HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S236/2020
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Important Information

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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)

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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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RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: CERTIFICATION

1. The respondent certifies that the outline is in a form suitable for publication on the internet.

Part II: OUTLINE

Strict liability, and participation in a process of publication

30 2. There are three components of a plaintiff's cause of action for defamation, namely: (i) publication, (ii) identification, and (iii) defamatory meaning.

3. As to all three of those components, the tort is one of strict liability. The cause of action does not depend upon proof of fault, or intention (or knowledge).

4. Any degree of participation in the publication component (ie the process whereby the defamatory matter is conveyed to a recipient) constitutes publication.

5. So much was recognised in the old texts, not only in those chosen for citation by Isaacs J in *Webb v Bloch* – including Starkie (1830, Vol II, Chapter XI, p 225 [Supp E 134]) and Folkard (1891, Chapter XVIII, p 439 [E 823]) – but even earlier (for example in Bacon's Abridgement, 1798, p 458 [Supp E 21].

6. Those principles (as to strict liability, and as to the minimal degree of "participation" required) were also the acknowledged underpinning of the early cases from which the common law defence of innocent dissemination emerged: *Emmens v Pottle* (1885) 16 QBD 354; *Vizetelly v Mudies Select Library* [1900] 2 QB 170.

7. Those principles (and the limited exception for "innocent dissemination") were re-stated and applied in this Court, in *Webb v Bloch* (1928) 41 CLR 331 at 363-4, and in *Lee v Wilson* (1934) 51 CLR 276 at 287-290.

8. They have been often reiterated, including, in more recent times, not only by this Court in 2018 in *Trkulja v Google* (2018) 263 CLR 149 at [38]-[40], but also in other common law jurisdictions, in particular by the Hong Kong Court of Final Appeal in *Oriental Press v Fevaworks* (2013) 16 HKCFAR 366 at [18]-[23].

9. The NSW Court of Appeal was right to find that, in this case, the acts engaged in by the appellant media companies did amount to such participation. See *inter alia* CA [45]-[47], [70], [76], [85], [87], [98] and [109].

The defence of innocent dissemination, and the falling away of malice

10. Had liability for publication been fault-based, there would have been no need – in the late 19th century – for the development of the "innocent dissemination" exception (for distributors such as booksellers, librarians and the like) – where absence of knowledge, and absence of negligence, are the basis for the exception.

11. In earlier times, there was a fourth component of a plaintiff's cause of action, namely malice. The plaintiff had to aver that the publication by the defendant, of the defamatory matter, of and concerning the plaintiff, was malicious. Such malice could be "in law" or "in fact". See

- Bacon, 1798: p 449 (Supp E 12)
- Starkie, 1830: Vol I, Chapter XV, p 433 (Supp E 113)

12. Over time, the falsity of the defamatory matter itself came to be regarded as sufficient to raise a presumption of malice ("in law"), which presumption was rebuttable: see *Vizetelly* at 178 per Vaughan Williams LJ.

13. The necessity for malice, as part of the plaintiff's case, may have informed some of the statements in the old cases and texts in relation to the "publication" element, where knowledge (not "intention") is sometimes referred to as a relevant factor.

14. Indeed as late as 1900 Vaughan Williams LJ in *Vizetelly* explicitly based his conclusion (of "no publication") on such a presumption having been rebutted on the facts of that case.

15. But that requirement of malice, as part of the plaintiff's cause of action, has not been the law for at least a century: see *Lee v Wilson, Thompson v ACT*.

16. As a consequence, the rationale suggested by Vaughan Williams LJ in *Vizetelly* for the "innocent dissemination" exception has no present force.

17. Nor does a contention (such as the appellants advance here) that a defendant must be shown to have "intended" to publish the specific matter complained of.

10 18. The "innocent dissemination" exception, although it originated in a pragmatic response to the perceived harshness of the strict liability principle in certain limited situations, has long been understood as a defence to an action for defamation. It is so described, for example, in this Court in both *Thompson v ACT,* and *Dow Jones v Gutnick* (2002) 210 CLR 575 at [51], in *Crookes v Newton* in Canada, and in *Oriental Press* in Hong Kong.

19. For the reasons outlined in this Court in 1996 (in *Thompson v ACT*) and by the Hong Kong Court of Final Appeal in 2013 (in *Oriental Press*), that characterisation is correct and should be adopted.

20 20. The Appellants' case

(a) misreads the judgment of Dixon J in *Lee v Wilson*;

(b) does not acknowledge or grapple with the changes in this area of the law in relation to malice;

(c) is based on a proposition, not argued below (which the Court of Appeal therefore has not considered), which is contrary to long-standing authority both in this Court and elsewhere in the common law world.

Dated: 18 May 2021

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Peter Gray SC