



HIGH COURT OF AUSTRALIA

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File Number: S236/2020
File Title: Fairfax Media Publications Pty Ltd v. Voller
Registry: Sydney
Document filed: Form 27A - Appellant's submissions-Appellants' Submissions
Filing party: Appellant
Date filed: 17 Feb 2021

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

Fairfax Media Publications Pty Ltd
ACN 003 357 720
Appellant (S236 of 2020)

Nationwide News Pty Limited
ACN 008 438 828
Appellant (S237 of 2020)

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Australian News Channel Pty Ltd
ABN 28 068 954 478
Appellant (S238 of 2020)

and

Dylan Voller
Respondent

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APPELLANTS' SUBMISSIONS

PART I: CERTIFICATION

1. The appellants certify that these submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2. The appeal raises two principal issues:
 - (a) *First*, for a person to be a publisher for the purposes of the tort of defamation, must the person intend to communicate the matter complained of?
 - (b) *Secondly*, is the creator of a Facebook page (or other similar social media page) a publisher of third-party comments posted on the page even prior to being aware of those comments?

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PART III: SECTION 78B NOTICES

3. The appellants certify that they have considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth) and have concluded that such notice is not required in this case.

PART IV: REASONS FOR JUDGMENT BELOW

4. The reasons of the primary judge (Rothman J) are *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 (**PJ**).
5. The reasons of the Court of Appeal are *Fairfax Media Publications Pty Ltd v Voller* (2020) 380 ALR 700; [2020] NSWCA 102 (**CA**).

10 **PART V: FACTS**

6. The appellants are Australian media organisations. Each of them has established a page on the social media platform “Facebook”, on which it provides links to content published on its own websites. The Facebook pages are publicly accessible to users of Facebook, who are able to view and comment on posted content. The respondent has brought separate proceedings for defamation against each of the appellants. The matters complained of include comments posted on each appellant’s Facebook page by Facebook users.¹
7. The respondent does not allege that any of the appellants failed to take steps to remove any defamatory material from its Facebook page once it became aware of such material (joint core appeal book (**JCAB**) p 13 (**PJ** [11])). Rather, the respondent’s case as to publication is that each of the appellants is a publisher of any third-party comment on its Facebook page, even prior to being aware of the comment, from the moment the comment is posted by a user and read by another person. The conduct relied upon by the respondent to establish that each appellant is a publisher of the third-party comments is establishing a public page on Facebook and posting on that page links to content on the appellant’s own website about the respondent. When such a link is posted, the Facebook mechanisms automatically cause a box to appear under the link — which box cannot be removed or disabled —

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¹ Examples of the matters complained of were included in schedules to the statements of claim.

with options for a Facebook user to interact with the post, including an option to “Comment” (JCAB 116 (CA [70]), JCAB 120 (CA [85])). All of the specific acts and conduct of the appellants relied upon thus occurred *before* the third-party users’ comments existed (JCAB 123 (CA [93])).

8. The present appeal arises from the determination of a separate question stated in each of the respondent’s proceedings: “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?” The primary judge answered the separate question “Yes” and that answer was affirmed by the Court of Appeal.
9. The primary judge found that there are over 15 million Australian Facebook users (JCAB 24 (PJ [64])). In light of the answer to the separate question given by the Court below, any such user of Facebook (or other similar social media) could be found to be a publisher of matter posted on their page by third-party users, even if they are unaware of the material. There is no reason in principle why there would be a different approach to a public page of the kind the appellants have established and a private page accessible only to the user’s “Facebook friends” (cf JCAB 129 (CA [112])). For the following reasons, the answer to the separate question given by the Court below was incorrect. The question should have been answered: “No”.

20 PART VI: ARGUMENT

(a) Reasons of the Court of Appeal

10. In joint reasons, Meagher JA and Simpson AJA (JCAB 123 (CA [94])) noted the explanation of “publication” given by Isaacs J in *Webb v Bloch*,² in terms approved by this Court in *Trkulja v Google LLC*.³ His Honour said:

The meaning of “publication” is well described in *Folkard on Slander and Libel*, 5th ed. (1891), at p. 439, in these words: “The term *published* is the proper and technical term to be used in the case of libel, *without reference to the precise degree* in which the defendant has been instrumental to such publication; since, *if he has*

² (1928) 41 CLR 331 at 363–364.

³ (2018) 263 CLR 149 at [39]–[40].

intentionally lent his assistance to its existence for the purpose of being published, his instrumentality is evidence to show a publication by him.” [emphasis in original]

11. Notwithstanding Isaacs J’s reference to *intention*, Meagher JA and Simpson AJA stated what they saw as the “relevant question” in terms that made no reference to it (JCAB 125 (CA [98])): “whether in subscribing for and using the Facebook page to make their own posts and the comment posts of other Facebook users ‘public and viewable’ on the Page the applicants were instrumental and participated in the publication of those comments”. Their Honours concluded that this was so, because
- 10 the appellants had subscribed to Facebook, so as to have a publicly viewable page, which invited and encouraged Facebook users to comment in a way that was viewable by any visitor to the page (JCAB 125 (CA [98])). It was said that those acts were undertaken knowing that an outcome of operating the page was that any third-party comment would be published to any Facebook user (JCAB 126–127 (CA [104])).
12. The reasoning of Basten JA differed from that of Meagher JA and Simpson AJA in key respects. While quoting Isaacs J’s statement from *Webb v Bloch* when summarising the appellants’ submissions (JCAB 107 (CA [42])), his Honour apparently considered that there was no longer any element of intention for
- 20 publication. His Honour’s reasoning was that while the statement of the common law position by Dixon J in *Lee v Wilson*⁴ was that innocent dissemination led to a conclusion that the disseminator was not a publisher, that approach had been “abandoned” by a majority of this Court in *Thompson v Australian Capital Television Pty Ltd*⁵ (JCAB 106 (CA [39])) and was inconsistent with the statutory defence provided by s 32 of the *Defamation Act 2005* (NSW) (JCAB 106 (CA [40])). Accordingly, his Honour’s conclusion was that publication by the appellants was established because they “facilitated the posting of comments on articles published in their newspapers and had sufficient control over the platform to be able to delete
- 30 postings when they became aware that they were defamatory” (JCAB 109 (CA [47])).

⁴ (1934) 51 CLR 276 at 288.

⁵ (1996) 186 CLR 574 at 586.

13. Meagher JA and Simpson AJA expressly disagreed with Basten JA’s approach as to innocent dissemination (JCAB 122–123 (CA [91]–[92])). As explained further below, their Honours were correct to do so. The requirement that publication be intentional, as articulated for instance in *Webb v Bloch*, remains part of the common law. The innocent dissemination cases are not inconsistent with this requirement. To be a publisher, one must intend to communicate the matter complained of. However, the majority of the Court of Appeal — like Basten JA — ultimately failed to focus on this element of intention when considering whether the appellants are publishers.

10 (b) **Publication as an intentional act**

14. Significantly, Isaacs J in *Webb v Bloch* did not focus simply on whether the defendant was “instrumental” to the publication in a causal sense (cf JCAB 125 (CA [98] per Meagher JA and Simpson AJA)). That is plainly insufficient. So much is demonstrated by the fact that while an essential source for a story published in the media is instrumental to its publication, the source is not a publisher of the story merely on that basis.⁶ So too, “if the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes its contents known ... that would not be a publication”;⁷ yet the author is instrumental to the publication, for without his or her actions there would have been nothing for the thief to make known. Where the defendant sent a letter in an unclosed envelope to the plaintiff at his house that was allegedly defamatory of the plaintiff, there was no publication arising from the fact that the letter was improperly taken out of its envelope and read by the plaintiff’s butler out of curiosity;⁸ yet the defendant’s conduct was instrumental to the publication, for it could not have occurred unless the letter had been sent to the plaintiff’s house.

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15. In seeking to identify what is necessary beyond causal instrumentality for a person to be responsible for publication, it is difficult, if not impossible, to reconcile all of the cases. However, at the level of principle the correct focus — literally emphasised

⁶ *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 Qd R 156 (FC) at 194–195; *Dank v Cronulla Sutherland District Rugby League Club Ltd* [2014] NSWCA 288 at [130]–[137].

⁷ *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 (CA) at 527.

⁸ *Huth v Huth* [1915] 3 KB 32 (CA).

by Isaacs J — is that publication is an *intentional* act. Publication is a bilateral act whereby a publisher communicates matter which is then comprehended by a third party.⁹ This notion of communication necessarily involves an intentional act by the publisher in order to disseminate the matter. That is the way to reconcile Isaacs J’s statement with the fact that in respect of many elements of the tort intention is irrelevant, such as defamatory meaning, identification and damage. In this regard Meagher JA and Simpson AJA correctly observed that the description of the tort of defamation as one of “strict liability” is directed towards the absence of any requirement of an intention to defame or to cause injury to reputation (JCAB 121 (CA [88])). It says nothing about the nature of the acts of the defendant which are necessary to constitute publication.

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16. As noted above, Isaacs J’s statement in *Webb v Bloch* was approved by this Court in *Trkulja v Google LLC*.¹⁰ Consistently with that statement, the Court observed that it was “strongly arguable that Google’s *intentional* participation in the communication of the alleged defamatory results to Google search engine users supports a finding that Google published the allegedly defamatory results” (emphasis added).¹¹ The question of publication was not in issue before this Court and had not been the subject of argument. The passage just quoted thus did not determine the point, and in any event it concerned search results reported and communicated by Google. The significant point for present purposes is the recent endorsement by this Court that publication must be an intentional act.

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17. In this context, it is necessary to consider what was said by Dixon J in *Lee v Wilson*,¹² decided by this Court six years after *Webb v Bloch*:

The cause of action consists in publication of the defamatory matter of and concerning the plaintiff. It might be thought, therefore, that, in any event, this warranted or required some investigation of the actual intention of the publisher. But his liability depends upon mere communication of the defamatory matter to a third person. The communication may be quite unintentional, and the publisher may be unaware of the defamatory matter. If, however, the publication is

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⁹ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at [26].

¹⁰ (2018) 263 CLR 149 at [39]–[40].

¹¹ (2018) 263 CLR 149 at [38].

¹² (1934) 51 CLR 276 at 288.

made in the ordinary exercise of some business or calling, such as that of booksellers, newsvendors, messengers, or letter carriers, and the defendant neither knows nor suspects, nor using reasonable diligence ought to know or suspect the defamatory contents of the writing, proof of which facts lies upon him, his act does not amount to publication of a libel.

18. As is always the case with reasons for judgment,¹³ Dixon J’s statement that the “communication may be quite unintentional” needs to be considered in light of the facts and issues in *Lee v Wilson*. There was no issue in the case that the defendants had intentionally published the words of the newspaper article in question, in the sense of communicating them to readers of the newspaper. The issue in the case was the extent to which the defendants were liable in circumstances where they did not intend the publication to refer to or defame the appellants, being two persons known as “Detective Lee” who were different people from the “Detective Lee” intended to be referred to in the article. Dixon J’s statement was concerned with the intention to defame. Isaacs J’s statement in *Webb v Bloch* was not referred to in *Lee v Wilson*, which is indicative that Dixon J did not intend to depart from it. And in any event, as noted above, Isaacs J’s statement was approved by this Court in *Trkulja v Google LLC*.
19. Not only is it necessary for there to be an intentional act, the act of publication — and hence the requisite intention — must be directed to communication of ***the matter complained of***. As Eady J said in *Bunt v Tilley*,¹⁴ concerning the liability of an internet service provider: “for a person to be held responsible there must be knowing involvement in the process of publication of ***the relevant words***. It is not enough that a person merely plays a passive instrumental role in the process” (emphasis added). Similarly, in *Crookes v Newton*,¹⁵ concerning the liability of the creator of a hyperlink, Deschamps J said: “a person must knowingly be involved in the process of publishing ***the relevant words***” (emphasis added). It is not necessary for the purposes of this case to dwell on whether it is sufficient that the putative publisher

¹³ *Quinn v Leatham* [1901] AC 495 at 506; *Re Queensland Electricity Commission; Ex parte electrical Trades Union of Australia* (1987) 61 ALJR 393 at 396; *Comcare v PVYW* (2013) 250 CLR 246, 256 at [16].

¹⁴ [2007] 1 WLR 1243 at [23].

¹⁵ [2011] 3 SCR 269 at [85].

know the substance of the matter complained of, as opposed to the precise words.¹⁶ Either way, it follows that the conduct said to amount to publication, and the requisite intention, must be judged by reference to the communication of the matter complained of, and not by reference to conduct which took place at some time before the matter complained of exists. In a case such as the present, the requisite intention is missing because the conduct is remote from the matter complained of in terms of time and unconnected in respect of the relevant words.

20. While this latter proposition was not stated expressly by Isaacs J in *Webb v Bloch*, that is not surprising given the facts of that case. As the Full Court of the Supreme Court of Queensland noted in *Thiess v TCN Channel Nine Pty Ltd (No 5)*,¹⁷ his Honour was “directing attention to identifiable defamatory statements, to the publication of which in the completed form the defendant in question was held to have given his authority or approval or to the final form of which he had contributed”. His Honour did not have in mind a case, such as the present, where “the third parties’ composition, comment and publication occur without any further and specific acts of participation by the applicants” (JCAB 123 (CA [93])).
21. The analysis above explains the examples mentioned in paragraph 14 above. In none can it be said that the putative publisher had an intention to communicate the matter complained of. The case of the curious butler can be distinguished from that where the defendant knows that in the natural and ordinary course of things a letter sent to the plaintiff will be read by others: then it may readily be inferred from the sending of the letter that the defendant intended it to be so read.¹⁸ Importantly for present purposes, in such a case, the matter complained of exists at the time that that intention may be inferred, such that the intention exists with respect to the very matter complained of.
22. A focus on the intention of the putative publisher to communicate the matter complained of also explains the cases involving the proprietor of a building or

¹⁶ See *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at [84]; *Monir v Wood* [2018] EWHC 3525 (QB) at [187]–[191].

¹⁷ [1994] 1 Qd R 156 (FC) at 194.

¹⁸ *Delacroix v Thevenot* (1817) 2 Stark 63; 171 ER 573; *Huth v Huth* [1915] 3 KB 32 (CA) at 43–44; *Powell v Geltson* [1916] 2 KB 615.

structure to which a defamatory message has been affixed by a third party. As Greene LJ put it in *Byrne v Deane*,¹⁹ the question is “having regard to all the facts of the case, is the proper inference that, by not removing the defamatory matter, the defendant really made himself responsible for its continued presence in the place where it had been put”. As his Lordship said, that may not be so where somebody with a mallet and a chisel carved on the stonework of the defendant’s house a defamatory statement, and carved it so deeply that removal could only be effected by taking down the stonework and replacing it. These cases do not involve a “rule” that knowledge on the part of the defendant, plus an opportunity to remove the defamatory words, equates to publication. They involve an inference drawn from those facts as to the defendant’s intention to communicate the matter complained of. As Hunt J explained in *Urbanchich v Drummoyne Municipal Council*,²⁰ the plaintiff:

must establish more than mere knowledge on the part of the defendant of the existence of [the] statement and the opportunity to remove it. ... [T]he plaintiff must establish that the defendant consented to, or approved of, or adopted, or promoted, or in some way ratified, the continued presence of [the] statement on his property so that persons other than the plaintiff may continue to read it ...

23. Other illustrations can be given. It may be that the producer of a play is — along with the actors — a publisher of the lines spoken by the actors in accordance with the script of the play, but the same does not apply if the matter complained of is an “ad lib” remark by an actor.²¹ Likewise, the organiser of a public meeting or debate is not the publisher of statements made by the participants simply because the organiser provided the forum for those statements to be made.²² The existence of a risk that defamatory statements might be made is not sufficient. In neither case can it be said that the putative publisher intended to communicate the matter complained of, because in neither case was that matter in existence at any time that the putative publisher could have formed any such intent.

¹⁹ *Byrne v Deane* [1937] 1 KB 818 (CA) at 838.

²⁰ (1991) Aust Torts Reports ¶81-127 (NSWSC) at 69,193.

²¹ Mullis and Parkes (eds), *Gatley on Libel and Slander* (12th ed, 2013) at 217 [6.26]. See also *Bishop v New South Wales* [2000] NSWSC 1042.

²² *Murray v Wishart* [2014] 3 NZLR 722 (CA) at [132].

24. The circumstance that Meagher JA and Simpson AJA considered most analogous to this case was that of a talk-back radio station broadcasting live commentary from callers to the station (JCAB 123 (CA [93])). In practice in such a case, the apparently “live” commentary is not live at all: there is a short delay, allowing the station time to stop certain commentary being broadcast.²³ Even if that were not so, the radio station’s deliberate and purposeful act of broadcasting content, occurring simultaneously with the words being spoken, where there is an opportunity for the radio announcer to immediately stop or rebut a defamatory comment, differs radically from the circumstances of this case, where the appellants’ conduct relied upon occurred prior to the publication and not specifically in relation to the content complained of.
25. The Court of Appeal misunderstood the fundamental point that, at the level of principle, publication must involve an intention to communicate the matter complained of. The Court focused on matters such as whether the appellants were “instrumental” to the publication or “facilitated” the publication, without focusing on whether it can be said that the appellants had an intention to communicate the matters complained of. Correctly analysed, the facts provide no basis for such a conclusion.
26. The appellants could have no intention to communicate matters which did not exist at the time they engaged in the conduct relied upon, and of which they were not aware. There was no deliberate, purposeful act with respect to the impugned third-party comments which gives rise to an inference that the appellants intended for them to be read. That conclusion could not be reached merely from knowledge on the part of the appellants “that an outcome of operating the Page was that *any* third party comment would be published to any Facebook user” (emphasis added) (JCAB 126–127 (CA [104])).
27. Nor can it be concluded from the mere fact that they had Facebook pages which allowed third parties to comment that the appellants consented to, approved of, adopted, promoted or in some way ratified — and therefore may be taken to have

²³ See generally *Wanjurri v Southern Cross Broadcasting (Aus) Ltd* (2001) EOC 93-147; *Kearney v 2HD Broadcasters Pty Limited* [2012] NSWSC 321 at [68]–[69].

intended to communicate — whatever comments happened to be made. The appellants could not disable the comment functionality of their Facebook pages (JCAB 111 (CA [51])). They could not delete in advance all comments posted by third parties (JCAB 30 (PJ [90(iv)])). They could not edit or delete a third-party comment before it was posted (JCAB 31 (PJ [90(xiii)])). There was an automated process to “hide” comments containing certain specified words until those comments were un-hidden by staff of the appellants but such “hidden” comments could still be viewed by the poster’s Facebook “friends” (JCAB 31 (PJ [90(ix)])). Nor would it be practicable to attempt to “hide” substantially all comments by specifying a list of extremely common words (JCAB 30 (PJ [90(vi)], [90(vii)])), or to attempt to have staff review every hidden comment before being made public (JCAB 24 (PJ [65])).

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(c) **Innocent dissemination**

28. It is then necessary to reconcile the analysis above with the common law development of an innocent dissemination “defence” available to newspaper, magazine and book vendors. To be clear, the separate question was directed to whether the respondent had established, as a necessary element of the cause of action, that the appellants *published* the matters complained of. It did not concern whether the appellants were liable for those publications. Accordingly, there was no consideration or determination by the Court of Appeal of whether any defence, including innocent dissemination, was established by the appellants. However, as explained below, the historical development of the common law concept of innocent dissemination sheds light on what it means to be a publisher.

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29. The early case of *Day v Bream*²⁴ is entirely supportive of the analysis above. It concerned a porter who, in the course of his business, delivered parcels containing libellous handbills. Patteson J:

left it to the jury to say whether the defendant delivered the parcels in the course of his business without any knowledge of their contents; if so, to find for him, observing that *prima facie* he was answerable, inasmuch as he had in fact delivered and put into publication the libel

²⁴ (1837) 2 Mood & R 54; 174 ER 212.

complained of, and was therefore called upon to shew his ignorance of the contents.

While the defendant may have been “instrumental” to the publication of the handbills, if ignorant of their contents he could have had no intention to communicate their contents. The case is an early example of an innocent disseminator escaping liability, because they had no intention to communicate the matter complained of.²⁵

10 30. The development of a “defence” of innocent dissemination in the terms explained in *Emmens v Pottle*²⁶ does give rise to some confusion. The case required not only that the defendant was ignorant of the defamatory content but also that this ignorance was not a result of negligence on the defendant’s part. However, if the defendant has no knowledge of the contents, it is difficult to see how they can have intended to communicate it, as evidenced by *Day v Bream*, even if that lack of knowledge resulted from the defendant’s negligence. The view that the common law developed a defence of innocent dissemination that does not concern the requirement of intentional publication is difficult to reconcile with the weight of authority. That is perhaps why Gummow J expressed some doubt in *Thompson v Australian Capital Television Pty Ltd* as to whether it was aptly described as a defence.²⁷

20 31. As to the authorities, a correct reading of *Emmens v Pottle* shows that the Court of Appeal clearly contemplated the matters to which they were referring as going to the question of publication, not a freestanding “defence”. Thus, Lord Esher MR (with whom Cotton LJ concurred) said:²⁸

I am inclined to think that this called upon the defendants to shew some circumstances which absolve them from liability, not by way of privilege, **but facts which shew that they did not publish the libel**. ... The question is whether, as such disseminators, **they published the libel?** [emphasis added]

²⁵ cf the old case of *R v Clerk* (1728) 1 Barn KB 304; 94 ER 207, where a printer’s servant, whose only role in an act of publication was to “clap down” the printing press, was found criminally responsible for the libels contained in that publication, despite the fact that he was not aware of the contents.

²⁶ (1886) 16 QBD 354 (CA). See also *Vizetelly v Mudie’s Select Library Ltd* [1900] 2 QB 170 (CA).

²⁷ (1996) 186 CLR 574 at 618 and 619.

²⁸ (1886) 16 QBD 354 at 357.

32. Similarly, in *Vizetelly v Mudie's Select Library Ltd*,²⁹ each of the members of the Court of Appeal said that upon proof of an absence of knowledge and negligence, the defendant would be held not to have published the defamatory matter. In *Tamiz v Google Inc*,³⁰ the English Court of Appeal referred to this line of authority as establishing circumstances where a person “is not to be treated as a publisher”.

33. This understanding of innocent dissemination at common law is reflected in the Australian cases. Thus, at the conclusion of the passage from *Lee v Wilson* quoted in paragraph 17 above, Dixon J said that if innocent dissemination is established by a putative publisher “his act does not amount to publication of a libel”. In *Dow Jones & Co Inc v Gutnick*,³¹ this proposition was reiterated in almost identical terms, citing *Lee v Wilson*:

... A publication made in the ordinary course of a business such as that of bookseller or news vendor, which the defendant shows to have been made in circumstances where the defendant did not know or suspect and, using reasonable diligence, would not have known or suspected was defamatory, will be held not to amount to publication of a libel.

34. In the Court below, Basten JA considered that the “non-publication” conception of innocent dissemination was to be rejected for two reasons (JCAB 106 (CA [39]–[40])). The first was that his Honour considered this Court’s decision in *Thompson v Australian Capital Television Pty Ltd*³² to have abandoned this approach. However, as Meagher JA and Simpson AJA correctly explained (JCAB 122–123 (CA [92])), the passage in *Thompson* to which his Honour referred simply noted the view expressed in a textbook. The Court did not determine the point. Further, as noted above, the proposition in *Lee v Wilson* was subsequently approved in terms in *Gutnick*. The second matter on which Basten JA relied was a view that the language of s 32 of the *Defamation Act* was inconsistent with a “non-publication” approach. However, s 32 provides a new statutory defence. It says nothing about the content of the common law. The evident purpose of the provision is to provide a statutory

²⁹ [1900] 2 QB 170 at 177 per AL Smith LJ, 178 per Vaughan Williams LJ, 179–180 per Romer LJ.

³⁰ [2013] 1 WLR 2151 at [26].

³¹ (2002) 210 CLR 575 at [25].

³² (1996) 186 CLR 574 at 586.

defence *whatever* the position at common law. Further, even if s 32 wrongly assumed that at common law an innocent disseminator would be a publisher, it would not thereby modify the common law. “An Act of Parliament does not alter the law by merely betraying an erroneous opinion of it.”³³

35. Accordingly, the focus on the defendant’s intention in the innocent dissemination cases does indeed go to the question of publication. These cases are consistent with the proposition that publication must involve an intentional act and do not stand in the way of the analysis above.

10 36. The correct understanding of these cases is that they reflect a limited category of case where, even if the distributor is in fact ignorant of the matter complained of, because of the particular circumstances the distributor is inferred or imputed to have an intention to publish that matter if it knew or suspected that the matter was defamatory, or using reasonable diligence ought to have known that it was defamatory. They do not reflect an abandonment of a general requirement of intention. Further, their approach was very much rooted in the technology of the day. Thus, in *Emmens v Pottle*,³⁴ Lord Esher MR considered that unlike a distributor a printer could not take advantage of a plea of innocent dissemination. That may indeed have been so in the nineteenth century, when printing involved a physical process of typesetting. However, as explained in *Thompson*, that is not so today.³⁵
20 The distributors considered in *Emmens v Pottle* were all distributors of physical articles containing the matter complained of. That is not so for distributors of electronic communications.

37. Care must thus be taken in reasoning by analogy from the exceptional category of case with which *Emmens v Pottle* was concerned to any other case of inferred or imputed intention. That is particularly so when addressing vastly different factual scenarios created by advancing technologies that could never have been in contemplation at the time. Comments on a Facebook page reflect an even more radical technological advance than that relating to printing noted by this Court in

³³ *Deputy Federal Commissioner of Taxes v Elder’s Trustee & Executor Co Ltd* (1936) 57 CLR 610 at 625, cited in *Masson v Parsons* (2019) 266 CLR 554 at [28].

³⁴ (1886) 16 QBD 354 at 357.

³⁵ (1996) 186 CLR 574 at 586–587, 593–594.

Thompson. A case such as this, where a third party's composition, comment and publication all occur without any specific acts of participation by the appellants, and that putative participation consists entirely of previous conduct that makes a forum available on which comments can subsequently be posted by others, is radically different from that of a distributor of physical articles containing the matter complained of.

38. Accordingly, the fact that the innocent dissemination cases involve an imputation of an intention to publish the matter complained of in cases where the putative publisher's ignorance of that matter is due to their negligence does not cast doubt on the general principle that publication requires intention. Nor does it provide a foundation to extend any such imputation outside such cases.

(d) Overseas authorities

39. *New Zealand*. The position for which the appellants contend is consistent with the conclusion reached by the New Zealand Court of Appeal in *Murray v Wishart*.³⁶ The case concerned the same factual scenario as the present, namely the responsibility of the creator of a Facebook page for third-party comments on that page. The Court concluded that the creator was not a publisher of such comments unless it has actual knowledge of the third-party comments.³⁷ The Court correctly reasoned:³⁸

20 We do not see the situation of the news vendor in *Emmens v Pottle* as a particularly apposite analogy with the host of the Facebook page in the present case, however. The news vendor is a publisher only because of the role taken in distributing the primary vehicle of publication, the newspaper itself. This contrasts with the host of a Facebook page which is providing the actual medium of publication, and whose role in the publication is completed before publication occurs. This is because the action of the host allegedly amounting to infringement is the setting up of the Facebook page, an act which occurs before third party comments are posted.

30 We see that as more closely analogous to the notice on the wall situation described in *Byrne v Deane*. We acknowledge that this analogy is not perfect either. The Court of Final Appeal of Hong Kong rejected it in *Oriental Press Group Ltd* on the ground that posting a

³⁶ [2014] 3 NZLR 722.

³⁷ [2014] 3 NZLR 722 at [144].

³⁸ [2014] 3 NZLR 722 at [128]–[129].

notice on the wall in *Byrne v Deane* was a breach of the rules of the club and therefore amounted to a trespass. In contrast to that, posting a message on a Facebook page in response to an invitation to do so is a lawful activity and, indeed, solicited by the host. We do not consider the fact that the posting of a notice on the wall in *Byrne v Deane* was a breach of the club's rules was a factor affecting the outcome in that case. The decisive factor was that the club and its owners had not posted the defamatory notice and, until they became aware of it, were in no position to prevent or bring to an end the publication of the defamatory message. If a case arose where the defamatory message was posted on a community notice board on which postings were welcomed from anyone, the same analysis would apply.

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40. The Court further considered that a useful analogy to publication of third-party comments on a Facebook page was a public meeting: the organiser of the meeting would be liable for their own comments at the meeting but not for the comments of others who spoke at the meeting, unless the organiser adopted the others' statements.³⁹ The Court explained that this was a useful analogy as it incorporated a factor present in that case, that the third-party comments had been solicited by the Facebook creator. This seems to be a reference to the fact that every Facebook page automatically includes a function by which Facebook users can "Like", "Comment" or "Share" the post, which box cannot be removed or suspended. This factor was significant to the Court of Appeal in this case (JCAB 120–121 (CA [87]), JCAB 125 (CA [98]), JCAB 128 (CA [109]), JCAB 129 (CA [112]); cf JCAB 108–109 (CA [46]–[47])). The Court of Appeal did not explain why it declined to follow the approach in *Murray v Wishart*.

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41. **United Kingdom.** The position adopted in *Murray v Wishart* reflects that adopted in the United Kingdom concerning Google's responsibility for comments posted on blogs created by bloggers on Google's Blogger.com platform. In *Tamiz v Google Inc*,⁴⁰ the Court of Appeal described that platform as analogous to a "gigantic noticeboard on which others place comments". The Court: held that Google was not a primary publisher; was very doubtful that it was a secondary publisher; and held that, even if it were, it was not to be treated as a publisher prior to notification of defamatory comments because of the innocent dissemination defence.⁴¹

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³⁹ [2014] 3 NZLR 722 at [132].

⁴⁰ [2013] 1 WLR 2151 (CA) at [33]

⁴¹ [2013] 1 WLR 2151 (CA) at [25]–[26].

42. *Monir v Wood*⁴² concerned a tweet on the Twitter account of the Bristol branch of the United Kingdom Independence Party. The Twitter account was owned by the Chairman of the branch. However, the tweet was posted by the Vice Chairman of the branch without the knowledge of the Chairman, contrary to the Chairman's instructions that prior approval be sought. Nicklin J found that, in these circumstances, the Chairman was not liable as a publisher as a result of participation in the publication, for he did not have knowing involvement in the publication of the matter complained of.⁴³ Nicklin J went onto hold that the Vice Chairman was acting as the Chairman's agent and the Chairman was liable on this basis⁴⁴ but plainly that has no application on the facts of the present case. Nicklin J also held that the Chairman was liable in accordance with the *Byrne v Dean* line of cases, but only from the time he became aware of the tweet and failed to remove it, for this gave rise to an inference that he authorised its continued publication.⁴⁵ All of the analysis in *Monir v Wood* is entirely consistent with the position advanced by the appellants in this case.
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43. **Hong Kong.** The conclusions reached in these cases can be contrasted with that of the Hong Kong Court of Final Appeal in *Oriental Press Group Ltd v Fevaworks Solutions Ltd*.⁴⁶ That Court held that the administrators of a website that hosted a discussion forum were publishers of comments made on the forum by users, even if the administrators did not know of those comments. The reasoning contains a number of errors. *First*, the Court wrongly minimised the importance of intention.⁴⁷ *Secondly*, the Court confused the question of whether the defendant is a publisher with whether the defendant is vicariously liable for the acts of others.⁴⁸ *Thirdly*, the Court incorrectly regarded the *Byrne v Deane* line of authorities as reflecting a special principle for occupiers, with no application to the case before it, rather than
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⁴² [2018] EWHC 3525 (QB).

⁴³ [2018] EWHC 3525 (QB) at [134]–[139].

⁴⁴ [2018] EWHC 3525 (QB) at [140]–[166].

⁴⁵ [2018] EWHC 3525 (QB) at [174]–[193].

⁴⁶ (2013) 16 HKCFAR 366.

⁴⁷ (2013) 16 HKCFAR 366 at [21].

⁴⁸ (2013) 16 HKCFAR 366 at [22].

as a reflection of fundamental principle.⁴⁹ *Fourthly*, as a consequence, and like the Court of Appeal in this case, the Court wrongly thought the question of publication was answered by the fact that the administrators facilitated and encouraged discussion on the forum.⁵⁰ At JCAB 108 (CA [46]), Basten JA said that the relevant passages from *Oriental Press Group* had been cited with approval by this Court in *Trkulja v Google LLC*. In fact, as noted above, this Court reached no final conclusion as to publication in that case. *Oriental Press Group* was cited along with a number of other cases and preceded by the words “See and compare”.⁵¹ In these circumstances, there is no basis to say that this Court approved the analysis in *Oriental Press Group*.

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44. **Canada.** Canadian authority reflects conflicting approaches. In *Weaver v Corcoran*,⁵² the Supreme Court of British Columbia held that a newspaper which published stories on its website was not the publisher of comments on such stories posted by readers to the website unless and until it became aware of the reader postings. That is consistent with the position for which the appellants contend here.

45. There is contrasting *dicta* of the same Court in *Pritchard v Van Nes*.⁵³ There, the Court held that the creator of a Facebook page — in that case, an individual — was the publisher of third-party comments made on that page in response to a post by her about the plaintiff, even if she was not aware of the comments. The Court said this was so because the original post was inflammatory and could reasonably be expected to produce further defamatory comments. The Court declined to follow *Murray v Wishart*. For the reasons above, that approach was in error.

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⁴⁹ (2013) 16 HKCFAR 366 at [48]–[50]. cf *Duffy v Google Inc* [2015] SASC 170 at [184]; *Google Inc v Duffy* (2017) 129 SASR 304 (FC) at [124]–[134].

⁵⁰ (2013) 16 HKCFAR 366 at [51].

⁵¹ (2018) 263 CLR 149 at [38] fn 57.

⁵² 2015 BCSC 165 at [284].

⁵³ 2016 BCSC 686 at [110]–[113].

PART VII: ORDERS SOUGHT

46. Appeal allowed.

47. Set aside paragraph 3 of the orders of the Court of Appeal and in its place, order:

(a) Appeal allowed.

(b) Set aside paragraph 1 of the orders of the Supreme Court of New South Wales made on 24 June 2019 and, in its place, order:

(i) The question “Whether the plaintiff has established the publication element of the cause of action of defamation against the defendant in respect of the Facebook comments by third-party users?” be answered “No”.

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PART VIII: ESTIMATE OF TIME REQUIRED

48. The appellants will require some 2 hours for argument in chief and some 15 minutes in reply.

Dated: 17 February 2021



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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

Fairfax Media Publications Pty Ltd
ACN 003 357 720
Appellant (S236 of 2020)

Nationwide News Pty Limited
ACN 008 438 828

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Appellant (S237 of 2020)

Australian News Channel Pty Ltd
ABN 28 068 954 478

Appellant (S238 of 2020)

and

Dylan Voller
Respondent

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ANNEXURE
LIST OF STATUTES AND PROVISIONS REFERRED TO IN THE
APPELLANTS' SUBMISSIONS

1. *Defamation Act 2005* (NSW), s 32 (compilation in force from 1 February 2016 to 7 June 2017).