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
ACN 003 357 720
Appellant (S236 of 2020)

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

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

and

Dylan Voller
Respondent

APPELLANTS' REPLY

PART I: CERTIFICATION

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

PART II: REPLY

(a) The way the case was run below

2. The respondent overstates the difference between the appellants' argument below and in this Court. The argument below was that the relevant test is that stated by Isaacs J in *Webb v Bloch*, which expressly refers to ***intentional*** assistance.

3. The reference at R [10] to the appellants' written submissions below is misplaced. That submission was in response to the respondent's submission that liability for defamation is strict. The distinction in the appellants' written submissions between a ***physical element*** for the tort — ie publication — and the absence of a ***mental element*** for the tort — ie the absence of any requirement for knowledge, negligence or any other mental state as to whether a publication is defamatory — says nothing of the necessity for an intention to publish to be established for the physical element to be established. As senior counsel put it in oral argument before the Court below: "[O]ne is strictly liable for that which one publishes. So the question is: what have you published? … So, yes,

we do accept it's strict liability, but we say that doesn't bear with the question that is posed here."[1]

4. In any event, the point at issue is a question of law. The respondent does not suggest that it could have been met by any different evidence below.[2] It is not one requiring a new trial if the appellants are correct.[3] Even if it was not raised in the Court below the appellants are entitled to raise it in this Court.[4] They do not require "leave".[5]

(b) *Webb v Bloch*

5. The respondent makes the mistake of reading Isaacs J's reasons in *Webb v Bloch* like a statute.[6] Contrary to R [14]–[16], the passage Isaacs J quoted from *Starkie* does not support the respondent. The passage appears in the part of *Starkie* dealing with criminal libel. In full, it reads:[7]

> According to the general rule of law, it is clear that all who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are to be considered as principals in the act of publication: thus if one suggest illegal matter, in order that another may write or print it, and that a third may publish it, all are equally amenable for the act of publication, when it has been so effected.

In context of a criminal offence, and in light of the example which appears after the colon, it is plain that the words "accessory" and "conduce" carried with them the notion of intentional involvement in the publication of the matter complained of.

6. As for the passage from *Folkard* quoted by Isaacs J, the respondent submits it requires only "an intention to participate in a process … by which words or other matter are or will be conveyed to a recipient" (R [18]). To the contrary, where *Folkard* refers to a case where a person "has intentionally lent his assistance to ***its*** existence for the purpose

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1 Book of respondent's further materials, 197.39–46. See also 188.30–39, 189.1–5.

2 cf, eg, *Coulton v Holcombe* (1986) 162 CLR 1 at 7–8, 11; *Water Board v Moustakas* (1988) 180 CLR 491 at 497; *Zheng v Cai* (2009) 239 CLR 446 at [16].

3 cf, eg, *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at [53]. As to the difference between raising a new "verdict" point and a new "new trial" point, see *Electricity Commission of New South Wales v Yates* (1991) 30 NSWLR 351 (CA) at 356; *Robinson v Campbell (No 2)* (1992) 30 NSWLR 503 (CA) at 508.

4 *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 at 480; *Martin v Hogan* (1917) 24 CLR 234 at 275; *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *Green v Sommerville* (1979) 141 CLR 594 at 608; *O'Brien v Komersaroff* (1982) 150 CLR 310 at 319; *Chalmers Leask Underwriting Agencies v Mayne Nickless Ltd* (1983) 155 CLR 279 at 283; *Shin Kobe Maru v Empire Shipping Co Inc* (1994) 68 ALJR 311 at 313; *Crampton v The Queen* (2000) 206 CLR 161 at [12], [50]; *Gattellaro v Westpac Banking Corp* (2004) 78 ALJR 394 at [58]; *Spriggs v Federal Commissioner of Taxation* (2009) 239 CLR 1 at [43].

5 The "leave" referred to in *Park v Brothers* (2005) 80 ALJR 317 at [34] was leave to file a notice of contention out of time. No such issue arises here.

6 cf, eg, *Comcare v PVYW* (2013) 250 CLR 246 at [15]–[16]: "The concern is not with the ascertainment of the meaning and the application of particular words used by previous judges, so much as with gaining an understanding of the concepts to which expression was sought to be given."

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

of being published" (emphasis added), the "its" is not a process — it is the matter complained of. So much is evidenced by the citation by *Folkard* of *John Lamb's Case*,[8] where the holding was: "every one who shall be convicted in the said case, either ought to be a contriver of the libel, or a procurer of the contriving of it, or a malicious publisher of it, knowing it to be a libel".

7. No difficulty is presented by the facts of *Webb v Bloch* (cf R [24]). It involved preparation and publication by Norman, a solicitor acting on behalf of a committee whose members were the defendants, of a circular whose terms were authorised by the secretary of the committee, the defendant Bloch. The other defendants confirmed Bloch's actions. The case was one where the acts and state of mind of an agent — Norman — acting within authority was imputed to his principals.[9] That is plainly not the case with the third-party comments here.

(c) "Participation in a process of communication"

8. The distinction between intention to communicate the matter complained of, which the appellants submit is required, and "participation in a process of communication", which the respondent accepts is required (R [13], [18]), is unstable. So much is evidenced by the property owner cases (cf R [37]). Where the author affixes a defamatory notice to the property, it might be said that the owner participates in the process of communication by providing the means by which the communication occurs. But if simply providing a wall or notice board is insufficient, as the respondent accepts, the same may be said of the appellants' Facebook pages.

9. The true position is that one must focus on the intention to publish the matter complained of.[10] This necessarily involves a temporal connection between the conduct said to give rise to liability, and the communication of the matter complained of. This temporal element is overlooked in the respondent's submissions.

10. In the case of the owner of the property or notice board, or the author of the letter opened by the curious butler, and the appellants, intention to communicate is absent. Indeed, the appellants' position is even more removed from any publication than the author of the letter in the case of the curious butler, for they are not the authors of the matter complained of and their actions take place before it even exists. It is much more akin to the owner of property upon which is placed a defamatory statement.

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[8] (1610) 9 Co Rep 59; 77 ER 822.

[9] See the various references to Norman's being an agent in *Webb v Bloch* (1928) 41 CLR 331 at 341–3, 364–366, 368 per Isaacs J. See also *Thompson* (1996) 186 CLR 574 at 595.

[10] In addition to A [19], see *Crookes v Newton* [2011] 3 SCR 269 at [21] (cf R [77]).

11. The breadth of the proposition for which the respondent contends is evident from R [38]–[42]. On the respondent's view, the producer of a play is, apparently, a publisher of any entirely unexpected *ad lib* statement of an actor and the organiser of a meeting about topic A is, apparently, a publisher of any unexpected statement made by a speaker about topic B. If, on the other hand, the respondent accepts that this may be so only *sometimes*, the respondent's submissions do not make clear why: in each case, the producer or organiser participates in "the process". The true answer is provided by the need for an intention to communicate the matter complained of.

12. The position of the broadcaster of a talk-back radio program is quite different from that of the appellants, for the reasons in A [24] (cf R [33]–[34]). So too the broadcaster in *Thompson* (cf R [35]). As Brennan CJ, Toohey and Dawson JJ explained: "Channel 7 had the ability to control and supervise the material it televised. … It was Channel 7's decision that the telecast should be near instantaneous".[11] In those circumstances, as Gaudron J said, Channel 7 "authorised the retransmission to its viewers of whatever was transmitted by Channel 9 without regard to its contents".[12] Channel 7 thus intended to communicate the matter complained of, by choosing — after it came into existence — to take positive steps to broadcast it. Channel 7's intentional conduct in broadcasting occurred simultaneously with the communication. That is not so here, where all of the actions of the appellants preceded the existence of the matters complained of.

13. Further, the various features mentioned at A [27] distinguish the circumstances from those in *Thompson*. R [45]–[46] contests some of those matters. However, as R [44] accepts, this contest is irrelevant as the decision of the Court of Appeal was not based on these matters. In any event, none of the matters identified by the respondent establishes an intention to communicate the matters complained of:

    a. That, as between Facebook and the appellants, the latter "owned" the content *they* posted on their Facebook page says nothing about their responsibility *to the respondent* for posts by *third parties* (cf R [45(a)]).

    b. The fact that members of the public were encouraged to comment on the appellants' posts by the presence of the "Like", "Comment" and "Share" buttons says nothing about the appellants' intentions, as that feature could not be disabled (cf R [45(b)], see A [7]).

[11] (1996) 186 CLR 574 at 589–90.

[12] (1996) 186 CLR 574 at 596.

c. That posts by the appellants may have been "emotive" provides no basis to infer that they intended that any of the matters complained of, posted in response, should be communicated (cf R [45(c)]).

d. The appellants' commercial purpose in using Facebook is immaterial (cf R [45(d)]). The conclusion of the Court below would apply equally to a charity which used Facebook for purely charitable purposes or an individual who used it for purely social purposes.

e. R [46] accepts that using a filter of common words would not necessarily cause *all* comments to be "hidden"; further, "hidden" comments would still be viewable by a commenter's Facebook friends. In any case, the magnitude of the task involved in reviewing all hidden comments *would* be impracticable (see JCAB 24 (PJ [65])). At the least, its difficulty is such that one cannot infer from the failure to implement this process an intention to communicate the matters complained of — just as one cannot infer from the failure to demolish a house that the owner intends to communicate a defamatory statement carved so deeply into the stone that removal can only be effected by demolition.

(d) Innocent dissemination

14. The respondent persists in referring to innocent dissemination as a "defence" (eg R [50], [55]) and wrongly asserts that, in *Thompson*, Brennan CJ, Dawson and Toohey JJ approved this conception (R [57(e)]). The respondent asserts it "should be adopted", ignoring the fact that it is contrary to the more recent statement of this Court in *Gutnick*. On the respondent's approach, innocent dissemination is an anomalous "defence". On the appellants' approach, it emerges as a reflection — albeit imperfect — of the requirement of intentional publication of the matter complained of.

15. The appellants' approach produces no incoherence (cf R [61]–[62]). As explained at A [36], the notion of innocent dissemination arose in a limited category of cases where the distributor is inferred or imputed to have an intention to publish the matter complained of. But when new circumstances arise outside those cases, such as those here, it is wrong to reason — as the respondent does — that because innocent dissemination *must* have a role to play, publication *must* be established without considering the intention to communicate the matter complained of (R [62]).

Dated: 7 April 2021

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