

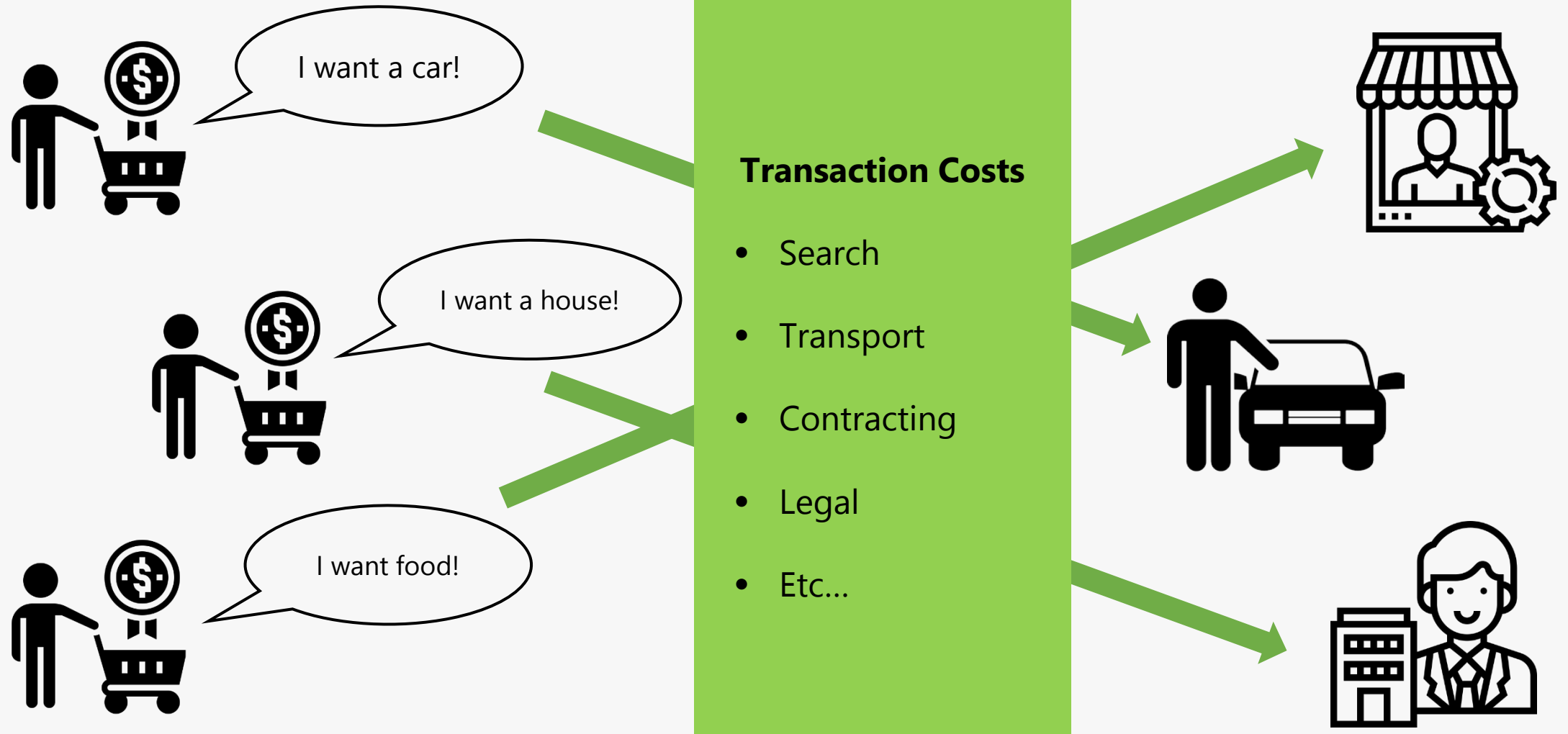
Emerging Technologies and Law

Digital Platforms

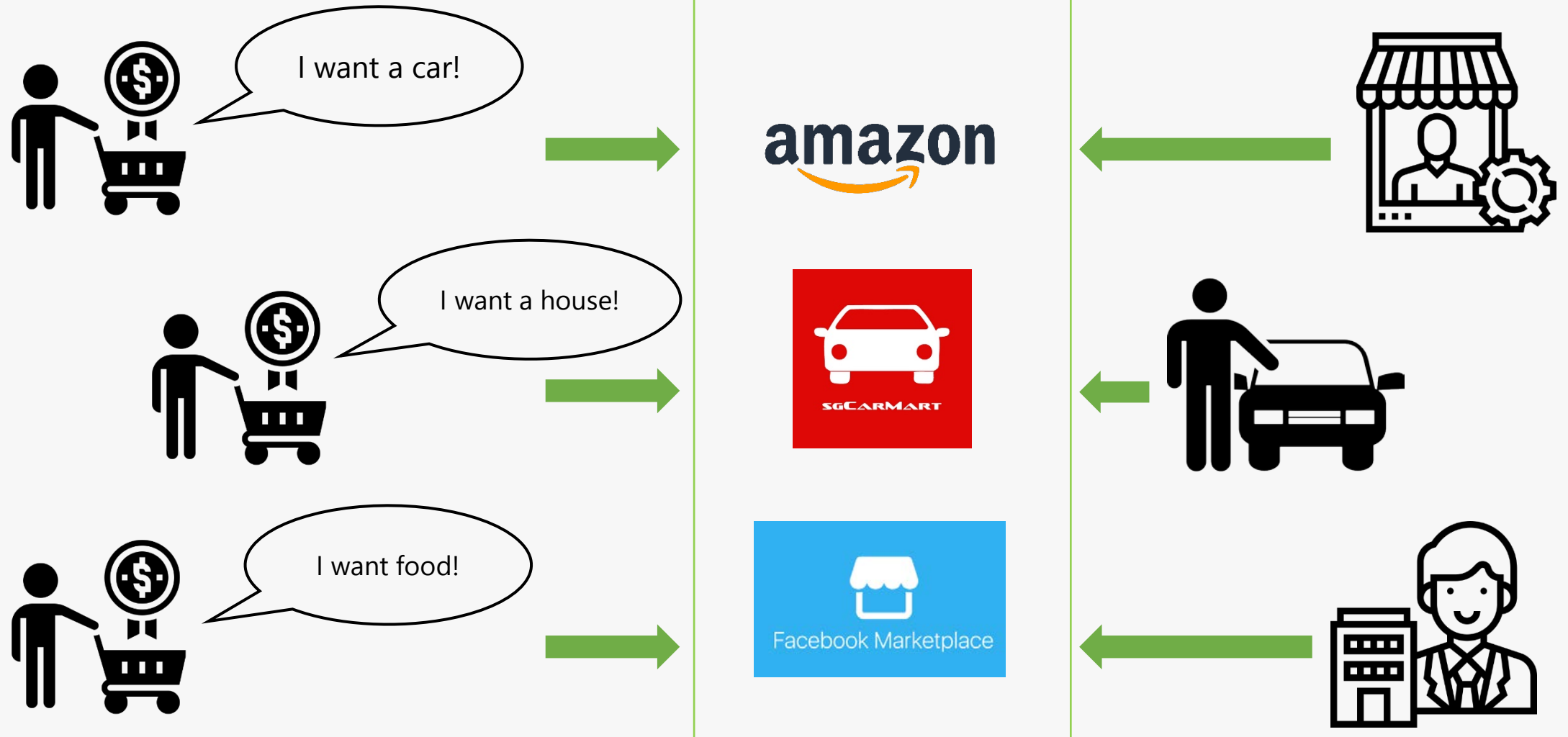
In this video...

- What are (digital) platforms?
- Are platform workers employees?
- Platform liability (for defamatory content)

What is a Platform?



How Platforms Help



But, wait!

How can introducing middlemen *reduce* transaction costs?

1. Economies of **concentration**: look in 1 place, not everywhere
2. Economics of **scale**: platform handles boilerplate terms, etc
3. Predictability: buyers expect sellers expect buyers
4. **Network externalities**: the more buyers, the more attractive to sellers; the more sellers, the more attractive to buyers

Network Externalities/Effects

- More buyers makes it better for sellers (positive, cross-effect)
- More buyers also makes it better for other buyers (positive, same-side effect)
- Vice-versa
- **Critical mass is critical**
 - Beyond some point, sellers/buyers attract buyers/sellers attract sellers/buyers
 - But initially, negative feedback loop – no sellers >> no buyers >> no sellers
- So is **maintaining** critical mass
 - Imagine if Grab lost 50% of its drivers overnight
- 'Regulated' by these **market forces**, how would a platform behave?

Platform Behaviour in Two-Sided Markets

- **What can platforms do?**
- Membership fees (price of entry)
- Transaction fees (price of use)
- Can target **both sides of market, but may not always want to**
- Other 'regulations'
 - Terms of entry/use
 - Social norms
- **Code architecture, especially for tech platforms**

Many Things are Platforms

- **Capital markets:** stringent checks to access many investors
- **Universities:** pay professors, charge students
- **Tinder:** **positive** cross-exts, but **negative** same-side exts
- All platforms' central value propositions lie in coordination and **reducing transaction costs**
 - **Aside:** obvious competition law/anti-trust implications
- **Each platform is a unique 'cyberspace' (Lessig) shaped by market forces, norms, code, and law**

New Platforms vs Old Laws

Are Platform Workers Employees?

Are Platform Workers Employees?

- Classic question that's been asked in many jurisdictions
- Discussions more advanced in jurisdictions with labour law traditions
- **Note:** UK law is used as a case study, but will **not** be examined
 - UK employment law very different from ours, for example in coverage of interns, trainees, occasional workers
 - **Pay attention rather to the principles**

Employment Act in UK

230 Employees, workers etc.

- (1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
- (2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
- (3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
 - (a) a contract of employment, or
 - (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;and any reference to a worker’s contract shall be construed accordingly.

Excluded: “mariners” and “police officers” (ss 199. 200), some parliament, royal, army staff etc given special treatment

Employment Act in SG

“employee” means a person who has entered into or works under a contract of service with an employer and includes a workman, and any officer or employee of the Government included in a category, class or description of such officers or employees declared by the President to be employees for the purposes of this Act or any provision thereof, but does not include any of the following:

(a) any seafarer;

[Act 6 of 2014 wef 01/04/2014]

(b) any domestic worker; house, stable or garden servant or motor car driver, employed in or in connection with the domestic services of any private premises;

(c) *[Deleted by Act 55 of 2018 wef 01/04/2019]* Past: person in “managerial or executive position”

(d) any person belonging to any other class of persons whom the Minister may, from time to time by notification in the *Gazette*, declare not to be employees for the purposes of this Act; Subsidiary Legis: employees of stat board not “employees”

[Act 55 of 2018 wef 01/04/2019]

Illegal terms of contract of service

8. Every term of a contract of service which provides a condition of service which is less favourable to an employee than any of the conditions of service prescribed by this Act shall be illegal, null and void to the extent that it is so less favourable.

Uber v Aslam (UKSC)

Lord Leggatt (all but Lord Kitchin, who fell ill, agreed):

1. New ways of working organised through digital platforms pose pressing questions about the employment status of the people who do the work involved. The central question on this appeal is whether an employment tribunal was entitled to find that **drivers ... work for Uber under workers' contracts and so qualify for the national minimum wage, paid annual leave and other workers' rights**; or whether, as Uber contends, the drivers do not have these rights because they work for themselves as independent contractors, **performing services under contracts made with passengers through Uber as their booking agent**.

If drivers work for Uber under workers' contracts, a secondary question arises as to **whether the employment tribunal was also entitled to find that the drivers who have brought the present claims were working under such contracts whenever they were logged into the Uber app within the territory in which they were licensed to operate and ready and willing to accept trips**; or whether, as Uber argues, they were working only when driving passengers to their destinations.

... I would affirm the conclusion [below]

Uber v Aslam – Holdings

- Case was actually disposed of based on close analysis of who the contracts were with
 - Uber argued that was a **mere agent** helping drivers contract with users
 - Court found that in reality **Uber contracted with the drivers to perform services for Uber's users**
- However, court went on to comment on the nature of the relationship given "the wider importance of the case"

Uber v Aslam – Power and Control

71. The general purpose of the employment legislation invoked ... by the claimants in the present case, is not in doubt. **It is to protect vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing).** The paradigm case of a worker whom the legislation is designed to protect is an employee, defined as an individual who works under a contract of employment. **In addition, however, the statutory definition of a “worker” includes in limb (b) a further category of individuals who are not employees.**

76 **it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point** in determining whether an individual falls within the definition of a “worker”. To do so would reinstate the mischief which the legislation was enacted to prevent. **It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place.** The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker.

Uber v Aslam – Power and Control

77. This point can be illustrated by the facts of the present case. The Services Agreement (like the Partner Terms before it) was drafted by Uber's lawyers and presented to drivers as containing terms which they had to accept in order to use, or continue to use, the Uber app. **It is unlikely that many drivers ever read these terms or, even if they did, understood their intended legal significance.** In any case there was **no practical possibility of negotiating any different terms.** In these circumstances to treat the way in which the relationships between Uber, drivers and passengers are characterised by the terms of the Services Agreement as the starting point in classifying the parties' relationship, and as conclusive if the facts are consistent with more than one possible legal classification, would in effect be **to accord Uber power to determine for itself whether or not the legislation designed to protect workers will apply to its drivers.**

Uber v Aslam – Power and Control

87. ... the **vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done.** As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a “worker” who is employed under a “worker’s contract”.

90. **The claimant drivers in the present case had in some respects a substantial measure of autonomy and independence ... they were free to choose when, how much and where ... to work.** ... The contractual arrangements between drivers and Uber London did subsist over an extended period of time. But they did not bind drivers during periods when drivers were not working: rather, they established the terms on which drivers would work for Uber London **on each occasion when they chose to log on to the Uber app**

Uber v Aslam – Power and Control

92 ... **there are three parties involved: Uber, drivers and passengers. But the focus must still be on the nature of the relationship between drivers and Uber.**

The principal relevance of the involvement of third parties (ie passengers) is the need to consider **the relative degree of control exercised by Uber and drivers respectively over the service provided to them.** A particularly important consideration is who determines the price charged to the passenger. More generally, it is necessary to consider who is responsible for defining and delivering the service provided to passengers. A further and related factor is the extent to which the arrangements with passengers afford drivers the potential to market their own services and develop their own independent business.

93 In all these respects, the findings of the employment tribunal justified its conclusion that, although free to choose when and where they worked, at times when they are working drivers work for and under contracts with Uber (and, specifically, Uber London). **Five aspects of the tribunal's findings are worth emphasising.**

Uber v Aslam – Power and Control

1. **Remuneration paid to drivers fixed by Uber**; drivers have no say; fares not set by regulator (unlike taxis)
2. **Terms of transportation contract dictated by Uber**
3. Once logged on, **choice on whether to accept rides constrained by Uber**, who controls information on the ride provided to driver, withholds destination, and monitors acceptance rate (enforceable by “penalty”)
4. **Control over how drivers deliver their services**; vets type of car, operates the app that directs drivers where to go; ratings system used by Uber purely as an internal tool for managing performance, not publicised at time of request
5. **Restricts communication** between passenger and driver, even after trip ends

Workers or Not? Lessons for Law and Tech

- **“Control” exercised by tech platform** pivotal, and not just for labour law
- But control as a device is very fickle when up against tech
- Platforms will always cry “no control”
- But easy to see control when adopting a “code is law” lens
- In reality, tech allows far more **indirect forms of (behavioural) control** which the UKSC references somewhat
- Debate over employment status often masks larger debates over **social power hierarchies**

Singapore

- Tripartite Workgroup on Representation for Platform Worker
 - Members across government, platform companies, labour groups, and businesses
 - Consulted >20000 Platform Workers, 30 companies and associations, and 2700 users
- Key recommendations:
 - “Platform Workers should not be classified as employees”
 - “requiring Platform Companies that **exert a significant level of management control** over Platform Workers to provide them with basic protections”
 - “requiring Platform Companies [with a significant level of management control – see fn 3] to provide the same scope and level of work injury compensation as employees’ entitlement under WICA”

Singapore

- **“Management control” test** to be determined by government but recommended non-exhaustive factors include:
 - Data-driven, algorithmic matching of demand and supply of services;
 - Effectively determining or setting upper limits on price and remuneration; and
 - Controlling and directing the performance of work
- **Suppose this becomes law. How would you advise/argue a case on this issue?**
 - What facts about the technology do you need to know?
 - What other facts?
 - What legal cases and doctrines may also be relevant?

Online Defamation

Should platforms be liable for user-created defamatory content?

Internet Defamation

- Today almost every instance of defamation takes place on some online platform
 - People have (mostly) stopped making their own websites
 - If I *only* print a defamatory article about you and give out copies to people, would you even sue?
- **Recall:** every platform is its own cyberspace whose code shapes behaviour
- **Note:** while you will **not** be tested on defamation law per se, knowing it will help you understand this section more easily.
 - Here I will assume some working knowledge of the tort.
 - If you need a quick refresher read Gary Chan's *Law of Torts in Singapore*

6 At around 6.16pm on 7 November 2018, the defendant shared a link to the Article in the Post on his Facebook Timeline. The Timeline on a Facebook user's profile page sets out some of their Facebook activity. **Among other functions, the Timeline showcases a user's posts in roughly reverse chronological order, with the most recent post generally appearing first.** The defendant did not include any accompanying text or commentary in the Post, which simply indicated that the defendant had shared a link, with part of the Article's title and an image from the Article being displayed, as shown below:

7 By 10.16pm on 7 November 2018, the defendant's **Post had attracted 22 "reactions", five "comments", and 18 "shares". The Post had been made on the "Public" setting**, meaning that other Facebook users apart from the defendant's "friends" on Facebook would be able to view it.

LHL v LZH [2021] SGHC 66 (Aedit Abdullah J)

What is the platform's role?

NOTICE: A Facebook post below contains contains false and defamatory statements regarding the persons pictured therein. It is reproduced here purely for educational purposes and should not be read to imply anything about the persons below. For the correct facts, click here: https://www.elitigation.sg/gd/s/2021_SGHC_66



LHL v LZH and Platform Liability

- **Note: not** an issue raised in that case, but facts are the near to some of the platform liability cases abroad
- There question was whether Df published the linked article as well
 - Court held yes
 - This is another interesting L&T question but we don't have time
- For platform liability:
 - Did the platform publish or re-publish the user's content?
 - Adoption: if actively sought to re-print it
 - Acquiescence: if they were told but did nothing
 - How far does platform's architecture **facilitate defamatory meaning**?

Fairfax v Voller and Ors (2021 HCA)

- Fairfax which runs Sky News maintains an FB page, on that page users posted content defamatory of Voller
- HCA in 5:2 split: **Fairfax** (not FB) can be liable in defamation as a **publisher** of the defamation
- **Majority**: Publication includes intentional participation and includes intentional platforming. Intentional, so long as voluntary and active. Fairfax actively maintains the FB page and encourages comments, benefits commercially from it

Fairfax v Voller and Ors (2021 HCA)

Gageler and Gordon JJ:

[62] every intentional participant in a process directed to making matter available for comprehension by a third party is a "publisher" of the matter upon the matter becoming available to be comprehended by the third party.

[66] "intentionally" within the second quotation should be understood to be directed at an intention to facilitate, or provide a platform for, communication of the allegedly defamatory matter. Enough for participation in a process that is in fact directed to making matter available for comprehension by a third party to be characterised as intentional is that the participation in the process is active and voluntary. That is irrespective of the degree of active and voluntary participation in the process. And it is irrespective of knowledge or intention on the part of the participant as to the defamatory content of the matter published.

Fairfax v Voller and Ors (2021 HCA)

[69] The strictness of the common law rule is illustrated by Webb v Bloch itself. There members of a committee who ratified a decision of another member to instruct a solicitor to prepare and send a circular were found each to have been a publisher of the circular prepared and sent out by the solicitor. That was despite some of them having been completely unaware of the contents of the circular.

(see also Kiefel, Keane, Gleeson JJ's judgment at [32])

Fairfax v Voller and Ors (2021 HCA)

[98] Each appellant became a publisher of each comment posted on its public Facebook page by a Facebook user as and when that comment was accessed in a comprehensible form by another Facebook user. Each appellant became a publisher at that time by reason of its intentional participation in the process by which the posted comment had become available to be accessed by the other Facebook user. **In each case, the intentional participation in that process was sufficiently constituted by the appellant, having contracted with Facebook for the creation and ongoing provision of its public Facebook page, posting content on the page the effect of which was automatically to give Facebook users the option (in addition to "Like" or "Share") to "Comment" on the content by posting a comment which (if not "filtered" so as to be automatically "hidden" if it contained "moderated words") was automatically accessible in a comprehensible form by other Facebook users.**

Fairfax v Voller and Ors (2021 HCA)

[101] the "primary purpose" of the operation of each appellant's public Facebook page was "to optimise readership of the newspaper (whether hardcopy or digital) or broadcast and to optimise advertising revenue". Each appellant "provided the forum for its publication and encouraged, for its own commercial purposes, the publication of comments".

[102] Having regard to those findings, the appellants' attempt 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.

Discussion

- **Key implication** from Fairfax: the **High Court of Australia has found that a business-user of a platform can be liable for defamatory content posted by consumer-users on its business page**
- **Do you agree with the outcome?**
- What implications could this have for business-users generally, including on other kinds of platforms?
- What implications could Fairfax have for platform companies, both directly and indirectly?
- **Should Singapore adopt a similar rule?**

In this video...

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