

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

S236/2020

FAIRFAX MEDIA PUBLICATIONS PTY LTD APPELLANT

AND

DYLAN VOLLER RESPONDENT

S237/2020

NATIONWIDE NEWS PTY LIMITED APPELLANT

AND

DYLAN VOLLER RESPONDENT

S238/2020

AUSTRALIAN NEWS CHANNEL PTY LTD APPELLANT

AND

DYLAN VOLLER RESPONDENT

Fairfax Media Publications Pty Ltd v Voller
Nationwide News Pty Limited v Voller
Australian News Channel Pty Ltd v Voller
[2021] HCA 27

Date of Hearing: 18 May 2021

Date of Judgment: 8 September 2021
S236/2020, S237/2020 & S238/2020



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ORDER

In each matter:

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

N J Young QC and P D Herzfeld SC with L E Barnett for the appellant in each matter (instructed by Ashurst)

P W J Gray SC with R W Potter SC and L A R Goodchild for the respondent in each matter (instructed by O'Brien Criminal and Civil Solicitors)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

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CATCHWORDS

Fairfax Media Publications Pty Ltd v Voller
Nationwide News Pty Limited v Voller
Australian News Channel Pty Ltd v Voller

Defamation – Publication – Where appellants were media companies – Where each appellant created, operated and maintained public Facebook page – Where each appellant created posts on Facebook page hyperlinking to news stories referring to respondent – Where third-party Facebook users left "comments" on appellants' posts – Where comments alleged to be defamatory of respondent – Whether appellants "publishers" of comments – Whether intention to communicate defamatory matter necessary for appellants to be publishers.

Words and phrases – "communication of defamatory matter to a third party", "defamation", "digital newspaper or broadcast", "encouraged and facilitated", "Facebook comments", "Facebook page", "innocent dissemination", "intention to publish defamatory matter", "internet platform providers", "participation", "participation in the process", "publication", "publisher", "rebuttable presumption of publication", "strict liability", "third party".

Defamation Act 2005 (NSW), s 7(2).

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1 KIEFEL CJ, KEANE AND GLEESON JJ. The appellants, Fairfax Media Publications Pty Ltd, Nationwide News Pty Limited and Australian News Channel Pty Ltd, publish newspapers which circulate in New South Wales or operate television stations, or both. They each maintain a public Facebook page on which they post content relating to news stories and provide hyperlinks to those stories on their website. They invite comment on the posted content from members of the public who are Facebook users. Comments which are made appear on the Facebook page and are available to be seen by other Facebook users.

2 In each of the three proceedings brought in the Supreme Court of New South Wales, the respondent claimed that following the appellants posting about particular news stories referring to him, including posts concerning his incarceration in a juvenile justice detention centre in the Northern Territory, a number of third-party Facebook users responded with comments that were defamatory of him. He alleged that the appellants were liable as the publishers of those comments.

3 The parties agreed to the terms of a question concerning the issue of publication. The Supreme Court ordered that the question be decided separately from the balance of the proceedings¹. The question was whether the respondent, the plaintiff in the proceedings, "has established the publication element of the cause of action of defamation against the defendant[s] in respect of each of the Facebook comments by third-party users". The appellants took the view that a negative answer to the separate question would result in dismissal of the proceedings.

4 The primary judge (Rothman J) answered the separate question in the affirmative². Each of the appeals from that decision was dismissed³.

Background facts

5 The appellants each maintain a public Facebook page on terms of use agreed with Facebook. The page is used by each appellant to share content and connect with Facebook users. The page is publicly accessible to users, who are able to view and comment on content posted to that page.

1 *Uniform Civil Procedure Rules 2005* (NSW), r 28.2.

2 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766.

3 *Fairfax Media Publications Pty Ltd v Voller* (2020) 380 ALR 700.

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6 The use by each appellant of their Facebook page usually involves the posting of a hyperlink to a news story, with a headline, a comment and an image. Clicking on the hyperlink takes the reader to the full story on an appellant's news website. Readers are invited, by options which appear under the post, to "Like", "Comment" on or "Share" the post. These options are standard features of a Facebook page. Comments which are made by users appear on the page and are available to be seen by all Facebook users who can see the page.

7 The Facebook page used by each appellant is managed by a Page administrator, the person or persons authorised by the appellant to administer it in accordance with Facebook's terms of use. There was evidence before the primary judge, which was largely uncontentious, that an administrator could prevent, or block, the posting of comments by third parties through various means, although the Facebook platform did not allow all posts on a public Facebook page to be blocked. Individual comments could be deleted after they were posted but this would not prevent publication. It was possible to "hide" most comments, through the application of a filter, which would prevent publication to all except the administrator, the third-party user who posted the comment and their Facebook "friends". Hidden comments could then be individually assessed by an administrator. If sufficient staff were allocated to perform this task, comments could be monitored and un-hidden if approved by an administrator.

8 The primary judge found, as might be anticipated, that certain posts would be expected to draw adverse comments about the person who was the subject of the news story. It was not in dispute that the use of a Facebook page encourages and facilitates visits by third-party users to a media outlet's own website. The number of comments is an important aspect of the use of a public Facebook page, because comments increase the profile and popularity of the page, which in turn increases the readership of the digital newspaper or broadcast, and the revenue from advertising on both the page and the digital newspaper or broadcast.

The *Defamation Act 2005* (NSW)

9 Section 6 of the *Defamation Act 2005* (NSW) states the subject matter of the Act to relate to "the tort of defamation at general law". It provides that the Act "does not affect the operation of the general law in relation to the tort of defamation except to the extent that this Act provides otherwise (whether expressly or by necessary implication)".

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10 Provisions of the Act refer to the "publication of defamatory matter"⁴.
"Matter" is relevantly defined⁵ to include an article, report or other thing
communicated by means of a newspaper and a report or other thing
communicated by means of television, the internet or any other form of
electronic communication. The Act does not define what is meant by the
"publication" of defamatory matter. Resort is necessary to the general law in that
regard.

11 The *Defamation Act* makes provision, in s 32, for a defence of innocent
dissemination. A defence of this kind has its origins in the common law. No
question as to the availability of the statutory defence arises with respect to the
answer to the separate question. Nevertheless, the appellants refer to the cases
which developed the defence at common law and later observations about those
cases. The appellants submit that the cases illuminate what it means to be a
publisher.

The argument and decision below

12 The appellants argued their cases in the Court of Appeal on the basis that,
to be publishers, they must have been instrumental to, or a participant in, the
communication of the alleged defamatory matter. This was a correct approach
and followed the meaning of publication given in *Webb v Bloch*⁶, to which
reference is made later in these reasons.

13 The appellants argued that they did not make the defamatory comments
available to the public, did not participate in their publication and were not in any
relevant sense instrumental in their publication⁷; they merely administered a
public Facebook page on which third parties published material. They submitted
to the Court of Appeal that they were more closely equivalent to the supplier of
paper to a newspaper owner or the supplier of a computer to an author.

14 Reliance was also placed by the appellants on cases which involved
actions brought against owners or occupiers of premises in which unauthorised

4 See, for example, s 8, s 32.

5 s 4.

6 (1928) 41 CLR 331 at 363-364.

7 *Fairfax Media Publications Pty Ltd v Voller* (2020) 380 ALR 700 at 712 [45].

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third parties affixed defamatory statements on the wall of a premises⁸ or scrawled them as graffiti on the walls of a structure⁹. In cases of this kind the occupier has been regarded by the courts as a publisher only if, after becoming aware of the statements, the occupier allowed them to remain in place and the circumstances justified an inference that they had accepted responsibility for the continuing publication of the statement by adopting or ratifying it.

15 In a case to which reference was made in the judgments in the Court of Appeal¹⁰ it had been held that internet platform providers which hosted a discussion forum were in a different position from the occupiers referred to in those cases. Unlike the occupiers, the providers had encouraged and facilitated postings by members of the forum and were therefore held to be participants in their publication from the outset¹¹.

16 Basten JA accepted that the appellants played no such active role, distinguishing them from the internet platform providers in that case, but nevertheless considered the appellants to be publishers, as did Meagher JA and Simpson A-JA¹². Each of their Honours pointed to the appellants having facilitated the making of comments by third parties which then became available to others. Meagher JA and Simpson A-JA pointed out that the appellants invited and encouraged comments from Facebook users and provided the vehicle for publication to those who might avail themselves of it. Their Honours upheld the primary judge's answer to the separate question, that the plaintiff had established the element of publication.

17 After finding the appellants were publishers, the primary judge went on to consider aspects of the defence of innocent dissemination under s 32 of the *Defamation Act*. But as the appellants pointed out in the Court of Appeal, that issue did not arise in relation to the separate question. There was some discussion in the judgments in the Court of Appeal as to whether the cases which developed

8 *Byrne v Deane* [1937] 1 KB 818.

9 *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports ¶81-127.

10 *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366.

11 *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at 387 [51]-[52].

12 *Fairfax Media Publications Pty Ltd v Voller* (2020) 380 ALR 700 at 712 [47], 724-725 [108]-[110].

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the defence at common law hold that if the defence is made out there is taken to have been no publication by a defendant¹³. But as Meagher JA and Simpson A-JA observed¹⁴, such a question was not relevant because the appellants placed no reliance on the "never published" principle. It will be observed that the position of the appellants has now changed.

The appellants' contentions

18 The appellants now contend that the common law requires that the publication of defamatory matter be intentional. It is not sufficient that a defendant merely plays a passive instrumental role in the process of publication. To be a publisher a person must intend to communicate the matter complained of, which is to say the relevant words. This is said to follow from what was said by Isaacs J in *Webb v Bloch*¹⁵ and to accord with the holding in *Trkulja v Google LLC*¹⁶, that Google's intentional participation in the communication of the defamatory matter supported a finding of publication.

19 As mentioned earlier in these reasons, the appellants do not rely on the statutory defence of innocent dissemination as providing an answer to whether they are publishers of the alleged defamatory material. However, they submit that the cases which concern the common law defence of innocent dissemination, commencing with *Emmens v Pottle*¹⁷, support a requirement of intention to publish defamatory matter. They submit that the cases show that publication is more than mere dissemination. Publication is dissemination with an element of intention.

20 The approach of the courts in these cases, the appellants say, is not to regard publication as having occurred and then excuse the defendant from liability if the defence is made out. It is to allow the defendant to demonstrate that there was no publication. The cases treat publication as an evidentiary

13 Including by reference to *Lee v Wilson & Mackinnon* (1934) 51 CLR 276 at 288 and *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 585-586.

14 *Fairfax Media Publications Pty Ltd v Voller* (2020) 380 ALR 700 at 721 [93].

15 (1928) 41 CLR 331 at 363-364.

16 (2018) 263 CLR 149 at 163 [38].

17 (1885) 16 QBD 354.

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presumption which is rebuttable on proof of the requirements of the defence, relevantly a lack of knowledge that the matter being communicated is defamatory or a lack of intention to communicate it.

21 A focus on the intention of a putative publisher to communicate the matter complained of is also said to explain the cases concerning whether occupiers are publishers of defamatory statements affixed to their premises or structures by unauthorised third parties, the appellants contend. These cases hold that, to be a publisher, an occupier must have consented to, approved of, adopted or promoted the continued presence of the statements, such that it can be said the occupier accepted responsibility for their presence. The question of publication is therefore determined by the courts by drawing an inference that the occupier intends to communicate the matter, the appellants contend. No such deliberate act is present in these appeals which would permit an inference of intention on the part of the appellants to be drawn, it is submitted.

22 The appellants' contentions are not supported by authority and cannot be accepted.

Publication and intention

23 In the law of defamation, harm is understood to be occasioned to a person's reputation when a defamatory publication is made to a third party. Publication is the actionable wrong. In *Dow Jones & Co Inc v Gutnick*¹⁸, publication was described as a bilateral act by which the publisher makes the defamatory material available and a third party has it available for their comprehension. Publication may therefore be understood as the process by which a defamatory statement or imputation is conveyed¹⁹.

24 In *Trkulja v Google LLC*²⁰, it was said that "[i]n point of principle, the law as to publication is tolerably clear". The judgment of Isaacs J in *Webb v Bloch*²¹ was cited for that proposition. In that case, Isaacs J drew upon texts to identify

18 (2002) 210 CLR 575 at 600 [26].

19 Rolph, *Defamation Law* (2016) at 140 [8.20].

20 (2018) 263 CLR 149 at 163 [39].

21 (1928) 41 CLR 331 at 363-364.

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who may be a publisher. Folkard²² described the word "published" as a technical term in the law of libel. It is used, he said:

"without reference to the precise degree in which the defendant has been instrumental to such publication; since, if he has intentionally lent his assistance to its existence for the purpose of being published, his instrumentality is evidence to show a publication by him".

25 Starkie²³ said that all persons who:

"are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are to be considered as principals in the act of publication".

26 Part of the quotation from Folkard ("has intentionally lent his assistance to its existence for the purpose of being published") is relied on by the appellants as supporting their argument that for a person to be a publisher they must know of the relevant defamatory matter and intend to convey it. The argument is inconsistent with the common law rule relating to publication and, as shall be explained, it derives no support from what was said in *Webb v Bloch*.

27 An action for defamation does not require proof of fault. Defamation is a tort of strict liability, in the sense that a defendant may be liable even though no injury to reputation was intended and the defendant acted with reasonable care²⁴. The intention of the author of the defamatory matter is not relevant²⁵ because the actionable wrong is the publication. It is often persons other than the author who are liable as publisher. A publisher's liability does not depend upon their knowledge of the defamatory matter which is being communicated or their intention to communicate it.

22 Folkard, *The Law of Slander and Libel*, 5th ed (1891) at 439 (emphasis added by Isaacs J).

23 Starkie, *A Treatise on the Law of Slander and Libel*, 2nd ed (1830), vol II at 225 (emphasis added by Isaacs J).

24 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 600 [25], referring to *Lee v Wilson & Mackinnon* (1934) 51 CLR 276.

25 *Lee v Wilson & Mackinnon* (1934) 51 CLR 276 at 287 per Dixon J.

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28 The liability of a person as a publisher "depends upon mere communication of the defamatory matter to a third person", Dixon J said²⁶ in *Lee v Wilson & Mackinnon*. No question as to the knowledge or intention of the publisher arises. His Honour said "[t]he communication may be quite unintentional, and the publisher may be unaware of the defamatory matter", but the person communicating the defamatory matter will nevertheless be liable. The exception identified by his Honour was the case of certain booksellers, news vendors and messengers, to which reference will later be made.

29 The appellants' argument that a person must intend to publish the defamatory matter gains no support from what was said in *Trkulja v Google LLC*²⁷. On an application for summary dismissal of the plaintiff's claim of defamation, the primary judge had held that it was strongly arguable that Google's "intentional participation" in the communication of the alleged defamatory material to users of the Google search engine supported a finding that Google was a publisher²⁸.

30 This Court upheld that finding, but criticised the intermediate appellate court for proceeding to make a determinative finding as to publication²⁹. The issue concerning publication required consideration of "the nature and extent of Google's involvement in the compilation and publication of its search engine results", the Court said, and this could not be known with any certainty until after discovery³⁰. Adopting the quotation in *Webb v Bloch* from Folkard, the Court said that "all degrees of participation in the publication" of defamatory matter are publication³¹. Far from supporting the appellants' argument as to intention, *Trkulja v Google LLC* confirms that the correct meaning of publication, which was given in *Webb v Bloch*, is that any act of participation in the communication of defamatory matter to a third party is sufficient to make a defendant a publisher.

26 (1934) 51 CLR 276 at 288.

27 (2018) 263 CLR 149 at 163 [38].

28 (2018) 263 CLR 149 at 158 [25].

29 (2018) 263 CLR 149 at 163 [38].

30 (2018) 263 CLR 149 at 164 [39].

31 (2018) 263 CLR 149 at 164 [40].

9.

31 Putting to one side the exception created by the defence of innocent dissemination, the publication rule has always been understood to have a very wide operation. In *Crookes v Newton*³², a decision of the Supreme Court of Canada, Abella J remarked that "the breadth of activity captured by the traditional publication rule is vast". Her Honour gave as an example a case in which a printer's employee, whose only role in a publication was to "clap down" the printing press, was held liable for the libels contained in the publication even though he was unaware of its contents³³.

32 Consistently with *Trkulja v Google LLC* and the publication rule, *Webb v Bloch* is to be understood to say that a person who has been instrumental in, or contributes to any extent to, the publication of defamatory matter is a publisher. All that is required is a voluntary act of participation in its communication.

33 True it is that that part of the quotation from Folkard on which the appellants rely ("has intentionally lent his assistance to its existence for the purpose of being published") refers to something other than a publication by distribution. That circumstance was apposite to the facts in *Webb v Bloch* and the issue with which Isaacs J was dealing in the passages which preceded his discussion about publication. In *Webb v Bloch*, the solicitor enlisted by the defendants both composed the defamatory circular "for the purpose of publication" and subsequently "consciously distributed it", Isaacs J found³⁴. The latter finding points to the fact that it is the defendant's act of participation in publication which must be intentional, in the sense of being voluntary.

34 Because the solicitor had participated from the outset, his publication of the libel was found by Isaacs J³⁵ not to consist merely in the distribution of the circular which contained the libel. The conclusion which was then available was that the solicitor was not a subordinate, but rather a primary, publisher for the purposes of the defence of innocent dissemination.

35 Isaacs J in *Webb v Bloch* may be understood to acknowledge that publication may involve acts of participation other than, and which may precede, the actual physical distribution of the defamatory material. His Honour is not to

32 [2011] 3 SCR 269 at 281-282 [18].

33 *R v Clerk* (1728) 1 Barn KB 304 [94 ER 207].

34 (1928) 41 CLR 331 at 363.

35 (1928) 41 CLR 331 at 363.

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be understood to say that a person must intend to communicate the material complained of as defamatory in order to be a publisher.

Innocent dissemination

36 As Ribeiro PJ observed in *Oriental Press Group Ltd v Fevaworks Solutions Ltd*³⁶, "[t]he strictness of the publication rule plainly called for some relaxation". *Emmens v Pottle*³⁷ is generally taken as the starting point of what came to be called the common law defence of innocent dissemination, which was developed by the courts to mitigate the harshness of the law relating to publication. *Vizetelly v Mudie's Select Library Ltd*³⁸ took up the new "doctrine"³⁹.

37 *Emmens v Pottle* concerned persons in the business of selling newspapers. Lord Esher held⁴⁰ that although such a person may be prima facie liable as a publisher, if they are able to show that they did not know that the newspaper was likely to contain a libel and their lack of knowledge was not the result of their own negligence they will not be liable for the libel⁴¹.

38 *Vizetelly* involved a circulating library. The "defence" also came to extend to persons who conducted the business of bookseller or messenger⁴². What they had in common was that they were mere distributors or disseminators. They were lesser or subordinate publishers, not primary publishers. The latter could not take advantage of the defence. The defence could be described as one special to distributors⁴³.

36 (2013) 16 HKCFAR 366 at 379 [24].

37 (1885) 16 QBD 354.

38 [1900] 2 QB 170.

39 [1900] 2 QB 170 at 175 per A L Smith LJ.

40 (1885) 16 QBD 354 at 356-357, Cotton LJ concurring. See also Bowen LJ at 358.

41 (1885) 16 QBD 354 at 357.

42 See *Lee v Wilson & Mackinnon* (1934) 51 CLR 276 at 288 per Dixon J.

43 *Gatley on Libel and Slander*, 12th ed (2013) at 227 [6.30].

11.

39 The defence cannot be said to be rooted in principle. In *Thompson v Australian Capital Television Pty Ltd*⁴⁴, its origins were described as "muddled". The decision in *Emmens v Pottle* has been described as more pragmatic than principled⁴⁵. Lord Esher appears to have been motivated by a concern that the common law would appear to be unjust and unreasonable if some such accommodation was not made by the courts. In *Thompson*⁴⁶, it was said that his Lordship "rationalised rather than explained the decision".

40 The appellants' argument that *Emmens v Pottle* and later cases treat publication as a mere rebuttable presumption relies on statements in *Emmens v Pottle* and *Vizetelly* concerning the relevant defendant's liability for publication. In *Emmens v Pottle*⁴⁷, Lord Esher observed that the defendants were "primâ facie liable" because "[t]hey have handed to other people a newspaper in which there is a libel on the plaintiff". In *Vizetelly*, A L Smith LJ⁴⁸ said that, the defendants having lent and sold copies of the book, "primâ facie they published it".

41 These statements most clearly acknowledge the strictness of the publication rule in its operation. It is difficult to accept that by these words their Lordships intended to convert the rule to a rebuttable presumption of publication. Indeed the rule has continued to be regarded as operating strictly with respect to other publishers. The statements are better understood to say that but for the "defence" which the courts will now afford distributors, they would be liable as publishers. In *Vizetelly*⁴⁹, A L Smith LJ, having observed that the defendants were "primâ facie" publishers, enquired "[w]hat defence, then, have they?" and answered "[n]one, unless they can bring themselves within the doctrine of *Emmens v Pottle*".

42 The appellants also rely on what was said in the cases as to what followed where the defence was made out. In *Emmens v Pottle*⁵⁰, Lord Esher said that if

44 (1996) 186 CLR 574 at 586 per Brennan CJ, Dawson and Toohey JJ.

45 Rolph, *Defamation Law* (2016) at 292 [14.20].

46 (1996) 186 CLR 574 at 585 per Brennan CJ, Dawson and Toohey JJ.

47 (1885) 16 QBD 354 at 356-357.

48 [1900] 2 QB 170 at 175.

49 [1900] 2 QB 170 at 175.

50 (1885) 16 QBD 354 at 357.

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the defendants proved the necessary facts, namely lack of knowledge and absence of negligence, a conclusion might be reached that the defendants "did not publish the libel". His Lordship appears also to have distinguished the defendants as mere "disseminators" who were innocent, in contradistinction to authors or other primary publishers.

43 In *Vizetelly*⁵¹, Romer LJ did not suggest that the defence resulted in there being no publication in fact or law. His Lordship said that on proof of no knowledge and negligence a defendant may "be held not to have published" the libel. This might suggest that the court would deem a defendant not to be a publisher and, by that means, absolve them from liability. Recent decisions in the courts of the United Kingdom appear to have proceeded on this basis⁵².

44 It may be accepted that if a plea by a defendant of "no publication" were established, a plaintiff would fail to establish a cause of action⁵³. However, in contending for the conclusion that there was no publication, the appellants do not rely upon the "defence" as explaining this result. No mention of a "defence" was made in the judgments in *Emmens v Pottle*. The word has a number of meanings. It may simply mean the answer given to the plaintiff's claim, as the appellants point out. It is therefore unnecessary to consider historical questions of procedure further.

45 The appellants rely on the apparent acceptance by Dixon J in *Lee v Wilson & Mackinnon*⁵⁴ that the result of establishing the defence is that there is no publication. His Honour did not refer to *Emmens v Pottle* or to *Vizetelly*, but was no doubt conscious of them. He said that in cases involving booksellers, news vendors and the like, who neither know nor suspect the defamatory content, what would otherwise be publication "does not amount to publication of a libel". It must be accepted that his Honour repeated what had been said in the early cases. It is also necessary to observe that there was no issue in *Lee v Wilson & Mackinnon* as to the correctness of the statements in the early cases.

51 [1900] 2 QB 170 at 180.

52 *Bunt v Tilley* [2007] 1 WLR 1243 at 1252 [36]; [2006] 3 All ER 336 at 345; *Tamiz v Google Inc* [2013] 1 WLR 2151 at 2162 [26].

53 Rolph, *Defamation Law* (2016) at 292 [14.20].

54 (1934) 51 CLR 276 at 288.

13.

46 The appellants also point to the repetition of Dixon J's words in a passage in the joint judgment in *Dow Jones & Co Inc v Gutnick*⁵⁵. It needs to be borne in mind that that case involved choice of law considerations referable to the act of publication of a defamation. Their Honours stated in general terms how the tort of defamation is understood in Australia to make the point that a defendant needs to be able to identify by what law publication may be judged. Their Honours were not concerned with whether the effect of the defence of innocent dissemination might be stated more accurately. And their Honours did not refer in that passage to the earlier decision of this Court in *Thompson*⁵⁶.

47 In *Thompson*⁵⁷, Brennan CJ, Dawson and Toohey JJ observed that the plea of "never published" has introduced a "measure of confusion". Their Honours then referred, with apparent approval, to what the authors of *Duncan and Neill on Defamation* had said⁵⁸:

"It is submitted that it would be more accurate to say that any disseminator of a libel publishes the libel but, if he can establish the defence of innocent dissemination, he will not be responsible for that publication."

48 Gummow J⁵⁹, dealing with what his Honour described as the "so-called" defence, approved the statement of Sir Frederick Pollock⁶⁰ that a person "is free from liability if he proves his ignorance".

49 The views expressed by their Honours should be accepted as the explanation of what a successful "defence" of innocent dissemination achieves. It is not that publication is to be taken not to have occurred. In providing for the defence, the courts are to be understood simply to except from liability a

55 (2002) 210 CLR 575 at 600 [25] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

56 (1996) 186 CLR 574.

57 (1996) 186 CLR 574 at 586, referring to *Gatley on Libel and Slander*, 8th ed (1981) at 113, fn 3.

58 *Duncan and Neill on Defamation*, 2nd ed (1983) at 110, fn 3.

59 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 618-619.

60 *Pollock's Law of Torts*, 15th ed (1951) at 186.

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defendant who would otherwise have been liable as a publisher. Such an approach was followed by the Hong Kong Court of Final Appeal in *Oriental Press*⁶¹. It accords with the fact that the common law continues to apply the rule of publication for publishers, other than innocent distributors or disseminators, who are not primary publishers.

Byrne v Deane

50 The other line of cases upon which the appellants rely commences with *Byrne v Deane*⁶². The appellants seek to draw from cases of this kind that an occupier may become liable as a publisher of a defamatory statement affixed to their premises if it may be inferred that they intended the publication to continue. Such an inference may be drawn where an occupier has consented to, adopted or approved the continuance of the publication.

51 *Byrne v Deane*⁶³ concerned the placing of an alleged defamatory verse on the wall of a golf club. The rules of the club required the consent of the Secretary to the posting of any notice in the club premises. The words were held to be incapable of a defamatory meaning. Nevertheless, some attention was directed by the Court of Appeal to the issue of publication.

52 As Greene LJ pointed out⁶⁴, publication is a question of fact which depends upon the circumstances of each case. A failure to remove defamatory material might amount to publication in some circumstances but not in others. Slesser LJ pointed to cases⁶⁵ where persons who had taken no overt part in the publication of defamatory matter nevertheless adopted and promoted its reading so as to render themselves liable for its publication.

53 Greer and Greene LJJ considered that there was evidence which tended to show that the actions of both defendants, as directors of the golf club, fell into this latter category. By electing to leave the alleged libel on the wall of the club,

61 (2013) 16 HKCFAR 366 at 381 [31] per Ribeiro PJ (Ma CJ, Chan PJ and Gleeson NPJ agreeing), 409 [123], 410-411 [127], 412 [132] per Litton NPJ.

62 [1937] 1 KB 818.

63 [1937] 1 KB 818.

64 [1937] 1 KB 818 at 837-838.

65 Such as *Hird v Wood* (1894) 38 Sol J 234: see [1937] 1 KB 818 at 834-835.

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having had the power to remove it, they were taken to have consented to its continued publication to each member who saw it⁶⁶. Slessor LJ on the other hand considered that the evidence only tended to show that the Secretary, by failing to exercise her specific powers under the club rules, had promoted and associated herself with the continuance of the publication⁶⁷.

54 Cases such as *Byrne v Deane*⁶⁸ do not establish a different rule for publication, one based upon the intention of occupiers, as the appellants contend. They involve the application of the general rule of publication to a particular set of circumstances where a person who has not participated in the primary act of publication may nevertheless become a publisher. The time when the occupier becomes aware of the publication of the material marks the point from which the occupier's conduct or inaction is assessed to determine whether they can be said to have participated in the continuing publication. Cases of this kind are not useful to explain the involvement of others in publications in very different circumstances⁶⁹ and are not of assistance in this case.

Conclusion and orders

55 The Court of Appeal was correct to hold that the acts of the appellants in facilitating, encouraging and thereby assisting the posting of comments by the third-party Facebook users rendered them publishers of those comments.

56 The appeals should be dismissed with costs.

66 [1937] 1 KB 818 at 830 per Greer LJ, 838 per Greene LJ.

67 [1937] 1 KB 818 at 835.

68 See also *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports ¶81-127.

69 *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 (internet platform providers); *Murray v Wishart* [2014] 3 NZLR 722 (hosts of a Facebook page).

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57 GAGELER AND GORDON JJ. The law of defamation in Australia illustrates the observation of Gleeson CJ in *Brodie v Singleton Shire Council*⁷⁰ that:

"Legislation and the common law are not separate and independent sources of law; the one the concern of parliaments, and the other the concern of courts. They exist in a symbiotic relationship."

The two sources of law have been intertwined since the *Slander and Libel Act 1847* (NSW) first abolished the common law distinction between libel and slander in New South Wales. They became more intertwined with the enactment of the *Defamation Act 2005* (NSW) and legislation in substantially identical form in each other State and Territory⁷¹. That nationally uniform legislation is expressed "not [to] affect the operation of the general law in relation to the tort of defamation except to the extent that [it] provides otherwise"⁷² and to have as an object "to promote uniform laws of defamation in Australia"⁷³. A task of the integrated Australian judiciary is to ensure that the nationally uniform statute law of defamation and the nationally uniform common law of defamation fit into a "coherent and interlocking whole"⁷⁴.

58 Subject to a range of potentially applicable statutory and common law defences, the tort of defamation is committed in Australia upon "the publication of defamatory matter of any kind"⁷⁵. "Matter" is legislatively defined to include "a program, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication"⁷⁶. "Publication" is left to have its meaning at common law.

70 (2001) 206 CLR 512 at 532 [31].

71 *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA); *Defamation Act 2006* (NT); *Civil Law (Wrongs) Act 2002* (ACT), Ch 9.

72 See eg, s 6(2) of the *Defamation Act 2005* (NSW).

73 See eg, Preamble to, and s 3(a) of, the *Defamation Act 2005* (NSW).

74 cf Leeming, *The Statutory Foundations of Negligence* (2019) at 1, quoting Moses and Edgeworth, "Taking it Personally: Ebb and Flow in the Torrens System's In Personam Exception to Indefeasibility" (2013) 35 *Sydney Law Review* 107 at 111.

75 See eg, s 7(2) of the *Defamation Act 2005* (NSW).

76 See eg, s 4 of the *Defamation Act 2005* (NSW).

17.

59 We agree with Kiefel CJ, Keane and Gleeson JJ that the Court of Appeal of the Supreme Court of New South Wales (Basten and Meagher JJA and Simpson A-JA)⁷⁷ properly concluded that the primary judge (Rothman J)⁷⁸ was right to answer questions reserved in defamation proceedings brought by the respondent to the effect that the appellant media companies were the publishers at common law of third-party comments posted on their public Facebook pages. To their Honours' reasons, we add the following observations.

Publication and publishers at common law

60 Put succinctly by Cardozo CJ⁷⁹:

"In the law of defamation, 'publication' is a term of art ... A defamatory writing is not published if it is read by no one but the one defamed. Published, it is, however, as soon as read by any one else."

61 Publication for the purpose of the tort of defamation has been emphasised in Australia to be "a bilateral act – in which the publisher makes [matter] available and a third party has [that matter] available for his or her comprehension"⁸⁰. Publication of matter by means of the Internet is accordingly complete when and where the matter is accessed by a third party in a comprehensible form.

62 Adopted in Australia in the decision of this Court in *Webb v Bloch*⁸¹, and reconfirmed by the decision of this Court in *Trkulja v Google LLC*⁸², has been the long-standing rule of the common law that every intentional participant in a process directed to making matter available for comprehension by a third party is a "publisher" of the matter upon the matter becoming available to be comprehended by the third party. The rule was captured in the reasons for judgment of Isaacs J in *Webb v Bloch* through the combination of two quotations from a specialist textbook, drawing on English case law stretching back to the Jacobean period.

77 *Fairfax Media Publications Pty Ltd v Voller* (2020) 380 ALR 700.

78 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766.

79 *Ostrowe v Lee* (1931) 175 NE 505 at 505.

80 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 600 [26].

81 (1928) 41 CLR 331 at 363-364.

82 (2018) 263 CLR 149 at 164-165 [40].

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63 One of the quotations was from a chapter dealing with publication of a criminal libel in an early edition of the textbook, published in 1830⁸³:

"According to the general rule of law, it is clear that all who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are to be considered as principals in the act of publication: thus if one suggest illegal matter, in order that another may write or print it, and that a third may publish it, all are equally amenable for the act of publication, when it has been so effected."

64 The other of the quotations was from a chapter dealing with publication of a civil libel in a revised edition of the textbook, published in 1891⁸⁴:

"The term *published* is the proper and technical term to be used in the case of libel, without reference to the precise degree in which the defendant has been instrumental to such publication; since, if he has intentionally lent his assistance to its existence for the purpose of being published, his instrumentality is evidence to show a publication by him".

65 In the form stated in the first quotation⁸⁵, the rule might well have been explained as nothing more than a manifestation of the general rule of the common law that a secondary participant in a misdemeanour was liable as a principal given the refusal of the common law to "distinguish the different shades of guilt in petty misdemeanours"⁸⁶. In the form stated in the second quotation, however, the rule is appropriately identified as an exposition of the technical content of "publication" when used as a term of art to express an element of the tort of defamation.

66 The word "intentionally" within the second quotation should be understood to be directed at an intention to facilitate, or provide a platform for, communication of the allegedly defamatory matter. Enough for participation in a process that is in fact directed to making matter available for comprehension by a third party to be characterised as intentional is that the participation in the process is

83 Starkie, *A Treatise on the Law of Slander and Libel*, 2nd ed (1830), vol II at 225, quoted in part in argument in *Parke v Prescott* (1869) LR 4 Ex 169 at 173-174.

84 Folkard, *The Law of Slander and Libel*, 5th ed (1891) at 439 (emphasis in original).

85 See also Folkard, *The Law of Slander and Libel*, 5th ed (1891) at 796.

86 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 3 at 36. See generally *Giorgianni v The Queen* (1985) 156 CLR 473 at 480-481, 490-493.

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active and voluntary. That is irrespective of the degree of active and voluntary participation in the process. And it is irrespective of knowledge or intention on the part of the participant as to the defamatory content of the matter published.

67 As Dixon J said in *Lee v Wilson & Mackinnon*⁸⁷:

"The cause of action consists in publication of the defamatory matter of and concerning the plaintiff. It might be thought, therefore, that, in any event, this warranted or required some investigation of the actual intention of the publisher. But his liability *depends upon mere communication of the defamatory matter to a third person*. The communication [of the defamatory matter] may be quite unintentional, and the publisher may be *unaware of the defamatory matter*."

68 Adapting and adopting what was said with reference to *Webb v Bloch* in the Court of Final Appeal of Hong Kong in *Oriental Press Group Ltd v Fevaworks Solutions Ltd*⁸⁸ by Ribeiro PJ (with whom other members of the Court including Gleeson NPJ agreed), a person is a publisher of defamatory matter if "by an act of any description" the person "intentionally assisted in the process" of communicating the matter containing content conveying the defamatory imputation to a third party, regardless of whether the person knows that the matter contains that content.

69 The strictness of the common law rule is illustrated by *Webb v Bloch* itself. There members of a committee who ratified a decision of another member to instruct a solicitor to prepare and send a circular were found each to have been a publisher of the circular prepared and sent out by the solicitor. That was despite some of them having been completely unaware of the contents of the circular.

70 Consistent with the strictness of the common law rule, as was observed in the Supreme Court of Canada in *Crookes v Newton*⁸⁹ by Abella J (with whom five other Justices concurred), "the breadth of activity captured by the traditional publication rule is vast". The breadth of the activity is perhaps best illustrated by reference to a series of early eighteenth century English cases, the reports of which were noted in both editions of the textbook⁹⁰ referred to in *Webb v Bloch*⁹¹, and one

87 (1934) 51 CLR 276 at 288 (emphasis added).

88 (2013) 16 HKCFAR 366 at 377 [19].

89 [2011] 3 SCR 269 at 281-282 [18].

90 Starkie, *A Treatise on the Law of Slander and Libel*, 2nd ed (1830), vol II at 188, 237-238, 341; Folkard, *The Law of Slander and Libel*, 5th ed (1891) at 830-831.

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of which was singled out for mention by Abella J⁹². The cases concerned prosecutions for treasonable libel arising out of the publication in *Mist's Weekly Journal* of "The Persian Letter", in respect of which "it was shewn by proper averments and innuendos, that in a pretended piece of Persian history the king and several other members of the royal family had been libelled"⁹³. The prosecutions were tried before Raymond CJ in the Court of King's Bench. Convicted as a publisher was a servant to the printer, whose only involvement was to "clap down the press" with "few or no circumstances [being] offered of his knowing the import of the paper"⁹⁴. Convicted of printing, and escaping liability as a publisher only by reason of lack of evidence of publication of the pages printed, was a servant whose job as a compositor was limited to setting the type for printing the words in one of two columns on each page, another servant having the responsibility for setting the type for printing the words in the other column⁹⁵. Escaping conviction altogether, but only through the merciful intransigence of the jury and the eventual capitulation of the Attorney-General, was the keeper of a "pamphlet shop" who lived more than a mile away and who had been bedridden for some time⁹⁶. In response to a submission by her counsel that not "all those, through whose hands a libel goes, are publishers of it", Raymond CJ observed "that if a servant carries a libel for his master, he certainly is answerable for what he does, though he cannot so much as write or read"⁹⁷.

71

Formulated in the age of print, the common law rule was not seen to require modification in order to deal with the advent of the telegraph or the telephone. When, in the late nineteenth century, an operator employed by a telegraph company at one place transmitted a customer's message to an operator employed by the same telegraph company at another place who then reduced the message to writing and delivered the message in print to the addressee, the telegraph company was as much a publisher of the printed message as was the customer⁹⁸. When, in the

91 (1928) 41 CLR 331 at 363-364.

92 [2011] 3 SCR 269 at 282 [18].

93 Starkie, *A Treatise on the Law of Slander and Libel*, 2nd ed (1830), vol I at 419.

94 *R v Clerk* (1728) 1 Barn KB 304 [94 ER 207].

95 *R v Knell* (1728) 1 Barn KB 305 [94 ER 207].

96 *R v Nutt* (1728) 1 Barn KB 306 [94 ER 208].

97 *R v Nutt* (1728) 1 Barn KB 306 at 306-307 [94 ER 208 at 208].

98 eg, Lewis, *Gatley on Libel and Slander*, 8th ed (1981) at 104 [226], citing *Peterson v Western Union Telegraph Co* (1898) 71 Am St R 461.

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late twentieth century, one person communicated with another by telephone, the telephone company was not a publisher. The difference was that "a telegram [was] sent only through the direct participation of agents of the telegraph company whereas in the case of a modern-day telephone call the caller communicate[d] directly with the listener over the facilities of the telephone company, with no publication by the company itself"⁹⁹.

72 Nor was the common law seen to require modification in order to deal with the advent of radio and television. Radio and television broadcasters were readily seen to be publishers of "all material broadcast or televised on [their] network, whether scripted or live" so as to be liable for defamatory matter contained in "a derogatory remark made by a contributor to a live studio discussion, or a banner or leaflet thrust before a television camera in a live transmission of a political meeting or demonstration". Not "to the point" was that the broadcaster "[did] not itself make or adopt the defamatory statements": "by its broadcast it [had] published them"¹⁰⁰.

73 Accordingly, in *Thompson v Australian Capital Television Pty Ltd*¹⁰¹, a television station which broadcast live to viewers in the Australian Capital Territory a current affairs program produced by another television station in Sydney was not doubted to be a publisher of defamatory statements made during a live interview on the program. The only relevant issue was whether it was entitled to the common law "defence" of "innocent dissemination" associated with *Emmens v Pottle*¹⁰²: it was not.

74 Accepted by at least a majority in *Thompson v Australian Capital Television Pty Ltd*¹⁰³ was the proposition that innocent dissemination at common law constitutes a "defence" to an action in defamation, in the strictest sense of the

99 *Lunney v Prodigy Services Company* (1998) 250 AD 2d 230 at 235 (cleaned up quote), referring to *Anderson v New York Telephone Company* (1974) 35 NY 2d 746.

100 Mullis and Parkes (eds), *Gatley on Libel and Slander*, 12th ed (2013) at 216-217 [6.24], quoting United Kingdom, *Report of the Committee on Defamation* (1975) Cmnd 5909 at 82 [298].

101 (1996) 186 CLR 574.

102 (1885) 16 QBD 354.

103 (1996) 186 CLR 574.

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meaning of "defence"¹⁰⁴ involving "confession" (meaning acceptance) of facts sufficient to establish the legal elements of the cause of action and "avoidance" (meaning negation or defeasance) of the legal effect of those facts upon proof of further facts establishing a justification or excuse, as distinct from involving the denial of facts sufficient to establish an element of the cause of action. Brennan CJ, Dawson and Toohey JJ, who constituted a majority, in that respect singled out for approval¹⁰⁵ a comment, contained in the then current edition of a leading English textbook¹⁰⁶, on the statement of Lord Esher MR in *Emmens v Pottle* that the innocent disseminators in that case "did not publish the libel"¹⁰⁷. The comment was to the effect that "it would be more accurate to say that any disseminator of a libel publishes the libel but, if he can establish the defence of innocent dissemination, he will not be responsible for that publication".

75 On the strength of *Thompson v Australian Capital Television Pty Ltd*, those drafting the *Defamation Act* and cognate legislation in other States and Territories proceeded on the understanding that an innocent disseminator is a publisher according to the common law of Australia¹⁰⁸. In common law principle, not to mention on the authority of this Court, that understanding was fundamentally sound.

76 Treating innocent dissemination as a defence to a cause of action in defamation rather than as a denial of the element of publication accords with the historical explanation of *Emmens v Pottle* given by Vaughan Williams LJ in *Vizetelly v Mudie's Select Library Ltd*¹⁰⁹, to which Gummow J drew attention in his

104 See *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 527-528 [8]; Perkins, *Chitty's Treatise on Pleading*, 16th American ed (1882), vol I at 551; Goudkamp, *Tort Law Defences* (2013) at 2-3.

105 (1996) 186 CLR 574 at 586.

106 *Duncan and Neill on Defamation*, 2nd ed (1983) at 110, fn 3.

107 (1885) 16 QBD 354 at 357.

108 See eg, New South Wales, *Defamation Bill 2005*, Explanatory Note at 15, cl 32; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 September 2005 at 17640.

109 [1900] 2 QB 170 at 178.

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separate reasons for judgment in *Thompson v Australian Capital Television Pty Ltd*¹¹⁰.

77 The explanation requires that *Emmens v Pottle* be understood against the background of the emergence of the tort of defamation out of the earlier action on the case for words over the course of the nineteenth century¹¹¹. Only in the early twentieth century did the tort ultimately appear, from *E Hulton & Co v Jones*¹¹² as explained by Dixon J in *Lee v Wilson & Mackinnon*¹¹³, as a "tort of strict liability"¹¹⁴ (in the sense that neither an intention to do harm nor negligence resulting in harm is necessary for liability¹¹⁵) in which "liability depends upon mere communication of the defamatory matter to a third person" without need to "look for the publisher's actual intention" as to the meaning of the matter¹¹⁶.

78 *Emmens v Pottle* was decided at a stage in the evolution of the tort of defamation when the "gist" of a cause of action could still be said to be "malice" on the part of the defendant¹¹⁷. The typical pleading of an action in libel alleged that the defendant "falsely and maliciously printed and published of the plaintiff ... the words following ..."¹¹⁸. By that stage, however, "malice" had long since come to be understood not in the "popular sense" of meaning "ill will against a person" but in the "legal sense" of meaning "a wrongful act, done intentionally, without just cause or excuse"¹¹⁹. On the basis that a defendant who published defamatory matter "must

110 (1996) 186 CLR 574 at 619.

111 See Mitchell, *The Making of the Modern Law of Defamation* (2005) at 101-144; Mitchell, *A History of Tort Law 1900-1950* (2015) at 140-144.

112 [1910] AC 20.

113 (1934) 51 CLR 276 at 287-292.

114 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 600 [25].

115 *Benning v Wong* (1969) 122 CLR 249 at 298-299.

116 (1934) 51 CLR 276 at 288.

117 *Capital and Counties Bank v Henty* (1882) 7 App Cas 741 at 767.

118 *Bullen and Leake's Precedents of Pleadings*, 4th ed, Pt I (1882) at 390. See also *Jones v E Hulton & Co* [1909] 2 KB 444 at 458, 477; *E Hulton & Co v Jones* [1910] AC 20 at 24.

119 *Bromage v Prosser* (1825) 4 B & C 247 at 255 [107 ER 1051 at 1054].

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be considered, in point of law, to have intended the consequences resulting from that act"¹²⁰, malice on the part of the defendant was presumed as a matter of law from the tendency in fact of the matter published to defame the plaintiff. The legal presumption of malice prevailed unless rebutted through the defendant establishing a justification or excuse for the publication.

79 The rules of pleading applicable to the proceeding in *Emmens v Pottle* discouraged a defendant to an action in libel from simply pleading "denial of the several acts (or matters) complained of" by the plaintiff. The pleading rules instead encouraged a defendant who sought "to deny the fact of publication or the alleged reference to the plaintiff, to plead those denials specifically". They also had the effect that "a defendant in pleading a defence of privilege or justification must in general set out the facts on which [the defendant] relies to show that the publication was privileged or justified"¹²¹. In *Emmens v Pottle*, the successful defendants took both of those pleading options: they denied publication and, "further and alternatively", they pleaded the facts ultimately held to have made them innocent disseminators. Those additionally pleaded facts were specifically found by a jury. Judgment was ordered to be entered for the defendants from which an appeal by the plaintiff in person was dismissed by the Court of Appeal for very brief reasons delivered extempore.

80 The explanation of *Emmens v Pottle* given by Vaughan Williams LJ in *Vizetelly v Mudie's Select Library Ltd* is that the case is best understood as having been decided on the second of the pleaded grounds of the defence, not the first. What the case decided, so the explanation went, was that proof that a publication of defamatory matter occurred in circumstances of innocent dissemination, not unlike proof that a publication occurred in circumstances of qualified or absolute privilege, amounted to establishment by the defendant of a justification or excuse which operated to rebut the presumption of malice and thereby to negate the tortious liability of the defendant for the publication. Thus, it could be said, inelegantly but without logical contradiction, that what occurred in *Emmens v Pottle* was a publication of defamatory matter that was nevertheless an "innocent publication of defamatory matter" and which was for that reason "not a publication within the meaning of the law of libel"¹²².

120 *Fisher v Clement* (1830) 10 B & C 472 at 475 [109 ER 526 at 527]. See also *Haire v Wilson* (1829) 9 B & C 643 at 645 [109 ER 239 at 240].

121 *Bullen and Leake's Precedents of Pleadings*, 4th ed, Pt II (1888) at 370-371, fn (b).

122 [1900] 2 QB 170 at 178.

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81 The explanation accords with the report of the charge to the jury in *Day v Bream*¹²³, to which Romer LJ alluded in *Vizetelly v Mudie's Select Library Ltd* as a case of innocent dissemination¹²⁴. There the defendant was the porter at a coach office who delivered parcels of handbills defamatory of the plaintiff. The report of the case records that the trial judge¹²⁵:

"left it to the jury to say whether the defendant delivered the parcels in the course of his business without any knowledge of their contents; if so, to find for him, observing that *prima facie* he was answerable, inasmuch as he had in fact delivered and put into publication the libel complained of, and was therefore called upon to shew his ignorance of the contents".

82 Even by the middle of the twentieth century, it remained common practice for a plaintiff in a defamation action to plead that the defendant published the allegedly defamatory matter with malice. But the allegation of malice could be said by then to have been "little more than a pleader's flourish or a survival of older ways"¹²⁶, "intended as, if anything, an anticipatory rebuttal of every mode by which the defamatory matter might be sought to be 'protected, or justified, or excused by law'"¹²⁷.

83 Proof by the defendant of a justification or excuse, which when *Emmens v Pottle* was decided and for some time afterwards¹²⁸ might still have been thought to operate to defeat the tortious liability of the defendant by negating the presumption of malice, had been freed through the development of the common law by the middle of the twentieth century to be understood to operate to defeat the tortious liability of the defendant for the defamatory publication directly. The common law of Australia had by then in that way evolved to reflect the approach taken in the late nineteenth century in Queensland by legislation¹²⁹ the effect of which was "to

123 (1837) 2 M & Rob 54 [174 ER 212].

124 [1900] 2 QB 170 at 179.

125 (1837) 2 M & Rob 54 at 56 [174 ER 212 at 212].

126 *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185 at 204.

127 *Motel Holdings Ltd v The Bulletin Newspaper Co Pty Ltd* [1963] SR (NSW) 208 at 212.

128 eg, *Sun Life Assurance Co of Canada v W H Smith and Son Ltd* (1933) 150 LT 211 at 214.

129 *Defamation Law of Queensland 1889* (Qld).

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eliminate the element of malice ... and to substitute the principle that all defamation must be justified or excused"¹³⁰. Such was the position at common law when *Thompson v Australian Capital Television Pty Ltd* was decided, and such is the position which the *Defamation Act* and cognate State and Territory legislation properly treat as the foundation for the legislative modifications they make to the common law.

84

Further supporting that position is that, at least since *Vizetelly v Mudie's Select Library Ltd*, defendants relying on innocent dissemination have been liable in defamation unless they have succeeded in discharging the onus of proving innocent dissemination. Ribeiro PJ pointed out in *Oriental Press Group Ltd v Fevaworks Solutions Ltd*¹³¹ that acceptance of that liability is alone sufficient to indicate that "they must in principle be publishers, albeit in a subordinate role, for otherwise they could not be held liable at all since a fundamental constituent of the tort would be missing". That logic is reflected in the distinction drawn at common law and under statute¹³² between "primary" publishers, who cannot rely on innocent dissemination, and "subordinate" or "secondary" publishers, who can.

85

Statements are to be found in reasons for judgment of this Court before¹³³ and after¹³⁴ *Thompson v Australian Capital Television Pty Ltd* to the effect that a publication of defamatory matter shown by a defendant to have occurred in the ordinary course of the defendant's business in circumstances in which the defendant did not know or suspect and, using reasonable diligence, would not have known or suspected that the matter was defamatory "does not amount to publication of a libel". Those statements are best understood to refer to proof of innocent dissemination operating at common law to avoid tortious liability. Understood that way, the statements do not deny that the defendant was a publisher of the matter. The statements instead acknowledge that success by the defendant in proving innocent dissemination amounts to success in establishing a justification or excuse for the publication, the legal effect of which is to avoid tortious liability for the publication.

130 *Hall-Gibbs Mercantile Agency Ltd v Dun* (1910) 12 CLR 84 at 90.

131 (2013) 16 HKCFAR 366 at 381 [32].

132 This distinction is now reflected in the additional statutory defence of innocent dissemination: see eg, s 32(2) of the *Defamation Act 2005* (NSW), definition of "subordinate distributor".

133 *Lee v Wilson & Mackinnon* (1934) 51 CLR 276 at 288.

134 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 600 [25].

27.

86 The advent of the Internet has resulted in a "disaggregation" of the process of publication¹³⁵ and has facilitated a shift from "one-to-many" publication to "many-to-many" publication¹³⁶. That technological and sociological development has not been shown to warrant relaxation of the strictness of the common law rule associated with *Webb v Bloch*.

87 Application of the strict common law rule as to publication, as has been emphasised, has long captured within the meaning of "publisher" all persons who have intentionally assisted in the process of publication. It is unsurprising, therefore, that statements can be found in some cases describing a publisher's liability for defamatory matter as arising by reason of the person "assisting and encouraging" another to do an act¹³⁷, or that all those who contribute to publication of a libellous book are "joint tortfeasors in respect of the ultimate publication"¹³⁸.

88 Equally clear, however, is that the strictness of the common law rule ensures that all degrees of intentional participation in the process of publication constitute publication for the purposes of the law of defamation¹³⁹. Unlike other areas of tort law or criminal law, where "mere assistance" or "mere similarity of design" may be insufficient to establish liability of an assister as a principal¹⁴⁰, liability in defamation depends upon "mere communication" of the defamatory

135 Rolph, "Liability for the Publication of Third Party Comments: *Fairfax Media Publications Pty Ltd v Voller*" (2021) 43 *Sydney Law Review* 225 at 239.

136 *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at 390 [59], quoting Balkin, paper prepared for the "Global Constitutionalism Seminar 2010", Yale Law School, adapted from Balkin, "Media Access: A Question of Design" (2008) 76 *George Washington Law Review* 933.

137 *Webb v Bloch* (1928) 41 CLR 331 at 364, quoting *R v Paine* (1696) 5 Mod 163 at 167 [87 ER 584 at 587].

138 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 581.

139 *Webb v Bloch* (1928) 41 CLR 331 at 363-364; *Trkulja v Google LLC* (2018) 263 CLR 149 at 164 [40].

140 cf *Credit Lyonnais Bank Nederland NV (now Generale Bank Nederland NV) v Export Credit Guarantee Department* [1998] 1 Lloyd's Rep 19 at 45-46, quoting *The Koursk* [1924] P 140 at 156. See also *IL v The Queen* (2017) 262 CLR 268 at 282 [29].

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matter to a third person, provided the defendant intentionally participated to any degree in that process¹⁴¹.

89 Two considerations strongly support maintenance of the strictness of the common law rule in Australia. The first is fidelity to the underlying concern of the common law of defamation to protect against damage to reputation, which should not be diminished as the threats to reputation are multiplied. The second is recognition that the balance that has been struck between freedom of communication by means of the Internet and protection of reputation is one that the Commonwealth Parliament (in enacting and maintaining the *Broadcasting Services Act 1992* (Cth)¹⁴²) and that State Parliaments and Territory legislatures (in enacting and maintaining and providing for review of¹⁴³ the *Defamation Act* and cognate legislation) have determined for the time being to be appropriate against the background of the stable application of common law principle.

90 Not unimportantly, continuing adherence to the strictness of the common law rule associated with *Webb v Bloch* also results in substantial conformity of the common law of Australia to the approach taken to resolving novel issues concerning publication of defamatory matter by means of the Internet in strongly reasoned common law decisions both of the Supreme Court of Canada in *Crookes v Newton*¹⁴⁴ and of the Court of Final Appeal of Hong Kong in *Oriental Press Group Ltd v Fevaworks Solutions Ltd*¹⁴⁵. To adapt an observation made by French CJ in *Paciocco v Australia & New Zealand Banking Group Ltd*¹⁴⁶, given that a strength of common law reasoning lies in its ability to assimilate and build upon collective experience, when grappling with the application of common law principles of tortious liability inherited from a common source to meet common challenges presented by emerging global phenomena, "convergence ... is preferable to divergence even if harmonisation is beyond reach".

141 *Lee v Wilson & Mackinnon* (1934) 51 CLR 276 at 288.

142 See cl 91 of Sch 5 to the *Broadcasting Services Act*.

143 See s 49 of the *Defamation Act 2005* (NSW).

144 [2011] 3 SCR 269 at 281-283 [16]-[20].

145 (2013) 16 HKCFAR 366 at 376-382 [16]-[33].

146 (2016) 258 CLR 525 at 540 [10].

Overseas cases

91 The appellants referred to several overseas decisions which they argued to contain reasoning supporting their contention that intention to publish defamatory matter is required for a person to be a publisher. None of those decisions assists them.

92 *Tamiz v Google Inc*¹⁴⁷ was a decision of the Court of Appeal of England and Wales in which Google Inc was found not to have been the publisher at common law of allegedly defamatory comments posted anonymously on an independent blog created by an Internet user by means of its platform known as "Blogger.com". As Ribeiro PJ pointed out in *Oriental Press Group Ltd v Fevaworks Solutions Ltd*¹⁴⁸, the decision proceeded "on the basis that successful invocation of the defence of innocent dissemination results in the defendant being deemed not to have published at all". For reasons already stated, that process of reasoning does not reflect the common law of Australia.

93 *Monir v Wood*¹⁴⁹ was a subsequent decision of a single judge of the High Court of England and Wales in which it was noted with reference to an earlier decision of a single judge of that Court in *Bunt v Tilley*¹⁵⁰ that the parties did not dispute the proposition that "for a person to be held liable as a *primary* publisher, s/he must be shown to have knowing involvement in the publication of the particular words". The appellants sought to unpack neither the meaning of the emphasised descriptor in the context of that case nor what might have been thought in the context of that case to be included in or excluded from the notion of "knowing involvement in the publication of the particular words". At least without considerably more analysis, invocation in argument of isolated statements of that kind does nothing to inform principled analysis.

94 *Murray v Wishart*¹⁵¹ was a decision in which the New Zealand Court of Appeal held that an individual Internet user who was the administrator of a private Facebook page and who had no "actual knowledge" of the contents of third-party comments posted on the page was not liable in defamation. The Court of Appeal

147 [2013] 1 WLR 2151.

148 (2013) 16 HKCFAR 366 at 388 [53].

149 [2018] EWHC 3525 (QB) at [135] (emphasis in original).

150 [2007] 1 WLR 1243 at 1249 [22]-[23]; [2006] 3 All ER 336 at 342.

151 [2014] 3 NZLR 722 at 752 [144], 754 [155].

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proceeded without reference to *Webb v Bloch*, and indeed without analysis of what constitutes publication at common law. Rather, the starting point for its analysis was that the issue of publication was to be determined by "strained analogy" with previously decided cases¹⁵². It appeared to assume that either actual or constructive knowledge of the defamatory content was necessary for publication¹⁵³. Its ultimate conclusion that "the actual knowledge test should be the only test to determine whether a Facebook page host is a publisher"¹⁵⁴ was reached having regard to the guarantee of freedom of expression in the *New Zealand Bill of Rights Act 1990* (NZ). The reasoning does not reflect the common law of Australia.

95 *Crookes v Newton* was a decision of the Supreme Court of Canada which, as already noted, expounded the common law rule about publication in terms consistent with *Webb v Bloch*¹⁵⁵. The issue before the Supreme Court was whether the creation of a hyperlink in an article posted on a website, in and of itself, constituted publication of the content which an Internet user reading the article was able to access by clicking on the hyperlink. The Supreme Court found that a "mere" hyperlink did not engage the common law rule on the basis that the hyperlink was essentially a reference to other material rather than republication of that other material¹⁵⁶. The conduct of the appellants in the present case, like the conduct of the respondents in *Oriental Press Group Ltd v Fevaworks Solutions Ltd*, was of a wholly different character.

The appellants as publishers

96 In *Oriental Press Group Ltd v Fevaworks Solutions Ltd*, not unlike in *Thompson v Australian Capital Television Pty Ltd*, the issue was not as to publication but as to whether the common law defence of innocent dissemination was available to the respondents, who administered a website which hosted an Internet discussion forum on which users posted defamatory matter. Before turning to resolve that issue, Ribeiro PJ said of the respondents¹⁵⁷:

152 [2014] 3 NZLR 722 at 745 [99].

153 [2014] 3 NZLR 722 at 740 [81]-[82].

154 [2014] 3 NZLR 722 at 752 [144].

155 [2011] 3 SCR 269 at 281-283 [16]-[20].

156 [2011] 3 SCR 269 at 289 [36].

157 (2013) 16 HKCFAR 366 at 399 [89].

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"They were certainly publishers of those postings (and do not seek to argue otherwise) since they provided the platform for their dissemination, but the respondents were not aware of their content and realistically, in a many-to-many context, did not have the ability or opportunity to prevent their dissemination, having learned of them only after they had already been published by their originators."

97 Except that the present appellants do "seek to argue otherwise", that description of the respondents in *Oriental Press Group Ltd v Fevaworks Solutions Ltd* is an apt description of the present appellants.

98 Each appellant became a publisher of each comment posted on its public Facebook page by a Facebook user as and when that comment was accessed in a comprehensible form by another Facebook user. Each appellant became a publisher at that time by reason of its intentional participation in the process by which the posted comment had become available to be accessed by the other Facebook user. In each case, the intentional participation in that process was sufficiently constituted by the appellant, having contracted with Facebook for the creation and ongoing provision of its public Facebook page, posting content on the page the effect of which was automatically to give Facebook users the option (in addition to "Like" or "Share") to "Comment" on the content by posting a comment which (if not "filtered" so as to be automatically "hidden" if it contained "moderated words") was automatically accessible in a comprehensible form by other Facebook users.

99 Not to the point of the appellants having been publishers is the fact that: the appellants had no control over the facility by which the Facebook service was provided to them and to Facebook users; the "Comment" function was a standard feature of the Facebook service which the appellants could not disable; it was not possible for them to delete all comments in advance; or they could have effectively "hidden" all comments posted by Facebook users only by applying an extremely long list of common words as "moderated words".

100 The primary judge found that over 15 million Australians are Facebook users¹⁵⁸. The appellants chose to operate public Facebook pages in order to engage commercially with that significant segment of the population.

101 The primary judge found that the "primary purpose" of the operation of each appellant's public Facebook page was "to optimise readership of the newspaper (whether hardcopy or digital) or broadcast and to optimise advertising revenue"¹⁵⁹.

158 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [64].

159 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [209].

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Each appellant "provided the forum for its publication and encouraged, for its own commercial purposes, the publication of comments"¹⁶⁰. Indeed, the primary judge found that¹⁶¹:

"[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".

102 Having regard to those findings, the appellants' 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.

103 The conduct of the appellants is accordingly distinguishable from "graffitied wall" cases, such as *Byrne v Deane*¹⁶² and *Urbanchich v Drummoyne Municipal Council*¹⁶³, in which issues have been raised about whether an owner of a building or noticeboard on which a defamatory statement was initially wrongfully affixed by a third party subsequently "consented to, or approved of, or adopted, or promoted, or in some way ratified, the continued presence of that statement ... so that persons other than the plaintiff may continue to read it"¹⁶⁴. There is plainly a critical difference between that line of cases, involving defendants who have played *no* role in the facilitation of publication prior to becoming aware of the defamatory matter, and the present case.

104 Where, as here, the operator of an "electronic bulletin board" posts material with the intention that third parties will comment on the material posted, the operator cannot escape being a publisher of the comments of those third parties. The most appropriate analogy is with live television or talkback radio. As Brennan CJ, Dawson and Toohey JJ recognised in *Thompson v Australian Capital Television Pty*

160 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [224].

161 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [90(xvii)].

162 [1937] 1 KB 818.

163 (1991) Aust Torts Reports ¶81-127.

164 *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports ¶81-127 at 69,193.

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Ltd, in the context of a live to air broadcast of a television program being simultaneously aired by another network, "the nature of a live to air current affairs program carries a high risk of defamatory statements being made"¹⁶⁵ and such a program "by its nature would be likely to involve comments about persons"¹⁶⁶.

105 In sum, each appellant intentionally took a platform provided by another entity, Facebook, created and administered a public Facebook page, and posted content on that page. The creation of the public Facebook page, and the posting of content on that page, encouraged and facilitated publication of comments from third parties. The appellants were thereby publishers of the third-party comments.

Conclusion

106 The appeals should be dismissed with costs.

165 (1996) 186 CLR 574 at 590.

166 (1996) 186 CLR 574 at 590, quoting *Thompson v Australian Capital Television Pty Ltd* (1994) 54 FCR 513 at 520.

EDELMAN J.

Introduction

107 Nationwide News Pty Ltd, one of the appellants, posts news items and images to a public Facebook page that it manages. The news items include hyperlinks to stories on the website for *The Australian* newspaper¹⁶⁷. At the relevant time, Facebook did not permit the creators of Facebook pages to prevent any Facebook user from exercising an automatic option to "comment" on the publicly posted and hyperlinked news story. Suppose that Nationwide News published a link on its Facebook page to a mundane story about weather patterns and that a reader posted, in the space reserved for "comments" on the story, a defamatory remark that a particular named person was a thief. The remark was entirely unrelated to the weather story. Suppose, also, that at the time the remark was posted, Nationwide News had no knowledge of the remark, little or no ability to prevent it being made, and a system that would remove the remark as soon as Nationwide News became aware of it.

108 Is Nationwide News a publisher of such a defamatory remark, which it neither invited nor requested, which it manifested no intention to publish, of which it was unaware, and which it would have removed as soon as reasonably possible? This question concerns the scope of the requirement in the *Defamation Act 2005* (NSW), which reflects the common law in this respect, that a person must "publish" a statement to be liable for defamation.

109 The question for determination on these appeals is expressed so broadly that it encompasses circumstances of this nature. Unlike the other members of this Court apart from Steward J, I do not accept that the appellants are publishers of such uninvited words written on their Facebook pages. It can be accepted that, in the circumstances of this case, Nationwide News intended that readers publish comments concerning the story it posted. But, in my respectful view, there is no meaningful sense in which it could be concluded that Nationwide News intended to publish remarks that were not, in any imaginable sense, a "comment" on the story. The remark described above would bear no more resemblance to invited "comments" on the posted story than defamatory graffiti on a commercial noticeboard would bear to invited notices on the commercial noticeboard. Neither satisfies the required intention for publication. Equally, the remark above would be no more an intended publication than a television broadcast which accidentally captures in the background an unknown stranger who, unbeknownst to the live presenter and camera operator, walks past wearing a t-shirt with a defamatory message or carrying a defamatory placard.

167 *Fairfax Media Publications Pty Ltd v Voller* (2020) 380 ALR 700 at 719 [85].

110 I have had the considerable benefit of reading in draft the reasons of Steward J, which conclude that the parties to these appeals erred in their assumption that the appellants either were publishers of all third-party comments on their respective Facebook pages or were not publishers of any of them. I agree with that conclusion. Steward J's comprehensive treatment of the factual background to this case and the authorities permits me to express my reasons below in relation to two further matters only, which illustrate the lack of principle for the assumption of the parties and the lack of justification for the assumption in any of the authorities upon which the parties relied.

Intention to publish and strict liability in defamation

Intention and fault

111 Defamation is a tort of strict liability. This means that it is actionable, subject to defences, without proof of fault. The defendant must intentionally perform an act of publishing a communication, which is of and concerning the plaintiff¹⁶⁸ and which is defamatory. Alternatively, if the defendant does not intentionally perform the act of publication then the defendant must assist in another's act of publication with a common intention to publish. In each case, the defendant must intend the act of publication. In each case, the relevant intention is an objective or manifested intention based upon the person's words or acts in the circumstances.

112 The act of "publication" by the defendant of words or other communications about the plaintiff has a specific meaning in the law of defamation. It means "mere communication ... to a third person"¹⁶⁹ or "making [the communication] known" to the third person¹⁷⁰. The act must also be accompanied by an objective or manifested intention to act. The defamatory *content* of the communication "may be quite uninten[ded], and the publisher may be unaware of the defamatory matter"¹⁷¹ but there must be a manifested intention to make a communication to a third party. It can sometimes be a difficult exercise to determine whether intention to communicate has been manifested by a defendant. One sufficient, though not necessary, indicator is, in the words of Abella J in *Crookes v Newton*¹⁷², "exerting *control* over the content".

168 *Lee v Wilson & Mackinnon* (1934) 51 CLR 276 at 288.

169 *Lee v Wilson & Mackinnon* (1934) 51 CLR 276 at 288.

170 *Pullman v Hill & Co* [1891] 1 QB 524 at 527.

171 *Lee v Wilson & Mackinnon* (1934) 51 CLR 276 at 288.

172 [2011] 3 SCR 269 at 285 [26] (emphasis in original).

113 A bookstore owner or a newspaper vendor will generally be a publisher because, having chosen the book or newspaper to be sold and having made the sale, they have manifested an intention to make the communication to a third party even if they are not aware of its contents. On the other hand, the need for an objective intention to communicate to a third party means that a cashier in a bookstore will not be a publisher. Nor will a mere courier or postal worker who delivers a defamatory publication, or a person who mistakenly "delivers one paper instead of another"¹⁷³. This principle also explains why telephone companies and internet service providers who passively transmit have been held not to be publishers¹⁷⁴. And it explains why the passive deliverer of a spare newspaper to a librarian, who "never intended to publish", was held not to be a publisher, unlike "[a] printer and publisher [who] intends to publish"¹⁷⁵. In all of these instances of passive assistance, the basis for the conclusion is that there is no manifested intention to communicate any content.

114 Of course, like distributors of books, television broadcasters have generally been held to be publishers of broadcast material, both scripted and live, irrespective of whether they are aware of the content of the broadcast. It suffices that they intend the communication, whatever its content. By contrast, it would be unprincipled if a television broadcaster – of, say, a weather programme – were found to be a publisher of material that was a "mere communication" that the broadcaster did not intend to publish. For instance, the example of a stranger who, unknown to the broadcaster, happened to be walking in the background with an entirely unrelated defamatory t-shirt or placard during a live public broadcast is a scenario in which the broadcaster would not be liable for defamation arising from such images, which the broadcaster did not "cho[o]se to present"¹⁷⁶, having "merely provide[d] a vehicle"¹⁷⁷.

115 The element of an intention to publish that is required is concerned with an intention to act rather than with any of the consequences of the act. It is not a requirement of fault. In this respect, the intention required for the tort of defamation is no different in principle from the intention required for the torts of conversion, public nuisance, or trespass. In none of these torts is there a requirement of fault. As

173 *R v Topham* (1791) 4 TR 126 at 127-128 [100 ER 931 at 932].

174 *Anderson v New York Telephone Co* (1974) 35 NY 2d 746 at 750; *Bunt v Tilley* [2007] 1 WLR 1243 at 1252 [36]-[37]; [2006] 3 All ER 336 at 345; *Crookes v Newton* [2011] 3 SCR 269 at 310 [89].

175 *McLeod v St Aubyn* [1899] AC 549 at 562.

176 *Australian Broadcasting Corporation v Comalco Ltd* (1986) 12 FCR 510 at 521.

177 *Buck v Jones* [2002] NSWCA 8 at [60].

Professor Stevens has explained¹⁷⁸, any intentional act of a person – whether it be destroying another's car, blocking the public highway, or walking on someone else's land – gives rise to prima facie liability as a tortfeasor even if the person was "wholly without fault" because they honestly and reasonably believed that the car was theirs, or honestly and reasonably believed that they had statutory authorisation to block the road, or honestly and reasonably believed that they had a right of way over the land crossed: "[i]t is unnecessary to show the intention to cause harm, or commit a wrong. ... [A]cting with the intention of exercising a liberty which [the defendant does] not have with respect to the claimant suffices."

Fault in the publication element of the tort of defamation

116 The liability for the tort of defamation, subject to defences, did not always fit this modern picture of strict liability. Historically, the elements of the tort of defamation required fault in some circumstances. For instance, some early cases appeared to treat a requirement of malice as an element of fault, rebuttably presumed¹⁷⁹. But early in the 19th century that requirement of malice was replaced by an intention to perform the act. This shift occurred by reasoning that "[m]alice ... in its legal sense ... means a wrongful act, done intentionally, without just cause or excuse"¹⁸⁰.

117 Another instance in which fault was historically present in the elements of the tort of defamation was where the publication was by a person who was sometimes described as a secondary or subordinate publisher. A subordinate publisher was held not to have published the words if they could show that dissemination occurred "innocently". The circumstances of "innocent dissemination" were relied upon heavily by the appellants on these appeals. An essential step in the appellants' submission that the publication element of the tort of defamation would not be established if they did not intend to publish particular content was based upon the common law doctrine of innocent dissemination operating to negate an element of the tort, namely the requirement of publication. In order to show why the appellants' reliance upon innocent dissemination as negating an element of the requirement of publication is misplaced, it is necessary to explain the evolution away

178 Stevens, *Torts and Rights* (2007) at 101.

179 Mitchell, *The Making of the Modern Law of Defamation* (2005) at 101-102, citing Starkie, *A Treatise on the Law of Slander, Libel, Scandalum Magnatum, and False Rumours* (1813); *Vanspike v Cleyson* (1597) Cro Eliz 541 [78 ER 788]; *Crawford v Middleton* (1662) 1 Lev 82 [83 ER 308]; *Wilson v Stephenson* (1816) 2 Price 282 [146 ER 97]; *Bromage v Prosser* (1824) 1 Car & P 475 [171 ER 1280].

180 *Bromage v Prosser* (1825) 4 B & C 247 at 255 [107 ER 1051 at 1054].

from the historical requirement of fault in the elements of defamation, which Sir William Holdsworth described as a "chapter of accidents"¹⁸¹.

118 The doctrine concerning "innocent dissemination" evolved from negating the publication element of the tort of defamation to being an independent defence to the completed tort. In that evolved state, the tort of defamation became a tort of strict liability, albeit with a defence based on lack of fault in limited circumstances. In the pleading language for an action on the case of the Hilary Term Rules of 1834, the doctrine of innocent dissemination had moved from a matter that the defendant could rely upon as the general issue, namely a blanket denial of the elements of the action by a plea of not guilty¹⁸², to a plea of specific justification by confession and avoidance, namely confession that the elements of the tort had been proved but avoidance of liability by an independent justification¹⁸³.

119 The treatment of the innocent dissemination doctrine as negating the element of publication was taken in the late 19th century decision of *Emmens v Pottle*¹⁸⁴. In that case, the Court of Appeal of England and Wales upheld a jury verdict for the defendants, concluding that, although the printer of a newspaper would be liable, a vendor of a newspaper was not liable where the vendor could establish that they acted in the ordinary course of business, not knowing, and without reasonable basis to know, that the newspaper contained any libellous matter. Lord Esher MR, with whom Cotton LJ agreed, said that it would be "unreasonable and unjust" to hold the vendor liable¹⁸⁵. Bowen LJ also focused upon the "innocent" nature of the vendor¹⁸⁶. This unreasonableness or innocence was not expressed as a defence independent of the elements for defamation. It was said to negate the element of publication. Lord Esher MR said that the defence arises when the "facts

181 Holdsworth, "A Chapter of Accidents in the Law of Libel" (1941) 57 *Law Quarterly Review* 74.

182 See Chitty, *A Practical Treatise on Pleading: and on the Parties to Actions, and the Forms of Actions* (1809), vol 1 at 487-488. See also, generally, *Taverner v Little* (1839) 5 Bing (NC) 678 at 684-686 [132 ER 1261 at 1264].

183 See Goudkamp, *Tort Law Defences* (2013) at 2, 7, 112. See also *Goldsbrough v John Fairfax & Sons Ltd* (1934) 34 SR (NSW) 524 at 531; Ibbetson, "Pleading Defences in Tort: The Historical Perspective", in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Tort* (2015) 25 at 29-30.

184 (1885) 16 QBD 354.

185 (1885) 16 QBD 354 at 357-358.

186 (1885) 16 QBD 354 at 358.

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[show] that they did not publish the libel"¹⁸⁷. His Lordship added: "If they had known what was in the paper ... they would have published the libel" but the findings of the jury that the defendants were innocent disseminators "make it clear that the defendants did not publish the libel"¹⁸⁸.

120 The decision in *Emmens v Pottle* was applied in *Vizetelly v Mudie's Select Library Ltd*¹⁸⁹, in which the defendants were held liable for circulating copies of a book containing a libel. A L Smith LJ explained that the negligence of the defendants had precluded their discovery that the book contained a libel, so the defendants did not "do what the defendants in *Emmens v Pottle* ... succeeded in doing, namely, prove that they did not publish the libel"¹⁹⁰. Vaughan Williams LJ agreed, adding that *Emmens v Pottle* had decided that innocent publication of a defamatory matter "is not a publication within the meaning of the law of libel"¹⁹¹. Romer LJ also saw the doctrine as one that negated publication, saying that the courts, in endeavouring to mitigate the hardship of strict liability, "have only been able to do so by holding that, under the circumstances of cases before them, there had been no publication of the libel by the defendant"¹⁹². He described *Emmens v Pottle* as a case where "the result was that there was no publication"¹⁹³. The plea of innocent dissemination was a plea of "never published"¹⁹⁴.

121 In *Vizetelly v Mudie's Select Library Ltd*¹⁹⁵, whilst Romer LJ saw the result in *Emmens v Pottle* as working "substantial justice", he described the reasoning in the case as not being "altogether satisfactory". Similarly, Scrutton LJ said that it was "difficult to state exactly the principles" upon which the innocent dissemination doctrine led to a defendant's freedom from responsibility¹⁹⁶. The

187 (1885) 16 QBD 354 at 357.

188 (1885) 16 QBD 354 at 357.

189 [1900] 2 QB 170.

190 [1900] 2 QB 170 at 177.

191 [1900] 2 QB 170 at 178.

192 [1900] 2 QB 170 at 179.

193 [1900] 2 QB 170 at 179.

194 O'Sullivan and Brown, *The Law of Defamation* (1958) at 39, fn 9.

195 [1900] 2 QB 170 at 180.

196 *Bottomley v F W Woolworth and Co Ltd* (1932) 48 TLR 521 at 521.

doctrine was unsatisfactory and unprincipled for two reasons. First, it is difficult to see why innocent dissemination should negate publication by defendants who played a subordinate part in disseminating the work¹⁹⁷ but not by defendants who were the "first or main publisher"¹⁹⁸. If innocence in dissemination were a matter that negated publication, then it should equally negate the act of publication by both primary and subordinate actors. Secondly, the notion that innocent dissemination negated publication involved a fiction that a subordinate distributor of defamatory material, who was ignorant of the defamatory content and could not have discovered it with reasonable care, did not have an intention to make or provide a communication to a third party.

122 The fiction that an absence of fault meant that a subordinate distributor did not intend to make a communication and hence did not "publish", even in circumstances where that intention was objectively apparent, was incompatible with any strict liability conception of the tort of defamation. The strict liability basis for defamation became firmly established by the "very new law"¹⁹⁹ in the decision of the Court of Appeal, and subsequently the House of Lords²⁰⁰, in *Jones v E Hulton & Co*²⁰¹. As Holmes J had earlier said in dissent in *Hanson v Globe Newspaper Co*²⁰², supporting the same strict liability conclusion that would later be reached in *Jones v E Hulton & Co*, "[t]he law constantly is tending towards consistency of theory". In that trend towards consistency of theory, the recognition of defamation as a tort of strict liability meant that the notion of innocent dissemination needed a new justification to survive.

The shift from fault as an element of publication to an independent defence

123 Although many writers supported the innocent dissemination principle in *Emmens v Pottle* as one that negated the element of publication²⁰³, some authors

197 *Ridgway v Smith and Son* (1890) 6 TLR 275; *Mallon v W H Smith and Son* (1893) 9 TLR 621; *Martin v Trustees of the British Museum and Thompson* (1894) 10 TLR 338.

198 *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170 at 180.

199 Pollock, "Note" (1910) 26 *Law Quarterly Review* 103 at 104.

200 *E Hulton & Co v Jones* [1910] AC 20.

201 [1909] 2 KB 444.

202 (1893) 159 Mass 293 at 302.

203 Fraser, *The Law of Libel in its relation to the Press* (1889) at 3; Ball, *The Law of Libel as affecting Newspapers and Journalists* (1912) at 19-20; Bower, *A Code of*

appeared to doubt whether the foundation of the innocent dissemination principle was a defendant's plea of an absence of a necessary element of the action rather than a defence in the true sense of confession and avoidance. In his first edition of *The Law of Torts*, published in 1887, although Pollock considered *Emmens v Pottle* in a section of his text entitled "What is publication"²⁰⁴, he described the defence as one which created a "free[dom] from liability" rather than one which involved a lack of publication. Likewise, Clerk and Lindsell wrote of innocent dissemination as an "excuse"²⁰⁵; Bigelow described it as an "immunity"²⁰⁶; Brett and, initially, Gatley described it as establishing an absence of liability rather than an absence of publication²⁰⁷. Even some of those, such as Odgers, who saw the doctrine as an element of the action referred to the fiction or "deeming" involved in the negation of publication²⁰⁸.

124 By 1977, there was therefore some support for the proposition, articulated by Bridge LJ, that the disseminator of defamatory material is liable, subject to the defence of innocent dissemination²⁰⁹. This treatment by Bridge LJ of innocent dissemination as a true defence to the completed elements of the tort of defamation was described in a footnote in an English text, referred to by Brennan CJ, Dawson and Toohey JJ in *Thompson v Australian Capital Television Pty Ltd*²¹⁰, as supporting the proposition that "it would be more accurate to say that any disseminator of a libel

the Law of Actionable Defamation, 2nd ed (1923) at 260; Fakhri, *Principles and Practice of the Law of Libel and Slander*, 6th ed (1925) at 29-31; O'Sullivan and Brown, *The Law of Defamation* (1958) at 38.

204 Pollock, *The Law of Torts* (1887) at 214-215.

205 Clerk and Lindsell, *The Law of Torts* (1889) at 442.

206 Bigelow, *Elements of the Law of Torts*, 5th ed (1894) at 97-98.

207 Brett, *Commentaries on the Present Laws of England* (1890), vol 1 at 458; Gatley, *Law and Practice of Libel and Slander in a Civil Action with Precedents of Pleadings* (1924) at 94-95.

208 Odgers, *An Outline of the Law of Libel: Six Lectures Delivered in the Middle Temple Hall during Michaelmas Term, 1896* (1897) at 207.

209 *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 at 505; [1977] 2 All ER 566 at 587.

210 (1996) 186 CLR 574 at 586, quoting *Duncan and Neill on Defamation*, 2nd ed (1983) at 110, fn 3. See also *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at 381 [31].

publishes the libel but, if he can establish the defence of innocent dissemination, he will not be responsible for that publication".

125 Despite some academic support and strong hints of judicial support, no Australian case has yet conclusively recognised that the foundations of "innocent dissemination" have shifted from being a negation of the element of publication to becoming a true defence to the completed cause of action. In 1934, Dixon J was still describing the circumstances of innocent dissemination as negating "publication of a libel"²¹¹. And the passing reference in the joint judgment of Brennan CJ, Dawson and Toohey JJ in *Thompson v Australian Capital Television Pty Ltd*, which was not endorsed by Gaudron J or Gummow J, who were the other two members of the Court in that appeal²¹², was far from an endorsement of a wholesale shift in the foundations of innocent dissemination²¹³.

126 The step of reorienting innocent dissemination from being a negation of an element of the cause of action for defamation to being an independent defence should now be taken in Australia, as it has been taken in Hong Kong²¹⁴. The reason to take this step is not merely the need for consistency of theory. It is also required as a matter of coherence in statutory interpretation.

127 Shortly after the decision in *Emmens v Pottle*, statutory provisions were introduced in Queensland²¹⁵ and Tasmania²¹⁶. The statutory provisions were expressed in broader terms than innocent dissemination at common law, exempting from liability sellers who disseminated defamatory material without knowledge that the material contained defamatory words. The foundation upon which these innocent dissemination provisions were recognised was not clear. The provisions were not expressed as either a negation of publication or a defence to the completed elements of defamation. From 1958, however, the *Defamation Act 1958* (NSW) treated innocent dissemination as a true defence. Section 10 provided that the "unlawful

211 *Lee v Wilson & Mackinnon* (1934) 51 CLR 276 at 288.

212 (1996) 186 CLR 574 at 594, 618.

213 Compare their Honours' statement that "an innocent subordinate disseminator does not intend to publish" at (1996) 186 CLR 574 at 588.

214 *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at 381 [31]-[32].

215 *Defamation Law of Queensland 1889* (Qld) (53 Vict No 12), s 33 excepting from criminal responsibility only.

216 *Defamation Act 1895* (Tas) (59 Vict No 11), ss 32, 33.

publication of defamatory matter is an actionable wrong". The modified innocent dissemination provisions were expressed as providing for a lack of criminal responsibility²¹⁷, a lack of liability²¹⁸, or a lack of responsibility²¹⁹. A New South Wales Law Reform Commission report in 1971 observed that the protection afforded to innocent sellers of defamatory matter in New South Wales had modified "the common law by relieving the defendant of the onus of showing that his ignorance of the defamatory nature of the matter complained of was not due to his negligence"²²⁰. It also modified the common law by shifting the foundation of the defence from one which negated an element of the action to one that was a true, and independent, defence.

128

The *Defamation Act 2005* provides in s 6(2) that the Act "does not affect the operation of the general law in relation to the tort of defamation except to the extent that this Act provides otherwise (whether expressly or by necessary implication)". Section 32 provides for the "Defence of innocent dissemination". That defence is expressed as, and intended as, a true defence, independent of the element of publication required for the completed tort. Against the background of statutory interference with and modification of the common law, the enactment of this defence in the *Defamation Act 2005* replaced the common law plea of innocent dissemination, the foundation of which had been a negation of the publication element of defamation. As was observed in the Explanatory Note and Second Reading Speech for the Bill which introduced the *Defamation Act 2005*, the defence of innocent dissemination "largely" followed the general law²²¹. Yet it did so by rationalising the common law in a coherent way, removing innocent dissemination from its operation in negating an element of the cause of action and creating it as a separate and true defence. In this case, s 32 has been pleaded but the only question before this Court concerns the content of the element of publication required for the completed tort.

217 *Defamation Act 1958* (NSW), s 34.

218 *Defamation Act 1958* (NSW), s 35.

219 *Defamation Act 1958* (NSW), s 36.

220 New South Wales Law Reform Commission, *Defamation*, Report 11 (1971), Appendix D at [309].

221 New South Wales, *Defamation Bill 2005*, Explanatory Note at 15; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 September 2005 at 17640.

Attribution by assistance with a common intention to publish

129 A defendant who does not perform any act of publication personally can still be liable for defamation on the basis of assisting another who performs the act of publication, provided that the defendant assists with a common intention to publish. Consistently with the general principles of the law of torts, assistance can be established by a minor act. A battery where the "one beats violently, and the other a little" involves a joint tort²²². And for the tort of defamation it has been held to be sufficient to constitute assistance in an act of publication for a servant of the printer "only to clap down the press"²²³.

130 However, throughout the law of torts and civil wrongdoing, mere assistance is not sufficient to establish liability of an assister as a principal. For instance, the mere manufacture and sale of equipment that assists in the infringement of intellectual property rights is not sufficient to make the manufacturer a principal in the commission of the copyright infringement²²⁴. Even acts of assistance with knowledge of another's intention to infringe is insufficient: the "vendor must have made himself a party to the act of infringement" in order to be liable as a principal²²⁵. Putting to one side instances of agency²²⁶, in *Credit Lyonnais Bank Nederland NV (now Generale Bank Nederland NV) v Export Credit Guarantee Department*²²⁷ Hobhouse LJ explained two other categories of case in which a person can make themselves a party to the tort of another by assisting in the tort:

222 *Clark v Newsam* (1847) 1 Ex 131 at 140 [154 ER 55 at 59].

223 *R v Clerk* (1728) 1 Barn KB 304 at 304 [94 ER 207 at 207].

224 See *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013.

225 *Walker v Alemite Corporation* (1933) 49 CLR 643 at 658. See also *Townsend v Haworth* (1875) 12 ChD 831 (n); *Dunlop Pneumatic Tyre Co Ltd v David Moseley & Sons Ltd* [1904] 1 Ch 612 at 616-617, 620; *Belegging-en Exploitiemaatschappij Lavender BV v Witten Industrial Diamonds Ltd* [1979] FSR 59 at 64, 66-67. See further *Unilever Plc v Gillette (UK) Ltd* [1989] RPC 583 at 608-609; *Credit Lyonnais Bank Nederland NV (now Generale Bank Nederland NV) v Export Credit Guarantee Department* [1998] 1 Lloyd's Rep 19 at 35, 46, 47; *Fish & Fish Ltd v Sea Shepherd UK* [2015] AC 1229 at 1239 [21]-[22], 1248 [55], 1249 [58].

226 Cooley, *A Treatise on the Law of Torts or the Wrongs which arise Independent of Contract*, 2nd ed (1888) at 227-228.

227 [1998] 1 Lloyd's Rep 19 at 46. See also *Douglas v Hello! Ltd [No 3]* [2003] EMLR 601 at 625 [70].

"Mere assistance, even knowing assistance, does not suffice to make the 'secondary' party jointly liable as a joint tortfeasor with the primary party. What he does must go further. He must have conspired with the primary party or procured or induced his commission of the tort ... or he must have joined in the common design pursuant to which the tort was committed".

131 Although Hobhouse LJ divided these instances of assistance into two categories – (i) conspiring, procuring, or inducing, and (ii) joining in a common design – those two categories substantially overlap. Both require acts of assistance or encouragement in the tort with a common intention or "design" to publish. Indeed, acts of conspiring, procuring, or inducing – or as Steward J more clearly expresses them, procuring, provoking, or conducting²²⁸ – the publication are the obvious means of proving a common intention or design. At the higher level of generality, these categories are all concerned with assistance or encouragement pursuant to an "agreement or common design"²²⁹ or acting "in concert" with the tortfeasor²³⁰.

132 The point is simply that like the criminal law²³¹, with which the roots of torts are "greatly intermingled"²³², where two or more people engage in tortious acts with a common design the acts of each are attributed to the other²³³. As Scrutton LJ explained in *The Koursk*²³⁴, "mere similarity of design on the part of independent

228 See also *Webb v Bloch* (1928) 41 CLR 331 at 364, quoting Giffard QC in argument in *Parkes v Prescott* (1869) LR 4 Exch 169 at 173, in turn quoting Starkie, *A Treatise on the Law of Slander and Libel*, 2nd ed (1830), vol 2 at 225.

229 *Talacko v Talacko* (2021) 95 ALJR 417 at 423 [25]; 389 ALR 178 at 184.

230 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 580-581.

231 *IL v The Queen* (2017) 262 CLR 268 at 282 [29].

232 *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 6 [11], quoting *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149-150.

233 See *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 601-602, citing *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013. See also *Credit Lyonnais Bank Nederland NV (now Generale Bank Nederland NV) v Export Credit Guarantee Department* [1998] 1 Lloyd's Rep 19 at 46; *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] 1 WLR 1556 at 1564-1565 [34]-[35]; [2013] 4 All ER 781 at 790-791; *Fish & Fish Ltd v Sea Shepherd UK* [2015] AC 1229 at 1244 [40].

234 [1924] P 140 at 156, applied in *Bourke v Jessop [No 3]* [1935] NZLR 246 at 259-260; *Nilon v Bezzina* [1988] 2 Qd R 420 at 424; *Myer Stores Ltd v Soo* [1991]

actors, causing independent damage, is not enough; there must be concerted action to a common end". This is a general principle applicable to all torts and civil wrongs²³⁵.

133 The same approach has naturally been taken in the law of defamation²³⁶. Hence, if a defendant does not personally perform an act of publication, the act of publishing by another can be attributed to the defendant if the defendant has assisted the other with a common intention to publish. In *Webb v Bloch*²³⁷, Isaacs J quoted a passage from *R v Paine*²³⁸, which compared the principles for responsibility for assistance in publication for the purposes of the tort of defamation with the principles for responsibility for assistance in the offence of murder:

"If one repeat and another write a libel, and a third approve what is wrote, they are all makers of it; *for all persons who concur, and show their assent or approbation to do an unlawful act, are guilty*: so that murdering a man's reputation by a scandalous libel may be compared to murdering his person; for if several are assisting and encouraging a man in the act, though the stroke was given by one, yet all are guilty of homicide."

134 The application of this principle to defamation means that the same rules that apply to an author of a book also apply to a printer, who does not perform the act of communication but assists with a common intention to publish. As Glanville Williams said²³⁹ in a passage cited with approval by Brennan CJ, Dawson and Toohey JJ in *Thompson v Australian Capital Television Pty Ltd*²⁴⁰:

2 VR 597 at 630. See also *Unilever Plc v Gillette (UK) Ltd* [1989] RPC 583 at 608-609; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 580-581, 602; *Fish & Fish Ltd v Sea Shepherd UK* [2015] AC 1229 at 1242-1243 [37].

235 American Law Institute, *Restatement (Second) of Torts* (1979) at 315-318 §876(a)-(b).

236 *Dar Al Arkan Real Estate Development Company v Al Refai* [2013] EWHC 1630 (Comm) at [30]. See also Mullis and Parkes (eds), *Gatley on Libel and Slander*, 12th ed (2013) at 200-201 [6.11].

237 (1928) 41 CLR 331 at 364 (emphasis of Isaacs J).

238 (1696) 5 Mod 163 at 167 [87 ER 584 at 587].

239 Williams, *Joint Torts and Contributory Negligence* (1951) at 10.

240 (1996) 186 CLR 574 at 581, fn 35.

"[I]f A and B jointly write a book which in fact defames C, they are joint tortfeasors whether they realised that the book was defamatory or not. So also it seems that the journalist, compositor, printer, publisher and distributor of a libellous periodical are joint tortfeasors, at any rate in respect of the ultimate publication, since they are engaged in the joint enterprise of distributing the periodical to the public."

135 The recognition that this general principle applies to the tort of defamation explains why the editors of *Gatley on Libel and Slander*²⁴¹ treat the liability of persons who procure or participate in publication of a libel as questions of a "general principle" that "all persons who concur, and show their assent or approbation to do an unlawful act, are guilty"²⁴², citing cases involving breach of confidence, misrepresentation, harassment, trespass, and conversion. It is why Dr Collins argued in earlier editions of *The Law of Defamation and the Internet* that liability of procurers in defamation law should develop by reference to intellectual property cases concerned with the liability of persons who procure the commission of those wrongs²⁴³. And, it is why, as he observed in the latest edition, his prescient observation found favour in English cases²⁴⁴.

136 When, then, will a defendant such as the appellants be a publisher on the basis that they have assisted another with a common design or common intention to publish the communication with that other person? Ultimately, the question must be answered in the circumstances of the particular case. In some circumstances, reasonable minds might differ as to whether an objective common intention can be found. For instance, the Court of Appeal of England and Wales divided in holding (by majority) that one of the two proprietors of a golf club premises had a common intention to publish a notice on the wall of their premises when, after a period of time had expired, he abstained from taking action while knowing of the notice, which could easily have been removed²⁴⁵. The proprietor's intention to publish was

241 Mullis and Parkes (eds), *Gatley on Libel and Slander*, 12th ed (2013) at 200-201 [6.11].

242 Quoting *R v Paine* (1696) 5 Mod 163 at 167 [87 ER 584 at 587].

243 Collins, *The Law of Defamation and the Internet*, 1st ed (2001) at 173-174 [15.36]; Collins, *The Law of Defamation and the Internet*, 2nd ed (2005) at 199 [15.38].

244 Collins, *The Law of Defamation and the Internet*, 3rd ed (2010) at 106-107 [6.18], citing *Bunt v Tilley* [2007] 1 WLR 1243 at 1246 [10]; [2006] 3 All ER 336 at 339-340; *Metropolitan International Schools Ltd v Designtecnica Corpn* [2011] 1 WLR 1743 at 1752-1753 [40]-[41]; [2010] 3 All ER 548 at 557-558.

245 A second proprietor, who was also the secretary, was held to be liable by all members of the Court.

inferred from his consent "to [the notice's] publication to each member who saw it"²⁴⁶. The decision was later treated as one where the conduct of both proprietors involved republication of the libel²⁴⁷ by an inference that the publication had been adopted²⁴⁸.

The circumstances of this case

137 The electronic medium of social media would not have been foreseen by the late 19th century and 20th century judges who applied the basic principles of the law of torts to the law of defamation. But those basic principles should not be distorted in their application to new media. The basic principles with which the question in this case is concerned are those relating to the requirement of an intention to publish. Whilst innocent dissemination can now be seen as a true defence, rather than a negation of the element of publication, a defendant cannot be liable for publication unless they intentionally perform the act of publication or assist another in the act of publication with a common intention to publish.

138 It is just as true today as it was 150 years ago that, where a defendant requests another to publish a comment on a particular topic, the defendant will be liable for any defamation in the comment only to the extent that the publication was made "in pursuance of, and in accordance with, the request" and was not a departure from the request²⁴⁹. So too, if a defendant requests another generally to write a comment that turns out to be libellous then the defendant will be liable for "any libel written in pursuance of his request"²⁵⁰.

139 In this case, the appellants assisted in the publication of third-party comments by creating their Facebook pages and posting news stories upon which third-party users could comment. However, by merely creating a page and posting a story with an invitation to comment on the story (an invitation which the appellants could not then disable), the appellants did not manifest any intention, nor any common purpose with the author of the comment, to publish words that are entirely

246 *Byrne v Deane* [1937] 1 KB 818 at 838.

247 *Hellar v Bianco* (1952) 244 P 2d 757 at 759.

248 *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports ¶81-127 at 69,193; *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at 384-386 [41]-[44].

249 *Parkes v Prescott* (1869) LR 4 Exch 169 at 177.

250 *R v Cooper* (1846) 8 QB 533 at 536 [115 ER 976 at 977], quoted with approval in *Webb v Bloch* (1928) 41 CLR 331 at 364.

49.

unrelated to the posted story. Such unrelated words would not be in pursuance of, or in response to, the invitation.

140 In circumstances in which (i) the appellants desired to optimise the readership of their disseminated material and (ii) comments upon the appellants' posts were consistent with their commercial purposes, the appellants had manifested an intention or common purpose to publish third-party comments on their links to published stories. The nature of the story that is posted and the circumstances in which it is posted – including the commercial nature of the publisher, the public nature of the Facebook page, and the lack of any expressed restriction upon comments – might also permit a conclusion that the appellants manifested an intention to invite a wide range of comments connected to the subject matter of the story. Provided that a comment that is written in response to the invitation is genuinely a comment on the story, the appellants will be publishers of that comment, irrespective of whether the appellants knew of, or could have known of, the comment at the time it was published.

141 To return to the example with which these reasons began, a third-party comment on a story about the weather that disparaged the competence of the author of the story to predict the weather patterns would be sufficiently connected to the story to fall within the common intention that it be published by Nationwide News. A random remark by a third party, entirely unconnected with the weather story, that a particular person is a thief would not fall within any manifest common intention. In between these examples there might be difficult questions concerning the existence of a common intention. But such difficult questions have existed across the whole of the law of torts for more than a century.

142 There is no basis in any of the evidence before the primary judge to conclude that by the (then mandatory) invitation to "comment" on their posted stories the appellants intended to publish remarks on anything and everything, however unrelated to the posted story. The "comment" button, which could not have been disabled, was not an invitation to third-party users to write any words about anything. The invitation to comment did not extend to third-party remarks whose connection with the subject matter of the posted story is so remote or tenuous that they could not meaningfully be described as a "comment" on the posted story. The appellants might have assisted in the author's act of publishing such remarks, but the appellants had no common purpose for the publication of such remarks, which were not, in any meaningful sense, "comments" on the posted story.

143 Like Steward J, I would allow the appeals and answer the question stated in terms that are neither the universal negative answer proposed by the appellants nor the universal affirmative answer proposed by the respondent. There is also substantial overlap in our approaches. Indeed, as I have explained above, the concepts of procuring, provoking, and conducting publication, to which his Honour refers, involve assistance or encouragement with a common intention to publish.

Depending on how broadly those concepts are applied, they may exhaust the universe of assistance with a common intention.

144 In each appeal, I would allow the appeal in part, set aside paragraph 3 of the orders of the Court of Appeal of the Supreme Court of New South Wales and, in its place, order that: the appeal be allowed and paragraph 1 of the orders of the Supreme Court of New South Wales be set aside and, in its place, it be ordered that the question be answered as follows:

The plaintiff will establish the publication element of the cause of action for defamation against the defendant in respect of each of the Facebook comments by third-party users by establishing that the Facebook comment has a connection to the subject matter posted by the defendant that is more than remote or tenuous.

51.

145 STEWARD J. Fairfax Media Publications Pty Ltd ("Fairfax Media"), Nationwide News Pty Limited ("Nationwide News") and Australian News Channel Pty Ltd ("Australian News Channel") ("the appellants") have public Facebook pages onto which they make posts, normally by way of a comment, image or headline. Under each such post, a box automatically appears which offers three mechanisms of engagement: to "Like", "Comment" and/or "Share". Other Facebook users are thus given the opportunity to engage with the post by expressing approval (or disapproval) by using an emoji, or by commenting on or sharing the post. That opportunity is provided by Facebook's system, not the relevant Facebook page owner. The respondent claims that certain comments posted on the appellants' Facebook pages, by third-party Facebook users, defamed him.

146 The ultimate issue for determination by this Court was posed as a separate question, namely, whether the respondent has established the publication element of the cause of action of defamation against the appellants in respect of each of the Facebook comments by third-party users. No party disputed that posting such comments constituted publication. Critically, the separate question assumed that the appellants were the publisher on their respective Facebook pages of either all third-party comments or none of them. For the reasons which follow, that assumption is incorrect.

The competing contentions

147 The respondent submits that any degree of participation in the process of communicating defamatory material, however minor, makes that participant a publisher. He relies on eight facts in support of the conclusion that each appellant here was a publisher of the third-party Facebook user comments. First, they initiated their respective Facebook pages. Secondly, they appointed their own page administrators to administer and monitor their respective Facebook pages. Thirdly, they maintained those Facebook pages on an ongoing basis. Fourthly, they selectively posted content, being links to stories on their digital news websites. Fifthly, they posted in a context where Facebook systems automatically and compulsorily required them to permit third parties to engage and interact with those posts. Sixthly, by maximising the number of such interactions, they served their respective commercial and financial interests. Seventhly, and by reason of the foregoing, they facilitated and encouraged third-party Facebook users to respond to each post. Finally, the preceding facts took place in a context where all posts and Facebook user comments would be viewable by and visible to anyone who visited the appellants' Facebook pages.

148 No part of the respondent's case relies upon an ability or inability to delete or hide defamatory third-party comments after they have been made. His argument was that each appellant was a publisher of third-party comments from the moment they were posted.

149 The appellants contend that they were not the publishers of the relevant third-party comments because they did not intend to communicate their content. To be a publisher, it was said, there must be "knowing involvement" or "knowledge and control and inferred intention to directly engage" in the process of publication. No part of this test requires an intention to defame. But it does require an intention to publish the particular words; implicitly this requires knowledge of what is to be published. The appellants rely upon the following passage from *Webb v Bloch*, where Isaacs J described the act of publication in the following way²⁵¹:

"The meaning of 'publication' is well described in *Folkard on Slander and Libel*, 5th ed (1891), at p 439, in these words: 'The term *published* is the proper and technical term to be used in the case of libel, *without reference to the precise degree* in which the defendant has been instrumental to such publication; since, *if he has intentionally lent his assistance to its existence for the purpose of being published*, his instrumentality is evidence to show a publication by him.'" (emphasis of Isaacs J)

150 In making the foregoing submission, the appellants highlighted a number of facts. They said that they have no capacity to remove or disable Facebook's automated box which invites public comment. They did not, and could not, have any prior knowledge of the content of resulting third-party comments. They claim to have a limited capacity to control the content of such comments. In that respect, the learned primary judge observed that the appellants have no ability to require third-party users to seek their approval prior to posting comments²⁵²; nor could they delete or edit third-party comments before they were posted²⁵³. To the extent that there was an automated Facebook mechanism to "hide" in advance third-party comments containing specified words (which could subsequently be "unhidden" and therefore be publicly viewable), such "hidden" comments could, at all times, be viewed by the third party's Facebook "friends". The appellants were also subject to Facebook's terms of use. They occasionally monitored some of the comments posted but considered it "onerous" or "impracticable" to monitor every comment. The appellants otherwise accepted that it was in their financial interests to seek high

251 (1928) 41 CLR 331 at 363-364.

252 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [35] per Rothman J.

253 However, it was accepted that the appellants could, in advance, "block all comments on the public Facebook page", but the effect of this would be that "no comments could ever be made or seen and the process cannot be reversed": *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [29], [56], [90(iv)], [138] per Rothman J.

53.

levels of engagement with Facebook users because the number of such visits is measured for the purpose of negotiating with potential advertisers. Thus, the primary judge observed that media organisations, including the appellants, are incentivised to make posts that are "noticeable and generate engagement"²⁵⁴.

151 The respondent contends that there is no requirement to demonstrate an intention to publish as an element in the tort of defamation. He maintains that it is a tort of strict liability and relies upon the following passage from the reasons of Dixon J in *Lee v Wilson & Mackinnon*²⁵⁵:

"The cause of action consists in publication of the defamatory matter of and concerning the plaintiff. It might be thought, therefore, that, in any event, this warranted or required some investigation of the actual intention of the publisher. But his liability depends upon mere communication of the defamatory matter to a third person. The communication may be quite unintentional, and the publisher may be unaware of the defamatory matter."

152 The likelihood of an appellant's post resulting in defamatory or inappropriate third-party comment was the subject of cross-examination before the learned primary judge²⁵⁶. The appellants agreed that "controversial comments could occasionally (although rarely) be excited by wholly innocuous postings"²⁵⁷. In the case of Australian News Channel, it was found that it made no assessment of the likely reaction to its Facebook posts and that "nothing specific is done" for the risk of "intolerant and irresponsible" third-party comments²⁵⁸. That company's primary purpose of posting was to interest readers and have them gain access to its digital publications of the news²⁵⁹. In the case of one post about the respondent, Nationwide

254 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [14] per Rothman J.

255 (1934) 51 CLR 276 at 288.

256 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [59] per Rothman J.

257 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [59] per Rothman J.

258 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [62], [64] per Rothman J. However, Australian News Channel did assess the risk associated with the content of particular stories on the persons featured as published on its digital news website: at [60].

259 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [60] per Rothman J. Evidence was also given of the same commercial purpose for Nationwide News and Fairfax Media: at [68], [79].

News accepted that the making of third-party defamatory comments in response was a "thoroughly predictable" result²⁶⁰. In respect of another Facebook page administered by Nationwide News, it was agreed that a post concerning the respondent's story "was an emotive issue that could and did trigger very strong positions on both sides, including quite unreasonable positions"²⁶¹. Ultimately, the primary judge made, amongst others, the following unchallenged factual findings²⁶²:

- "(xi) Certain initial posts by the media outlet would be expected to excite adverse comment about a person who is the subject of the post, including comment that is unreasonable, factually incorrect and damaging to the reputation of the person involved;
- (xii) The publications of these relevant original posts by the media companies (ie posts to which the comments alleged to be defamatory relate), if any assessment were to have been made (which it was not), would have been assessed as likely (ie more probably than not) to give rise to nasty and defamatory comments".

153 The reference to "[c]ertain initial posts" is, it would appear, only to those posts which would reasonably be expected to provoke defamatory comments. Plainly, not all of the appellants' posts fell into this category.

Relevance of intention

154 Whilst it has been said that the tort of defamation is one of strict liability²⁶³, concepts of knowledge and control, and attributed knowledge and control, have long intruded. Four examples illustrate that proposition.

155 First, appreciating the harshness of the application of the tort to a subsidiary publisher, the common law of defamation has recognised, from at least

260 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [76]-[77] per Rothman J. Similarly, Australian News Channel accepted that one of its posts was "likely to provoke comments": at [61].

261 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [84] per Rothman J.

262 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [90] per Rothman J.

263 See, eg, *Lee v Wilson & Mackinnon* (1934) 51 CLR 276 at 288 per Dixon J; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 600 [25] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

1885, the defence of innocent dissemination²⁶⁴. This defence applies where a subsidiary publisher can show that they did not know, and by the exercise of reasonable care in all the circumstances could not have known, that the thing disseminated by them contained defamatory material²⁶⁵. The defence is now found in s 32 of the *Defamation Act 2005* (NSW).

156 Secondly, issues of knowledge and control are also relevant in determining whether a person is a subsidiary publisher or subordinate distributor (being the term used in the *Defamation Act*²⁶⁶), or a first or main distributor²⁶⁷. In the case of the *Defamation Act*, part of the test for being a subordinate distributor is whether a person had "any capacity to exercise editorial control over the content" of what had been published²⁶⁸. At common law, a person was a first or main publisher if she or he had sufficient knowledge and control over what was to be communicated²⁶⁹. As Ribeiro PJ said in *Oriental Press Group Ltd v Fevaworks Solutions Ltd*, a person will be a first or main publisher if²⁷⁰:

"(i) ... [she or he] knows or can easily acquire knowledge of the content of the article being published (although not necessarily of its defamatory nature as a matter of law); and (ii) ... [she or he] has a realistic ability to

264 *Emmens v Pottle* (1885) 16 QBD 354 at 357 per Lord Esher MR (Cotton LJ agreeing), 358 per Bowen LJ; *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170 at 176 per A L Smith LJ, 178 per Vaughan Williams LJ, 180 per Romer LJ.

265 *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at 380-381 [29] per Ribeiro PJ (Ma CJ, Chan PJ and Litton and Gleeson NPJJ agreeing).

266 *Defamation Act 2005* (NSW), s 32(2).

267 See, eg, *Emmens v Pottle* (1885) 16 QBD 354 at 357 per Lord Esher MR (Cotton LJ agreeing), 358 per Bowen LJ; *Byrne v Deane* [1937] 1 KB 818 at 830 per Greer LJ; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 651-652 [193] per Callinan J; *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at 380 [29] per Ribeiro PJ (Ma CJ, Chan PJ and Litton and Gleeson NPJJ agreeing).

268 *Defamation Act 2005* (NSW), s 32(2)(c).

269 See, eg, *Emmens v Pottle* (1885) 16 QBD 354 at 357 per Lord Esher MR (Cotton LJ agreeing).

270 (2013) 16 HKCFAR 366 at 394-395 [76] (Ma CJ, Chan PJ and Litton and Gleeson NPJJ agreeing).

control publication of such content, in other words, editorial control involving the ability and opportunity to prevent publication of such content."

157 Thirdly, knowledge of the content of a defamatory communication is also relevant to the *Byrne v Deane*²⁷¹ line of cases. As Ribeiro PJ in *Oriental Press* also observed, those cases are authority for the following propositions²⁷²:

- "(a) Where a third person writes or affixes a statement defamatory of the plaintiff on the occupier's property without the occupier's knowledge, the occupier is not treated as a publisher of that statement prior to [her or his] becoming aware of it.
- (b) Once the occupier discovers its existence, [she or he] may be treated as a publisher but only if, having the power to do so, [she or he] does not remove or obliterate the offending statement in circumstances which justify inferring as a matter of fact that by [her or his] inaction [she or he] has consented to or ratified its continued publication.
- (c) Where the occupier becomes aware of the libel but the circumstances show that removal or obliteration is very difficult or very expensive, the fact that the defamatory statement is not expunged may well not justify the inference that it remains in place with [her or his] approval."

158 Fourthly, a lack of control can be relevant in determining whether a person participated in the publication of third-party defamatory material. *Crookes v Newton*²⁷³ concerned Mr Newton's publication on his website of hyperlinks to third-party websites. Those other websites contained defamatory material concerning the appellants. The Supreme Court of Canada decided that Mr Newton had not published that defamatory material. His lack of control over the content of the other websites was important to the conclusion reached by the plurality. Abella J,

271 [1937] 1 KB 818. See, eg, *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports ¶81-127; *Bishop v New South Wales* [2000] NSWSC 1042.

272 *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at 385-386 [44] (Ma CJ, Chan PJ and Litton and Gleeson NPJJ agreeing).

273 [2011] 3 SCR 269.

57.

delivering the judgment of Binnie, LeBel, Charron, Rothstein and Cromwell JJ and herself, reasoned that hyperlinks are just references and said²⁷⁴:

"A reference to other content is fundamentally different from other acts involved in publication. *Referencing on its own does not involve exerting control over the content.* Communicating something is very different from merely communicating that something exists or where it exists. The former involves dissemination of the content, and suggests control over both the content and whether the content will reach an audience at all, while the latter does not. Even where the goal of the person referring to a defamatory publication is to expand that publication's audience, his or her participation is merely ancillary to that of the initial publisher: with or without the reference, the allegedly defamatory information has already been made available to the public by the initial publisher or publishers' acts. These features of references distinguish them from acts in the publication process like creating or posting the defamatory publication, and from repetition." (emphasis added)

159 The plurality was of the view that its conclusion accorded with the "dramatic transformation in the technology of communications"²⁷⁵. And, further, it avoided a "potential 'chill' in how the Internet functions ... since primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control"²⁷⁶.

160 Deschamps J in *Crookes* was of the view that publication requires "deliberate acts"²⁷⁷. This comes close to the case presented by the appellants here. Her Honour said²⁷⁸:

"It should be plain that not *every* act that makes the defamatory information available to a third party in a comprehensible form might ultimately constitute publication. The plaintiff must show that the act is deliberate. This requires showing that the defendant played more than a

274 *Crookes v Newton* [2011] 3 SCR 269 at 285 [26].

275 *Crookes v Newton* [2011] 3 SCR 269 at 287 [33] per Abella J (on behalf of Binnie, LeBel, Charron, Rothstein and Cromwell JJ).

276 *Crookes v Newton* [2011] 3 SCR 269 at 289 [36] per Abella J (on behalf of Binnie, LeBel, Charron, Rothstein and Cromwell JJ).

277 *Crookes v Newton* [2011] 3 SCR 269 at 297 [59] (emphasis in original).

278 *Crookes v Newton* [2011] 3 SCR 269 at 311 [91].

passive instrumental role in making the information available." (emphasis in original)

161 In contrast, in *Visscher v Maritime Union of Australia [No 6]*²⁷⁹,
Beech-Jones J decided that the defendant Union was a publisher of defamatory
material when it included on its website a hyperlink to a defamatory article. That
hyperlink comprised these words: "READ FULL STORY". In the circumstances, it
was found that the hyperlink amounted to an adoption or promotion of the
defamatory material²⁸⁰.

162 The foregoing intrusions in the tort of defamation are inconsistent with the
appellants' contended-for "intention" test; they exist precisely because there is
otherwise no requirement that there be an intention to publish. Any such test is also
inconsistent with the origins of the tort as one of strict liability. I agree with
Kiefel CJ, Keane and Gleeson JJ that the appellants' contention should be rejected.

Did the appellants publish the third-party comments?

163 However, that is not the end of the matter. The respondent here, as already
mentioned, emphasises that any degree of participation by a person in the act of
conveying defamatory content, however minor, is sufficient to make that person a
publisher. Nonetheless what constitutes participation in an act of publication, or in
an act of making defamatory material "available for ... comprehension"²⁸¹, is
ultimately a question of fact. Care should be taken to recognise that language
invoked in a judgment to express such fact finding is not an expression of any legal
test. Each case must turn on its own facts. In that respect, participation in an act of
publication is a specific example, for the purposes of the tort of defamation, of the
generic test of "common design" or "common intention" applicable to all joint
tortfeasors, as helpfully explained and described in the reasons of Edelman J in this
case. What follows is an application of that test to the particular facts of this case.

164 In the world of printing presses, it was easy to see who physically took
part in the process of, for example, publication of a defamatory article in a
newspaper. It included everyone involved in that process, from the author through to

279 (2014) 98 NSWLR 764.

280 *Visscher v Maritime Union of Australia [No 6]* (2014) 98 NSWLR 764 at 773 [30]
per Beech-Jones J.

281 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 600 [26] per Gleeson CJ,
McHugh, Gummow and Hayne JJ.

the news vendor who sold the first paper to a third party. Thus, in *Webb*, Isaacs J was able to say the following²⁸²:

"In *Parkes v Prescott*[,] *Giffard* QC quotes from the second edition of *Starkie*: 'All who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are to be considered as *principals in the act of publication*: thus if one suggest illegal matter in order that another may write or print it, and that a third may publish it, all are equally amenable for the act of publication when it has been so effected.' In *R v Paine* it is held: 'If one repeat and another write a libel, and a third approve what is wrote, they are all makers of it; *for all persons who concur, and show their assent or approbation to do an unlawful act, are guilty*: so that murdering a man's reputation by a scandalous libel may be compared to murdering his person; for if several are assisting and encouraging a man in the act, though the stroke was given by one, yet all are guilty of homicide.' A little later, in *R v Drake*, that law was reaffirmed. In *The Queen v Cooper* Lord Denman CJ said: 'If a man request another generally to write a libel, he must be answerable for any libel written in pursuance of his request: *he contributes to a misdemeanour and is therefore responsible as a principal*.'" (emphasis of Isaacs J; footnotes omitted)

165

However, it may be more difficult to discern "participation" in a publication in the modern world of the Internet, which has replaced "one-to-many" communications with "many-to-many" communications²⁸³. A key element of modern Internet "platforms", such as Facebook, is the provision of "widespread, democratized, access to media and encouraging participation"²⁸⁴. The act of posting on a public Facebook page starts an electronic conversation, whether long or short, with potentially millions of other Facebook users. A public Facebook page is exposed to receiving potentially thousands of comments from around the world; a Facebook page owner has no actual means of controlling the contents of such comments²⁸⁵.

282 *Webb v Bloch* (1928) 41 CLR 331 at 364.

283 *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at 389-390 [58]-[59] per Ribeiro PJ (Ma CJ, Chan PJ and Litton and Gleeson NPJJ agreeing).

284 *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at 390 [59] per Ribeiro PJ (Ma CJ, Chan PJ and Litton and Gleeson NPJJ agreeing).

285 See [150] above.

166 Two propositions are relevant to the determination of these appeals. First, a person does not participate in the communication or conveyance of defamatory material merely because, "but for" something they did, there would have been no such communication or conveyance. Whilst all publishers should, as it happens, satisfy such a "but for" test, that test is not of itself a sufficient means of identifying who participated in an act of publication²⁸⁶. That explains why, for example, a telephone company was not the publisher of defamatory material when it leased recording equipment that permitted a person to record defamatory accusations, which could then be heard by third parties by dialling certain telephone numbers²⁸⁷. It follows that not every facilitator of a communication or conveyance of defamatory material is necessarily a participant in its publication.

167 Secondly, and consistently with the foregoing, it has emerged in more recent times that some acts that facilitate communication of defamatory material may be "so passive"²⁸⁸ that they cannot constitute publication of that material. Thus, in *Bunt v Tilley*²⁸⁹, internet service providers were not found to be the publishers of defamatory messages which had been posted on websites which used the services of those providers. Playing a merely "passive instrumental role"²⁹⁰ did not constitute participation in publication of the messages. In *Google Inc v Duffy*²⁹¹, Kourakis CJ did not agree that an internet service provider was only a passive provider of a service, but otherwise accepted that such providers were not publishers because what they did was "too remote" from the act of publication. The Chief Justice said²⁹²:

286 *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at 394 [73] per Ribeiro PJ (Ma CJ, Chan PJ and Litton and Gleeson NPJJ agreeing). See also, eg, *Crookes v Newton* [2011] 3 SCR 269 at 311 [91] per Deschamps J; *Tamiz v Google Inc* [2013] 1 WLR 2151 at 2167 [40] per Richards LJ (Lord Dyson MR and Sullivan LJ agreeing); *Google Inc v Duffy* (2017) 129 SASR 304 at 344 [136] per Kourakis CJ (Peek and Hinton JJ agreeing on this point).

287 *Anderson v New York Telephone Company* (1974) 35 NY 2d 746.

288 *Crookes v Newton* [2011] 3 SCR 269 at 283 [21] per Abella J (on behalf of Binnie, LeBel, Charron, Rothstein and Cromwell JJ).

289 [2007] 1 WLR 1243; [2006] 3 All ER 336.

290 *Bunt v Tilley* [2007] 1 WLR 1243 at 1249 [23] per Eady J; [2006] 3 All ER 336 at 342.

291 (2017) 129 SASR 304.

292 *Google Inc v Duffy* (2017) 129 SASR 304 at 344 [139] (Peek and Hinton JJ agreeing).

61.

"The provision of an electronic protocol which allows a user access to the internet from his or her device plays no part in the selection of the particular information which is extracted from it. Moreover, an [internet service provider] has no practical capacity to control or limit the information obtained at the granular level needed to block particular statements or limit the information. The connection to the World Wide Web provided by [internet service providers] is too remote from the publication of written material on the computer screens of users to be a publication even as a secondary participant."

168

In *Metropolitan International Schools Ltd v Designtecnica Corpn*²⁹³ it was held that Google Inc was not a publisher when a search carried out by a user of its search engine resulted in the production of defamatory material. That was because the search was "performed automatically" without "human input"²⁹⁴. A different view was expressed by Beach J in *Trkulja v Google Inc LLC [No 5]*²⁹⁵. His Honour observed that internet search engines "operate precisely as intended by those who own them"²⁹⁶. It was on this basis that Kourakis CJ doubted that Google Inc offered only a passive service in making its search engine available to users of the Internet²⁹⁷. It has since been accepted by this Court that Beach J's observation is "strongly arguable"²⁹⁸. This conclusion follows from the proximate causative link between the application of Google's search engine and the resulting publication of defamatory content in the search results. In this way, it can be seen that Google Inc is an actual conveyor of such content. That publication of such material is a "direct consequence"²⁹⁹ of the application of the search engine. Accordingly, participation

293 [2011] 1 WLR 1743; [2010] 3 All ER 548.

294 *Metropolitan International Schools Ltd v Designtecnica Corpn* [2011] 1 WLR 1743 at 1757 [50] per Eady J; [2010] 3 All ER 548 at 561.

295 [2012] VSC 533.

296 *Trkulja v Google Inc LLC [No 5]* [2012] VSC 533 at [27]; cf *Rana v Google Australia Pty Ltd* [2013] FCA 60.

297 *Google Inc v Duffy* (2017) 129 SASR 304 at 352 [155] (Peek and Hinton JJ agreeing on this point).

298 *Trkulja v Google LLC* (2018) 263 CLR 149 at 163 [38] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ. See also *Trkulja v Google Inc* [2015] VSC 635 at [47] per McDonald J; cf *Google LLC v Trkulja* (2016) 342 ALR 504 at 590 [348] per Ashley, Ferguson and McLeish JJA.

299 *Trkulja v Google Inc* [2015] VSC 635 at [45] per McDonald J.

of this kind, in the means of communicating defamatory material, cannot be characterised as passive in nature.

169 In contrast to the position of an internet service provider³⁰⁰, or to that of the person who publishes hyperlinks on a website³⁰¹, the providers, administrators and managers of a website, which hosted a popular Internet discussion forum, were found to be publishers of defamatory statements posted by third-party users of that forum³⁰². The owners of that forum were found to have "played an active role in encouraging and facilitating the multitude of Internet postings by members of their forum"³⁰³. Those owners had designed the forum; they devised the rules for the forum and otherwise laid down the conditions for becoming a member and for making posts; they provided members with access to discussion threads developed on their forum; they employed administrators to monitor discussions and to delete posts that broke their rules; and they derived income from advertisements placed on their website³⁰⁴. However, the Hong Kong Court of Final Appeal ultimately decided that the owners were subordinate, and not main or first, publishers of the third-party posts³⁰⁵.

170 Returning to *Duffy*, the issue before the Full Court of the Supreme Court of South Australia was whether Google Inc was a subsidiary publisher when its search engine was used and defamatory material was produced³⁰⁶. Kourakis CJ correctly observed that a key issue is the extent to which an electronic program facilitates the production of defamatory material³⁰⁷. Internet forum hosts, like the

300 See, eg, *Bunt v Tilley* [2007] 1 WLR 1243; [2006] 3 All ER 336.

301 See, eg, *Crookes v Newton* [2011] 3 SCR 269.

302 *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366.

303 *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at 387 [51] per Ribeiro PJ (Ma CJ, Chan PJ and Litton and Gleeson NPJJ agreeing).

304 *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at 387 [51] per Ribeiro PJ (Ma CJ, Chan PJ and Litton and Gleeson NPJJ agreeing).

305 *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at 399 [89], 406 [113] per Ribeiro PJ (Ma CJ, Chan PJ and Litton and Gleeson NPJJ agreeing).

306 *Google Inc v Duffy* (2017) 129 SASR 304 at 352 [158], 359 [184] per Kourakis CJ, 401 [354] per Peek J, 467 [597] per Hinton J.

307 *Google Inc v Duffy* (2017) 129 SASR 304 at 344-345 [140] (Peek and Hinton JJ agreeing on this point).

63.

defendants in *Oriental Press*, have been held to be publishers of third-party material posted on their websites because of their greater involvement in procuring and controlling the making of such comments, thus evidencing the existence of a more direct connection between those hosts and those posts³⁰⁸. His Honour explained that connection as follows³⁰⁹:

"Webpage masters of internet forums or web-based bulletin sites which receive communications electronically but then make them readable in an organised manner by visitors to their webpages are in a very different position. Hosts of those webpages more closely facilitate the publication of material, on their sites because:

- they invite communications on a particular subject matter (indeed, comment and discussion is the very purpose of such sites);
- they have a greater capacity to read both by virtue of the form it is in and the more limited quantity of material they receive in comparison to the data for which telecommunications cable provider [sic] or an [internet service provider] is a conduit; and
- they have a practical capacity to control the content of their website."

171

A similar conclusion (expressed with some doubt) was reached by the Court of Appeal for England and Wales in *Tamiz v Google Inc*³¹⁰ in relation to defamatory material posted on a blog hosted on a blogging platform provided by Google Inc. The provision of this platform was said to be analogous to a noticeboard controlled by Google Inc. Richards LJ observed³¹¹:

"The provision of a platform for the blogs is equivalent to the provision of a notice board; and Google Inc goes further than this by providing tools to help a blogger design the layout of his part of the notice board and by providing a service that enables a blogger to display advertisements

308 See, eg, *Godfrey v Demon Internet Ltd* [2001] QB 201; *Metropolitan International Schools Ltd v Designtecnica Corpn* [2011] 1 WLR 1743; [2010] 3 All ER 548.

309 *Google Inc v Duffy* (2017) 129 SASR 304 at 345 [141] (Peek and Hinton JJ agreeing).

310 [2013] 1 WLR 2151.

311 *Tamiz v Google Inc* [2013] 1 WLR 2151 at 2165 [33] (Lord Dyson MR and Sullivan LJ agreeing); cf *Google Inc v Duffy* (2017) 129 SASR 304.

alongside the notices on his part of the notice board. Most importantly, it makes the notice board available to bloggers on terms of its own choice and it can readily remove or block access to any notice that does not comply with those terms."

172 But even then, and contrary to the reasons in *Duffy*, Richards LJ was not satisfied that Google Inc could be a secondary publisher of third-party defamatory material unless Google Inc had been notified of the presence of that material *and* then failed to remove that material within a reasonable period of time³¹². It is unnecessary to determine whether that conclusion is correct.

173 The foregoing cases suggest that concepts of passivity, control and prior knowledge of defamatory content may be relevant to a factual determination as to whether a person has participated in the publication of a third party's defamatory post or comment on Facebook. It will be difficult to conclude, as a factual proposition, that such a person has so participated if they could not practicably control the making of such a defamatory post, had no prior knowledge of the content of that post, and did no more than participate in an electronic conversation using Facebook. In other words, the mere act of posting by a Facebook page administrator is unlikely to justify, in and of itself, the factual conclusion that the administrator has thereby participated in the publication of all subsequent responses. More is needed to be a publisher.

174 Relevantly here, different considerations arise if it can be said that the Facebook page administrator procured, provoked or conduced the defamatory third-party response as distinct from any generally responsive posts. In those circumstances, and consistently with the observations of Isaacs J in *Webb*, there will be a more direct causative relationship between the administrator's post and the resulting third-party defamatory comment. In such cases, a factual conclusion of participation in the publication of the defamatory comment is more likely to be justified. Such a conclusion involves no modification of the law, but is merely an expression of its application to the specific facts of this case.

175 No doubt there are many ways in which a Facebook page owner might be found, on the facts of a given case, to be a publisher of third-party posts or comments. For example, in a different statutory context, the Federal Court of Australia has decided that a Facebook page owner was the publisher of third-party

312 *Tamiz v Google Inc* [2013] 1 WLR 2151 at 2165-2166 [34]-[36] (Lord Dyson MR and Sullivan LJ agreeing).

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posts when it acquired knowledge of the posts and decided not to remove them³¹³. The Court applied the *Byrne v Deane* line of cases.

176 The appellants here were not in the same position as the platform hosts in *Oriental Press* and *Tamiz*. That is because they were in the same position as all other public Facebook users. The appellants, to use the analogy from *Tamiz*, were users of Facebook's noticeboard and not their own noticeboard³¹⁴. They owned no electronic program that caused or facilitated the publication of third-party comments; Facebook owned that program. They were also not in the same position as Google; they did not convey the third-party comments. Instead, the appellants used a system devised, designed and controlled (to an extent) by Facebook itself, and were subject to Facebook's conditions of use like all other users. An aspect of Facebook's control was described by the primary judge as follows³¹⁵:

"As is common knowledge, Facebook and other social media utilise algorithms that measure the relevance of articles and correlate the articles with the comment. In relation to Facebook pages (including public Facebook pages), the algorithm utilises, as one criterion, the incidence of persons gaining access to a particular comment or article. Mr Shelley detailed examples of how the outcome operates, albeit in circumstances where the algorithm itself is commercially sensitive and not available, even to experts.

Essentially, Facebook measures the number of persons who show interest in the content (by, for example, liking an article, or sharing an article, or making comment on an article) and assesses a 'genus' of the persons who show interest. It then publishes the article to all persons within that genus.

The same process occurs, for a public Facebook page of the kind with which the Court is here dealing in each of the three proceedings. Further, the content on Facebook may be searched and one could, if one were so minded, search for the plaintiff's name and the Facebook entries in relation to the plaintiff would be discovered."

313 *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd [No 2]* (2011) 192 FCR 34 at 42 [33] per Finkelstein J.

314 *Tamiz v Google Inc* [2013] 1 WLR 2151 at 2165 [33] per Richards LJ (Lord Dyson MR and Sullivan LJ agreeing); cf *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at 387-388 [53] per Ribeiro PJ (Ma CJ, Chan PJ and Litton and Gleeson NPJJ agreeing).

315 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [16]-[18].

177 Save in the case of posts that procure, provoke or conduce the making of defamatory responses, the appellants only facilitated the publication of the third-party comments in two ways: first, by creating their own Facebook pages; and secondly, by making their own posts. Neither, whether considered separately or cumulatively, made the appellants publishers of *all* third-party comments made on their respective Facebook pages. The creation of a Facebook page gives the page administrator the ability to make posts, filter out words, control – to an extent – third-party comments after they have been made (ie, by deleting or hiding posts or by banning other users), and irreversibly block, in advance, all comments. The subsequent ability to hide or control comments is not relevant to this case; as previously noted, the respondent does not contend that this is a case whereby the appellants have become publishers by reason of their failure to delete defamatory material within a reasonable time³¹⁶. The ability to block all comments in advance or filter out certain words with the effect of blocking comments caught by the filter in advance is also irrelevant. That is because these have the effect of preventing, rather than causing, publication.

178 This leaves the ability for the Facebook page administrator to make posts. Undoubtedly, these were made generally for the purpose of stimulating or inspiring the making of responsive comments by third parties. However, that of itself is not enough to permit the conclusion that the appellants participated, in some fashion, in the publication of those responses. This is not a case where it can be said that the appellants' conduct in every case of posting amounted to procuring, encouraging or conducting the posting of defamatory responses³¹⁷. Nor is this a case where, at the very moment of third-party posting, it could be said that the appellants assented to, or in some way adopted, the contents of such posts. Rather, Facebook here has provided a means to have a public conversation, which takes place electronically, using its platform; it is a public meeting that takes place on the Internet. The convenor of a public meeting, however, is not the publisher of another person's speech, unless she or he in some way contributed to its making or in some way

316 cf *Byrne v Deane* [1937] 1 KB 818 at 830 per Greer LJ. See also *Tamiz v Google Inc* [2013] 1 WLR 2151 at 2165-2166 [33]-[36] per Richards LJ (Lord Dyson MR and Sullivan LJ agreeing).

317 cf *Pritchard v Van Nes* 2016 BCSC 686.

67.

assented to it³¹⁸. As the New Zealand Court of Appeal observed in a case concerning the publication of third-party comments on a person's Facebook page³¹⁹:

"[T]he most appropriate analogy in the present case is that of a public meeting. If Mr Murray had convened a public meeting on the subject of Mr Wishart's book, Mr Murray would have been liable for his own statements at the meeting but not for those of others who spoke at the meeting, unless he adopted others' statements himself. ... [T]his is a useful analogy because it incorporates a factor in the present case ... the fact that Mr Murray solicited third party comments about Mr Wishart's book. Speakers at a public meeting could be identified (and sued) if they made defamatory statements just as many contributors to the Facebook page could be. That is another common factor.

We acknowledge there are obvious differences between the present case and a public meeting. For example, statements at a meeting would be oral and therefore ephemeral unlike the written comments on the Facebook page.

The public meeting analogy does illustrate a situation where even if a person incites defamation, he or she will not necessarily be liable for defamatory statements made by others. That is the case even if he or she ought to have known that defamatory comments could be made by those present at the meeting."

179

It follows, and again save for those posts that procured, provoked or conduced defamatory responses, that the appellants' posts here were insufficiently connected to all the third-party comments made thereafter in response, to justify a conclusion that the appellants participated in their publication; the appellants' posts cannot be characterised as "instrumental"³²⁰ in the bringing about of such publication. That overstates the role played by each of the appellants. The appellants' posts are just the commencement of an electronic conversation. They are no more "instrumental" in making "available" future comments, than the first third-party comment is "instrumental" to the subsequent appearance of all third-party comments then made in response to it.

318 *Murray v Wishart* [2014] 3 NZLR 722 at 750 [132] per O'Regan P and Ellen France J (French J agreeing).

319 *Murray v Wishart* [2014] 3 NZLR 722 at 750-751 [132]-[134] per O'Regan P and Ellen France J (French J agreeing).

320 cf *Fairfax Media Publications Pty Ltd v Voller* (2020) 380 ALR 700 at 725 [111] per Meagher JA and Simpson A-JA.

180 In that respect, I respectfully disagree with the view of the learned primary judge. His Honour was of the view that "if an author of a comment, which is defamatory, were to post that comment on a public Facebook page, publication occurs by virtue of the fact that the owner of the public Facebook page allows access to the comment by the publication of the page and allows access by other third-party users to the comments on the page"³²¹. In the case of a public, but not a private, Facebook page, I accept that when a post takes place, in most cases it is in the hope of prompting some response. But, for the reasons already given, merely allowing third-party access to one's Facebook page is, of itself, insufficient to justify a factual conclusion that the Facebook page owner participated in the publication of all the third-party comments posted thereafter. Were it not so, all Facebook page owners, whether public or private, would be publishers of third-party comments posted on their Facebook pages, even those which were unwanted, unsolicited and entirely unpredicted. Indeed, it might extend to cases where a Facebook page is hacked and then has posted on it entirely unwelcome, uninvited and vile defamatory comments, whether by the hacker or in response to a post made by the hacker. It might also render Facebook itself, at common law, the publisher of all posts made on Facebook³²². It follows, and leaving aside cases in which a third-party comment is adopted by a Facebook page owner, that there must be something about the content, nature or circumstances of a Facebook post that justifies a conclusion that it has procured, provoked or conduced a defamatory third-party comment or comments, such as to make the owner the publisher of such comments.

181 Nothing otherwise turns upon the fact that each appellant, according to Facebook's Statement of Rights and Responsibilities, owned the content and information they posted on Facebook³²³. Whatever ownership might mean in that context, it did not render the appellants publishers of third-party comments from the moment they were posted. Nor does the concept of "hosting" a Facebook page appear to have any significance. Each appellant engaged with Facebook in the same way as other Facebook users.

182 The other matters relied upon by the respondent, as evidence of participation in the publication of the third-party comments, do not justify a contrary

321 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [106] per Rothman J.

322 Noting that this observation expresses no view on the applicability or otherwise of cl 91 of Sch 5 to the *Broadcasting Services Act 1992* (Cth) to this case: cf *Fairfax Media Publications Pty Ltd v Voller* (2020) 380 ALR 700 at 716-717 [62]-[69] per Meagher JA and Simpson A-JA.

323 *Fairfax Media Publications Pty Ltd v Voller* (2020) 380 ALR 700 at 719 [81] per Meagher JA and Simpson A-JA.

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conclusion. The fact that the appellants' monitoring of third-party comments takes place after a comment has been made³²⁴, means it can have no causative relationship with the act of posting. At most, that monitoring might lead to the deletion or hiding of a post, but only after it has been made³²⁵. Nor does the fact that the appellants were pursuing their commercial and financial interests make any difference to the outcome here. The pursuit of such interests supplies a motive and increases the likelihood that each appellant will make posts that will lead to greater third-party engagement. But the issue as to whether the appellants are publishers of the third-party Facebook user comments cannot turn upon the number of posts made and does not, without more, bear upon the relationship between any given post and any given comment.

183 However, different considerations would arise in relation to Facebook posts that are likely to provoke or procure adverse third-party comments. Where such posts in fact procure defamatory comments, the Facebook page owner will have participated in their publication. Thus, in *Pritchard v Van Nes*, by reason of the inflammatory and defamatory nature of Ms Van Nes' posts on her own Facebook page, and the particular circumstances of the case, it was found that she "ought to have anticipated" that further defamatory third-party comments would then be made³²⁶. Ms Van Nes was thus the publisher of those comments.

184 It will be a question of fact whether a given initial post has procured a third-party Facebook user to post a defamatory response. Here, the finding below was that only "certain" posts were potentially of this kind³²⁷. The circumstances in

324 However, to monitor every third-party comment made in response was described as "physically impossible" and is necessarily made more difficult through the presence of "sub-threads of comments" and because third-party engagement can be delayed in the sense of it occurring "many days after the initial post by the Administrator": *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [39]-[40] per Rothman J.

325 Although it was conceded that the monitoring of third-party comments can occur in advance (see [150] above), this was not done by any of the appellants. In that respect, it was also said this "would require a disproportionate amount of effort to the number of occasions that users have been blocked or comments deleted or hidden": *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [54] per Rothman J.

326 2016 BCSC 686 at [110]-[113] per Saunders J.

327 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [77], [90(xi)], [225] per Rothman J.

which those posts were made were that they were both "expected"³²⁸ and objectively "likely"³²⁹ to give rise to adverse comments. They thus exhibited a sufficient connection with those comments to justify a finding that the appellants had procured, provoked or conduced their making and that each was thus a publisher of them. (Whether those comments are defamatory is a matter that is yet to be decided.) In that respect, leaving aside the finding made below about expectation, it was sufficient that it was objectively likely that the posts would lead to the making of third-party adverse comments. But otherwise, and on the facts as found in this case, the appellants were not the publishers of *all other* third-party comments made on their respective Facebook pages.

185 The foregoing position of the appellants may be contrasted with that of the defendant Channel 7 in *Thompson v Australian Capital Television Pty Ltd*³³⁰. That case concerned the live transmission by Channel 7 in Canberra of a current affairs television program produced by Channel 9 in Sydney. The program was transmitted to Channel 7 by Channel 9. It included a live interview of a woman who made defamatory remarks about her father. Whilst Channel 7 had not produced the program, it was found that it had the ability to control and supervise the televised material³³¹. Channel 7 had also decided that the broadcast be "near instantaneous" in circumstances where "a live to air current affairs program carries a high risk of defamatory statements being made"³³². On those facts, this Court decided that Channel 7 was, together with Channel 9, a publisher of the defamatory remarks; the two broadcasters were joint tortfeasors because there had been "a concurrence in the act or acts causing damage"³³³. The position of the appellants here is distinguishable for the following reasons. First, Channel 7 was the actual conveyer of the defamatory material by its act of broadcasting; in contrast, for the reasons already given, as users of Facebook, the appellants are not the actual conveyers of third-party comments posted to their respective Facebook pages. Secondly, the

328 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [90(xi)] per Rothman J.

329 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 at [90(xii)] per Rothman J.

330 (1996) 186 CLR 574.

331 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 589 per Brennan CJ, Dawson and Toohey JJ.

332 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 590 per Brennan CJ, Dawson and Toohey JJ.

333 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 580-581 per Brennan CJ, Dawson and Toohey JJ, quoting *The Koursk* [1924] P 140 at 159-160 per Sargant LJ.

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appellants did not possess the equivalent of Channel 7's capacity to "control and supervise" the publication of the material. Thirdly, save in the case of the "certain" posts described above, it cannot be said that using Facebook in the ordinary course necessarily carries with it "a high risk" of defamatory third-party comments being posted.

186 I would allow the appeals in part and would answer the question posed on the facts of this case as follows:

The respondent will establish the publication element of the cause of action of defamation in relation to those third-party comments which had been procured, provoked or conducted by posts made by the appellants on their respective Facebook pages.