

Facebook defamation surge challenges courts



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Reported by **Marianna Papadakis for the Financial Review**

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Defamation claims based on social media posts are rising and legal experts are calling for reform to ensure the law keeps up with technology.

Slater & Gordon Lawyers associate Jeremy Zimet said 48 per cent of all defamation inquiries his firm received in the past financial year concerned posts on social media and 43 per cent concerned Facebook posts.

Mr Zimet said social media was changing the landscape of defamation, transforming ordinary people into a "new class of publishers" who were less attuned to defamation laws and the ramifications of posts than traditional publishers and media organisations.

More defamatory material was being published on social media platforms, fuelling a rise in cases with top platforms including Facebook, Twitter, Instagram, blogs and review websites.

"I expect that as a result of these types of cases, we will continue to receive more enquiries," Mr Zimet said.

The increase in the number of inquiries concerning social media is increasing the number of court proceedings issued.

The number of [NSW District Court defamation actions](#) doubled from 31 in 2013 to 61 in 2014.

Victorian Supreme Court figures showed of the 39 defamation cases heard in 2014, four related to website publications such as blogs, while two concerned Facebook posts.

Mr Zimet said not all enquiries that his firm received would result in proceedings, with a common result being an apology after the removal of a defamatory post.

Recent cases the firm worked on included where someone was accused of serious criminal offences on Facebook and where a person was allegedly defamed on an internet blog, he said.

One case that has been blamed for fuelling cases generally, particularly by unrepresented litigants, was a \$105,000 award received by a NSW school teacher last year after a student was found to have defamed her on Twitter and Facebook.

A Western Australian woman was also ordered to pay her former husband, a school teacher, \$12,500 after she posted damaging allegations on Facebook accusing him of domestic violence.

Most recently, federal treasurer Joe [Hockey was awarded \\$200,000 in damages](#) for a poster by *The Sydney Morning Herald* and two tweets by The Age relating to a story about a Liberal Party fundraising group. His main claim relating to the articles failed.

'FLEETING MENTIONS' CAN TRIGGER CASES

Minter Ellison partner Peter Bartlett said the Hockey case revealed how courts were struggling to deal with novel issues that arose from cases involving social media, unlike other jurisdictions such as Britain that were more progressive.

In the Hockey case, the judge regarded two tweets to be defamatory, and awarded Mr Hockey \$40,000 for each one, despite the fact that one of the tweets had a link to the full article and headline that were found not to be defamatory.

That contrasted the recent dismissal of a British Twitter case which found a tweet with a link should be read together and that a substantial proportion of people would follow it.

Unlike in the Hockey case, the British court noted the short-lived nature of a tweet, which gets pushed down a person's time line as newer tweets are posted.

Mr Bartlett said in Britain, plaintiffs could bring claims only if the publication caused serious harm, and such a test in Australia could go further to prevent trivial claims.

"In many cases you would say that fleeting mention on a tweet or Facebook has not caused serious harm. But in Australia a plaintiff can still sue," Mr Bartlett said.

TIME LIMIT ALMOST MEANINGLESS

Other problems with current laws in Australia included that the one-year limitation period on claims was essentially redundant in a social media sphere because every time an article, tweet or Facebook post was downloaded or accessed, it was defined as a new publication for defamation purposes.

"A significant issue for the courts is in many of these social media cases the parties are unrepresented by lawyers. And that means that those appearing are not as aware of the legal issues or the normal way to conduct a hearing in a court, which puts places far more pressure on the judge," Mr Bartlett said.

[Other problems](#) included inadequate drafting of uniform legislation, the need to redefine "publication" to include social media and other forms of electronic media, and the need for greater consistency in how damages were assessed.

Mr Bartlett said there was also inconsistency in the interpretation of the law, such as the continued refusal by Australian courts to apply the statutory qualified privilege defence, which was established to protect serious journalism.

Professor Andrew Kenyon of The University of Melbourne said any reform would be difficult to achieve given it would require the concurrence of the states and territories, in an environment of lacklustre political will.

But it was necessary to examine how electronic and social media publications should be interpreted by the law.

"Defamation is about free speech and reputation, the effect on reputation does not fit the traditional legal test," Mr Kenyon said.

"What reputation is and how it gets developed today, is different from a decade ago and if reputation works differently, defamation law should now as well."

Read more: <http://www.afr.com/business/legal/facebook-defamation-surge-challenges-courts-20150825-gj74hv#ixzz3jnpj82Uw>

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