



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 17 Mar 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: S236/2020
File Title: Fairfax Media Publications Pty Ltd v. Voller
Registry: Sydney
Document filed: Form 27D - Respondent's submissions-Respondent's submissi
Filing party: Respondent
Date filed: 17 Mar 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

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)

10

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

and

Dylan Voller
Respondent

20

RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION

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

Part II: STATEMENT OF ISSUES

2. The appeal raises two issues:

30

- (a) Whether 'the publication element of the cause of action of defamation' (as described in the separate question), which a plaintiff must establish, includes intention on the part of the defendant to publish the particular matter;
- (b) Whether the appellants' conduct as initiators and administrators of their public Facebook pages, including posting material and inviting and encouraging comments from the general public, amounted to participation in the process of publication of such comments on those pages.

3. The appellants' suggested issue 2(a), in their submissions of 17 February 2011 (AS), was not raised or argued below. Their suggested issue 2(b) goes well beyond the facts that were in evidence.

Part III: SECTION 78 B NOTICES

4. The respondent certifies that he has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903(Cth)* and has concluded that no such notice is required in this case.

10 **Part IV: FACTS:**

5. The relevant facts, as summarised at CA [70] to [87],¹ are not in contention. Nor are the facts summarised at AS 6–7. The factual matters contained within AS 27 are also not contested, with the exception of the two propositions advanced in the last sentence of AS 27: on the evidence, summarised by the primary judge at the very passages cited by the appellants, it was practicable to attempt to hide substantially all comments (by specifying a list of extremely common words), and it was also practicable (albeit at a cost) to attempt to have staff review every hidden comment before it was made public: see 46 below.

20 **Part V: ARGUMENT**

(1) The intention point – a new argument by the appellants

6. The appellants assert that to be a publisher, a person must *intend* to communicate the specific matter complained of: see, for example AS 13, 15, 19ff and 25. They say that an intention to communicate particular matter cannot be present without knowledge of the actual content of that matter, that the entirety of their conduct took place before the appearance of the third-party comments on the Facebook pages, and that therefore such an intention (said to be essential) cannot have existed. Authorities which make no mention of such an 'intention' criterion are to be explained, it is said, by an 'imputed' or 'inferred' intention: see for example at AS 22 and 36.
7. Such a submission was not put to the primary judge or to the Court of Appeal. It was raised for the first time on the special leave application.

¹ JCAB 31

8. The appellants' focus in the Court of Appeal was (correctly) on whether the appellants were instrumental to, or a participant in, the communication of the comments in question.² **In that context**, they cited the well-known statements of principle in this Court, by Isaacs J in *Webb v Bloch*,³ and in *Trkulja v Google*.⁴

9. Their argument was that the physical acts which they performed (setting up and maintaining their respective Facebook pages, thereby enabling third parties to post comments and otherwise engage with stories chosen by the applicants, appointing an administrator, and so on) were not sufficient to amount to such 'instrumentality' or such 'participation'. They submitted that a 'but for' involvement was not sufficient.⁵

10. In their written submissions below, the appellants expressly disavowed any requirement of intention. Those written submissions included:⁶

the issue is not the mental element of the tort, it is the physical element and, in particular, whether the physical conduct of the Media Companies constituted publication in all of the circumstances (emphasis in original);

and

the present issue is not the requisite state of mind for the tort, it is what acts (or omissions) can give rise to the tort.

11. The appellants' oral submissions in the Court of Appeal included those at transcript pages 16.10-25, 25.40 - 26.26, 32.45 – 33.46.⁷ As is apparent, they accepted, indeed asserted, that the issue was participation; their submission was that their activities did not amount to participation. (They also submitted that an 'ought to know' factor, said to be involved in the respondent's case, should be rejected. The joint judgment of Meagher and Simpson JJA dealt with that latter submission at CA [101] – [104].)⁸

² CA [42], [96]-[99], JCAB 22, 39

³ (1928) 41 CLR 331 at 363-364

⁴ *Trkulja v Google LLC* (2018) 263 CLR 149 at [40]

⁵ CA [96]-[99], JCAB 39

⁶ Appellants' Summary of Argument in Reply (CA) dated 21 November 2019, at [5] and [11] respectively (Book of Respondent's Further Material [BRFM] at pages 158, 160)

⁷ BRFM at pages 180, 189-190, 196-7

⁸ JCAB 41

12. The question thus arises as to whether this new ‘intention’ argument should be permitted to be raised at all at this stage.⁹ It is respectfully submitted that it should not. At the very least the appellants should properly seek leave to do so.¹⁰

(2) *Webb v Bloch*, and the reasons of the Court of Appeal

13. Publication, under the law concerning defamation, is the act of communication of defamatory matter to a recipient. It is separate from, and subsequent to, the anterior act of composition or compilation of that matter.¹¹ Any degree of participation in that process of communication, however minor, makes the participant a publisher.¹²

14. In *Webb v Bloch*, at 363-4, Isaacs J adopted, as correct, the following propositions (emphasis in the original):

- ‘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 intentionally lent his assistance to its existence for the purpose of being published*, his instrumentality is evidence to show a publication by him.’ [from *Folkard*, 1891¹³]
- ‘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*’. [from *Starkie*, 1830¹⁴]

15. Isaacs J plainly regarded both propositions as correct, and as encapsulating the same principle. However, the appellants in their AS choose not to mention the second (*Starkie*) proposition at all. They build their strained ‘intention’ submission solely on the presence of the word ‘*intentionally*’ in the second part of the *Folkard* formulation.

16. Yet the *Starkie* proposition is unequivocal. It makes no mention of intention. A person is a ‘*principal in the act of publication*’ if the person is ‘*in any degree accessory*’ to it, and ‘*by any means whatever conduce[s] to*’ it.

⁹ *Metwally v University of Wollongong* (1985) 60 ALR 68 at 71; *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8; *Zheng v Cai* (2009) 239 CLR 446 at [16]; *Vella v Minister for Immigration* (2015) 90 ALJR 89 at [18]; *Nationwide News Pty Ltd v Rush* [2020] FCAFC 115 at [448]-[449]

¹⁰ *Park v Brothers* (2005) 80 ALJR 317 per Gleeson CJ, Hayne Callinan and Heydon JJ at [34]

¹¹ *Lee v Wilson* (1934) 51 CLR 276 at 287-8; see also *Gatley*, 12th ed., at [6.1], [6.10]

¹² *Lee v Wilson* (1934) 51 CLR 276 at 287-8; Tobin & Sexton, *Australian Defamation Law*, at [5170], [5180], [5215]; see also *Gatley*, 12th ed., at [6.10]

¹³ *Folkard on Slander and Libel* 5th Ed (1891) at 439

¹⁴ *Starkie on the Law of Slander and Libel*, 1st Ed (1830)

17. The first half of the *Folkard* formulation states the principle: if a person is ‘instrumental’ to a publication occurring, that is enough for the term ‘published’ to apply to that person. The ‘precise degree’ of such ‘instrumentality’ does not matter.

18. The second half of the *Folkard* formulation emphasises that on the already low bar of ‘instrumentality,’ all that is necessary is that the act constituting such instrumentality is itself done intentionally. The word ‘intentionally’ is a reference to an intention to participate in a process – a process by which words or other matter are or will be conveyed to a recipient.

10

19. Folkard did not say, and neither did Isaacs J, that intention to publish was necessary. His point was the actually the opposite; as was that of Isaacs J. Such an intention is not necessary. The appellants’ insistence to the contrary is a rewriting of legal history.

20. As this Court said in *Trkulja*, at [40], citing the whole *Folkard* passage: “All degrees of participation in the publication are publication.” (The appellants submit at AS 16 that the question of publication was not in issue before this Court in *Trkulja*, and that this Court in *Trkulja* ‘endorsed’ the proposition that publication must be an intentional act. Both of those submissions are incorrect.)

20

21. The elegant exposition of the law in this area by Ribeiro PJ in *Oriental Press v Fevaworks*¹⁵ includes the following statement at [19], in which his Honour adopts and restates the true position as reflected in the judgment of Isaacs J in *Webb*:

Until mitigated by the common law defence of innocent dissemination which evolved in the late nineteenth century, liability for publishing a libel was strict and could lead to harsh results. A person was held liable for publishing a libel if by any act of any description he could be said to have intentionally assisted in the process of conveying the words bearing the defamatory meaning to a third party, regardless of whether he knew that the article in question contained those words. [Emphasis added]

30

22. That analysis accords with the observations of Dixon J in *Lee v Wilson & Mackinnon*:¹⁶

¹⁵ [2013] 16 HKCFAR 366 especially at [19] – [23]

¹⁶ (1934) 51 CLR 276 at 288

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 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.¹⁷ [Emphasis added]

23. As pointed out by Abella J in *Crookes v Newton*¹⁸ and as Ribeiro PJ also noted in *Oriental Press* at [20],

10 “... the breadth of activity captured by the traditional publication rule is vast. In *R v Clerk* (1728), 1 Barn KB 304, 94 ER 207 for example, a printer’s servant, whose only role in an act of publication was to ‘clap down’ the printing press, was found responsible for the libels contained in that publication, despite the fact that he was not aware of the contents (p 207).”

24. The facts in *Webb v Bloch* are themselves directly contrary to the appellants’ argument. One defendant, Bloch, directed the solicitor Norman to distribute the defamatory circular. All that the other three did was later to ratify Bloch’s direction to Norman – at a time when, even then, they still had not seen it (one of them never saw it at all). That ratification appears to have occurred (although it is not entirely clear from the report) *after* the circular had been distributed.¹⁹ Thus three of the four defendants did not see the defamatory circular, or otherwise know its contents, before it was distributed (and one never knew).

25. Those individuals could not have possessed an ‘intention’ to publish those particular contents. No member of the High Court suggested either that they did, or that any such intention was necessary. But the High Court held, consistently with the principles cited by Isaacs J, that all four defendants were publishers. The intentional act of ratification – even though in ignorance of what had been (or would be) published – was sufficient participation, or ‘instrumentality’.

26. The appellants suggest, at AS 11, that the joint judgment in this case failed to deal with the ‘intention’ point despite the word ‘*intentionally*’ appearing in the *Folkard*

¹⁷ His Honour then went on to note the different considerations that can apply in the case of booksellers etc ‘*in the ordinary exercise of a business or calling*’, ie the innocent disseminator situation: see 56 below. As Meagher and Simpson JJA noted, at CA [93], the appellants did not rely below on any ‘never published’ concept and seem to have accepted that they were not in the same or any analogous position to booksellers

¹⁸ [2011] 3 SCR 269 at §18.

¹⁹ At 355, Knox CJ set out a chronology of events

passage cited by Isaacs J in *Webb*. That suggestion does considerable injustice to the approach of their Honours to the submissions actually advanced below. The appellants did not contend that '*intentionally assisted*' was other than a reference to the need for the act constituting 'participation' to be itself an intentional act. That is why their Honours dealt with the matter as they did at CA [104].²⁰

10 27. The Court of Appeal recognised, correctly with respect, that the evidence amply showed that the appellants were instrumental to, and had participated in, the publication of the comments. They did intentionally lend assistance to such comments being communicated to their readers, including by: initiating and maintaining a public Facebook page; posting items to that Facebook page (such as stories on their own webpages); and facilitating, inviting and actively encouraging readers to react to and engage with those stories by various means (including by choosing to 'Like', 'Comment' on, or 'Share' a post), in circumstances where such comments would be viewable by anyone visiting the appellants' Facebook pages.²¹

(3) Various analogies suggested by the appellants

(a) *The 'source', the thief and the 'curious butler': AS 14 and 21*

20 28. These examples, the applicants say, show that mere 'instrumentality' is not enough for publication. The appellants' first example is the 'source' for a 'story published in the media'. They say that such a source is 'instrumental' to the eventual publication, yet is not a publisher. The latter is correct, but the former is not.

29. Such a 'source' does not necessarily even participate in the composition of the 'story'. The 'source' provides information to a journalist, who then composes the 'story'. But in any event, what matters is that the source does not contribute, at all, to the relevant process namely publication (that is, the process of the conveying, by 'the media', to its readers or viewers, of whatever 'story' has been composed).²²

30

²⁰ JCAB 41

²¹ See for example CA [45] – [47] (JCAB 23), [70] (JCAB 31), [76], (JCAB 33), [85] and [87] (JCAB 35), [98] and [109] (JCAB 43)

²² The position may be different where the 'source' actually does participate in the act of publication by 'the media', for example by participating in a live interview.

30. The second example (from Lord Esher MR in *Pullman v Hill & Co* in 1890)²³ is that of the thief who breaks open the locked desk of a writer, removes a defamatory letter from where the writer has locked it away, and makes its contents known. The appellants say that the writer is instrumental to the publication, because if it had not been written there would be nothing to distribute – and so they say that the finding of no publication by the writer must be based on an absence of ‘intention’ to publish.

10 31. Again this argument is misconceived. The writer in this example does nothing to ‘lend assistance’ to the publication of the letter. Quite the contrary: the writer has sought to prevent the letter’s emerging from the drawer, and thus to prevent any communication of it. The writer could not be said to have ‘conduced’, in the slightest, to its publication (as distinct from its composition). The writer has not participated in, has not been ‘instrumental’ to, the communication by the thief.

20 32. The appellants’ third example is that of the butler who opens (in breach of his duty) a letter from a husband to his estranged wife, because he is ‘curious’ as to its contents, and reads it.²⁴ This example comes from *Huth v Huth* as cited by the appellants. The appellants again say that if mere instrumentality were all that were necessary, the husband would be a publisher of the letter to the butler because without his writing the letter in the first place the butler could not have read it. So the court’s finding of no publication must be attributable to a requirement of ‘intention’. But that is not so. The *Folkard* principle is clear: the husband was not ‘instrumental’ because he did not ‘intentionally lend his assistance’ to the only publication sued upon, namely the communication to the butler.

(b) Talk-back radio; and relay of a television signal: AS 24

33. There is no doubt that a radio broadcaster is a publisher of defamatory statements made by external commentators on live talk-back shows.²⁵

²³ [1891] 1 QB 524 at 527

²⁴ *Huth v Huth* [1915] 3 KB 32

²⁵ CA [93], JCAB 38; see *ABC v Comalco* (1986) 68 ALR 259 at 269; *Thompson v Australian Capital Television* (1996) 186 CLR 574 at 590

34. That is so even though, as was recognised below at CA [93],²⁶ the conduct of the broadcaster, in introducing the topic and providing a forum for commentators, occurs *before* any third party comment takes place – just as with the appellants’ provision of their Facebook page forum. And the broadcaster does not know what the commentators will say, until it has been said – just as with the appellants and their Facebook page here.²⁷ The broadcaster’s intentional provision of the broadcast platform is instrumental to the process of communicating (publishing) the words of the commentator to listeners.

10 35. Similarly, a television company is also a publisher when it merely relays the signal of another television company: *Thompson v Australian Capital Television*.²⁸ This is so notwithstanding that it had no prior knowledge of the actual content of the matter complained of and no involvement in its compilation. Again, the critical factor is that the publisher participates in, is instrumental to, the process of conveying the words in question to third parties namely viewers. The appellants do not mention this well-known example from the case law. They refer to *Thompson* for other purposes,²⁹ but close their eyes to what the case actually decided.

(c) *The property owner cases: AS 22*

20 36. The applicants submit that these cases (where owners of property to which defamatory messages have been affixed have been held liable if the offending material is not removed)³⁰ are to be understood as ‘involving an *inference* ... as to the defendant’s *intention* to communicate the matter complained of’.

37. Basten JA discusses this line of cases at CA [45] – [47],³¹ and Meagher and Simpson JJA do so at CA [106] – [110].³² Both judgments cite with approval the analysis of these cases, and the differences between them and cases (like the present) involving

²⁶ JCAB 38

²⁷ The appellants assert at AS 24 that in practice, ‘live’ is not actually live, as there is a short delay which allows a radio station to erase or block defamatory content before it is broadcast. There was no evidence to establish such a global assertion.

²⁸ (1996) 186 CLR 574 at 589-590, 594-596 and 620

²⁹ See eg AS 12, 30, 34, 36

³⁰ *Byrne v Deane* [1937] 1 KB 818; *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Rep 81-127

³¹ JCAB 23

³² JCAB 42

an internet platform, by Ribeiro PJ in *Oriental Press*. That analysis does not involve any ‘intention’ touchstone. Rather, in the property cases, the property owner (unless and until he/she becomes aware of what has been affixed and declines to take it down – at which point ‘he turns himself into’ a publisher³³) does not participate, in any way at all, in any process whereby any words are conveyed to any recipients. But in the internet platform situation, the provider of the platform does participate, from the outset, by intentional acts, in just such a process: see in this regard 45(a)-(d) below.

(d) *Plays and public meetings: AS 23*

- 10 38. The appellants accept, at AS 23, that the producer of a play and its actors may be liable as publishers for the content of the script, but suggest that that would not be so in the case of something said by an actor *ad lib*. The scant authority cited for the latter suggestion does not support it.³⁴ The facts of each particular case would be determinative.
39. As to public meetings, the appellants say that simply because the organiser provides the forum for whatever statements are made, that would not make the organiser a publisher of those statements. They cite *Murray v Wishart* at [132].³⁵
- 20 40. The remarks in *Murray v Wishart* at [132] - [134] were reflections by their Honours, not concluded views, on analogies suggested by counsel.
41. More generally, the wide range of types of public meeting would include for example: (i) a meeting to discuss whatever the attendees choose to discuss, with no topics set in advance; (ii) a meeting to discuss topic A, at which unexpectedly a speaker says something about topic B; or (iii) a meeting to discuss topic A, being accusations against X of criminal activity, at which the speakers would be persons well-known for their antipathy to X and for their views that he was guilty.
- 30 42. None of these examples is necessarily different from the talkback radio situation. The organisers in all three cases (depending as always on the facts of the particular case)

³³ *Oriental Press v Fevaworks* [2013] 16 HKCFAR 366 at [48]

³⁴ *Gatley*, 12th ed. at [6.24]; *Bishop v State of NSW* [2000] NSWSC 1042

³⁵ AS 23, footnote 22 – [2014] 3 NZLR (CA) at [132]

would face difficulties in contending that they did not participate in, were not instrumental to, the conveying by the speakers of what they said at the meeting. The organiser of a meeting of the type (iii) kind might find it more difficult than the other two to make out a defence of innocent dissemination, but that is a different question.³⁶

(e) Consent, approval, adoption, promotion, ratification: AS 27

10 43. The appellants submit that although they set up Facebook pages which enabled third parties to comment, that does not permit a conclusion that they '*consented to, approved of, adopted, promoted or in some way ratified*' – and in such ways may be taken to have intended to communicate – any third party comments. Various factors are listed which are said to support this submission.

44. This submission is irrelevant to the issues raised on this appeal. The decision of the Court of Appeal was not based on any such conclusion.

20 45. In any event, the factors relied on by the appellants at AS 27 amount to a plea that the inflexible protocols of the Facebook platform were such that they were merely helpless users of that service, on Facebook's implacable terms, and so bore no responsibility for the comments of others on that platform. This is to ignore a number of realities including the following:

(a) Under Facebook's terms, noted at CA [80] – [83],³⁷ the appellants '*own all the content and information you post on Facebook and you can control how it is shared though your privacy and application settings*';

(b) Members of the public who are Facebook users are deliberately encouraged to comment on the appellants' posts by use of the buttons ('Like', 'Comment' and 'Share') appearing under each post;³⁸

30 (c) A cursory glance at some of the appellants' highly emotive posts reveals the obvious likelihood that derogatory and/or defamatory comments will flow. For example,

³⁶ See 48-62 below

³⁷ JCAB 34

³⁸ CA [70]

- Schedule A to the Nationwide News Statement of Claim contains a photo of the respondent, grinning, with the caption: ‘*Dylan Voller’s list of jailhouse incidents tops 200*’;³⁹
- Schedule A to the Australian News Channel Statement of Claim contains a photo of the respondent with the caption: ‘*Live Now: The Royal Commission has promoted Dylan Voller as the hero victim of prison officials – it’s a disgrace*’;⁴⁰

(d) Media organisations such as the appellants use Facebook for the purposes (among others) of increasing the number of subscribers to their own websites and increasing the profile both of those websites and of their Facebook pages. Their commercial interest lies in maximising the numbers of ‘visits’ to their Facebook pages, thereby affecting the Facebook algorithm and augmenting advertising sales on both their Facebook pages and their own websites.⁴¹

10

46. As to the ‘profanity filter’, in fact it **could** be tailored to include common words so that virtually all comments would be hidden pending review.⁴² And on the evidence it **would** be practicable (albeit at a cost) to attempt to have staff review every hidden comment before it was made public.⁴³ Given the nature of the appellants’ own posts about the respondent and the inherent likelihood of defamatory comments,⁴⁴ in the context of a commercial choice by the appellants to deploy Facebook pages as well as their own websites,⁴⁵ it is no answer to say it is ‘not practicable’.⁴⁶

20

(4) ‘Intention’; innocent dissemination; and ‘ought to know’: AS 28-38

47. The restricted terms of the separate question, and the fact that no defences have yet been pleaded, rendered premature any consideration of potential defences of innocent dissemination (either at common law or under s 32 of the *Defamation Act 2005*)

³⁹ BRFM page 44

⁴⁰ BRFM page 63

⁴¹ PJ [90](viii), (xvii) (JCAB 22); CA [76]-[77] (JCAB 33)

⁴² PJ [90(v) - 90(vii)] (JCAB 23)

⁴³ PJ [87], [90](xiv)-(xvi) (JCAB 24)

⁴⁴ PJ [87] (JCAB 22), [90](xi), (xii) (JCAB 24)

⁴⁵ See 45(d) above

⁴⁶ In *Thompson v Australian Capital Television* (1996) 186 CLR 574 at 590, the joint judgment (Brennan CJ, Dawson and Toohey JJ) approved the words of the court below: ‘[Channel 7] took no precautions of any kind, knowing the programme was a current affairs programme, a programme which by its nature would be likely to involve comments about persons.’ See also *Aldridge v Johnston* [2020] SASCFC 31 at [163]

including whether the appellants ‘knew’ or ‘ought reasonably to have known’ various things, or were ‘negligent’ in not knowing those things.

48. Nevertheless the appellants suggest that the historical beginnings of the common law defence need to be ‘reconciled’ with, and that they ‘shed light on’, their ‘intention’ theory of publication.⁴⁷

49. That attempted ‘reconciliation’ is both misconceived, and extraneous to the issues on this appeal, for the reasons which follow.

10

50. **First**, there has developed in the common law, over centuries, a recognition that some types of publishers of defamatory matter should not be fixed with liability if (i) they did not know that what they were publishing was defamatory and (ii) they were not negligent in not knowing – ie it could not be said of them that they ‘ought to have known’. Those are the essential elements of the modern defence of innocent dissemination at common law,⁴⁸ and also of its statutory counterpart namely s 32.

51. All of the early cases express the position in such terms, including *Day v Bream*,⁴⁹ *Emmens v Pottle*⁵⁰ and *Vizetelly v Mudies Library*.⁵¹ None of them refers, in terms or by inference, to ‘intention’.

20

52. **Second**, it is true that both Lord Esher in *Emmens* and all three of their Lordships in *Vizetelly* used language to the effect that if the defendant established those matters then the consequence was that there was ‘no publication’ by the defendant.⁵² And some more recent judgments, including in this Court, have used or adopted such language, notably Dixon J in *Lee v Wilson*,⁵³ Gaudron J in *Thompson*⁵⁴ and the judgment of the Court in *Dow Jones v Gutnick*.⁵⁵

⁴⁷ AS 28

⁴⁸ See *Gatley*, 12th ed. [6.30], [6.38]; Tobin & Sexton at [16,033], [16,035]

⁴⁹ (1837) 2 Mood & R 54; 174 ER 212. It may be noted that *Day v Bream* appears to have been a criminal case (where knowledge or its absence would have been a critical element).

⁵⁰ [1885] QB 354 at 357

⁵¹ [1900] 2QB 170 at 180

⁵² *Emmens v Pottle* per Lord Esher MR at 357 and *Vizetelly v Mudie's* per Smith LJ at 177, Vaughan Williams LJ at 178 and Romer LJ at 179

⁵³ *Lee v Wilson & Mackinnon* (1934) 51 CLR 276 at 288.

⁵⁴ *Thompson v Australian Capital Television* (1996) 186 CLR 574 at 593-594

⁵⁵ *Dow Jones v Gutnick* (2002) 210 CLR 575 at [25] per Gleeson CJ, McHugh, Gummow and Hayne JJ

53. **Third**, however, Dixon J’s statement of principle in *Lee v Wilson* had two parts – a statement of principle, and an exception. The statement of principle is quoted above at [22]. His Honour expressly rejected the idea that intention to publish is necessary. Rather, liability ‘*depends upon mere communication*’ – a communication which may be ‘*quite unintentional, and the publisher may be quite unaware of the defamatory matter.*’ That could hardly be plainer.

54. Then in the next sentence, Dixon J identified an exception to that principle, namely:

10

If, however, the publication is 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 the libel. [Emphasis added]

55. The applicants focus only on this second part of what Dixon J said, the exception. They say (AS 18) that ‘*Dixon J’s statement* (by which they are referring to this exception) *was concerned with the intention to defame*’. But what Dixon J was explaining in his exception – which only applied to these particular ‘businesses’ or ‘callings’, where the onus of proof was on the defendant – did not turn on any question of intention. Rather, it turned on two other matters altogether, namely (1) absence of knowledge and (2) absence of negligence in not knowing. Those are the two integers which continue to underpin the defence of innocent dissemination.

20

56. The statutory defence is available to anyone who comes within its parameters – it is not limited to ‘businesses’ or ‘callings’ of any particular kind. It is difficult to imagine the common law defence having any remaining utility given the breadth of the statutory defence.⁵⁶

30

57. **Fourth:**

(a) Lord Esher’s brief judgment in *Emmens*⁵⁷ contains no rationale for the conclusion of ‘no publication’ (as opposed to the availability of a defence);

⁵⁶ In this regard see *Gatley*, 12th ed., at [6.8] and *Tobin & Sexton* at [16,033]

⁵⁷ [1885] QB 354 at 356-7

- (b) Nor do the judgments of AL Smith LJ or Romer LJ in *Vizetelly*;⁵⁸
- (c) Romer LJ in *Vizetelly*⁵⁹ thought that the way the result was arrived at in *Emmens* was not ‘altogether satisfactory’;
- (d) Vaughan Williams LJ in *Vizetelly*⁶⁰ did state his rationale for the ‘no publication’ conclusion in these exceptional situations. That rationale was that proof (by the defendant) of ‘no knowledge’ and ‘no negligence’ would rebut the presumption of malice, which was traditionally regarded as (but is no longer) an essential element of publication in libel;⁶¹
- 10 (e) In *Thompson*,⁶² three of the five justices (Brennan CJ, Dawson and Toohey JJ) cited with approval the view of the authors of *Duncan & Neill on Defamation*, that it would be more accurate to say that an ‘innocent’ disseminator does publish the libel, but (if he can establish the defence of innocent dissemination) will not be responsible for that publication;⁶³
- (f) That view was also endorsed by the Court of Final Appeal in Hong Kong in 2013 in *Oriental Press Group v Fevaworks*;⁶⁴
- (g) In the Court of Appeal, below,
- Basten JA considered that the ‘no publication’ view had been ‘abandoned’ in this country in the light of *Thompson*,⁶⁵ whereas
 - Meagher and Simpson JJA, while appearing also to favour the
- 20 approach of the plurality in *Thompson*, considered that it could not yet be regarded as settled law;⁶⁶
- (h) The statutory defence, in s 32, unambiguously adopts the *Thompson* approach: the defence is to the ‘publication’ of defamatory matter.

58. The respondent respectfully submits that the approach of the plurality in *Thompson* is correct and should be adopted. To do so would eliminate such confusion as may

⁵⁸ [1900] 2QB 170 at 174-7, 178-80

⁵⁹ [1900] 2QB 170 at 180

⁶⁰ [1900] 2QB 170 at 177-8

⁶¹ Noted by Gaudron J in *Thompson v Australian Capital Television* (1996) 186 CLR 574 at 594

⁶² (1996) 186 CLR 574 at 585-586

⁶³ Their Honours also expressed the view that ‘the judgments in *Vizetelly* itself hardly offer a satisfactory statement of principle’.

⁶⁴ [2013] 16 HKCFAR 366 at [31]

⁶⁵ CA [39], [40] (JCAB 21)

⁶⁶ CA [90] – [92] (JCAB 36)

have resulted or remain from the language in the early cases, and would enable the law to develop in a coherent way.

59. **Fifth**, in any event, as Meagher and Simpson JJA appreciated, in the context of these proceedings *'none of this is presently relevant'*.⁶⁷ The appellants did not rely below on the 'never published' approach. Indeed the appellants positively submitted that the view of the plurality in *Thompson* was correct: *'The better view is that innocent dissemination does not disprove publication at common law'*.⁶⁸

10 60. Where a defendant seeks to bring himself under the protection of the 'innocent dissemination' exception, he must plead the relevant facts by way of defence. Then he must prove those facts. The onus is on the defendant. Those matters can then be adjudicated upon, at trial, on the evidence. This Court's decision in *Trkulja* in 2018 reiterated this in the plainest terms.

61. The appellants' argument involves asking this Court to determine the question of publication (on which the plaintiff bears the onus), by reference to facts and matters relevant to the innocent dissemination defence (on which the defendant bears the onus), when they have neither pleaded nor proved such facts or matters.

20

62. There would be no place for either the common law or statutory defence of innocent dissemination if the 'absence of knowledge' and 'absence of negligence' elements in those defences could be pre-emptively circumvented by the introduction of an intention requirement as to publication.

(6) Overseas authorities relied upon by the appellants

New Zealand

30 63. In *Murray v Wishart*,⁶⁹ the issue was whether it was arguable that a Facebook page administrator was the publisher of third-party comments. The NZ Court of Appeal did not engage in any review, or analysis, of what constitutes publication at law. It

⁶⁷ CA [93] (JCAB 38)

⁶⁸ Applicants' Summary of Argument (CA) 16 September 2019 at [55] (BRFM at pages 140-1)

⁶⁹ [2014] 3 NZLR 722

did not consider or even refer to *Webb v Bloch*, or to notions such as ‘instrumental’, or ‘participation’.

64. Rather the Court appears to have assumed, as a starting point, that some element of knowledge, actual or constructive, is always necessary for publication.⁷⁰ From that unsatisfactory starting point, it proceeded on the footing that its task was to make a binary choice between two possible tests (in relation to the assumed requirement of knowledge):

- 10
- (i) whether the defendant knew of the defamatory post and failed to remove it (an ‘actual knowledge’ test), or
 - (ii) whether the defendant, although it did not know of the defamatory post, ought to have known (an ‘ought to know’ test).

65. The primary judge had held that the second was the correct test, and that on that test it was arguable that the Facebook page administrator was the publisher of third-party comments. The Court of Appeal disagreed, considering that the ‘ought to know’ test was undesirable for a number of reasons,⁷¹ including an inability to balance the right of freedom of expression under the New Zealand *Bill of Rights Act* 1990.

20 66. The Court’s consideration of authority – on the only question which it addressed, namely ‘*the correctness or otherwise of the ought to know test*’⁷² – began with *Emmens v Pottle*, and included *Byrne v Deane*⁷³ and *Urbanchich v Drummoyne Municipal Council*.⁷⁴ The Court referred to *Oriental Press* at [124] but did not engage with the reasoning of the Hong Kong court.⁷⁵ Nor did the Court give consideration to potential relief from liability through the defence of innocent dissemination.⁷⁶

67. At AS 40, the appellants appear to criticise the NSW Court of Appeal for ‘not explaining’ why it ‘declined to follow the approach in *Murray v Wishart*’. Such a

⁷⁰ See at [81] – [83], [92]

⁷¹ [136] – [143]

⁷² [92] – [93]

⁷³ [100] – [104] - [1937] 1 KB 818

⁷⁴ (1991) Aust Torts Rep 81-127

⁷⁵ As to which, see above at [21] and [37], and below at [71] – [73]

⁷⁶ Which existed as a statutory defence in New Zealand - referred to at [143]

criticism is misplaced, given (what it is respectfully suggested are) the inadequacies of that approach as noted above.

United Kingdom

68. *Tamiz v Google*⁷⁷ concerned the operation by Google Inc of a worldwide platform known as Blogger.com which allowed any internet user to create an independent blog. As the appellants acknowledge, the decision did not reject the possibility that (on those quite different facts) Google was a ‘secondary publisher’.

10 69. In *Monir v Wood*,⁷⁸ the defendant delegated control of a Twitter account to another person, who posted defamatory material without the knowledge of the defendant. Nicklin J found the defendant liable on the basis of agency. However, his Honour declined to find the defendant a ‘primary publisher’ because ‘... *For a person to be held liable as a primary publisher, s/he must be shown to have knowing involvement in the publication of the particular words.*’⁷⁹

70. The authority for that proposition was said to be *Bunt v Tilley* at [23].⁸⁰ In fact, what Eady J said in *Bunt*, at [23], was starkly different [emphasis added]:

20 Of course, to be liable for a defamatory publication it is not always necessary to be aware of the defamatory content, still less of its legal significance. Editors and publishers are often fixed with responsibility notwithstanding such lack of knowledge. On the other hand, for a person to be held responsible there must be knowing involvement in the process of publication of the relevant words.

Hong Kong

71. In *Oriental Press Ltd v Fevaworks Solutions Ltd*⁸¹ Ribeiro PJ provided a scholarly and wide-ranging review of the principles relating to publication. At [16] – [23] his Honour traced the common law’s insistence that liability for publication was strict; at [24] – [33] he traced the eventual relaxation of that strict liability by the development of the defence of innocent dissemination;⁸² at [34] – [54] he analysed the notice board and graffiti cases such as *Byrne v Deane*⁸³ and explained why the

30

⁷⁷ [2013] 1 WLR 2151 (CA)

⁷⁸ [2018] EWHC 3525 (QB)

⁷⁹ At [135]

⁸⁰ [2007] 1 WLR 1243 [22]-[23] (Eady J). See generally the discussion in *Gatley*, 12th ed. at [6.27]

⁸¹ (2013) 16 HKCFAR 366

⁸² Which exists in Hong Kong only under common law -see [30]

⁸³ *Byrne v Dean* [1937] 1 KB 818

principles deriving from those cases were fundamentally different from the principles constituting the innocent dissemination defence.

72. His Honour concluded, in the light of that analysis, that the *Byrne v Deane* principles do not apply to internet platform providers.⁸⁴ (For the same reasons, it is submitted, they do not apply to Facebook page administrators such as the appellants.) The real question to be considered was therefore, as it is in this case, whether the appellants had ‘participated’ in the publication in question. Having regard to a series of factors many of which are also present in this case, his Honour concluded that the defendants in *Oriental Press* ‘plainly’ were such participants.⁸⁵

73. The compelling analysis of Ribeiro PJ is securely grounded in both principle and authority.⁸⁶ None of the attempted criticisms of it at AS 43 is of substance.

Canada

74. *Weaver v Corcoran*⁸⁷ was a first instance decision where the defendant was held not liable for defamatory comments, by third parties, on articles posted by the defendant to her online newspaper.⁸⁸ The reasoning of the trial judge seems to have turned on the absence of ‘approval’ or ‘adoption’ by the defendant of those comments.⁸⁹

75. In *Pritchard v Van Nes*,⁹⁰ the defendant was found liable (also at first instance) for comments posted by others to her (public) Facebook page. The reasoning of the trial judge seems to have included the view that the defendant *ought to have anticipated* such comments would be made.⁹¹

76. These two conflicting first instance decisions of the British Columbia court are, with respect, of limited assistance.

⁸⁴ At [50]

⁸⁵ At [51] – [53]. His Honour went on to hold that, on the facts, a defence of innocent dissemination was available. That issue has yet to be pleaded or litigated in this case.

⁸⁶ The authors of *Gatley*, 12th edition at [6.29], consider that the decision in *Oriental Press* ‘offers a model analysis of how well-accepted principles of the common law of publication should apply to internet publications’.

⁸⁷ 2015 BCSC 165

⁸⁸ *Ibid* at [268]

⁸⁹ *Ibid* at [284]

⁹⁰ 2016 BCSC 686

⁹¹ *Ibid* at [110] and [113]

77. Of more assistance is the decision of the Supreme Court of Canada in *Crookes v Newton*.⁹² There the issue was whether a hyperlink in an online article amounted to publication of the material on the site which was the destination of the hyperlink. The Court held that it did not, taking the view that the hyperlink was only a reference to that material; it communicated to the reader the existence of that material but not its content. However, in their several different reasons (all concurring in the result), the nine appellate judges all accepted that the publication element in defamation requires only that the defendant has, by any act, conveyed defamatory meaning to a single third party who has received it, and that the form of the defendant’s act and the manner in which it assists in causing the defamatory content to reach a third party are irrelevant.⁹³

Part VI: NOTICE OF CONTENTION OR CROSS-APPEAL: N/A

Part VII: TIME ESTIMATE:

78. The respondent estimates two hours for his response.

Dated: 17 March 2021

Peter Gray
 153 Phillip, Barristers
 02 9132 5718
gray@153phillip.com.au

Richard Potter
 153 Phillip, Barristers
 02 9132 5721
potter@153phillip.com.au

Louise Goodchild
 Frederick Jordan Chambers
 02 9229 7333
louise.goodchild@fjc.net.au

Counsel for the Respondent

The respondent is represented by O’Brien Criminal & Civil Solicitors

⁹² [2011] 3 SCR 269

⁹³ [2011] 3 SCR 269 at [16], [18] (Abella J, five justices concurring); [46] (McLachlin CJ and Fish J); [55] (Deschamps J)

IN THE HIGH COURT OF AUSTRALIA

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)

10

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

And

Dylan Voller
Respondent

20

ANNEXURE

Judiciary Act 1903 (Cth) as at 25 August 2018

Defamation Act 2005 (NSW) as at 26 September 2019

Bill of Rights Act 1900 (NZ) as at 1 July 2019

30