webpage that is reached by a user who clicks on a hyperlink within an apparently neutral search result?"*¹⁰

which was, at the time, still undetermined (as *Duffy* had dealt with a defamatory hyperlink reached from clicking on a defamatory snippet).

The High Court by majority comprising Kiefel CJ, Gleeson, Gageler, Edelman and Steward JJ; overturned the Full Court of Victoria's decision and found that Google was not a publisher of hyperlinked material.

Kiefel CJ and Gleeson J stated (emphasis added);

*'It cannot be said that the appellant was **involved in the communication** of the defamatory material by reference to the circumstances in *Webb v Bloch and Voller*. It **did not approve the writing** of defamatory matter for the purpose of publication. It **did not contribute to any extent to the publication** of the Underworld article on The Age's webpage. It **did not provide a forum or place where it could be communicated, nor did it encourage the writing of comment in response** to the article which was likely to contain defamatory matter. Contrary to the finding of the trial judge, the appellant **was not instrumental in communicating** the Underworld article. It assisted persons searching the Web to find certain information and to access it.'*¹¹

⁹ *ibid.*, [105]

¹⁰ *Defteros v Google* [2020] VSC 201 para [48]

¹¹ *Google LLC v Defteros* [2022] HCA 27, para [49]

...there is a difference between drawing a person's attention to the existence of an article and communicating its content. And whilst it may be said that the use of a hyperlink may mean The Age gains a reader, that does not make the appellant something other than a reference provider.¹²

To reach this finding the Court had to critically review Google's function, and the following findings were made with respect of this issue:

The critical feature is that the search result is no more than a designedly helpful answer to a user-initiated inquiry as to the existence and location of information on the Internet.¹³

By entering a search term into the Google search engine, the searcher looks for matter on a topic of interest to the searcher. By providing a search result, Google indicates where on the Internet that matter may be found. The hyperlink in the search result identifies the webpage on which matter on that topic is located. The hyperlink in the search result – no differently from any other hyperlink – also provides a shortcut which facilitates immediate access to the webpage should the searcher choose to take the further step of clicking on it. Having obtained the search result, including the hyperlink and the snippet, it is then up to the searcher to decide whether or not to take that further step of clicking on the hyperlink so as to access the webpage. Google does not, merely by providing the search result in a form which includes the hyperlink, direct, entice or encourage the searcher to click on the hyperlink.¹⁴

The High Court found however that there could be situations in which Google would be a publisher of hyperlinked material. These included as a result of;

1. The promotional system employed by Google in a particular circumstance;
2. Enticement; and
3. Incorporation.¹⁵

Examples provided by the Court included circumstances where Google was promoting the material (such as ranking it higher in the search results) or had included a defamatory snippet linking to the hyperlinked material (as in *Duffy*).

Future changes to who is a publisher in the online world

Following the judgment of *Voller* media outlets expressed concerns that the floodgates would open, and they would face a greater risk of future liability. The judgment of *Deferos* may have alleviated some of these concerns, and has ultimately ensured that Australia's position on the liability of publishers has greater consistency with other common law jurisdictions.

We suspect that lobbying will continue by media outlets for further legislative change.

Currently under review is a 'stage 2' reform to the *Defamation Act*, which will address, amongst other things, the question of internet intermediary liability for publication of third party content through the introduction of a new defence, with a new section 9A proposed.

¹² *ibid*, para [50]

¹³ *ibid*, para [73]

¹⁴ *ibid*, para [74]

¹⁵ *ibid*, para [217]

The proposed defence, whilst perhaps not quite as broad as the defences available in the US and UK,¹⁶ would limit the liability of search engines such as Google as a secondary publisher of defamatory material. For example, the proposed defence would appear to be applicable in the situation seen in *Duffy* where the search result itself is defamatory - unless the search engine had prioritised or promoted the result (because of payment or other benefit it had received). The proposed defence may not however assist media outlets in cases like *Voller*.

Take away message for your business

Businesses should remain vigilant and exercise caution in respect to their online presence, e.g. in both:

1. protecting their reputation against third party posts; and
2. reducing their liability as a potential publisher of other's defamatory material.

In light of the recent case law, it would therefore appear that businesses need to:

- Exercise caution when publishing material from other websites via a hyperlink.

If it directs, entices or encourages someone to click on the link, then they will be liable for any defamatory hyperlinked material on the underlying material.

- Care should be given when publishing material on a business social media page especially when the intention is to encourage participation and discussion. If defamatory comments are left by a third party then, the business may be liable for these comments.

Note that it is presently unsettled law as to whether a business would be liable as a primary publisher or as a secondary publisher (who may have the defence of innocent dissemination available to them).

- Further, businesses should have a carefully considered online management plan of how to deal with third party comments of a defamatory nature, whether defamatory of their business or others.

It may be that the online management plan is to restrict third party users from commenting on their Facebook post (a functionality that Facebook allows) or that detailed and regular audits and censoring of comments are undertaken to ensure that defamatory material is not available.

- If you or your business has been defamed online, it is important that you take immediate action and pay attention to who is publishing the material and in what situation. There may be other parties who are liable for defamation, in addition to the person who posted the material. This is especially important if the identity of that person cannot be determined or they have insufficient means to appropriately compensate for any harm caused.

Keep in mind that not all businesses have a right to sue in defamation. If a business operates as a corporation then it must have fewer than 10 employees (with part-time employees being calculated based on the appropriate fraction of the full-time equivalency) or its objectives must not include obtaining financial gain for its members or corporators.¹⁷

¹⁶ Under s230 of the *Communications Decency Act 1996 (US)* states that no provider or user of an interactive computer service shall be treated as a publisher and s5 of the *Defamation Act 2003 (UK)* states that operators of websites are not liable for defamation except in very specific circumstances eg where it is not possible to identify the publisher who posted the defamatory material..

¹⁷ Corporations may have the right to sue in injurious falsehood if defamation is not available.

Protecting your business' online

Lessons learnt from the recent High Court cases of *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27 and *Google LLC v Deferos* [2022] HCA 27

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After several years without legislative developments, governments now appear eager to update the *Defamation Act* into the online digital age. With further changes foreshadowed, it will be prudent to watch this space for changes to publishers' liability online.