

The defamation case that could tear apart the internet as we know it

It's very unlikely former Don Dale detainee Dylan Voller will win this one, but we should all be watching closely.

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FEB 12, 2019



DYLAN VOLLER (IMAGE: AAP/JOEL CARRETT)

In 2016 Dylan Voller pierced the national conscience, when a photo of him strapped to a chair by the wrists and neck, his head shrouded in a “spit hood”, hit the news. He was 17 — an inmate of the Northern Territory’s Don Dale Youth Detention Centre. The ensuing shock triggered the sacking of the corrections minister and the Don Dale chief, followed by a royal commission.

The media reporting of Don Dale was extensive and florid. Voller, having been identified, became a story in himself. He is now the plaintiff in a defamation case which engages the legal responsibility of everyone who posts stuff on the internet. So... everyone.

The case

Voller is suing Sky News, *The Sydney Morning Herald* and *The Australian* for defamation in the NSW Supreme Court; not over anything they wrote about him, but for comments posted by readers on Facebook, in response to the media organisations’ social media posts.

Putting anything up on social media guarantees the generation of vile sludge from the sub-species we call trolls. Naturally, Voller’s story provoked a tide of awfulness that included wrongful allegations about assault and rape.

Voller decided to go after the media companies, rather than the individual bottom-feeders who did the actual defaming. He has understandable reasons for taking this course. The problem, the media says, is that he has no case against *them*. They didn’t

write the defamatory words, but that doesn't matter; the question is whether they published them.

It's old law that anyone involved in the process of publication (writer, editor, publisher, distributor) is a publisher of the defamation and can be sued for it. Pre-internet, this wasn't a difficult issue. Now, it's a minefield. If I post something on Facebook, and people comment on it on my page, am I responsible for their words as well as my own? After all, I control the page, and the people who view its content are there because of me.

The courts have struggled with this. In some Australian cases, they have [held Google liable](#) for defamatory material which turned up in search results, but only after it had been made aware of the material. Other courts have been less enthusiastic about this idea of liability for a "secondary publisher".

Voller's lawyers point to two principles in support of their argument that the media is liable. First, there's an old English case from 1937: the [famous "golf club" case](#). The plaintiff had been defamed by a scandalous poem someone had put up on the noticeboard at the golf club. The club secretary was told about it, but didn't take it down. He was found liable as a knowing participant in the continuing publication of the defamation.

In theory, it's the same online. If a company operates an online forum, it is not primarily responsible for defamatory comments posted by third parties. However if someone complains about a post and the host doesn't take it down then, from that point on, it's directly involved in the ongoing publication. Bear in mind that "publication" of material on the internet takes place every time someone reads it. But Voller's lawyers had to go further because the media defendants weren't aware of the defamatory posts, and Voller had never complained to them. His case is that they were liable from the moment the posts went up, regardless.

What are his chances?

The argument is that the media, in deciding to put their stories about Voller on Facebook, were aware of what would inevitably follow: intense abuse. That is part and parcel of the modern media business model. Therefore, since they knew what they'd unleash, they are legally responsible for all of it.

The media companies argued they can't control the comments and, in fact, on Facebook you can't even shut the comments down. From their view, the suggestion that they have to read and censor every comment is absurd.

Voller's side countered this; pointing out you can set up censorship rules on Facebook comments and screen out offensive words, for example. You could technically set the filter to reject words like "as", "is" or "the", so that all comments would be rejected. The thinking goes: since the media isn't technologically helpless, it's their positive choice to let the comments in, and they should pay the legal price for the risk they've chosen to take.

The argument is, I have to say, threadbare. The idea that the host of an online forum becomes liable in defamation as soon as they are told about a defamatory post but

don't take it down, is legally tenuous enough. The much more radical concept that their liability begins when the post first goes up, regardless of their knowledge, goes way too far.

If Voller's case gets up, then not just the media but everyone would have to get out of the comments hosting business altogether. Either that or monitor and censor every single post before allowing it on your page, or else risk being sued for something you didn't write. That's so un-free speechy, even in this country without legally protected free speech, that no court could seriously contemplate it.

The judge has promised an early decision and acknowledged that whatever he decides will inevitably be appealed. Hopefully it'll go all the way to the High Court, so we can get a definitive answer on this. I'm predicting it will be a dead loss for Voller. Meanwhile, I have a new reason for maintaining my peaceful non-existence on Facebook.

Do you think Dylan Voller has a case? Send your comments with your full name (for moderation) to boss@crikey.com.au.