Authorised report: (2019) 14 ACTLR 108

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Bailey v Bottrill (No 2)**
Citation:	**[2019] ACTSC 167**
Hearing Date:	30 May 2019
Decision Date:	27 June 2019
Before:	McWilliam AsJ
Decision:	Appeal dismissed with costs.
Catchwords:	**DEFAMATION** – Publication – whether hyperlink to defamatory material and an accompanying text on a personal Facebook page amounts to publication – whether Tribunal applied correct test
Legislation Cited:	*Civil Law (Wrongs) Act 2002* (ACT) s 139C
Cases Cited:	*Bailey v Bottrill* [2019] ACTSC 45 *Bailey v Bottrill (Appeal)* [2018] ACAT 120 *Bolton v Stoltenberg* [2018] NSWSC 1518 *Bottrill v Bailey (Civil Dispute)* [2018] ACAT 45 *Bunt v Tilley* [2007] 1 WLR 1243 *Crookes v Newton* [2011] 3 SCR 269 *Dow Jones & Co Inc v Gutnick* [2002] HCA 56; 210 CLR 575 *Godfrey v Demon Internet Ltd* [2001] QB 201 *Google Inc v Duffy* [2017] SASCFC 130; 129 SASR 304 *Google Inc v Trkulja* [2016] VSCA 333; 342 ALR 504 *Habib v Radio 2UE Sydney Pty Ltd* [2009] NSWCA 231 *Hird v Wood* (1894) 38 Sol J 234 *John Fairfax Publications Pty Ltd v Obeid* [2005] NSWCA 60; 64 NSWLR 485 *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50; 77 ALJR 1657 *Lee v Wilson* (1934) 51 CLR 276 *Rana v Google Australia* [2013] FCA 60 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 *Trkulja v Google LLC* [2018] HCA 25; 263 CLR 149 *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533 *Urbanchich v Drummoyne Municipal Council* [1991] Aust Torts Reports ¶81–127 *Visscher v Maritime Union of Australia (No 6)* [2014] NSWSC 350 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 *Wake v John Fairfax & Sons Ltd* [1973] NSWLR 43 *Webb v Bloch* (1928) 41 CLR 331
Parties:	Katrina Bailey (Appellant) David Bottrill (Respondent)

Representation:	Self-represented (Appellant)	
	Self-represented (Respondent)	
File Number:	SCA 60 of 2018	
Decision under appeal:	Court/Tribunal:	ACT Civil and Administrative Tribunal
	Before:	Presidential Member G McCarthy, Senior Member G Lunney SC
	Date of Decision:	30 November 2018
	Case Title:	Bailey v Bottrill (Appeal)
	Citation:	[2018] ACAT 120

McWilliam AsJ

1. This appeal concerns whether Ms Katrina Bailey, the appellant, participated in the publication of material that was defamatory of Mr David Bottrill, the respondent, by placing a functioning hyperlink with a small amount of what was found to be neutral text on her Facebook page. The hyperlink directed any person who clicked on the link to material which was clearly defamatory of the respondent, located on another website, YouTube.

2. The appeal is from a decision of the appeal panel of the Australian Capital Territory Civil and Administrative Tribunal (**Appeal Tribunal**) delivered on 30 November 2018: *Bailey v Bottrill (Appeal)* [2018] ACAT 120 (***Appeal Decision***). The Appeal Decision was itself an appeal from a single instance decision of Senior Member Donohoe SC dated 20 April 2018: *Bottrill v Bailey (Civil Dispute)* [2018] ACAT 45 (***First Instance Decision***).

3. The appellant has previously been granted leave to appeal on one limited issue: see *Bailey v Bottrill* [2019] ACTSC 45 (***Bailey***).

Issue on Appeal

4. The parties were each self-represented and neither had any legal training. As a consequence, the arguments of each party strayed a little outside the limited question on appeal, and the Notice of Appeal, purportedly filed pursuant to the grant of leave on 12 March 2019, was in terms that were somewhat confusing, as follows:

> The Tribunal erred in claiming the actions of the appellant met the cited case law tests. The appellant does not believe her actions met the test of primary publisher.
>
> The Appellant's main topics were not related to this material and only a small number of related public posts were ever made receiving next to no attention.
>
> Neither the Respondent nor the Tribunal claimed, argued or showed at any point, that materials &/or the claims contained in the Van Lieshout video or the materials the Appellant's decision to "share" the item were based on were not mostly proper at any point. This also goes against case law tests & [precedents] to this end. The Vischner case being but one example of this more thorough assessment of the material not just the claimed imputations alone.

5. The limited issue for determination on appeal (as explained in *Bailey* at [22]) is whether the appellant was a 'publisher' within the meaning of the tort of defamation in

causing a hyperlink and accompanying text to be posted on her Facebook page, and whether the Appeal Tribunal erred in so finding. In turn, this requires consideration of the test for what amounts to publication in the particular factual context.

6. I have taken the appellant's reference in her Notice of Appeal to the 'cited case law tests' as being a reference to two authorities referred to by Senior Member Donohoe in the Tribunal and in the Appeal Tribunal, namely *Google Inc v Duffy* [2017] SASCFC 130; 129 SASR 304 (***Duffy***) and *Visscher v Maritime Union of Australia (No 6)* [2014] NSWSC 350 (***Visscher***). These authorities concerned the method in deciding what amounts to publication in the context of internet hyperlinks. They are discussed further below.

7. It is first necessary to understand the nature of the material giving rise to the dispute and the reasoning of the decisions in the Tribunal below.

The defamatory material

8. The defamatory material was a video located on the well-known YouTube website. It had two components: a video and accompanying text, collectively referred to as the Van Lieshout material. The video was a recording of a person speaking named Ms Teresa Van Lieshout. The accompanying text was approximately 300 words. The Van Lieshout material referred to Mr Bottrill as a life member of an organisation known as the Ordo Templi Orientis Australia (**OTO**).

9. At first instance it was found that the Van Lieshout material was defamatory in containing the imputations that Mr Bottrill was a member of a paedophile group which kills and tortures victims, and that he uses his employment to facilitate the entry into Australia of minors for paedophilia by Muslim men: *First Instance Decision* at [58]–[66].

10. The defamatory nature of the material was confirmed by the Appeal Tribunal: *Appeal Decision* at [16]. Leave to appeal that finding was refused.

What appeared on Ms Bailey's Facebook page?

11. Before the Tribunal at first instance, there were evidentiary difficulties working out exactly what was visible on Ms Bailey's Facebook page, as viewed on 27 June 2017 (being the date when a third party viewed the page).

12. It was not disputed that on that date, Ms Bailey's Facebook page contained a functioning hyperlink, which permitted direct access to the Van Lieshout material on the YouTube website when a person 'clicked' on the hyperlink.

13. It was also not disputed that there was some text which appeared beneath the hyperlink on Ms Bailey's Facebook page, but there was uncertainty as to precisely what words were visible on 27 June 2017. The Appeal Tribunal recorded (at [20] of its reasons – the factual finding of the Tribunal at first instance is less clear) that under the hyperlink on the Facebook page, the following words appeared:

> **David Bottrill: Ordo Templi Orientis (OTO, Australia) The former National Treasurer, now confessed 'Life Member' of** the Ordo Templi Orientis (OTO) – Grand Lodge of Australia, …
>
> [Emphasis added.]

14. A disputed issue in the Tribunal at first instance had been whether the OTO was also described in the text under the hyperlink as a satanic group. That was not established on the evidence and the Appeal Tribunal saw no error in that finding.

15. On the appeal to this Court, the appellant made a different argument arising out of the Appeal Tribunal setting out the above text. She submitted that the text was not quite correct, in that all that was visible on her Facebook page were the emphasised words above.

16. For the purposes of this appeal, it does not matter whether the remaining words were visible or obscured. Neither the Tribunal at first instance nor the Appeal Tribunal found the visible text to be defamatory of itself either as set out above or in a more limited form of the emphasised words. It may be accepted that either version is neutral.

17. It was also accepted that, whatever words did appear under the hyperlink, they were not authored by Ms Bailey, but appeared automatically as a result of Ms Bailey sharing the YouTube link to her Facebook page.

18. The hyperlink and the accompanying text on the Facebook page were not surrounded by any other commentary about the topic, either authored by Ms Bailey or otherwise.

The findings of the Tribunal at first instance and on appeal

19. At first instance, Senior Member Donohoe SC divided the issue of whether the respondent published the defamatory material into two questions: first, whether Ms Bailey published the material by a positive act, and second whether she published the material by omission.

20. The Senior Member stated at [69] of the *First Instance Decision* (without reference to any authority):

> What is required at law, however, to establish publishing by positive act is proof of a mental element of intention to publish or assist in the publication or an inference of conduct amounting to an omission to act evidenced by notice and a failure to act.

21. The Senior Member was unable to identify an intention on the part of Ms Bailey to assist in publication (*First Instance Decision* at [98]), but went on to find that the evidence satisfied the test for publication by omission (*First Instance Decision* at [141]).

22. The Appeal Tribunal held that the Senior Member had erred in that finding. It found that Ms Bailey had engaged in a positive act of participation in the publication of the defamatory material and that the cases relied upon by the Senior Member in finding that there had been publication by omission were different in principle. The key finding of the Appeal Tribunal is at [38] of the reasons for its decision:

> Applying the reasoning in *Visscher* and [*Duffy*], in our view the act of the appellant establishing the hyperlink to the Van Lieshout Material was a positive act of participation in its publication. In our view, the Senior Member should therefore have accepted the respondent's submission that the appellant's creation of the hyperlink on her Facebook page was a positive act of publication of the Van Lieshout Material in circumstances where there is no dispute that she did so with knowledge and approval of the content of the hyperlinked material.

Did the Appeal Tribunal err in finding there was a positive act of participation?

23. As the parties were self-represented, it is appropriate to set out some general principles governing the element of publication.

24. The tort of defamation has three elements: publication, identification and defamatory meaning. In order for the tort of defamation to be complete, there must be publication (that is, communication in a comprehensible form), of material defamatory of the plaintiff, to a person other than the plaintiff. It is a tort of strict liability: *Dow Jones & Co Inc v Gutnick* [2002] HCA 56; 210 CLR 575 at [25]-[26].

25. The High Court has recently stated that in point of principle, the law as to publication is 'tolerably clear': *Trkulja v Google LLC* [2018] HCA 25; 263 CLR 149 (***Trkulja***) at [39]. The test for whether a person has published defamatory material is whether the defendant has participated in the publication.

What constitutes participation?

26. A person will have 'participated' in the publication if it is shown that the person is in some degree accessory to the communication of the defamatory material: *Webb v Bloch* (1928) 41 CLR 331 (***Webb***) at 363–4; *Lee v Wilson* (1934) 51 CLR 276 at 287 per Dixon J. 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: *Habib v Radio 2UE Sydney Pty Ltd* [2009] NSWCA 231 at [121] per McColl JA, citing *Webb* at 364 per Isaacs J.

27. Participation in the publication of defamatory matter in any degree must be deliberate, in the sense of intentionally lending assistance (*Webb* at 363–364), although all degrees of participation in the publication are publication: *Trkulja* at [40]. Any person who knowingly participates in the communication of defamatory material, in whatever degree, is a publisher and is therefore exposed to potential liability under the tort of defamation: *Godfrey v Demon Internet Ltd* [2001] QB 201, 207.

28. If, by words or conduct, a person draws the attention of another to defamatory words then there has been primary, or at least secondary, participation in the publication: *Bolton v Stoltenberg* [2018] NSWSC 1518 (***Bolton***) at [169]; *Duffy* at [133] per Kourakis CJ, citing *Hird v Wood* (1894) 38 Sol J 234.

Primary and secondary participants

29. Relevant to the appellant's argument below, the nature of one's participation may critically affect a person's ultimate liability. The participant may play a primary or secondary role.

30. If the participant is found to play a secondary role, the defence of innocent dissemination may be available. The defence is not available to primary participants in a publication, as they are presumed to know all that the publication contains: see the useful discussion in *Duffy* at [88]–[93].

31. Innocent dissemination was discussed in *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 (***Thompson***) at 586. It arises where a secondary participant shows that he or she did not know and could not reasonably have known that the material disseminated contained the impugned words.

32. In *Thompson*, a broadcaster had relayed a live television programme from a national network into the Australian Capital Territory. The programme contained defamatory statements. The High Court found (at 596–8) that as the broadcaster had engaged in the conscious process of selecting and airing television programmes, it did not qualify as a subordinate distributor.

33. The defence of innocent dissemination is now reflected in the Territory in s 139C of the *Civil Law (Wrongs) Act 2002* (ACT). However, the defendant must first prove that they published the defamatory matter as a 'subordinate distributor' which is defined in that section: s 139C(2).

34. Where someone reports or republishes a defamatory statement that person may be a secondary participant, and the context in which the publication appears becomes important. The publication must be read as a whole. It is relevant whether the report of it adopts, repudiates or discounts the original defamatory statement: *John Fairfax Publications Pty Ltd v Obeid* [2005] NSWCA 60; 64 NSWLR 485 at [95]. However, there is no general rule that a person who merely reports a defamatory statement is not liable unless he or she adopts or re-affirms it: *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50; 77 ALJR 1657 at [27] per McHugh J; *Wake v John Fairfax & Sons Ltd* [1973] NSWLR 43 at 49.

35. Where a party who meets the definition of a secondary participant consents to, approves of, adopts, promotes or ratifies the defamatory material, that person may still be responsible for the continued publication of defamatory material: *Urbanchich v Drummoyne Municipal Council* [1991] Aust Torts Reports ¶81–127 at 69,193; *Duffy* at [130]–[133]; *Rana v Google Australia* [2013] FCA 60 at [51]; *Visscher* at [20], [22], [29].

The posting of hyperlinks on a personal Facebook page leading to defamatory material

36. Internet publication cases are highly fact specific, in terms of allegations of associated involvement by a defendant: *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533 at [27], per Beach J.

37. The two cases from which the Appeal Panel drew assistance are *Visscher* and *Duffy.* In *Visscher*, Beech-Jones J considered the position where the Maritime Union of Australia (**MUA**) had published an article which contained a hyperlink to an article by the *Cootamundra Herald*, which in turn contained defamatory content.

38. His Honour discussed the Canadian authority of *Crookes v Newton* [2011] 3 SCR 269 (***Crookes***), before finding that it was not necessary for a hyperlink to present content from the hyperlinked material in a way that actually repeated the defamatory content, before it could amount to publication. Beech-Jones J considered that in Australia, the question to be asked was whether, by the inclusion of the hyperlink, the defendant in that case 'accepted responsibility' for the publication of the hyperlinked material. His Honour went on to state at [29]:

> … This could be answered in the affirmative if, amongst other ways, it was concluded that there was an approval, adoption, promotion or some form of ratification of the content of the hyperlinked material.

39. His Honour held at [30] that the act of publishing the MUA article with its hyperlink to the *Cootamundra Herald* at the very least was an adoption or promotion of the

content of the *Cootamundra Herald* article. His Honour's reasoning at [30] was as follows:

> ...The MUA article introduced the reader to the danger faced by the MUA crew. It provided details about their plight and then invited a viewing of the "full story" by having the reader click on a hyperlink. **In context, it conveyed that the details published in the MUA article were part of a more complete version (the "full story") which was to be found by clicking the hyperlink**.
>
> [Emphasis added.]

40. In *Duffy*, the issue was whether a search engine (Google), which returned results that both repeated a snippet of defamatory material and contained a hyperlink to the website where the full content was displayed, constituted publication. Kourakis CJ also referred to the decision of *Crookes*, in the context of stating at [172]:

> … in certain circumstances, depending on both the ease with which the hyperlink can be accessed, and the information provided by the hyperlink (whether or not that information is defamatory in itself), hyper-linking can for all practical purposes constitute an incorporation of the defamatory material into the reference. … Moreover, neutrality is not refutation. In those special circumstances the search result and hyperlink may be the electronic equivalent of handing over a text bookmarked to a certain page or line and inviting a person to read it. In that event the person providing the reference may be regarded as a secondary publisher.

41. Kourakis CJ went on to state at [173]:

> I prefer to speak of incorporation, rather than adoption or endorsement, because lending or imparting weight to the truth of a defamatory imputation is not relevant [to] the law of defamation in any other context. Incorporation focusses the enquiry on whether the defamatory material is, as a factual matter, incorporated into the publication of the reference or hyperlinker. When referring to another source, the greater the information which is provided about the content of the reference material, irrespective of whether the reference repeats a defamation, the more closely connected the act of reference is to the publication of the referenced material.
>
> [Emphasis added.]

42. His Honour then discussed how adding a snippet or abstract of the material contained in the hyperlink may convey sufficient information about its contents so as to constitute publication of the underlying webpage. His Honour ultimately concluded at [174]:

> In my view the liability of referencers as a secondary publisher does not depend on their adoption or endorsement of the truth of the defamatory imputation. If they are publishers, it is because the additional description of the contents of the article or book more closely connects them to its publication. The more information a referencer gives, and the easier his or her assistance makes retrieval of the publication, the more his or her facilitation becomes a substantial enough cause of the publication to attract liability.

43. Although their Honours differed in their reasoning on other matters, Peek and Hinton JJ both agreed with Kourakis CJ's reasoning on this aspect of the argument. Hinton J's reasoning on hyperlinked material is also instructive for the present case. His Honour stated at [599]:

> Turning to the question of whether the appellant published the …[hyperlinked material], like the Chief Justice, I agree with the Judge's conclusions. I also agree with the Chief Justice's additional reasons. The deep hyperlink taken with the snippet is more than a reference. The snippet entices and the hyperlink bespeaks a willingness on the appellant's part to transport the enticed searcher immediately to the relevant web page for more information – to publish the web page to those who, having read the snippet, want more information. In my view it is unnecessary to refer to the concepts of adoption or

> endorsement here. **By transporting the enticed searcher to the web page upon the searcher clicking on the hyperlink contained in the search result the appellant publishes to the searcher the web page once it is opened.** I agree with the analogy of handing over a bookmarked text, the invitation to provide it having been extended by the snippet and accepted upon clicking on the hyperlink. The position is also analogous to the circumstances in *Hird v Wood*.
>
> [Emphasis added; references omitted]

44. It is important in the factual context of the present case to appreciate the difference between a search engine such as Google and an individual Facebook page. In the decision of *Google Inc v Trkulja* [2016] VSCA 333; 342 ALR 504, the nature of a Facebook page was discussed at [164]–[165] and [177], relevantly as follows:

> [164] The world wide web permits human interaction via so-called social platforms. Facebook, Twitter and Google+ are platforms of that kind. They publish **user-created content**, available in some instances to other users connected to the particular platform — 'friends' — and in other instances to the 'user world' at large. To call them 'platforms' is not to suggest that they are not accessible in the form of websites.
>
> [165] Pausing for a moment, it can be said that the Facebook and Twitter webpages (to take two well-known platforms) have about them **something of the character of a noticeboard,** owned or controlled by another, on which a person can put up a note, story, video or image.…
>
> [177] Pausing for a moment, it can be seen that the interaction between a user and the Google search engine is quite different to the interaction between a user and Facebook or Twitter or the like. The user instigates the search by inputting search terms. The results which the search engine produces are a response which identifies webpages, or images from pages, or both. Those pages have been created by authors other than Google. Thus, Google neither compiles the search terms nor any webpages or images which are identified in response. **This is different in kind to those websites which host text or photographs authored by users — that is, Facebook, Twitter or the like**. …
>
> [Emphasis added.]

45. The Victorian Court of Appeal's judgment was overturned by the High Court in *Trkulja*, to which reference has earlier been made, but not in relation to these general observations as to the use of Facebook as a social platform.

46. The recent decision of *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 (***Voller***), delivered by Rothman J on 24 June 2019, should also be noted. That case concerned a public Facebook page and defamatory comments that might be posted on the Facebook page, rather than any hyperlinked material uploaded or posted by the operator of the page. His Honour found (at [228]) that the relevant media companies who operated each of the public Facebook pages in question were a first or primary publisher in relation to the general readership of the Facebook page each operated.

Applying the authorities to the appellant's Facebook page

47. The relevant context to the publication is as follows. First is the nature of the Facebook page itself. It was a personal page, containing the posts and material shared by the appellant, on which people could comment.

48. The appellant argued that she made no contribution to the hyperlink or the words of the post, so that the publisher or distributor of the hyperlink was really YouTube. She effectively argued that she only played a passive role in the publication, by simply affording access to a link and no more.

49. While such arguments have been successful with regard to internet service providers (for example, *Bunt v Tilley* [2007] 1 WLR 1243), the facts of this case are very different. The appellant overlooks the notion of overall authorship or control in respect of the individual Facebook page on which the hyperlink and the accompanying text was published. The appellant had personal control over her own Facebook page. She was the author of the content in that she controlled what was placed on the particular site and who had access to it. When she shared a link from the YouTube website, it was her conduct that caused the link to appear on her Facebook page. That establishes intentional or deliberate communication, as opposed to any intent to defame Mr Bottrill.

50. It was not in dispute that the hyperlink to the Van Lieshout material gave immediate access to the video. This was not a case where the hyperlink directed a person to the YouTube website generally and the person then had to conduct a separate search for the relevant video. In that way, the appellant facilitated direct access to the defamatory material.

51. The text that accompanied the hyperlink identified Mr Bottrill as a 'now confessed life member' of the OTO. That was a sufficient snippet or context to entice a searcher to click on the hyperlink if he or she wanted more information about Mr Bottrill, Mr Bottrill's 'confession', his membership of the OTO, or even simply what type of an organisation the OTO was. It does not matter that the snippet itself was neutral – recalling that neutrality does not constitute refutation – and it does not matter that the appellant did not herself write the words under the hyperlink. The only reason the words were on her Facebook page was because the appellant shared the link.

52. To use the phraseology of Hinton J in *Duffy*, the combination of the hyperlink and the text bespeaks a willingness on the appellant's part to transport the enticed searcher immediately to the relevant web page on YouTube for more information.

53. In these circumstances, the appellant participated in the publication of the defamatory content on her Facebook page. The combination of the publication being a personal Facebook page (having the character of a noticeboard), the direct access hyperlink and the existence of a brief description of what the hyperlink related to, for all practical purposes, constituted an incorporation of the defamatory material into the reference.

54. If it were necessary to make a finding, the facts establish that the appellant was a primary participant. By the conduct of sharing the hyperlink and limited text from the YouTube site, she drew the attention of another to the defamatory content of the Van Lieshout material. Following *Bolton* at [169]; *Duffy* at [133] and *Hird v Wood*, that amounts to primary participation in the publication.

55. In any event, even if the appellant were found to be a secondary participant in the publication, the defence of innocent dissemination was raised and rejected by both the Tribunal at first instance and the Appeal Panel, and leave to re-agitate that argument was refused in *Bailey*, for the reasons set out in that judgment.

56. Accordingly, there was no error in the Appeal Tribunal finding that the conduct of the appellant was a positive act of participation in the publication of the defamatory material.

57. In light of these findings, it is unnecessary to deal with the respondent's submission that earlier posts on Ms Bailey's Facebook page were part of the context of the

hyperlink to the Van Lieshout material and demonstrated an ongoing commentary about the OTO.

Costs

58. Costs are in the discretion of the Court and there does not appear to be any reason why costs would not follow the event in this appeal. As the parties were self-represented, there may not in fact be any legal costs. However, it is appropriate that the order be made in case there were miscellaneous disbursements which may be recoverable.

Orders

59. The orders of the Court are as follows:

    (a) The appeal is dismissed.

(b) The appellant is to pay the respondent's costs.

I certify that the preceding fifty-nine [59] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Associate Justice McWilliam.

Associate:

Date: