Ruling fit for 1928, not Facebook era

This High Court judgment should alarm not only media outlets but every user of social media.

Matt Collins

Australia has produced few jurists of Sir Isaac Isaacs' ilk. Born in Melbourne in 1855, he became attorney-general of both Victoria and the newly federated Commonwealth of Australia. Then appointed to the High Court, he became its Chief Justice from 1930 and later the nation's first Australian-born governor-general.

But Isaacs could hardly have foreseen the advent of the internet, its implications for legacy media as a source of trusted and curated news and information, or the perils of social media.

Yesterday, the High Court had the opportunity to reconsider the application of age-old principles of defamation law in the online era. Instead, it affirmed a pronouncement by Sir Isaac in a 1928 case about a defamatory circular concerning litigation over mice-damaged wheat, and applied it to Facebook users.

Dylan Voller, a young Aboriginal man whose treatment in youth detention in the Northern Territory had attracted media attention, is suing Fairfax Media Publications (the former publisher of this masthead), Nationwide News (publisher of *The Australian* and *The Daily Telegraph*) and Australian News Channel (operator of Sky News) in relation to comments by members of the public posted in response to stories these outlets published on their Facebook pages. The outlets use Facebook as a vehicle to promote their content to reach the 16 million or so Australians who are active users of the social media network.

The outlets opposed Voller's claim, arguing they are not responsible for third-party comments posted in response to their stories. They pointed out they do not own or operate Facebook and are at the mercy of its policies, which at the time did not allow all comments on a public Facebook page to be blocked. They argued they should not be exposed to liability in defamation law for comments by members of the public that they had not written, commissioned or in some way endorsed.

By a majority of five to two, the High Court upheld decisions of lower courts in Voller's favour. Chief Justice Kiefel and Justices Keane and Gleeson held that a publisher's exposure to liability "does not depend upon their knowledge of the defamatory matter which is being communicated or their intention to communicate it". Justices Gageler and Gordon agreed, holding that exposure to liability arises "irrespective of knowledge or intention on the part of the participant as to the defamatory content of the matter published". In short, the majority of judges held that, because the media outlets had chosen to establish a presence on social media, knowing that comments could be posted to their stories, it was consistent with ancient principle to treat them as if they'd written the comments themselves.

Every social media user is now a publisher of comments to their posts.

Justices Edelman and Steward dissented. Justice Edelman thought the media outlets should not be exposed to liability in relation to comments that were irrelevant, or had only a remote or tenuous connection, to the subject matter of their stories. Justice Steward considered that the media outlets should only be exposed to liability in relation to comments that they had "procured, provoked or conduced".

As is often the way in defamation disputes, this judgment is not the end of the matter. It now returns to the NSW Supreme Court where it will be open to the media outlets to argue that although they are publishers of comments by members of the public, they can make good some defence in relation to them.

Fair enough, many would say. Media organisations choose to use Facebook to promote their commercial interests. Everyone knows comments can be toxic and have the capacity to ruin peoples' lives. Why shouldn't media organisations be held responsible for them?

The implications of the judgment, however, extend well beyond media organisations. The effect is that every user of social media is a publisher of comments to their posts by anyone, irrespective of their knowledge or intention. The only responsible advice any defamation lawyer could now give to users of social media wanting to avoid the risk of being sued, short of disabling comments entirely, is to monitor them obsessively and remove anything that might remotely cause offence.

State and territory attorneys-general are currently considering reforms to Australia's defamation laws to bring them into the internet age. They will no doubt need to take a close look at the implications of continuing to follow, in 21st century Australia, a precedent set by Sir Isaac Isaacs in the 1920s.

Dr Matt Collins is a barrister specialising in media law. He has acted for plaintiffs and defendants, including the publisher of the *Herald*, and social media networks including Facebook.