High Court rules Facebook comments are the news media's problem — big time

The question of whether media outlets are liable for readers' feedback on social media has been answered by the High Court.

DYLAN VOLLER AT A PROTEST IN 2017 (IMAGE: AAP/JOEL CARRETT)

The High Court has emphatically pronounced that media organisations are liable for defamatory comments posted by punters on their Facebook pages. The ruling, by a 5-2 majority, ends that debate.

The case is that of Dylan Voller, the young victim of appallingly inhumane treatment within the Northern Territory's juvenile detention system. He is suing various media outlets — not for their reporting of his story but for the vile and disgusting comments by people on the Facebook pages where the outlets post their articles and invite comment.

The case hasn't been heard yet. A preliminary question first had to go to the High Court: are the media "publishers" of the defamatory comments they didn't write, didn't know about (because they don't and can't read the comments before they're posted) and can't effectively moderate unless they disable comments altogether?

Defamation is a "strict liability" cause of action, constituted by the act of publication, and the subjective motives or intentions of the publisher are irrelevant. Publication means the process of putting the defamatory material out, and someone else hearing or seeing it. If the material is found to convey a defamatory meaning regarding the plaintiff, the cause of action is made out, and the defendant has to find a defence, such as truth, to avoid liability.

The media's argument, essentially, was that (for example) *The Sydney Morning Herald* does not publish the comments on its Facebook page because it has no involvement in the act of publication. It is merely a passive provider of a platform (the page) on which others publish their comments. It is analogous to the supplier of paper to a newspaper publisher on which the news is then printed.

The answer to this from the High Court is savage. As justices Gageler and Gordon put it:

> **"… The [media's] attempt to portray themselves as passive and unwitting victims of Facebook's functionality has an air of unreality. Having taken action to secure the commercial benefit of the Facebook functionality, the appellants bear the legal consequences.**

This picks up on the first instance judge's analysis. He found the media's "primary purpose" in operating their Facebook pages was "to optimise readership of the newspaper (whether hardcopy or digital) or broadcast and to optimise advertising revenue".

He went on: "[T]he existence and number of comments … from third-party users is an important (and, more probably than not, the most important) aspect of the public Facebook page, as it affects the Facebook algorithm and increases the profile of the Facebook page and the consequential popularity of the Facebook page, thereby increasing readership … and augmenting advertising sales."

That's it in a nutshell. The law in Australia is that "any act of participation in the communication of defamatory matter to a third party is sufficient to make a defendant a publisher". The media are liable because their acts "in facilitating, encouraging and thereby assisting the posting of comments by the third-party Facebook users rendered them publishers of those comments".

It doesn't matter that they don't write, approve or even read the comments. They provide the pen and ink and the invitation — and that's enough.

Not even the two judges in the minority give the media much succour. Their view was that the wrong question was being asked; you can't determine whether the media are publishing all the comments on their Facebook pages; you have to ask that question with respect to each comment. Only if the comments are sufficiently connected to the article is the answer yes.

The critical takeaway from this case is that the High Court is adamant on one thing: the advent of the internet and social media do not require special new legal rules. Defamation is still defamation, and it is one tough law on publishers.

As Gageler and Gordon said: "The underlying concern of the common law of defamation to protect against damage to reputation … should not be diminished as the threats to reputation are multiplied."

This is consistent with a preference the court has to being technology-neutral. Just because a law was written before the invention of radio, television, the internet or Facebook, it's not for the courts to change the fundamentals of that law to adapt to the shifting social imperatives that changes in technology cause or reflect.

There are two equally rational sides to that debate, but at least we know unequivocally where the High Court stands. If defamation law is to adapt to the digital age, and support a more sensible balance between the personal right to reputation and the public interest in free speech, the changes will have to be made by parliaments.

As for the Voller principle, I maintain my view that the courts all the way up the chain have got the law right. The media are publishers of the comments they invite and, under the law as it is, are accordingly liable for any filth they facilitate.

As to whether that strikes the right balance, no, it does not. It contributes to the stifling of reportage and debate which is slowly strangling our public space. We need a law better adapted than one that was conceived in a world of books and print newspapers which, sad as it is to say, fewer and fewer people read.

ABOUT THE AUTHOR

Michael Bradley

CRIKEY COLUMNIST @MARQUELAWYERS

Michael Bradley is a freelance writer and managing partner at Sydney firm Marque Lawyers, which was created in 2008 with the singular ambition of completely changing the way law is practised.