

## UNSOCIAL MEDIA: DEFAMATION AND SOCIAL MEDIA IN AUSTRALIA

### *Introduction*

Since the launch of Facebook in 2004, the utility of social media has dramatically evolved and it is now undoubtedly considered to be an advertising juggernaut, for both commercial and personal benefit. Other platforms such as Twitter and Instagram have quickly risen to meet demand and it is now almost mandatory that public figures and businesses maintain an online presence. These platforms allow users to develop their own valuable brands through instant engagement with other users and the opportunity for exposure to a truly global audience. Furthermore, at the core of the advertising revolution is that users can tailor a comment to a specific section of the online community, based on for example, a person's age, location, interests or occupation.

The unfettered access to these platforms means that any member of the online community is afforded the same opportunity to engage with a global audience and consequently, directly impact upon one's brand or reputation. It is abundantly clear that many of these same features that have made these platforms so successful also allow members of the public to defame with unprecedented efficiency and precision. While the law at this time does not appear to distinguish between a defamatory statement on social media and a defamatory statement published in mainstream media, it is obvious that technological developments and changing societal norms are posing unique challenges for defamation law.

This article will navigate some of the legal principles that are being established in Australia in this emerging area and outline how the courts are assessing the unique features of social media and the potential consequences of taunting others online.

## ***Is anyone actually reading?***

In the notable recent case of *Hockey v Fairfax Media Publications Pty Ltd*,<sup>1</sup> Treasurer Joe Hockey (**Hockey**) was successful in his defamation case against Fairfax Media (**Fairfax**). Hockey issued proceedings against Fairfax for defamation over a collection of articles, tweets and advertising banners which appeared beneath the provocative headline “*Treasurer for Sale*” in two Fairfax newspapers. Hockey argued that this headline indicated to the public that the Treasurer could be bought, which was tantamount to an allegation of corruption.<sup>2</sup>

Federal Court Justice Richard White presided over the matter and found that in the context of the news article, the headline did not defame Hockey. However, counsel for Hockey submitted that a tweet should be regarded as a discrete publication and its defamatory meaning determined in isolation.<sup>3</sup>

The case of *World Hosts Pty Ltd v Mirror Newspapers Ltd*,<sup>4</sup> which dealt with advertising placards, guided much of the analysis as to whether the tweet was a stand-alone publication. In that case Glass JA said that “*posters stand in a special position, for the obvious reason that they are published to many persons who do not read the newspaper itself*”.<sup>5</sup> The reasoning in *Pedavoli v Fairfax Media Publications Pty Ltd*<sup>6</sup> was also considered, in which McCallum J rejected the likeness of a billboard and a tweet, stating at [60] that:

*A billboard advertises the newspaper but it does not provide access to any part of it. Twitter provides access to particular articles by sending a link to followers of the relevant Twitter account. It is a way of disseminating material to a wider audience, an audience which is unlikely to overlap completely with those who buy or subscribe to the news- paper in other forms.*

Unfortunately, White J avoided an at length examination of the comparison between the two mediums, but noted in the assessment of damages that there would have been a large number of persons, perhaps in the tens of thousands, who read the bare tweets and who did not read further.<sup>7</sup> Ultimately, the words “*Treasurer for Sale*”, when produced in isolation on either Twitter or an advertising

placard, were found to have defamatory imputations. Although the debate between the likeness of a tweet and an advertising billboard is likely to continue, the courts seem inclined to give considerable weight to comments made online, in future cases, regardless of the ease in which one can access any qualifications that may exist.

While the court rejected Hockey's claim for aggravated damages, he was awarded damages in the sum of \$120,000 in respect of the advertising placard and an award of \$80,000 in respect of the tweets.<sup>8</sup> The award in respect of the tweet was less partly because it was considered that the tweets are likely to have been read and "*taken in*" by fewer persons than in the case of the placard.<sup>9</sup>

An interesting takeaway from this case was the approach taken by Counsel for Hockey in demonstrating why a tweet and an article should not be considered a single publication. Counsel submitted that at the date of publishing the comments in this case:

- the Age had about 280,000 followers on its Twitter account; and
- only 789 of these had that day downloaded the article headed "Treasurer for Sale: Joe Hockey offers privileged access".

While this approach was not specifically addressed by White J, we foreshadow that similar statistics such as the above may be utilised in future cases regarding comments made together with a hyperlink. Despite this, we consider the effectiveness of this approach may be limited as it implies that each and every follower sees every single post of whoever they are following, which is simply not the case. The inability to measure how many people actually sight a particular tweet is another factor for an already complicated consideration.

## ***Truth by design***

In the Federal Court decision *Madden v Seafolly Pty Ltd*,<sup>10</sup> Seafolly Pty Ltd (an Australian swimwear company) pursued Leah Madden (**Madden**), the owner of White Sands (a clothing label and competitor of Seafolly) for misleading and deceptive conduct in relation to a number of comments published on Facebook.

Madden took issue with eight items of clothing that Seafolly had recently released for sale and made comments on:

- her own personal page, which can be seen by her “friends”;
- The White Sands Facebook page, seen by “friends” of her company; and
- in emails directly to several media outlets.

Madden published messages such as “*Seriously, almost an entire line-line ripoff of my Shipwrecked collection*”<sup>11</sup> as well as a series of images of her own designs side by side with the Seafolly designs, above text which read “*The most sincere form of flattery?*”<sup>12</sup> Madden was adamant that Seafolly had copied her clothing designs and was using social media as a vehicle to present her allegations, with photographic evidence, directly to her followers on Facebook. Instantly, the online community responded with messages of support for White Sands and aversion for Seafolly’s actions.

Seafolly quickly became aware of the posts, published several media releases and brought a case against Madden under s 52 of the *Trade Practices Act 1974* (Cth) (TPA) (now s 18 of Sch 2 of the *Competition and Consumer Act 2010* (Cth)). However, in presiding over the case, the court considered the common law defamation defence of fair comment. This defence seeks to protect the rights of individuals to express their opinions about facts; however it cannot succeed if the publisher misstated the facts on which the opinion was based.<sup>13</sup>

The court explored the example of the experience of dining at a restaurant.<sup>14</sup> By referring to a fact, such as the type of food eaten and the manner in which it was cooked, a food critic allowed the audience to consider whether or not they agreed

with his or her opinion about it.<sup>15</sup> However, if the critic got the facts in their description of them wrong, the common law did not allow them to defend what they said about those “facts” as being a mere opinion.<sup>16</sup>

In this case, Madden’s assertions allegedly stemmed from the fact that an individual named Ms McLaren had met with her on behalf of a swimwear retailer, Sunburn. Ms McLaren viewed a number of Madden’s designs and took photos of those designs. It later came to Madden’s attention that Seafolly were part owners of Sunburn, which was evidence in her mind that Seafolly had copied her designs.

Unfortunately for Madden, six of the eight dresses had been in circulation prior to Ms McClaren’s visit and when she posted the photos of the juxtaposed dresses, she labeled these six dresses with release dates after the release of her own label. The dates when Seafolly’s designs were marketed, were facts, not opinions.<sup>17</sup> Madden got the dates wrong which were the basis upon which she alleged that they had copied her designs and ultimately this led the court to conclude that the defence of fair comment had failed.<sup>18</sup>

The court ultimately held Madden to a very high standard in saying that she failed to make prudent enquiries prior to publishing the posts online.<sup>19</sup> It was said that Madden should have attempted to ascertain the proper release dates, by either contacting Seafolly or inspecting the designs in person.<sup>20</sup> This shows that individuals need to be mindful that despite the lure of being able to publish their thoughts instantaneously, they will not escape the legal standards applied to the traditional forms of communication.

In relation to damages, it was ultimately determined that \$20,000 would be awarded to Seafolly. The court acknowledged that Seafolly had a strong and positive image in the swimwear industry and that reputation was important to it in a highly competitive environment.<sup>21</sup>

We note that while White Sands is obviously a much smaller company, with a much smaller following online, they are a participant in the same competitive environment and Facebook allows them to influence individuals who were not only consumers

of White Sands, but potential consumers of Seafolly also. This demonstrates that individuals looking to air their grievances can immediately impact upon those that generate value for a particular brand. It is clear that social media has given individuals significant power in that regard and this is likely to be a key consideration when assessing damages in social media cases in the future.

### ***The source of the pain***

The case of *Mickle v Farley*<sup>22</sup> led the way in dealing with the impact of taunting via social media, on an individual's reputation. In this case, the court found that Mrs Mickle, a 58 year old, experienced and well regarded school teacher at Orange High School had been defamed by the Twitter and Facebook postings of Mr Farley, a former student at Orange High School. Mr Farley's father was also a teacher at the school, who had left the school in 2008 to attend to personal issues. The court found that Mr Farley bore a grudge against Mrs Mickle based on a mistaken belief that Mrs Mickle had something to do with his father's departure from the school. Due to their being no evidence that this was in fact the case,<sup>23</sup> Mickle was awarded \$105,000 in damages. The court gave considerable weight to the ease in which messages spread online via social media platforms.<sup>24</sup>

In the case of *Dabrowski v Greeuw*,<sup>25</sup> Mr Dabrowski

brought a claim against his former partner Ms Greeuw for an allegedly defamatory post made by Ms Greeuw on her personal Facebook page in December 2012. Mr Dabrowski stated that in December 2012 Ms Greeuw posted an entry saying "*separated from Miro Dabrowski after 18 years suffering domestic violence and abuse. Now fighting the system to keep my children safe*" (**the disputed post**). On the contrary, Ms Greeuw denied that the post had any defamatory imputations and if it was found that they did, she relied upon the defence of justification pursuant to s 25 of the *Defamation Act 2005* (WA).

In *Dabrowski*, at [183] the court acknowledged that:<sup>26</sup>

*to say that a person has for 18 years subjected their partner to domestic violence and abuse and that their children need to be kept safe from that person, tends to diminish the esteem in which that person is held by the community and/or diminish his standing in some respect and would lead an ordinary reasonable person to think lesser of that person and is defamatory.*

The posts were determined to be defamatory and the defence of justification also failed due to Greeuw's failure to adduce independent evidence in support of the alleged domestic violence or abuse. Overall, the court was not required to address the platform of communication in detail until the assessment of damages, and said that:<sup>27</sup>

*... the mode, medium and manner of publication are relevant to an assessment of damages. The nature of the internet is such that it records what might once have been transient and ill-considered statement said in the heat of the moment*

The court noted that because of the message and the platform, it was obvious to the reader that it was coming from an estranged spouse<sup>28</sup> and that it would have been approached with a level of caution. The court also noted that doubts about the character of Dabrowski would still exist but they would not be as grave as if the defamatory post had been published in a reputable newspaper.<sup>29</sup> While this may demonstrate for future reference that a level of discount may be afforded to what people read online depending on the source, this is far from clear.

The court went on to acknowledge that the power for these platforms to disseminate information could mean that the defamatory imputations are repeated without revealing that the source was a Facebook post made by an estranged wife.<sup>30</sup> In conclusion, it was found that Dabrowski had suffered distress, humiliation and hurt and harm to his reputation and it did cause people to "look at him twice"

and be more reserved about their contact with him.<sup>31</sup> An award of \$12,500 was made to Dabrowski.<sup>32</sup>

The Victorian Supreme Court in *Gluyas v Canby*<sup>33</sup> has held that comments posted by Mr Canby (resident in the US) on his internet blog alleging the sexual proclivities of Mr Gluyas were defamatory and awarded damages of \$50,000 plus interest.

Some of the allegations made by Mr Canby against Mr Gluyas were highly defamatory and very serious. Further, Mr Canby invited readers of his blog to kill Mr Gluyas and in return they would be rewarded financially by Mr Canby. The court awarded aggravated damages because the publications remained on the site, notwithstanding the Victorian proceedings and the request for publications to be taken down. Accordingly the case highlights the concern that while progress has been made in legal principles being applied to unsocial media comments, enforcement of the awards, however, remains a significant issue.

The courts have also shown some flexibility in dealing with the new technologies as evidenced in the decision of the Supreme Court of Western Australia in *Wilson v Ferguson*<sup>34</sup> where the court awarded equitable compensation for the damage which Ms Wilson sustained in the form of significant humiliation, anxiety and distress as the result of dissemination of intimate images of her to her workplace and social group.

Briefly Ms Wilson and Mr Ferguson were workmates that entered into a relationship. Both were “Fly-in Fly-out” workers, at the same mine, in Western Australia. Ms Wilson and Mr Ferguson lived together in Perth but when at the mine lived in separate quarters. They exchanged intimate and sexually explicit images of each other which when the relationship ended Mr Ferguson distributed by way of Facebook posts to be viewed by his “friends” at the mine site.

The court found that the taking and exchange of images by Ms Wilson was private between herself and Mr Ferguson and that Mr Ferguson understood this. Further, Mr Ferguson’s publication was motivated to cause Ms Wilson humiliation as many

of his 300 Facebook “friends” were common friends, acquaintances and workmates.

The court assessed damages for the breach of confidence at \$35,000 plus an additional \$13,404 for economic loss.

In this case the court followed the Victorian Supreme Court, Court of Appeal decision in *Giller v Procopets*<sup>35</sup> which, among other things, concerned the publication of a videotape of sexual activity between Ms Giller and Mr Procopets. The publication was the distribution of the videotape by Mr Procopets.

While one would expect that the majority of defamation proceedings will involve either Facebook or Twitter, thought should be given to other online platforms such as Trip Advisor or Urbanspoon. Is a court likely to consider that readers approach information on these platforms with caution or are they viewed in a similar context to a review in a reputable newspaper? This of course raises issues of who the source of the message is, as identifying the motivations behind a review or comment is inherently difficult on these platforms and courts would need to consider whether a hypothetical reader is aware that competitors are able to create artificial online personas with ease.

### **Conclusion**

Social media poses many unique challenges for the law, as evidenced by the struggle for the courts to consistently juxtapose old and new channels of communication. There are a multitude of legal scenarios that might arise as social media platforms and their functions develop. In any event, social media poses a significant risk for individuals looking to air their grievances online. Due to the ability to target messages with relative precision, any special meaning given to the words said about that person or brand, will almost certainly be understood by that audience, giving users very little margin for error.

Overall, these cases show that despite the fact that the popularity of social media is founded on largely unfettered, instantaneous publishing; the user wields considerable power to publish their thoughts, impact upon a specific audience and cause damage. Therefore it is clear that users must proceed with caution, despite the temptation to click “post” on whatever it is they are thinking.

## Footnotes

1. *Hockey v Fairfax Media Publications Pty Ltd* [2015] FCA 652; BC201505854.
2. Above, n 1, at [75].
3. Above, n 1, at [205].
4. *World Hosts Pty Ltd v Mirror Newspapers Ltd* [1976] 1 NSWLR 712.
5. Above, n 4, at [725].
6. *Pedavoli v Fairfax Media Publications Pty Ltd* [2014] NSWSC 1674; BC201410648.
7. Above, n 1, at [454].
8. Above, n 1, at [517].
9. Above, n 1, at [517].
10. *Madden v Seafolly Pty Ltd* (2014) 313 ALR 1; [2014] FCAFC 30; BC201402065.
11. Above, n 10, at [10].
12. Above, n 10, at [15].
13. *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309 at 319–20 per Fletcher Moulton LJ; *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245 at 252–3; 241 ALR 468; [2007] HCA 60; BC200710838 at [4]–[6] per Gleeson CJ, 266 [41], 270 [47] per Gummow, Hayne and Heydon JJ.
14. Above, n 10, at [90].
15. Above, n 10, at [90].
16. Above, n 10, at [90].
17. Above, n 10, at [92].
18. Above, n 10, at [53].
19. *Seafolly Pty Ltd v Madden* (2012) 297 ALR 337; 98 IPR 389; [2012] FCA 1346; BC201209325 at [68].
20. Above, n 19.
21. Above, n 10, at [155].
22. *Mickle v Farley* (2013) 18 DCLR (NSW) 51; [2013] NSWDC 295.
23. Above, n 22, at [7].
24. Above, n 22, at [21].
25. *Dabrowski v Greeuw* [2014] WADC 175.
26. See *Boyd v Western Australia* [2012] WASC 388 at [22] (Hall J).
27. Above, n 25, at [264]; *Maher v Nationwide News Pty Ltd* [2013] WASC 254; BC201303182 at [21].
28. Above, n 25, at [266].
29. Above, n 25, at [267].
30. Above, n 25, at [268].
31. Above, n 25, at [291].
32. Above, n 25, at [295].
33. *Gluyas v Canby* [2015] VSC 11; BC201500122.
34. *Wilson v Ferguson* [2015] WASC 15; BC201500064.
35. *Giller v Procopets* (2008) 24 VR 1; 40 Fam LR 378; [2008] VSCA 236; BC200810874.

**Victor Hamit**

**Wentworth Lawyers Pty Ltd**

Level 40

140 William Street

MELBOURNE VIC 3000

Tel: +61 (3) 9607 8380

Mobile (Aust.): 0408 590 706

Email: [vhamit@wentworthlawyers.com.au](mailto:vhamit@wentworthlawyers.com.au)

Website: [www.wentworthlawyers.com.au](http://www.wentworthlawyers.com.au)

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