

When harmful content is posted online, who is ultimately responsible?

The devolution of a Facebook NRL memes page into something much more insidious has raised important questions about how the internet and the law intersect.

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(IMAGE: UNSPLASH/MONIKA RAMS)

Apparently when the NRL Memes Facebook page started out it posted actual memes about the NRL. At some point last year, it devolved into a home for wayward sex tapes. Now, it's a piece of Facebook history, although not for the guy who was running the page: he's being sued for defamation.

The videos of NRL players engaging in their peculiar pursuit of recorded sex have apparently been circulating for months, and have only recently become a spectacle — first of embarrassment and then of criminality.

Two big developments shifted the ground: firstly Tyrone May, a Penrith player, was charged under NSW's new "revenge porn" laws for recording videos of him having sex with a woman and the disseminating them without her consent. Secondly Montana Geyer, a young woman who happens to be the daughter of league legend Mark Geyer, has issued defamation proceedings against the administrators of several Facebook pages, including NRL Memes, for incorrectly identifying her as the woman in the videos.

Misidentification is the type of defamatory act which allows the plaintiff to write their own ticket for damages; it's indefensible and, in this situation, disgusting. Geyer's lawyers have been making a splash with their distribution of lawsuits, and have achieved one tactical end: anyone with a vague awareness of this story now knows that the woman in the video is *not* Montana Geyer. As to whether the litigation by which she may be consumed for the next couple of years will deliver a better result than that, however, is more questionable.

The story throws up a few issues which aren't being considered as deeply as perhaps they might be. One is whether the administrator of a Facebook page is liable in defamation for third party content.

If I set up a Facebook page or blog site open to comments and someone posts a comment (or video) which is defamatory, am I liable? The answer is, probably, maybe. The leading authority is from 1937, an English case which held the secretary of a golf club liable for a notice on the notice board put up by someone else. The principle, which has been applied in some Facebook cases recently, is that you can be liable if you leave it up after you've been told about it. But some other judges disagree. Geyer's case may provide a clearer answer.

Should Facebook itself be liable? Geyer's father says yes, but I can't really agree. Should Westfield be liable for misleading statements made by its shop tenants? Putting aside the intricacies of defamation law, let's talk practicality. Where is the evil here, and how do we stop it? The internet, we know, is the wild west. Consequently, it's full of gun-slingers who believe they can ride around shooting things without consequence. But the west was tamed, eventually.

One tool already exists — criminal law. While Tyrone May has been charged with disseminating revenge porn, nobody else has. I don't know why not. The administrator of every website or Facebook page, the user of every Twitter feed, who hosted or shared the video which May took, has committed a crime under the same law.

These people aren't as anonymous as they like to think. The same approach which the police took to the Cronulla riots — scan the video evidence and identify every idiot who participated in the violence — can and should be applied here. Track them down, haul them into the courts and deliver a message to every pathetic troll who thinks they're immune.

Law and order only ever gets us so far though. The key thing is to recognise the layout of the new environment in which we find ourselves: borderless, non-physical, and never switched off. New worlds require new laws. What should have been available to Geyer is a form of easily accessible and immediately effective relief. She should not have to resort to the slow, expensive and uncertain courts of defamation for vindication of her right to personal sanctity.

What is required is a legal revolution. Facebook and its kind operate, whether they like it or not, under a social licence. That carries social responsibility. If they won't take that on themselves — and they won't — it must be imposed on them. Facebook shouldn't be liable for defamation perpetrated by others on the platform it provides; but it should be susceptible to a regime which forces it to respond responsibly to any harm which its platform enables. Such as a regime for immediately enforceable take-down notices, with criminal consequences for non-compliance.

Many obstacles exist. Facebook is not vulnerable to Australian courts or parliaments. So the answer may require international cooperation at government level. It will need the kind of realistic acceptance of changing needs which led to maritime laws, or rules for conduct of war.

The internet presents a much higher level of challenge than the invention of the aeroplane, in terms of how much it is changing the way society functions. For now, the law is pretending otherwise, but eventually we'll have to get on with some serious reform. NRL Memes is just one of a billion canaries in the coal mine.