



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

BETWEEN:

Fairfax Media Publications Pty Ltd (S236/2020)
Nationwide News Pty Limited (S237/2020)
Australian News Channel Pty Ltd (S238/2020)
 Appellants

and

Dylan Voller
 Respondent

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APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

PART I: PUBLICATION

1. This outline is in a form suitable for publication on the internet.

PART II: OUTLINE OF ORAL SUBMISSIONS

The reasons of the Court below

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1. Publication is the bilateral act by which the publisher communicates the defamatory material to a third party, and the third party has it available for his or her comprehension: *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 at [26].

2. Meagher JA and Simpson AJA focused attention on whether the appellants were 'instrumental and participated in the publication of' third party comments on the appellants' public Facebook pages, as opposed to the fundamental question of *intention* of the appellants to publish the third party comments (AS [10]-[11]; [25]).

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3. Basten JA determined that there was no longer any element of intention because his Honour perceived that the "never published" approach to the common law defence of innocent dissemination had been abandoned in *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 586 and perceived an inconsistency with the statutory defence provided by section 32 of the *Defamation Act 2005* (NSW) (AS [12]). The majority expressly disagreed with Basten JA's approach (AS [13]).

Publication as an intentional act

4. A key aspect of Isaac J's statement in relation to publication in *Webb v Bloch* is that the publication is *intentional*. Instrumentality in a causal sense is plainly insufficient to establish publication (AS [10]; [14]; [16]).

Webb v Bloch (1928) 41 CLR 331 at 363-364

Trkulja v Google LLC (2018) 263 CLR 149 at [39]-[40]

5. There is no tension between the historical texts to which Isaacs J referred, or the facts of *Webb v Bloch* (which involved agency), and the Appellant's submission (**Reply [5]-[7]**).

10 *Starkie, A Treatise on the Law of Slander and Libel* (2nd ed, 1830), vol 2, p 225

Folkard, *The Law of Slander and Libel* (5th ed, 1891), 439

John Lamb's Case (1610) 9 Co Rep 59; 77 ER 822

Webb v Bloch (1928) 41 CLR 331 at 341-3, 364-6, 368

6. The intention must be to communicate the matter complained of. There must be knowing involvement in the publication of the relevant words. The conduct said to amount to publication, and the requisite intention, must be judged by reference to the communication of the matter complained of, not by reference to conduct which took place before the matter complained of exists (AS [19]; **Reply [6], [9]**).

Bunt v Tilley [2007] 1 WLR 1243 at [23].

20 *Crookes v Newton* [2011] 3 SCR 269 at [21], [85]

7. Dixon J's statement in *Lee v Wilson*, considered in light of the facts and issues in that case, was concerned with intention to defame, not intention to publish (AS [17]-[18]).

Lee v Wilson (1934) 51 CLR 276 at 288

8. A focus on intention to communicate the matter complained of is consistent with cases in different factual contexts (AS [14]; [21]-[23]; **Reply [10]-[11]**).

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

Urbanchich (1991) Aust Tort Reports ¶81-127 (NSWSC) at 69,193

9. 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. The position is factually distinguishable from the broadcaster of a talk-back radio program or the broadcaster in *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 (AS [24], [26]-[27]; Reply [13]).

Innocent dissemination

10. The historical development of the common law concept of innocent dissemination sheds light on what it means to be a publisher (AS [28]-[38]; Reply [14]-[15]).

Day v Bream (1837) 2 Mood & R 54; 174 ER 212

10 *Emmens v Pottle* (1886) 16 QBD 354 (CA)

Vizetelly v Mudie's Select Library Ltd [1900] 2 QB 170 (CA) at 177 and 179-180

Overseas authorities

11. The proposition for which the Appellants content is consistent with the conclusion reached by the New Zealand Court of Appeal in *Murray v Wishart* (AS [39]-[40]). This reflects the position adopted in the United Kingdom (AS [41]-[42]).

Murray v Wishart [2014] 3 NZLR 722 (CA)

Tamiz v Google Inc [2013] 1 WLR 2151 (CA)

Monir v Wood [2018] EWHC 3525 (QB)

- 20 12. The reasoning of the Hong Kong Court of Final Appeal in *Oriental Press Group* contains a number of errors. It is not correct to say, as Basten JA did in the Court below, that *Oriental Press Group* has been approved by this Court. (AS [43]).

Oriental Press Group Ltd v Fevaworks Solutions Ltd (2013) 16 HKCFAR 366

Trkulja v Google LLC (2018) 263 CLR 149 at [38] fn 57

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