Australian High Court sets dangerous precedent on social media and defamation

Oscar Grenfell
13 September 2021

In a ruling last Wednesday, Australia's High Court held news companies liable for third-party comments on their social media pages.

The decision by the country's supreme judicial body establishes a dangerous precedent, which could be deployed not only against media corporations, but also political parties, alternative publishers and even private individuals. The ruling will curtail online discussion amid a broader campaign of internet censorship by governments and the ruling elites internationally.

The judgment was made in response to an appeal by several media conglomerates, including Nationwide News and Nine Entertainment. They challenged rulings in lower courts which declared them to be the publishers of all comments on their Facebook pages, including those they did not author, and therefore subject to defamation proceedings based on their content.

The High Court ruling is part of a defamation action brought by Dylan Voller against the *Sydney Morning Herald*, now owned by Nine, as well as Sky News Australia and Nationwide News' *Centralian Advocate* and *Australian* newspapers.

Voller, a young Aboriginal man, came to prominence in 2016 when the Australian Broadcasting Corporation published a "Four Corners" documentary, exposing the brutal and violent mistreatment to which he and other child prisoners were subjected at the Don Dale Youth Detention Centre in the Northern Territory. Voller has courageously campaigned against the horrific conditions in the facility and others like it, and the broader police persecution of Aboriginal people. Like many other Aboriginal public figures, he has been subjected to racist and bigoted abuse online.

In 2017, Voller's lawyers initiated proceedings against the media companies, alleging that he had been defamed in comments on their Facebook pages. Hearings since have centred on whether the news companies could be considered publishers of the comments. With the High Court ruling ending any avenues of appeal on this issue, future proceedings will focus on the comments themselves. The media corporations have very limited grounds of defence under Australia's defamation laws, which are among the most stringent in the world.

The implications of last week's ruling go far beyond the potential financial consequences for the multi-billion dollar media conglomerates. The High Court effectively declared the owners of any social media pages in Australia liable for defamation, based on content that they have little-to-no control over.

Significantly, Voller's lawyers did not allege that the companies failed to remove the offending comments when notified of them. Prior to Voller's case, legal precedent was that organisations could be held liable as publishers of such third-party comments only if they were given notice, and failed to take action.

At the time the comments were posted, moreover, it was not technically possible for the owners of Facebook pages to disable comment sections beneath their postings entirely, meaning that even if they wanted to, they could not prevent third-party individuals from publishing content on their pages.

In their High Court appeal, the media companies argued that to be held liable as the publishers of the comments, they had to know of the defamatory material and intend it to be conveyed. By contrast, Voller's lawyers argued: "Any degree of participation in that process of communication, however minor, makes the participant a publisher."

In a 5-2 ruling, the judges accepted this argument, essentially declaring blanket liability for the owner of a

Facebook page or other social media account for any comments posted on them.

The majority judges issued two concurring rulings. In theirs, Justices Gaegler and Gordon cited common law precedent for publishing liability, including cases that occurred decades before the invention of the internet, going back to 1928. These included printers being held liable for defamation and servants for carrying defamatory material on behalf of their masters. The judges asserted that the transformational character of the internet did not "warrant relaxation" of these common law precedents.

They stated that the attempts of the media companies 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."

The other majority judges, Justices Kiefel, Keane and Gleeson, declared: "The Court of Appeal was correct to hold that the acts of the [media outlets] in facilitating, encouraging and thereby assisting the posting of comments by the third-party Facebook users rendered them publishers of those comments." The Court of Appeal essentially ruled that the very act of having a Facebook page encouraged and assisted the publication of comments, including those potentially defamatory.

The two High Court minority judgments pointed to the wider dangers of the ruling. Justice Edelman said a media organisation could be held liable for a third-party comment only if the relationship between its story and the offending statements was more than "tenuous or remote." He cited a scenario of a media organisation publishing a story about the weather, only to have a comment posted beneath about a completely unrelated topic. Justice Steward argued that a media company could be held liable only for content that it "procured, provoked or conduced."

The precedent that has been established applies to all Facebook pages, social media accounts, websites and other online platforms, opening up thousands of organisations to possible defamation action.

People making defamatory statements online frequently seek to hide their identity. This raises the clear danger of individuals making defamatory comments to try to provoke lawsuits against organisations to which they are hostile, for political, commercial or other reasons.

Smaller organisations, without the financial resources that enable the media conglomerates to withstand the consequences of defamation actions, are particularly vulnerable.

Many organisations, including media outlets, are likely to now disable commenting functions on their pages, or employ strict moderation criteria to remove comments considered controversial. Because social media platforms are the primary centres of political discussion and debate, this would limit the ability of millions of people to engage with news developments and political issues.

The judgment was handed down in a broader political climate in which governments and the ruling elites are seeking to curtail online discussion in the face of mass popular opposition to the criminal, pro-business response to the pandemic, mounting social inequality, authoritarianism and the threat of war.

Since 2017, companies such as Facebook and Google have imposed sweeping censorship measures, targeting socialist and alternative publications, including the *World Socialist Web Site*. This campaign, conducted under the fraudulent banner of combating "fake news" and promoting "authoritative content," has been carried out at the behest of the US and other governments.

Governments are also intensifying their use of social media to conduct mass surveillance against the population. In the latest example, late last month Labor joined with the federal Coalition government to pass sweeping legislation, allowing the police to "disrupt" online data by modifying, copying, adding or deleting it, to collect intelligence from devices or networks, and to take over online accounts to gather information.