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Special Innovation Edition

Defamation Panel:

Voller v Nationwide News Pty Limited; Voller v Fairfax; Voller v Australian News Channel [2019] NSWSC 766

Following a hearing in February this year, the Supreme Court handed down its judgment in the *Voller* case on 24 June 2019, and the result is intriguing for a host of reasons.

For a case this consequential, we've called in a favour (they never owed us anything, but bear with me here) from five of our favourite defamation specialists in the country. This may well be the most ambitious crossover project we have witnessed to date in the CAMLA Universe - expect this to turn into a franchise.

Marlia Saunders is Senior Litigation Counsel at News Corp Australia.
Kevin Lynch is a Media Litigation partner at Johnson Winter & Slattery.
Sophie Dawson is a Media and IT Litigation partner at Bird & Bird.
Robert Todd is a Media and Technology Litigation partner at Ashurst.
Justine Munsie is a Media and IP partner at Addisons.

Eli Fisher: Let's start from the beginning. Who is Dylan Voller, and how does he allege he was defamed?

Kevin Lynch: Mr Voller rose to national prominence after ABC TV Four Corners Program showed confronting footage of him shackled to a restraining chair in the Alice Springs Correctional Centre. The program prompted a Royal Commission into the treatment of youth in the child protection and youth detention systems in the Northern Territory. Mr Voller's history was detailed in the Royal Commission, including repeated terms in custody for a range of crimes including car theft, robbery and assault.

The defamation case is over Facebook "comments", apparently from members of the public, which formed part of the comment feed under links to coverage of Mr Voller variously posted by the Defendants. Whilst the Court is yet to decide whether the publications are defamatory or whether defences arise, I understand that Voller contends that the Facebook "comments" contain baseless allegations of fact - not comment or honest opinion in any defamation sense.

There were four separate proceedings brought by Mr Voller against Australian media companies. The proceedings were filed and served without Voller providing any prior notice of his concerns. One proceeding was resolved early in the piece whilst the action against Nationwide News, Fairfax Media and Australian News Channel proceeded to determination of the preliminary separate question that is the subject of this judgment.

Eli: Can you give us a summary of the judgment?

Sophie Dawson: The Court held that the media organisations which administered Facebook pages (**Page Owners**) were primary publishers of the third party comments.

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CAMLA

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Editors' Note

Spring has sprung and brought with it the September Special Edition CLB. This special edition on innovation canvasses the latest developments on deepfakes, defamation, artificial intelligence, the implications of 5G's arrival and industry views on press freedom in Australia.

In a novel decision, the Supreme Court of New South has held that media organisations can be liable as publishers of defamatory comments made by third parties on their public Facebook pages. We have collected the insights of leading defamation experts on this landmark decision, **Kevin Lynch**, **Justine Munsie**, **Marlia Saunders**, **Sophie Dawson** and **Robert Todd**.

Artificial intelligence gained more attention from industry bodies this year, in particular with the release of Australian Human Rights Commission's White Paper 'Artificial Intelligence: governance and leadership'. **Paul Kallenbach, Vanessa Mellis, Annabelle Ritchie** and **Siegfried Clarke** (MinterEllison) walk us through the ethical concerns identified in the paper. The MinterEllison team also look at the international developments in the AI space and where Australia sits among these changes. Meanwhile, **Ted Talas** and **Maggie Kearney** from Ashurst dive into efforts to regulate deep fakes and take us through the implications for the Australian legal landscape.

In further news, our representatives from CAMLA Young Lawyers have donned their journalism hats. **Patrick Tyson** from the ABC chats to **Richard Ackland** about press freedom, the recent AFP raids and innovation in the digital news space. **Madeline James** (Corrs) interviews **Matt Collins QC** for his views on freedom of speech, defamation and whether these laws fairly balance the interests of plaintiffs and defendants. HWL Ebsworth's **Amy Campbell** reports on CAMLA's panel discussion on 'Challenges and Opportunities in the Telco Sector' held in August at Bird and Bird.

August also brought to us the 25th rendition of the CAMLA Cup, held once again at Sky Phoenix. CAMLA Young Lawyer representative **Tara Koh** (Addisons) provides us with a report on the well-attended event. A thank you to all attendees of the event – CAMLA looks forward to seeing you again next year! On behalf of CAMLA, we give tremendous thanks to **Deb Richards** (Netflix) and **Ryan Grant** (Baker McKenzie) for hosting the event.

For those eager for more reading material, the ACCC has released its 619-page final report on the **Digital Platforms Inquiry**. Its 23 recommendations have serious implications for the business models of digital platforms and news media businesses in Australia. Whether or not these recommendations will materially affect the value placed on news content remains to be seen. **HealthEngine**, an online health booking platform, has gained attention from the ACCC for sharing personal information with insurance brokers and publishing patient reviews and ratings. **Clive Palmer** is demanding $500,000 from, and threatening to bring a defamation claim against, YouTube creator **FriendlyJordies** for calling him 'Fatty McF--Head' and a 'dense Humpty Dumpty'. Finally, the Federal Court has ordered **Birubi Art,** a seller of fake Indigenous Australian souvenirs, to pay AU$2.3 million in penalties for contraventions of the Australian Consumer Law.

For more, read on.

Eli and Ashleigh

There are two aspects of this decision ("publisher" and "primary") which warrant separate consideration.

In relation to the first question, of whether the Page Owners were "publishers", the Court in *Voller* found that:

- publication of third-party comments to persons other than the Facebook friends of the commenter occurs by virtue of the fact that the owner of a public Facebook page allows access to the comment by the publication of the page; and
- the owner or administrator of a public Facebook page is capable of rendering all or substantially all comments hidden.

On that basis, the Court held that the extended publication of a third-party comment is wholly in the hands of the media company that owns the Facebook page.

The second aspect of this decision concerns whether a Page Owner is a primary or secondary publisher. In short, Justice Rothman said that the Page Owners are primary publishers which means that the defence is not available to them.

Eli: What's the consequence of being classified as a primary (or 'first'), as opposed to secondary (or 'subordinate'), publisher?

Robert Todd: The main consequence is that a primary publisher cannot rely on a defence of innocent dissemination. Secondary publishers can avail themselves of the defence of innocent dissemination if they did not know and could not reasonably have known that the defamatory material had been published or that the published material contained defamatory words. Justice Rothman held that knowledge of the existence of the defamatory material should be presumed not only for primary publishers, but also secondary publishers. However, for secondary publishers the presumption is rebuttable. If a secondary publisher is able to rebut the presumption, they can rely on the innocent dissemination defence, and thereby completely absolve themselves of liability for the publication.

Eli: Can you place this judgment in context? Where are the parties up to in this dispute? What was this judgment addressing, and what was it not addressing?

Justine Munsie: Justice Rothman's judgment addressed a specific question on the preliminary issue of publication – namely, "whether the plaintiff had established the publication element of the cause of action of defamation against the media defendants in respect of each of the Facebook comments by third-party users?"

His Honour's judgment did not deal with the issues of whether the comments were defamatory or whether the media defendants were liable for the comments. The question of whether the defence of innocent dissemination under s 32 of the *Defamation Act* was available to the media defendants was not required to be answered, but given his Honour's finding that they were primary publishers, the issue was touched upon.

Sophie: And to add to what Justine has said, there is some doubt as to whether this second aspect of the decision - that is, whether the Page Owners are primary or secondary publishers - constitutes part of the binding ratio decidendi or whether it is merely obiter.

The judgment is confined to that question that Justine has quoted: whether the plaintiff has established the publication element against the media defendants in respect of the third-party comments.

There is doubt as to whether the above question extends to the plaintiff establishing publication for innocent dissemination purposes, or rather "publication" in the narrower sense. The Court indicated that the parties had at first also framed a question concerning the availability or otherwise of the principle of innocent dissemination. It said that question was withdrawn "perhaps on the basis, to which some authorities refer, that an "innocent disseminator" is not a publisher". The Court also said that "The question on which the parties agreed does not seem, directly, to raise whether the defence of "innocent dissemination", arising under s 32 of the *Defamation Act*, is available. Nevertheless, there are certain aspects of the process by which the comments of third parties are placed, or remain, on the public Facebook page of the defendants that directly raises this aspect".

The drafting of the question and the ambiguity of the Court's language on this point leaves room for doubt as to whether its findings in relation to innocent dissemination constitute ratio decidendi or mere obiter dicta. We have to consider this in light of the High Court's finding as to the meaning of 'publication' in *Trkulja v Google LLC* [2018] HCA 25. There the High Court held (at [38] to [41]) that "all degrees of publication are publication" (at 40) and that the proper approach to pleading is for the plaintiff to simply plead publication, on the basis that the question of whether or not the defendant is a subordinate publisher only arises if the innocent dissemination defence is pleaded. So, the better view may be that the finding as to innocent dissemination is obiter.

Kevin Lynch

Eli: Marlia, can you explain the process of content moderation, and how hiding and deleting comments work? What control does a media publisher have over comments posted by third party users on Facebook?

Marlia Saunders: On public Facebook pages, there is no option to remove or disable the "Like", "Comment" or "Share" features or to pre-moderate comments before they appear. Apart from banning specific names of users (who could just pop up again with a different profile anyway), there is no way to prevent users from posting comments. Content moderation can be done by setting the "profanity filter" offered by Facebook to "strong" – Facebook will then hide any comments which contain commonly reported words and phrases marked as offensive by the community. There is also a feature on Facebook that allows a page administrator to compile a list of words which if included in a comment posted on the page will cause the comment to be hidden. This feature is generally used for profanities that may not be picked up in the automatic "profanity filter" provided by Facebook, such as uniquely Australian derogatory terms which Americans have never heard of. While I say such comments will be "hidden", a comment containing a word on these lists will actually remain visible to the user who posted it and to all of their "friends".

Otherwise, moderation must occur after a comment is posted by employing someone to manually scroll through the comments and either hide or delete them. This is challenging for a number of reasons – comments can be posted at any time of the day or night; comments can be posted in response to other comments which creates sub-threads and makes it difficult to keep track of what is new; problematic comments can be posted on even the most anodyne stories; and the volume of comments on media pages can number thousands or tens of thousands each day, and most media organisations have multiple pages dedicated to each masthead or program, which makes moderation a very time consuming and costly exercise. To give you some figures, at the hearing, evidence was given that there are around 50 articles a day posted on the Sydney Morning Herald page and each post can receive thousands of comments (at [40]). The Facebook page of The Australian

Marlia Saunders

public Facebook page, and the text filtering options available aren't comprehensive. Even if you manage to prepare an extensive list of words, the text filters will not capture emoji or image-based comments (such as GIFs or memes), nor, as noted in the judgment, will they capture comments that use alternative spellings or lettering (e.g. substituting an "S" for "$").

It should also be noted that, if

posts about 20-30 stories per day and comments are made up to thousands of times per day (at [46]); and The Sky News and Bolt Report Facebook pages have around 60 to 80 posts times per day, and each post can receive as many as 1800 comments (at [54]). Due to the large volume of comments, email notifications of new comments are often switched off, otherwise social media editors would receive thousands or tens of thousands of emails each day.

Eli: Nine CEO, Hugh Marks, has argued that the responsibility should rest with social media platforms as the publishers, not with the news organisations. Robert, what about Facebook's role in all of this? What is expected of a platform in the moderation of third party comments?

Robert: That assumes you accept that both should have some primary responsibility beyond that of the poster and I would argue that neither the platform nor the Page Owner should immediately have such liability placed on them. However, it may be desirable that social media platforms provide the operators of public pages with the tools they need to be able to efficiently moderate third party comments published to the public. For example, Facebook does not provide an option for operators to totally disable comments on a

one starts from the position that everyone is a publisher (as Justice Rothman seems to do), Facebook and other social media platforms are also at significant risk of being found liable as primary publishers of defamatory posts of which they have knowledge (e.g. through a complaints handling mechanism). On that basis, implementing additional controls for the individual operators of public Facebook pages in order to deal with defamatory content more easily is also to the platform's benefit in mitigating the risk of liability.

Eli: Justine, it seems that the judgment was guided considerably by the *Oriental Press* judgment of the Court of Final Appeal of Hong Kong. Can you take us through that judgment and explain why it was so persuasive? How does this judgment cooperate with other Australian online defamation judgments, such as *Duffy* and *Johnston v Aldridge*?

Justine: Justice Rothman found that *Oriental Press* was the most factually analogous case to *Voller*. *Oriental Press* concerned defamatory comments made in a forum on a public website. Only members of the website could comment in the forum, and there could be as many as 30,000 users online at any time with a peak of 5,000 comments made each hour. The webpage hosts employed two administrators to monitor the comments and delete objectionable content.

Oriental Press was particularly useful in that it canvassed the common law across several jurisdictions and the Hong Kong court considered and distinguished previous 'noticeboard' cases. It was relevant that in this case the webpage hosts played an active role in encouraging and facilitating forum postings; they derived income from advertisements placed on their website; and their business model benefitted from attracting as many users as possible to the forum. For these reasons, it was clear that the webpage hosts were publishers from the outset and were not mere conduits.

The test as to whether a publisher is a primary or secondary publisher as enunciated in *Oriental Press* was adopted by Justice Rothman – that is, whether, prior to publication, the publisher:

- knows or can easily acquire knowledge of the content of the article being published ("knowledge criterion"); and
- has editorial control involving the ability and opportunity to prevent publication of such content ("control criterion").

Justice Rothman found that the media defendants in *Voller* satisfied both the "knowledge criterion" (since the media defendants are notified of all new comments through Facebook's notification mechanisms) and the "control criterion" (because the media defendants in his Honour's view are able to "hide" or "block" comments prior to them being published by using a generic word filter, although as Marlia explains, the idea of control is somewhat illusory).

This reasoning is also consistent with the Australian authorities of *Duffy* and *Johnstone v Aldridge*. Although *Duffy* concerned a search engine that automatically published 'snippets' of website content, that judgment showed that the greater the capacity to control content in advance of publication, the more

likely it is that the disseminator will be a publisher and not a mere conduit. In other words, the extent of the disseminator's participation is highly relevant. Similarly in *Voller*, Justice Rothman found that the capacity of the media defendants to vet the comments prior to publication by using filters meant that they had a requisite degree of control and knowledge.

A key argument for the defendant in *Johnstone v Aldridge* was that it would be overly burdensome to require him to monitor and remove the objectionable content from the thousands of comments left on his Facebook post. The South Australian District Court rejected that argument and found that the volume of comments could not create a 'shield' from liability. In a similar vein, the media defendants in *Voller* claimed that continual monitoring would require a disproportionate amount of resources and would be "physically impossible" – however, Justice Rothman found that the media defendants ought to assume the risk associated with their Facebook pages, particularly when they had created them for their own commercial purposes.

Eli: How does this legal position compare to those in other jurisdictions, such as New Zealand and the UK?

Robert: As noted in *Voller*, the position in New Zealand is set out in *Murray v Wishart* [2014] 3 NZLR 722.

In *Murray*, the defendant created a Facebook page to attempt to encourage people to boycott the publication of a book about the death of infant twins and the case which acquitted their father of their murder. The book had been written by the plaintiff together with the mother of the twins, and purported to tell the mother's side of the story. The Facebook page attracted negative comments about the plaintiff, and the plaintiff sued for defamation.

A similar question arose to that in *Voller*: was the defendant the publisher of the third party comments on his page?

Sophie Dawson

The court took the opposite position to that in *Voller* and held that the defendant was not the publisher. It was held that the operator of a page would only be liable for defamatory material if it knew about the defamatory material and did not remove it in a reasonable period of time (an actual knowledge test). By failing to remove it, it could be inferred that the operator of the page accepted responsibility for the third party material.

Similarly to Justice Rothman, the NZ court also considered *Byrne v Deane*, *Urbanchich* and *Oriental Press* in making their decision.

The court rejected the "ought to know" test, finding that a person's knowledge that their page may attract defamatory material is not sufficient to found liability. The court considered the need to protect free speech, as enshrined in the *New Zealand Bill of Rights Act 1990*, and found that the "ought to know" test gives undue preference to reputation over freedom of expression. The court considered the "ought to know" test was too uncertain, and placed those that didn't know in a worse position than those who do know what is on their page (as those who do know have the opportunity to fix it).

Interestingly the court noted how difficult it would be for one person to review all comments on a popular page, and factored this into their decision.

Some significance has been attached in distinguishing *Murray* from *Voller* to the fact that Murray was operating a "private" Facebook page, and therefore did not have the same editorial controls available that the operator of a public page would have. Mr Murray gave evidence to say that he only had the following controls available:

> It is correct, however, that a creator of a Facebook page has some control over comments published on the page as he/she can, once aware of comments published, retrospectively remove individual comments and block specific Facebook users to prevent them from publishing further comments.

If Mr Murray had had the more extensive controls available to the operator of a public page, the decision may have been different. In its judgment, the court noted that it is a very fact-specific area.

No similar cases have considered the issue in New Zealand since *Murray*.

It is possible that *Voller* could impact the common law position in New Zealand, as Australia and New Zealand do consider the precedents set by the other in some cases.

In the UK, at common law, the position was that a website operator would not be liable for defamatory statements made by third parties on their website, provided that the website operator took them down when notified of them (*Tamiz v Google Inc* [2013] EWCA Civ 68).

This position changed in 2014 with the enactment of the *Defamation Act 2013* (UK). Section 5 of that Act specifically addresses the issue of the liability of website operators for defamatory material that is published on their website by a third party.

The rule under section 5 boils down to the following:

- If the author of the comment is identifiable by the plaintiff, the website owner is not liable for the defamatory material.
- If the author of the comment is not identifiable by the plaintiff, the website owner will be liable if the plaintiff gave the website owner a notice of complaint, and the website owner fails to respond within a reasonable time.

The website operator will not have a defence if the claimant demonstrates that the website operator acted with malice in relation to the defamatory material.

The fact that the website operator moderates the material published on it by others does not defeat the defence.

Liability for operators of public Facebook pages in the UK will therefore depend on whether the author of the defamatory material is identifiable, and, if the author is not identifiable, whether the operator took action upon being notified of the plaintiff's complaint.

This UK provision could potentially act as a model for reform of the Uniform Defamation Laws.

Eli: Kevin, a distinction is made between the service that a Facebook "host" provides and that which others do, including the Google search engine, and a website host. What is that distinction, and do you think that the distinction is such that it should so affect the legal position of a Facebook host?

Kevin: The distinction turned on the finding that comments on a public Facebook page can be hidden and reviewed, via the profanity filter "hack" that Marlia has described.

On the other hand, the Court said that it would be impossible, "in any meaningful way", to attribute to Google advanced knowledge of the contents of the "inordinate" number of articles which could be the subject of search published on the internet.

So that is where this Court has drawn the line. But that demarcation was in the face of evidence that the profanity filter itself is a clunky, resource-hungry and flawed mechanism to deal with the flow of third party comments posted on the defendants' Facebook pages each day.

There was an opportunity to put the defendants in this case in the same position as search engines – with notification setting up a requirement to review, consider and take down defamatory material within a reasonable time. It's not perfect, but it does set up a workable, balanced regime. Instead, commercial media organisations – and potentially others who administer Facebook pages – have been set apart.

Eli: What difference does it make that the defendants here were news organisations? Would this analysis apply equally to holding another business liable as a publisher for third party comments on a post? Should an organisation that is not a news organisation reconsider its content moderation practices, following this judgment?

Justine: Not a great deal turns on the fact that the defendants were news organisations. What is significant, however, are the findings that the media defendants had created their Facebook pages and encouraged users to comment in order to optimise readership of their news platforms and to maximise advertising revenue.

This means that any business or organisation that operates a Facebook page for commercial benefit may be liable for third party comments and will need to assess the risk of their posts attracting defamatory comments. Voller makes it clear that it is no excuse to claim that a business has insufficient resources to monitor comments; instead the Court expects that these costs will simply need to be factored into the expense of running a Facebook page.

Eli: The Court considered liability in the context of public pages hosted for commercial purposes. Do you think that non-commercial hosts – for example, NFPs, community discussion groups, government bodies, and so on – have anything to be concerned about following this judgment?

Robert: Yes. Everyone that operates a public Facebook page is in the firing line. The fact that the Facebook page may have been set up and is operating for non-commercial purposes (e.g. a charity or community discussion board) is immaterial to the question of publisher liability. Justice Rothman based the reasoning for his finding of liability primarily around the issue of editorial control of the pages, rather than the commerciality of the pages.

The operators of non-commercial public Facebook pages should also be taking steps to implement filters and monitor comments on their pages, particularly where issues discussed on their pages or posts are likely to generate defamatory comments.

Eli: Do you consider the implications of this judgment to extend beyond defamation? For example, if a media company posted a link to its article reporting on, say, a foreign conflict on which third-party users posted racist hate speech, could that give rise to liability for a media company?

Sophie: The case could well be influential in other, non-defamation, cases in which the question of responsibility for publication is raised. Section 18C of the *Racial Discrimination Act* prohibits non-private acts which are likely to offend, insult, humiliate or intimidate another person or a group of people which is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group. Defamation case law has been taken into account in previous cases concerning the application of section 18C, particularly in relation to the question of meanings conveyed: see *Eatcock v Bolt* (2011) 197 FCR 261 at [19], *Jones v Scully* (2002) 120 FCR

243 at [125]-[126] per Hely J; and *Jones v Toben* (2002) 71 ALD 629 at [87] per Branson J.

In relation to each statutory restriction on publication to determine responsibility for publication, it is necessary to consider the particular offence, and the mens rea for that offence. Publication offences are usually strict liability, but it is still necessary for the prosecution to establish beyond reasonable doubt that the factual elements (which usually include 'publication' or similar) of the offence are established. Criminal codes often provide for a defence of honest and reasonable mistake of fact.

In Doe v Fairfax Media Publications Pty Ltd [2018] NSWSC 1996 at [162], Fullerton J confirmed that the offence in section 578A of the *Crimes Act 1900* (NSW), which is in relation to identification of a complainant in prescribed sexual offence proceedings, is a strict liability offence and that a defence of honest and reasonable mistake is available "to a publisher who publishes material that does not identify the complainant, but which is found by objective analysis to have been likely to lead to his or her identification." Fullerton J noted that "that construction would achieve the same policy outcomes as a construction where mens rea is a requisite element of the offence.

Eli: Marlia, how should a news organisation change its content moderation practices, following this judgment, if at all? It doesn't seem like your organisation, or many others, have disabled comments on Facebook.

Marlia: The decision places news organisations in an impossible position, having to weigh up the potential legal risk of being sued over the comments of an unknown third party against the commercial benefits of maintaining a Facebook presence, which include to disseminate news content, to build brand loyalty and to drive users to news websites. Mumbrella announced in July that it had decided to stop posting links to its articles on Facebook, but I am not aware of any other news organisations which have left the platform. Businesses that want to maintain their Facebook presence could reduce their exposure by not posting links to content which could be controversial or which relate to criminal charges or court proceedings; by adding words to the filter so that comments which contain potential "problem words" are hidden; and by increasing human moderation after comments have been posted.

Justine Munsie

Eli: Would the Court's reasoning apply equally to other social media platforms, such as YouTube, Twitter and Instagram?

Justine: Much of *Voller* turned on the evidence about the mechanics and operation of the Facebook platform. For instance, notwithstanding that the media defendants argued it would be physically impossible to monitor the comments which were published at any time of the day or night, and in great volumes, the Court determined that it was possible to 'hide' the comments prior to publication by using a generic filter to capture all comments. The page owner would then be notified of the new comment, and from there, the comment could be vetted and then 'released' to the public page if deemed appropriate. The availability of this mechanism was central to the Court's finding that the media defendants had sufficient control and knowledge of the comments.

If other social media platforms offer a similar pre-publication filtering mechanism, then the Court's reasoning could also apply to comments arising from posts made on those sites as well. The question which must be asked is whether the page owner has sufficient control and knowledge of the comments being made on their post.

Eli: Let's talk freedom of speech. The judgment seemed unperturbed about any implications it might have on free speech, noting that commenters could still comment on their own individual Facebook page to their heart's content (as opposed to commenting on the post). I've seen some pretty conservative advice about risk of liability following the judgment. What is the consequence of hosts having the responsibility of moderating copious amounts of live content that may be defamatory - especially when it is difficult to test immediately whether a defamatory post is defensible?

Kevin: If you put aside the factual question as to the viability of the profanity-filter hack, his Honour's decision can be seen as an application of orthodox defamation law principles. His Honour cited *Thompson v Australian Capital Television* [1996] HCA 38 where a regional broadcaster was found to be a primary publisher, not because it participated in the production of a libel, but because it broadcast it in circumstances where it had control and supervision of the material, irrespective of time constraints.

But the case law, with its Drummoyne bus shelters and Mr Pottle's newsagency, can always benefit from some up to date thinking.

The process that is envisaged in this judgment involves a media company employing competent moderators to slave away over a hot profanity filter, conducting a front-end review and decision on hundreds of comments before they appear on Facebook. No one would see this as advancing freedom of expression.

The law has long enshrined the need for defamation law to strike a balance between "society's interest in freedom of speech and the free exchange of information and ideas" and the "maintenance of a person's reputation": *Dow Jones & Co Inc v Gutnick* (2002) CLR 575. Commercial publishers are well used to judicial criticism of their commercial imperative. This judgment suggests that the weight attached to freedom of speech and the exchange of ideas was lightened very considerably by a finding that the defendants' public Facebook pages are primarily "about their own commercial interests" [207-209].

Eli: Are these issues likely to be addressed in the course of the current review currently being undertaken?

Robert: The legal questions raised by the case are more fundamental than may be dealt with in the course of the current review, and it may be that only the High Court can resolve the issues and conflicting case law. One of the major issues both for the Courts and the review is that they don't have access to or at least a deep understanding of how the technology works and its constraints. I suspect for that reason it won't be addressed, although some of the issues have been raised and solutions proffered.

In any event, the decision is likely to fuel the rise of so called 'backyard' defamation litigation based upon defamatory social media posts. The introduction of a threshold test of harm, a proportionality test and/or the expansion of the defence of triviality (as contemplated in the review) is likely to become a practical solution, particularly when in many cases it will be difficult for a plaintiff to prove that a single Facebook comment among many thousands that may be uploaded to a social media post (such as those the subject of *Voller*) has even been seen by another person, let alone establish that the Plaintiff's reputation suffered damage as a result of the publication of that single comment.

In New South Wales, a defamation claim which is viewed as trivial can be dismissed early in proceedings as an abuse of process based on the proportionality principle, balancing the cost of the proceedings and the vindication of the plaintiff: *Bleyer v Google Inc* (2014) 88 NSWLR 670. A threshold of seriousness has also been considered to be an element of the tort of defamation in the Supreme Court of NSW: *Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858. Recognising and clarifying these findings in legislation through the review would go some way towards protecting free speech.

Currently the triviality defence is difficult, if not impossible, to establish for publications on the internet. It needs to be recognised that just because something is posted on the internet, where it is technically available for anyone and everyone to view, does not mean that a large number of people will in fact see it. For example, in a post with 300 comments most viewers of the post will only view the "top" or most recent five to 10 comments. On some occasions a comment will only be highlighted to the commenter's friend or follower group - which is akin to having published the defamatory material at a small private party, rather than as skywriting for the world to see. The defence of triviality should therefore be updated to assist in stemming the tide of litigation arising from social media stoushes.

Eli: What issues are we looking to have resolved on appeal?

Marlia: In their appeal, the media organisations say Justice Rothman erred in holding that they were primary publishers of the third party Facebook comments. The media organisations say that the correct position is that a person is not a primary publisher unless the person controls the content of the communication or assents to the final form of the communication.

Here, the media companies were not aware of the defamatory comments prior to publication and we say they could not realistically control the content in advance. The media companies do not own or control the platform – they are users of Facebook's services to the same extent as individual users. Further, the media companies say that they did not assent to the comments after they were posted. The plaintiff's case was that the media companies are liable for publication upon the comments being posted by third parties, even before they were notified that the comments may be defamatory. It was accepted by the plaintiff that the media companies deleted the comments within a reasonable period of being notified of them. For this reason, the media companies say that his Honour also erred in deciding whether the defence of innocent dissemination was available. This issue was not one covered by the separate question.

The media organisations also say his Honour made an error of fact in finding that the media organisations were able to "hide" all comments from all people and thereby prevent all publication of comments pending review. We say that the "hack" put forward by the plaintiff's IT expert could not be comprehensive (for example, a comment containing a defamatory image would get through the filter, as would a comment which contained spelling errors) and, in any event, a "hidden" comment would still be visible to the Facebook friends of the commenter, and would therefore be capable of being published to them. The IT expert conceded that he could not say whether the "hack" would have been available at the time the comments in this case were posted.

The appeal is set down for 17 and 18 December 2019, and we'll hopefully get some more clarity on the issues raised here when we get that judgment.

EF: Thanks everyone!