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# The Liability of Search Engines and Tech Companies in Defamation Law

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*In this second in a series of three articles, I consider another possible substantive change to the law of defamation, that relating to the liability of tech companies such as search engines for defamatory material. It is argued here that tech companies which merely allow others to access conduct created by another should not generally be regarded as publishers for the purposes of defamation law. The focus will be on the possible liability of search engines for such liability, given that internet service providers are provided some explicit statutory protection from such actions. The principles discussed would also be applicable to cases where it is claimed that those operating a public Facebook page are liable in defamation for material posted to that page by others, which is the subject of current Australian litigation.*

## INTRODUCTION

In the tort of defamation, the fact of publication is critical. Without it, there is no claim for defamation. There are numerous contentious issues surrounding publication in an online environment, including the issue of *where* the material should be deemed to be published, and *when* it should be deemed to be published. I have written about those matters elsewhere. For current purposes, the contentious question to be considered in detail is *by whom* material should be deemed to be published in the online space. Specifically, whether the law considers a search engine company<sup>1</sup> or an internet service provider that provides the service through which material is available online should be considered a publisher for the purposes of defamation law, potentially making them liable for material shown to be defamatory. It is estimated that search engines automatically process more than one billion searches per day,<sup>2</sup> making the logistics of practical, realistic regulation in this space challenging.

The application of existing defences in defamation law, particularly innocent dissemination, is not clear in the online context, as will be discussed below. In a recent paper Judge Gibson of the New South Wales Supreme Court alluded to this situation, acknowledging that the liability of internet service providers in Australia was unclear, including possible application of defences, and should be resolved as part of a comprehensive review into Australian defamation law, having regard to exponential development in technology since the uniform defamation laws were passed.<sup>3</sup> The *Statutory Review of the Defamation Act 2005* recommended that consideration be given to reform of the existing defences to defamation, particularly the innocent dissemination defence, given developments in the online space.<sup>4</sup> The Standing Committee of Attorneys-General announced such a review in February 2019, with a report expected in early 2020. It is expected or hoped that a result of this review will be concrete proposals for defamation law reform.

In this article, I consider the question of whether tech companies such as search engine providers should be liable for the kind of material that is available through their facilities. Unfortunately, this question is very topical. Recently the Commonwealth Parliament passed the *Criminal Code Amendment (Sharing of*

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<sup>1</sup> David Rolph, "The Ordinary, Reasonable Search Engine User and the Defamatory Capacity of Search Engine Results in *Trkulja v Google Inc*" (2017) 37 *Sydney Law Review* 601, 607 refers to the challenges that search engine results present to the principle and policy of the concept of publication in defamation law.

<sup>2</sup> NSW Department of Justice, *Statutory Review of the Defamation Act 2005* (NSW Department of Justice, 2018) 33.

<sup>3</sup> Judge Gibson, "Adapting Defamation Law Reform to Online Publication" (2018) 22(2) *Media and Arts Law Review* 119, 132–133.

<sup>4</sup> See NSW Department of Justice, n 2, Recommendation 15.



*Abhorrent Violent Material*) Act 2019 (Cth) in response to the Christchurch mosque massacres, making internet service providers, and social media content and hosting services liable if abhorrent violent material is accessible through their service.

Obviously, the law of defamation seeks to balance two important competing interests. On one hand, there is the value of freedom of speech within society. We all benefit from discussions that are frank and fearless. Free speech is lauded as helping society move closer to truth, provides a marketplace of ideas where the “best” ideas are supposed to win out, and is considered essential to the kind of democracy we cherish.<sup>5</sup> On the other hand, individuals have a right to their reputation, and there is a legitimate expectation that law will protect victims of untrue character attacks by others. Mill was a staunch-free speech advocate but drew the line at speech that harmed others. The law has recognised that damage to another’s reputation is a harm for which a remedy should be available. This is a difficult balance for the law to strike.

The online environment has only magnified these difficulties. It has increased exponentially the level of interaction and communication among individuals, and the possible range of a person’s communications. This means the likelihood that one person will believe that another has defamed them has increased sharply, because of the greater availability of fora in which to do so.<sup>6</sup> Further, some argue that some individuals approach online interaction in a different manner than how they would approach regular face to face interaction, posting material online that they would never say to a person in the same room as them. This again sharply increases the chances of defamation occurring. And given the potential reach of defamatory speech posted online, the damage to the defendant’s reputation is significantly magnified.

The increased use of online technology to communicate also raises the question of the liability, if any, of those organisations that facilitate these interactions for the communication that they have facilitated. A difficult question for the law in answering these questions has been whether it should seek to adapt existing rules of defamation, crafted in very different times and circumstances, to the exigencies of online defamation today.<sup>7</sup> This seemingly is the natural “homing” instinct of the law. The common law is generally able, and indeed this is seen as one of the prime benefits of judge-made law as opposed to statute or other fixed provision, to accommodate the new – old principles are applied to new scenarios where there is no factual precedent directly on point. Our common law systems have been doing this for centuries. As a result, it is natural that courts have sought to do the same in this context – adapt defamation principles in pre-internet days to today’s predominantly online world. Others can gauge how successful the courts have been in doing so. Opinions will differ as to how much adaptation might be required.<sup>8</sup> It is noteworthy that the United Kingdom Parliament has sought to significantly recast aspects of the law of defamation in that jurisdiction twice in the last 15 years. It is also noteworthy that the United States Congress also saw it as necessary to legislate in this area.

Thus, it would hardly surprise if the current review into Australian defamation law also found that the existing common law principles had failed to sufficiently adapt to the online world, and that the 2005 uniform defamation laws also are now seen to be inadequate in reforming the law to the realities of the online world. The two particular areas of concern in this article will be the definition of “publication” as applied to the online environment, and the extent of a defence open to someone who claims they unknowingly distributed material said to be defamatory.

There is also the question, if regulation is to be introduced, regarding whether it should be technology-neutral, in the sense that the same rules should be applied in an online environment as those applied if

<sup>5</sup> John Stuart Mill, *On Liberty* (John Parker, 1859); Kent Greenawalt, “Free Speech Justifications” (1989) 89 *Columbia Law Review* 119.

<sup>6</sup> *Delfi As v Estonia* [2015] ECHR 586, [110] (Grand Chamber).

<sup>7</sup> David Rolph, *Defamation Law* (2016) 162: “courts have preferred to extend and adapt existing principles of defamation law by way of analogy, while remaining acutely aware of the limitations of analogical reasoning”.

<sup>8</sup> In *Crookes v Newton* the Supreme Court of Canada adapted the old common law rules regarding publication to the question of hyperlinks. The joint reasons openly acknowledged the need to refine the old rules to fit the realities of today’s world: “strict application of the publication rule in these circumstances (hyperlinks) would be like trying to fit a square archaic peg into the hexagonal hole of modernity”: *Crookes v Newton* [2011] 3 SCR 269, 289 (Abella J, for Binnie Le Bel Charron Rothstein and Cromwell JJ).

the same factual scenario occurred through a purely physical situation. It is often suggested that the law should wherever possible be neutral, containing principles of broad application rather than specific rules. The counterargument is that the online context raises specific issues that must be dealt with specifically. There is no easy resolution to this debate.

This article will focus on the question of by whom online material should be deemed to be published, and in particular, whether search engines should be deemed to be liable in defamation for material available through a use of their services. The question of the possible liability of an internet service provider is less pressing in Australia, given an existing comprehensive statutory defence, so the focus will mainly be on search engines. However, cases that discuss one of these contexts often contain interesting points that might be useful to the other context, so the article will discuss cases involving both search engines and internet service providers.

I will now consider how the courts in various jurisdictions have answered the question of identifying who the publisher of given content is, with a particular focus to the online space, and possible liability of tech companies. I will then consider specific options for how a possibly re-crafted uniform Australian defamation law might deal with this issue.

## POSITION IN THE UNITED KINGDOM

Ironically, English decisions from the mid-19th century, well before the internet was created, have laid the platform for the legal answer to this question. In *Day v Bream*,<sup>9</sup> the case concerned handbills apparently containing defamatory matter that the defendant distributed as part of his occupation of delivering mail. The court noted that the defendant was prima facie liable in defamation for publishing the defamatory material, unless he could rely on a defence. In *Pullman v Walter Hill and Co Ltd*,<sup>10</sup> Lord Esher MR defined publication as “making known the defamatory matter after it has been written to some person other than the person to whom it was written”. Lord Esher MR said that a person who wrote a letter published it for the purposes of defamation law as soon as they showed it to a person other than the addressee.

The apparent harshness of this apparently strict liability approach was tempered to some extent. So, in *Emmens v Pottle*,<sup>11</sup> the defamation claim was brought by the plaintiff against the defendants, who sold a newspaper containing the allegedly defamatory material. All members of the Court denied that the vendor was liable for the alleged defamation. This was on the basis that they did not compose the defamatory material, and they did not print it. They were not aware that the content was defamatory, and there was nothing which ought to have made them aware that it was defamatory.<sup>12</sup> The Court found it would be unreasonable and unjust to make them liable for the defamation in such circumstances.<sup>13</sup>

This position was applied in the subsequent decision of *Vizetelly v Mudie’s Select Library Ltd*,<sup>14</sup> involving the question of the liability of book sellers for defamation contained in a book they sold. A jury had found the defendants liable in defamation, presumably on the basis they were negligent in permitting to be sold a book which contained defamatory content. On appeal, the Court refused to disturb the jury’s finding, and referred to the legal principles established in *Emmens* with evident approval in terms of those principles.

In the context of a posting on a notice board of a golf club, a member of the club sued the proprietor and secretary of the club in defamation.<sup>15</sup> Another person had placed material that defamed the plaintiff on the notice board. The proprietor and secretary did not take the material down. In the defamation

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<sup>9</sup> *Day v Bream* (1837) 2 Mood & R 54.

<sup>10</sup> *Pullman v Walter Hill and Co Ltd* [1891] 1 QB 524, 527.

<sup>11</sup> *Emmens v Pottle* (1885) 16 QBD 354.

<sup>12</sup> *Emmens v Pottle* (1885) 16 QBD 354, 357 (Lord Esher MR), Cotton LJ concurring, Bowen LJ to like effect (358).

<sup>13</sup> *Emmens v Pottle* (1885) 16 QBD 354, 357 (Lord Esher MR), Cotton LJ concurring.

<sup>14</sup> *Vizetelly v Mudie’s Select Library Ltd* [1900] 2 QB 170.

<sup>15</sup> *Byrne v Deane* [1937] 1 KB 818.

action, all members of the Court found that the secretary had published the material,<sup>16</sup> and a majority found that the proprietors had. Members of the Court took into account that the defendants had the power to remove the challenged material. It would have been very easy for the defendants to do so. Club rules stated that no-one could post material without the approval of the club secretary. On this basis, members of the Court found that someone could be liable as a publisher of defamatory material if they did not themselves author the publication, but “consented” to its publication,<sup>17</sup> or on one view, “adopt and promote the reading of the defamatory matter”.<sup>18</sup> These cases established distinctions, in terms of liability for defamation, between an individual who or an organisation that published defamatory material, and those that “merely” distributed such material, with different legal rules to be applied to the respective cases.

The challenge for the court was to translate these precedents to the Internet era. One case involving that question was *Godfrey v Demon Internet Ltd (Godfrey)*.<sup>19</sup> The plaintiff alleged they had been defamed by a post from an anonymous source. The defendant was an internet service provider. It provided a number of newsgroup forums. One was a soc.culture.thai, whereby discussion of social and cultural issues was facilitated. Posted messages remained visible to other members of the group for 14 days, after which time they would automatically disappear. The plaintiff complained to the internet service provider that one of the posts had defamed him. The defendant did not remove the post; the post was automatically removed after the 14-day period. One question for the Court’s consideration was whether the internet service provider could be considered to be a publisher of the defamatory material, potentially implicating them in a defamation action.

Morland J found that the defendant could be held liable as a publisher:

In my judgment, the defendants, whenever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their ISP who accesses the newsgroup containing that posting. Thus every time one of the defendants’ customers accesses soc.culture.thai and sees that posting defamatory of the plaintiff there is a publication to that customer ... I do not accept ... that the defendants were merely owners of an electronic device through which postings were transmitted. The defendants chose to store soc.culture.thai postings within their computers. Such postings could be accessed on that newsgroup. The defendants could obliterate (the posting).<sup>20</sup>

Judges in other cases apparently took a different position. In *Totalise Plc v The Motley Food Ltd* the judge found that the hosts of a discussion board were not “publishers” of allegedly defamatory material posted to it. They did not exercise editorial control over it; they were merely facilitators of an exchange among others.<sup>21</sup>

A similar view emerged in *Bunt v Tilley*.<sup>22</sup> There the case was brought against those who posted allegedly defamatory material (first defendants), and against the internet service providers (second defendants) who provided internet access to the first defendants. It is the action against the second defendants that is of interest to us here. The question was whether they could be held liable in defamation as publishers of the defamatory material. The facts differed from *Godfrey*, in that the material was not part of a discussion forum posted by the second defendants. Further, it was not asserted that the defendants were liable

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<sup>16</sup> *Byrne v Deane* [1937] 1 KB 818, 830 (Greer LJ), 835 (Slesser LJ) and 838 (Greene LJ).

<sup>17</sup> *Byrne v Deane* [1937] 1 KB 818, 829 (Greer LJ) and 838 (Greene LJ).

<sup>18</sup> *Byrne v Deane* [1937] 1 KB 818, 835 (Slesser LJ).

<sup>19</sup> *Godfrey v Demon Internet Ltd* [2001] QB 201.

<sup>20</sup> *Godfrey v Demon Internet Ltd* [2001] QB 201, 208–209. The case also concerned the availability of a defence under then *Defamation Act 1996* (UK) s 1. This aspect of the case has not been discussed, because that legislation is now redundant, given the passage of the *Defamation Act 2013* (UK), because that defence only applied to cases where the defendant was not a “publisher” and the court found the internet service provider there was a publisher, and because the focus of this article is who can be counted as a publisher.

<sup>21</sup> *Totalise Plc v The Motley Food Ltd* [2001] EWHC 706 (Owen J); not disturbed on appeal: *Totalise Plc v The Motley Food Ltd* [2002] 1 WLR 1233 (CA).

<sup>22</sup> *Bunt v Tilley* [2007] 1 WLR 1243.

for failing to take down defamatory material. The first that the second defendants were aware of the allegedly defamatory material was when they received notice of legal action against them.

Eady J found that in order to impose legal responsibility on an individual or organisation for publishing defamatory material, some awareness or at least general assumption of responsibility was required.<sup>23</sup> There had to be knowing involvement in publication of the relevant words, according to Eady J. He cited *Emmens v Pottle* for this view. This was somewhat contrary to other authorities, which would have considered such issues in terms of a defence, for example innocent dissemination, rather than in determining the initial question of publication.<sup>24</sup> As a result of this approach, the question of the defence of innocent dissemination effectively became redundant.<sup>25</sup>

Eady J found that none of the second defendants here did knowingly participate in the relevant publications. He concluded that “an internet service provider which performs no more than a passive role in facilitating postings on the internet cannot be deemed to be a publisher at common law”.<sup>26</sup> Eady J was fortified in his conclusions by the *European Parliament and Council Directive 2000/31/EC* (2000), regulation 17<sup>27</sup> and 18<sup>28</sup> of which provided internet service providers protection from liability in respect of information accessed through their service.<sup>29</sup> Subsequently s 1 of the *Defamation Act 2006* (UK) was enacted, providing a defence for a person who is not the author, editor or publisher of material, provided they took reasonable care in publication, and did not know and had no reason to know they were contributing to defamation. Section 1(3)(e) makes clear that a person or organisation is not deemed to be a publisher merely because they operate or provide access to a communication system by which the material is transmitted or made available.

Eady J took a similar position in his decision in *Metropolitan International Schools Ltd v Designtecnica Corp.*<sup>30</sup> There the claimant ran online distance education courses. The first defendant operated a website which provided a bulletin board for discussion. The second and third defendants operated an internet search engine Google. The plaintiff brought proceedings against the defendant for comments posted on their website which appeared as a snippet of information accompanying a hyperlink. This snippet appeared if a user carried out an internet search on the plaintiff using the second and third defendants’ search engine.

Eady J reiterated his view in *Bunt* that in order to fix liability upon a person or organisation as a publisher of defamatory material, it was necessary to show some mental element.<sup>31</sup> Here this was lacking in respect

<sup>23</sup> *Bunt v Tilley* [2007] 1 WLR 1249.

<sup>24</sup> Uta Kohl, “The Rise and Rise of Online Intermediaries in the Governance of the Internet and Beyond – Connectivity Intermediaries” (2012) 26 *International Review of Law, Computers and Technology* 185, 192.

<sup>25</sup> It is now believed that the defence in the United Kingdom has been superseded by s 1 of the *Defamation Act 1996* (UK): *Godfrey v Demon Internet Ltd* [2001] QB 201, 206–207.

<sup>26</sup> *Bunt v Tilley* [2007] 1 WLR 1252.

<sup>27</sup> “Where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service or of the provision of access to a communication network, the service provider ... shall not be liable for damages ... as a result of that transmission where the service provider (a) did not initiate the transmission; (b) did not select the receiver of the transmission; and (c) did not select or modify the information contained in the transmission”.

<sup>28</sup> “Where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service, the service provider ... shall not be liable for damages ... where (a) the information is the subject of automatic, intermediate and temporary storage where that storage is for the sole purpose of making more efficient onward transmission of the information to other recipients of the service ... and (b) the service provider (i) does not modify the information; (ii) complies with conditions on access to the information; (iii) complies with an rules regarding the updating of the information ...; (iv) does not interfere with the lawful use of technology ... to obtain data on the use of the information; and (v) acts expeditiously to remove or to disable access to the information he has stored upon obtaining actual information of the fact that the transmission at the initial source of the transmission has been removed from the network”.

<sup>29</sup> This was implemented in the United Kingdom: *Electronic Commerce (EC Directive) Regulations 2002*. This position is now subject to the terms of any upcoming “Brexit” deal.

<sup>30</sup> *Metropolitan International Schools Ltd v Designtecnica Corp* [2011] 1 WLR 1743.

<sup>31</sup> *Metropolitan International Schools Ltd v Designtecnica Corp* [2011] 1 WLR 1743, 1755.



of Google. He briefly discussed the use of search engines. Google has compiled an index of pages from the web. When a user entered a search, the system would quickly scan that index, and return results deemed appropriate, in the order of those pages considered most relevant to those considered least relevant. The use of an index was necessary in order to deliver search results in a timeframe acceptable to users. There was no human input into the compiling of the index, or its updating. They did not control the search terms used by anyone using their service. They did not control the content that users placed online.<sup>32</sup>

Eady J concluded it was not possible for Google to meaningfully control the response the user received. In particular here, it could not control the fact the user would receive the snippet attached to the first defendant's website unless it had taken some positive prior steps. He concluded that Google could not be seen as a publisher of the impugned material. Rather it was a mere facilitator.<sup>33</sup> It could not be said that Google authorised, approved or acquiesced in the material and its publication.<sup>34</sup>

A broadly similar position was taken by the Court of Appeal in *Tamiz v Google Inc (Tamiz)*.<sup>35</sup> There the plaintiff sued the defendant in defamation based on eight comments posted anonymously on a blog hosted on a platform provided by the defendant. The defendant had the ability to remove posts that it considered to be contrary to its policies. Five weeks after Google received a complaint from the plaintiff, it contacted the person who posted the material, who then removed it within three days. The trial judge (Eady J) had found that Google was not a publisher of the relevant material.

By and large, the Court of Appeal agreed. It found that Google was a facilitator of the blogs and publication on them, but it was not a primary publisher, because it did not create the blogs and did not have any prior knowledge or effective control over their content.<sup>36</sup> The Court said it was "very doubtful" that Google was a secondary publisher either. Certainly, it could not be said to be such until the time the plaintiff brought the material to Google's attention. The Court of Appeal departed from Eady J's reasoning to the extent that they, following the reasoning of the court in *Byrne v Deane*, found that Google could be found to be a secondary publisher of the material, at least once a reasonable time had elapsed from when complaint was first made about the material.<sup>37</sup>

Subsequently the United Kingdom Parliament passed the *Defamation Act 2013* (UK). Section 5 of that legislation confers protection for a website operator in respect of material posted to the website, where the operator did not post the relevant material. The protection ceases if each of the following applies: (a) the plaintiff cannot sufficiently identify the person who did post the relevant material; (b) the plaintiff provides the website operator a notice of complaint in relation to the relevant material; and (c) the operator fails to respond to the complaint in accordance with the regulations made pursuant to the Act. Generally, these regulations require the website operator to respond to a complaint within 48 hours, asking the poster whether they agree to the material being removed. The poster has five days to respond. If within that time they respond that they consent for the material to be removed, it must be removed within 48 hours of response. If they do not respond, it must be removed within 48 hours of the end of the five-day period. If they respond by stating they wish the material to remain, the website host must inform the complainant of that within 48 hours of receiving the response.<sup>38</sup> This process is voluntary, not mandatory.<sup>39</sup> Section 10 seems to make action for defamation against an organisation or an individual

<sup>32</sup> *Metropolitan International Schools Ltd v Designtechica Corp* [2011] 1 WLR 1743, 1747.

<sup>33</sup> *Metropolitan International Schools Ltd v Designtechica Corp* [2011] 1 WLR 1743, 1757.

<sup>34</sup> *Metropolitan International Schools Ltd v Designtechica Corp* [2011] 1 WLR 1743, 1771. Eady J found that delays in taking down the material complained of could not be viewed as acquiescence.

<sup>35</sup> *Tamiz v Google Inc* [2013] 1 WLR 2151.

<sup>36</sup> *Tamiz v Google Inc* [2013] 1 WLR 2151, 2162 (Richards LJ, with whom Sullivan LJ and Lord Dyson agreed).

<sup>37</sup> *Tamiz v Google Inc* [2013] 1 WLR 2151, 2165. See for discussion Matthew Collins, *The Law of Defamation and the Internet* 3<sup>rd</sup> ed, (Oxford University Press, 2010) 112–120.

<sup>38</sup> *Defamation (Operators of Websites) Regulations 2013* (UK).

<sup>39</sup> Ronan Perry and Tal Zarsky, "Liability for Online Anonymous Speech: Comparative and Economic Analyses" (2014) *Journal of European Tort Law* 205, 225.

who is not the author, editor or publisher of the material a last resort. It is only possible to bring an action against an organisation that or individual whom *does not* fit at least one of these categories where it is not possible to bring action against an organisation that or individual whom *does* fit one such category.

## POSITION IN AUSTRALIA

The picture also appears to be uncertain in Australia.<sup>40</sup> There are some decisions (discussed below) which appear to suggest that internet service providers and/or companies providing a search engine may be publishers for the purposes of the law of defamation. Traditionally the concept of “publication” for the purposes of defamation law in Australia has been defined broadly.<sup>41</sup> In terms of preliminaries, it should be noted that internet service providers may have a defence to a defamation action under either or both of Sch 5 cl 91 of the *Broadcasting Services Act 1992* (Cth)<sup>42</sup> and s 32 of the uniform defamation<sup>43</sup> legislation in relation to innocent dissemination.<sup>44</sup> Search engine companies may also have a defence under s 32, though general doubt attends the applicability of s 32 to technology companies.<sup>45</sup> Schedule 5 could only apply to a search engine company if it falls within the definition of an “internet content host”, which is unlikely.

For example, in *Trkulja v Google (No 5)* (*Trkulja*)<sup>46</sup> a jury had found that Google, a search engine provider, was liable as a publisher of material defamatory of the plaintiff. The alleged defamation involved images that would appear on screen in response to a search of the plaintiff’s name. These images were said to be defamatory. It also included Google’s autocomplete function, where someone who began to type in a search of the plaintiff may be confronted with an autocomplete that again linked the plaintiff with criminal activity. The jury found that Google was a publisher for the purposes of defamation law, a finding that the Court refused to overturn.

Beach J held that the jury was entitled to find that Google was a publisher of the material, even prior to the time when they first received complaints about the search results. Beach J said:

The jury were entitled to conclude that Google Inc intended to publish the material that its automated systems produced, because that was what they were designed to do upon a search request being typed into one of Google Inc’s search products. Google Inc is like the newsagent that sells a newspaper containing a defamatory article. While there might be no specific intention to publish defamatory material, there is a relevant intention by the newsagent to publish the newspaper for the purposes of the law of defamation.<sup>47</sup>

Beach J pointed out that defamation cases were fact sensitive, and some of the evidence might have been different in this case to that considered in some of the English decisions referred to above. That said, Beach J said that the English decisions (particularly *Bunt*, *Metropolitan* and *Tamiz*) “did not represent the

<sup>40</sup> Rolph, n 7, 166: “the issue of whether a search engine is a publisher for the purposes of defamation law has ... perplexed English and Australian courts ... the law on this point (is) far from settled”; *Statutory Review of the Defamation Act 2005*, n 2, 32.

<sup>41</sup> *Webb v Bloch* (1928) 41 CLR 331, 363 (“to publish a libel is to convey by some means to the mind of another the defamatory sense embodied”)(Isaacs J) and 364, quoting Gifford QC in *Parkes v Prescott* (1869) LR 4 Ex 169, 173 (“all who are in any degree accessory to the publication of a libel”).

<sup>42</sup> This clause states that no law shall make an internet service provider or internet content host liable with respect to material hosted or carried by their service where they are not aware of the nature of the internet content. Nor can they be required to monitor content carried by the provider or hosted by the host.

<sup>43</sup> This section essentially protects “subordinate” distributors of content where they neither knew nor ought to have known the material was defamatory and their lack of knowledge to this effect was not negligent.

<sup>44</sup> “There is no reason in principle why a mere distributor of electronic material should not be able to rely on the defence of innocent dissemination if the circumstances so permit”: *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 589 (Brennan CJ, Dawson and Toohey JJ).

<sup>45</sup> Julie Eisenberg, “Safely Out of Sight: The Impact of the New Online Content Regulation on Defamation Law” (2000) 23(1) *New South Wales Law Journal* 232, 234–235 notes it has not been simple to identify the right circumstances in which a tech company can rely on s 32, and suggests that where they offer a filtering service, they may be deemed to be a primary rather than secondary distributor, thus losing the defence available in s 32.

<sup>46</sup> *Trkulja v Google (No 5)* [2012] VSC 533.

<sup>47</sup> *Trkulja v Google (No 5)* [2012] VSC 533, [18].

common law of Australia” insofar as they might be taken to suggest that internet service providers and search engine companies were not publishers.<sup>48</sup> Beach J expressly disagreed with statements in the above cases suggesting that defendants in defamation cases who adopted a merely passive role could not be seen as publishers.<sup>49</sup> He said such decisions were inconsistent with other authority (presumably *Byrne*), and that in any event, Google’s role here could not be described as merely passive.<sup>50</sup>

The South Australian Full Court reached a similar conclusion in *Google Inc v Duffy*.<sup>51</sup> Here the plaintiff sued the defendant Google for defamation. The dispute involved Dr Duffy’s visits to psychics. She visited psychics online and believed that what she was told was wrong. She engaged in an online exchange with various psychics. Arising from these exchanges, Dr Duffy argued that an internet search of her name using the defendant’s surname produced content pages and hyperlinks to pages that defamed her, and that the autocomplete function would add defamatory material to her name through its search suggestions. Google denied they were a publisher of the allegedly defamatory material.

All members of the Full Court found that Google should be considered to be a publisher:

Google established the algorithms and programmes of its search engine and made that search engine available to all users of the Internet. At the time of a search, Google, by the mechanism of its search engine, produces the snippet paragraphs, albeit at the request of its user. That conduct made Google a participant of the content of the paragraph to the person making the search even though that content derived from and was an electronic reproduction of a webpage published by a third person. Google participated in the publication of the paragraphs about Dr Duffy produced by its search engine because it intended its search engine to do what it programmed it to do.<sup>52</sup>

The Victorian Court of Appeal discussed these issues in another proceeding involving the same parties, *Google Inc v Trkulja*.<sup>53</sup> In that judgment, the Court discussed the nature of the liability of Google for results of the use of its search engine and its autocorrect function. It found that search engine companies were more than passive participants in the publication of material, and not just facilitators of communication.<sup>54</sup> Thus, they could attract liability as secondary publishers of online material said to be defamatory. However, usually a defence of innocent dissemination would be available to them, at least in relation to publication of the material at a time prior to their having notice of a complaint.<sup>55</sup> This explanation occurred in the course of an appeal against dismissal of a summary disposition application.

On appeal, the High Court of Australia criticised the Victorian Court of Appeal for unnecessarily considering the relevant substantive matters for consideration, as opposed to dealing with the simple question of whether the matters should or should not have been disposed of summarily.<sup>56</sup> That said, the Court agreed with the finding of the trial judge that it was “strongly arguable” that Google was a publisher of the allegedly defamatory search results, including the images and the autocomplete results.<sup>57</sup> It left open the question of whether an innocent dissemination defence would typically be available to a search engine in such cases, as the Court of Appeal had found. It was not proper for the court to speculate on such matters at this point, in the view of the High Court. Of course, these comments were obiter in nature, but are likely to be very persuasive in future cases, unless statutory law reform occurs.<sup>58</sup>

<sup>48</sup> *Trkulja v Google (No 5)* [2012] VSC 533, [29].

<sup>49</sup> *Trkulja v Google (No 5)* [2012] VSC 533, [28].

<sup>50</sup> *Trkulja v Google (No 5)* [2012] VSC 533, [29].

<sup>51</sup> *Google Inc v Duffy* (2017) 129 SASR 304; [2017] SASCFC 130.

<sup>52</sup> *Google Inc v Duffy* (2017) 129 SASR 304, [155] (Kourakis CJ, with whom Peek and Hinton JJ agreed); [2017] SASCFC 130.

<sup>53</sup> *Google Inc v Trkulja* (2016) 342 ALR 504; [2016] VSCA 333.

<sup>54</sup> *Google Inc v Trkulja* (2016) 342 ALR 504, [352]; [2016] VSCA 333.

<sup>55</sup> *Google Inc v Trkulja* (2016) 342 ALR 504, [353]; [2016] VSCA 333.

<sup>56</sup> *Trkulja v Google LLC* (2018) 263 CLR 149; [2018] HCA 25.

<sup>57</sup> *Trkulja v Google LLC* (2018) 263 CLR 149, 163 [38] (all members of the Court); [2018] HCA 25.

<sup>58</sup> Judge Gibson has asked whether the High Court might have conflated defamatory capacity with liability as publisher: “Adapting Defamation Law Reform to Online Publication” (2018) 22(2) *Media and Arts Law Review* 119, 133. David Rolph argues the



A different view has been expressed by McCallum J in *Bleyer v Google Inc*.<sup>59</sup> There the plaintiff sued Google seeking to make them responsible for what the plaintiff claimed was defamatory material about him published by Google when they displayed search results containing it. McCallum J considered the English authorities which had found that neither an internet service provider or a search engine company was generally a publisher of material, at least at a time prior to receiving any complaints about allegedly defamatory material. She also referred to the comments of Beach J in *Trkulja* attempting to distinguish the English precedents. McCallum J concluded

I would respectfully not share Beach J's view that there is any relevant difference between the decisions in *Burt v Tilley*, *Metropolitan International Schools* and *Tamiz* and the common law of Australia ... the evidence before me establishes that there is no human input in the application of the Google search engine apart from the creation of the algorithm. I would respectfully disagree with the conclusion reached by Beach J in *Trkulja* that the performance of the function of the algorithm in that circumstance is capable of establishing liability as a publisher at common law. I would adopt the English line of authority to the effect that, at least prior to notification of a complaint (and on the strength of the evidence before me), Google Inc cannot be liable as a publisher of the results produced by its search engine.<sup>60</sup>

Defamation academic David Rolph has also suggested refinement of Australian legal principle to reflect the English position.<sup>61</sup>

The liability of Google for publications was also considered in the different context of misleading advertising in *Google Inc v Australian Competition and Consumer Commission*.<sup>62</sup> The issue was whether Google was liable for misleading and deceptive conduct for misleading advertising that appeared in results of a search using their search engine. The misleading advertising appeared as sponsored links. All members of the Court rejected the suggestion that Google was liable for the content of the misleading advertising.

French CJ Crennan and Kiefel JJ noted

That the display of sponsored links ... can be described as Google's response to a user's request for information does not render Google the maker, author, creator or originator of the information in a sponsored link. The technology which lies behind the display of a sponsored link merely assembles information provided by others for the purpose of displaying advertisements directed to users of the Google search engine in their capacity as consumers of products and services. In this sense Google is not relevantly different for other intermediaries such as newspaper publishers or broadcasters who publish, display or broadcast the advertisements of others. The fact that the provision of information via the internet will – because of the nature of the internet – necessarily involve a response to a request made by an internet user does not, without more, disturb the analogy between Google and other intermediaries. To the extent that Google displays sponsored links, the Google search engine is only a means of communication between advertisers and consumers ... ordinary and reasonable users of the Google search engine would have understood that the sponsored links were created by advertisers. Such users would also have understood that representations made by the sponsored links were those of the advertisers and were not adopted or endorsed by Google.<sup>63</sup>

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question of publication in the context of search engine results warrants direct consideration, rather than as a peripheral issue in a case primarily concerning other issues: Rolph, n 1, 611.

<sup>59</sup> *Bleyer v Google Inc LLC* (2014) 88 NSWLR 670; [2014] NSWSC 897.

<sup>60</sup> *Bleyer v Google Inc* (2014) 88 NSWLR 670, [77] and [83]; [2014] NSWSC 897.

<sup>61</sup> "Publication, Innocent Dissemination and the Internet After *Dow Jones and Co Inc v Gutnick*" (2010) 33 *University of New South Wales Law Journal* 562, 580: "the recent line of authority from the United Kingdom suggests that the concept of publication needs to be refined, so as to exclude conduct that amounts only to the merely passive facilitation of disseminating defamatory matter".

<sup>62</sup> *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435; [2013] HCA 1. See also *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42; [2012] HCA 16, involving the possible liability of an internet service provider for copyright infringement. However, that case is not discussed here because it turned particularly on the relevant provisions of the intellectual property legislation, rather than containing statements considered to be of broader application.

<sup>63</sup> *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435, 459–460; [2013] HCA 1. Hayne J denied that endorsement or adoption were necessarily relevant to liability (463).

The different context in which these statements were made is fully acknowledged. It was not a defamation case. That said, the joint judgment, together with that of Heydon J,<sup>64</sup> implies an acknowledgment of the potentially extremely broad liability to which a search engine might be subject, and perhaps a concern that a search engine should not be held liable for content over which it exercised no real control.

## POSITION IN CANADA

Canada obviously shares important common law foundations with the United Kingdom and Australia. It has traditionally defined publication broadly to mean any act by which meaning is conveyed to a third party.<sup>65</sup> The Supreme Court considered the application of these rules to an online environment in *Crookes v Newton*.<sup>66</sup> Newton controlled a website which included commentary on various issues. His website contained a hyperlink to various articles, which were alleged to include material defamatory of the plaintiff. The legal issue was whether the plaintiff could sue the defendant in defamation based on the hyperlinks.

The Court found that he could not. Although this case clearly involves a different factual context, it made comments of broader application considered relevant for the purposes of current discussion. The main judgment said there was a distinction between actual publishers of material and those whose participation is merely ancillary. The former controlled the content and whether it reached an audience at all; the latter did not.<sup>67</sup> Someone who created a hyperlink did not create the content or have control over it; they did not necessarily endorse or approve its content.<sup>68</sup>

## POSITION IN THE UNITED STATES

A couple of preliminary points should be made prior to considering the American case law regarding online defamation and the liability of tech companies. The first is that whenever there is discussion about “American law”, it must always be recalled that there is no one general common law of America, as there is in the United Kingdom and Australia.<sup>69</sup> Generally each State is free to develop its own common law as it thinks fit. In this context, the restatements assume more importance than they otherwise would. Their content might indicate a position on the law to which some might adhere. It is likely to be influential, though no State is required to adopt the content of any restatement in terms of its own common law.

American defamation law traditionally distinguished three categories of individual or organisation. The first was a publisher. The second was a distributor. The third was a common carrier. An example of a publisher was a newspaper. An example of a distributor was a newsagency or bookshop. An example of a common carrier was a telephone service. These categories were differentiated according to the degree of control exercised by the individual or the organisation over the relevant communication. So, for example a newspaper proprietor and their editorial staff exercised significant control over what the newspaper sought to publish. At the other end of the spectrum, an organisation that was a common carrier exercised little or no control over the content of conversations conducted using their technology. In the middle was a newsagency or bookshop, transmitting material that may be defamatory, but in a situation where they may not realise that the material was defamatory, and likely did not check the material they were selling for possible defamatory prior to distribution.

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<sup>64</sup> “If Google’s provision of its technological facilities to display the advertisements caused it to be the maker of the advertisements, one of two conclusions would follow. Either there would be an exceptionally wide form of absolute liability for those who publish information in the media, or there would be a distinction between advertising in online media and advertising in traditional media. Neither conclusion should be reached” (484).

<sup>65</sup> *McNichol v Grandy* [1931] SCR 696, 699.

<sup>66</sup> *Crookes v Newton* [2011] 3 SCR 269.

<sup>67</sup> *Crookes v Newton* [2011] 3 SCR 269, 285 (Abella J, for Binnie Le Bel Charron Rothstein and Cromwell JJ).

<sup>68</sup> *Crookes v Newton* [2011] 3 SCR 269, 286.

<sup>69</sup> *Erie Railroad Co v Tompkins*, 304 US 64, 78–79 (1938).

Different rules of liability were established for each type of individual or organisation. A publisher would generally be liable for the content of its publications, including defamation authored by a third party that it published. In other words, this was strict liability upon the publisher. The Supreme Court would restrict the scope of this liability in the classic *First Amendment* decision of *New York Times Co v Sullivan*, by providing broad scope for discussion of “public figures”, and limiting the liability of publishers for defamation of public figures to cases where malice attended the defamatory material.<sup>70</sup> Further, the *Restatement (Second) of Torts* moved away from strict liability, in requiring that a publisher be at least negligent in order to be liable for defamation.<sup>71</sup>

A distributor would only be liable if they knew or ought to have known of the defamatory material contained in what they distributed.<sup>72</sup> In this way, a distributor for the purposes of American defamation law would be in a similar position to that of someone in the traditional common law that had a defence of innocent dissemination, or in the language of the Australian uniform defamation legislation, a “subordinate distributor”. A common carrier would generally not be liable for defamation that occurred using its network.<sup>73</sup>

The question for the American courts in dealing with cases involving online defamation was which category applied to tech companies in some way implicated in online defamation. This challenged the viability of the categories, because it could be argued that tech companies should be included in each of the categories.<sup>74</sup> For instance, a tech company that controlled what could be published, for instance on a bulletin board, might be argued to be a publisher. A tech company that provided a facility for the exchange of messages between users could be argued to be a simple distributor. Initially, internet access was provided via dial-up services, linking such access to telephone services, and suggesting they should be seen as common carriers. The other challenge is that the nature of the internet and the kind of communication it facilitates has changed so much from inception. For example, there has been a move away from tech companies playing a role in monitoring or editing content produced by others, and towards direct interaction between users, with tech companies providing the network for this to occur, with minimal monitoring and surveillance, partly because of the sheer volume of interaction and messages that today occur online.

At one time the case law had reached different positions on the question of the liability of tech companies for defamation facilitated by their service. For instance, in one decision it found an internet service provider was not a publisher of material that was posted to one of its bulletin boards.<sup>75</sup> The Court noted it was not feasible for the company to monitor the material to which its platform provided access for the purposes of determining whether content might be defamatory.<sup>76</sup> In another case the Court found that an internet service provider was a common carrier, and not liable for defamatory content posted using its services.<sup>77</sup> In a case with similar facts to *Cubby*, but where the company exerted more control over what was posted, the Court found that they were a primary publisher.<sup>78</sup> This decision created real concern that internet service providers would face significant liability risk for material posted by others. It was argued that if this decision took hold, it could crimp and restrict the burgeoning technology sector. It was also argued the decision could create perverse incentives for technology companies to pay no attention to

<sup>70</sup> *New York Times Co v Sullivan*, 376 US 254 (1964).

<sup>71</sup> *Restatement (Second) of Torts* (1977) s 558; see also *Gertz v Robert Welch, Inc*, 418 US 323 (1974); Brian McManus, “Rethinking Defamation Liability for Internet Service Providers” (2001) 35 *Suffolk University Law Review* 647, 653: “in most states, a publisher’s liability for defamation depends on the nature of the defamed and either a recklessness or negligence standard applies”.

<sup>72</sup> *Restatement (Second) of Torts* (1977) s 581.

<sup>73</sup> *Anderson v New York Telephone Co*, 320 NE 2d 647, 648 (NY, 1974).

<sup>74</sup> Sewali Patel, “Immunizing Internet Service Providers from Third-party Internet Defamation Claims: How Far Should Courts Go” (2002) 55 *Vanderbilt Law Review* 647, 675–676; McManus, n 71, 661.

<sup>75</sup> *Cubby v Compuserve*, 776 F Supp 135 (SD NY, 1991).

<sup>76</sup> *Cubby v Compuserve*, 776 F Supp 135, 139–141 (Leisure J).

<sup>77</sup> *Lunney v Prodigy Services Co*, 723 NE 2d 539, 541–543 (NY 1999).

<sup>78</sup> *Stratton-Oakmont v Prodigy* (1995) NY Misc Lexis 229.

what was being posted using their systems, given that it was the fact that the internet service provider in *Stratton-Oakmont* had sought to control content that seemed to implicate them in liability.<sup>79</sup>

Congress then passed s 230 of the *Communications Decency Act*. That provision provides that no provider or user of any interactive computer service shall be treated as publisher or speaker of any information provided by another information content provider. Though aspects of the legislation were struck out on constitutional grounds, s 230 remains good law. The drafting of s 230 inevitably led to cases seeking clarity on its scope. One question was whether its safe-harbour protection of tech companies was limited to cases where the company was a “publisher” in terms of the above traditional classification, or whether it extended to “distributors”. The Court in *Zeran v America Online*<sup>80</sup> found that the s 230 defence applied to both publishers and distributors, protecting them from liability even after the company had received notice of complaint about particular content. American Online (AOL) had a complete defence to a claim by the plaintiff for defamation. Effectively, this decision heralds the collapse of the distinction between a publisher and a distributor. However, this collapse only applies to online defamation.

It is instructive to consider the facts of this case in some detail in order to determine the best balance here between the relevant competing interests. The plaintiff was Kenneth Zeran. In the aftermath of the Oklahoma City bombing, pranksters determined to play a “joke” on Zeran by impersonating him online. They advertised t-shirts for sale which apparently made light of the bombing, directing interested parties to contact Kenneth Zeran. As a result, Zeran received a torrent of abuse, and death threats. Zeran contacted AOL, explaining to them what had happened, and asking them to remove the content. They refused to do so. Zeran brought action against them in defamation and negligence.

The Court found that s 230 of the *Communication Decency Act* provided AOL with a complete defence to the action. It was irrelevant that Zeran had provided them with notice of the defamation. The Court reasoned that if liability depended on whether the tech company had received such notice, there would be incentive to complain as soon as possible about allegedly online defamatory material, and tech companies would likely err on the side of caution and remove material about which complaint was made, even if it was not in fact defamatory. This “chilling effect” on freedom of speech concerned the Fourth Circuit.<sup>81</sup>

The Court also broadened the scope of s 230 protection by broadly interpreting the meaning of “information provided by another information content provider”. So, in *Blumenthal v Drudge*<sup>82</sup> the case involved defamatory material contained in the “Drudge Report”. The Report was authored by Mr Drudge, but published by AOL. Mr Drudge and AOL had a written contract providing that the latter would publish the Drudge Report under license. AOL had the right to alter the content. They paid Mr Drudge a monthly retainer to write the report. The Court applied s 230 and found that AOL could not be held liable. It held that the information had been provided by another information content provider, although AOL and Drudge worked together under a written agreement, and AOL had editorial control over the content.<sup>83</sup>

Section 230, as interpreted by the courts, has had the effect that “victims of defamation have no legal remedies for cyber-defamation, and no legal incentives exist for ISPs, when they function as distributors or publishers, to act in a responsible manner”.<sup>84</sup>

<sup>79</sup> McManus, n 71, 666.

<sup>80</sup> *Zeran v America Online*, 129 F 3d 327 (1997).

<sup>81</sup> *Zeran v America Online*, 129 F 3d 327, 333 (1997).

<sup>82</sup> *Blumenthal v Drudge*, 992 F Supp 44 (DDC 1998).

<sup>83</sup> There are valid arguments that the courts have acted contrary to the wishes and will of the Congress in these interpretations. So for example it is argued that the tenor of the *Communications Decency Act* was to encourage internet service providers to actually take responsibility for material they were making available to users, including pornography: Christopher Butler, “Plotting the Return of an Ancient Tort to Cyberspace: Towards a New Federal Standard of Responsibility for Defamation for Internet Service Providers” (2000) 6 *Michigan Telecommunications and Technology Law Review* 247, 251–252 (this part of the legislation was struck out on *First Amendment* grounds: *Reno v American Civil Liberties Union*, 521 US 844 (1997)). However, the courts’ collective interpretation of s 230 have had the result of effectively protecting tech companies from any liability for what their services make available to users: Sewali Patel, “Immunizing Internet Service Providers from Third-party Internet Defamation Claims: How Far Should Courts Go” (2002) 55 *Vanderbilt Law Review* 647, 684.

<sup>84</sup> McManus, n 71, 669.

## POSSIBLE OPTIONS FOR LAW REFORM IN AUSTRALIA

Given the uncertainty that currently exists in Australia as to whether search engines are to be regarded as publishers and whether or not they may be entitled to rely on existing defences, the article will now turn to a consideration of the options for reform. The focus is on search engines rather than internet service providers, because the latter already enjoys significant protection from liability in the *Broadcasting Services Act 1992* (Cth). The question of notice of the allegedly defamatory material is an important one. The United Kingdom Court of Appeal in *Tamiz* indicated the question of notice was critical in terms of liability, and the Victorian Court of Appeal agreed in *Trkulja*.

### OPTION 1: SEARCH ENGINES ARE STRICTLY LIABLE FOR CONTENT DISPLAYED AS A RESULT OF SEARCHES, PRESUMABLY SUBJECT TO AN INNOCENT DISSEMINATION DEFENCE

This is the argument that Google and other search engines are publishers of the results of the search. This position would rely on the traditional definitions of publication noted above – per *Pullman* “making known the defamatory matter”, per Isaacs J in *Kent* “to convey to the mind of another”, and per *McNichol* “conveying defamatory meaning ... by an act”. The argument would be that this is what search engines do. They make known the defamatory matter to users, and they convey the message, including the possible defamation, to the user. This argument would rely on the fact that traditionally defamation was a tort of strict liability. It did not rely on the fault, still less active knowledge, on the part of the defendant.

The argument would be that in terms of the traditional distinction between a publisher and a distributor, a search engine is closer to a publisher because it controls the results of the search. The search occurs through the indexes prepared by the search engine. The search engine develops the algorithms through which the results are obtained. This led the High Court in *Trkulja* in obiter dicta to state it was “strongly arguable” that Google was a publisher of search results. This reflects the view taken by Beach J in *Trkulja* and by the South Australian Supreme Court in *Google Inc v Duffy*.

On the other hand, it can be argued that there is no manual involvement in the way the search occurs, once the user has inputted their search. The search occurs automatically. Google would argue it does not control the results. It was shown above that one of the ways the law in the past distinguished between a publisher and a distributor was the extent to which the relevant organisation or individual had control over the content. Google would argue it has little control over the content that is available to users. A similar observation was made by the European Court of Justice in relation to the possible liability of search engines for privacy breaches. Denying such liability, it noted that

The internet search engine provider merely supplying an information location tool does not exercise control over personal data included on third party web pages. The service provider is not aware of the existence of personal data in any other sense than as a statistical fact web pages are likely to include personal data ... the internet search engine provider has no relationship with the content of third-party source web pages on the internet where personal data might appear. Moreover as the search engine works on the basis of copies of the source web pages that its crawler function as retrieved and copied, the service provider does not have any means of changing the information in the host servers. Provision of an information location tool does not imply any control over the content.<sup>85</sup>

Notions of control and/or endorsement/approval were critical in the judgments of the Canadian Supreme Court in *Crookes v Newton*,<sup>86</sup> in the admittedly different context of possible liability of a website operator for material found through hyperlinks. Six members of the Supreme Court focused on the (lack of) control the website operator had over the content of the material linked through the hyperlink.<sup>87</sup> Two members of the Court focused on whether the website operator adopted or endorsed the material

<sup>85</sup> *Google Spain SL v Agencia Espanola de Proteccion de Datos (AEPD) Mario Costeja Gonzalez* [2013] EUECJ C-131/12, [84]–[85] (Advocate General Jaaskinen).

<sup>86</sup> *Crookes v Newton* [2011] 3 SCR 269.

<sup>87</sup> *Crookes v Newton* [2011] 3 SCR 269, 285–286 (Abella J, for Binnie Le Bel Charron Rothstein and Cromwell JJ);



linked.<sup>88</sup> The ninth member found that only deliberate acts should find liability in defamation.<sup>89</sup> In my view, a search engine is in a similar, if not identical, position. The search engine lacks control over the content of the pages to which it refers. It does not author the pages. It certainly does not adopt or endorse the material that is brought to the user's attention as a result of the search. Any defamation that appears on the user's screen as a result of the search is not the result of deliberate efforts by Google to defame anyone. Each of the other jurisdictions studied,<sup>90</sup> as well as Strasbourg jurisprudence,<sup>91</sup> and a decision of the European Court of Justice,<sup>92</sup> also considers or has considered questions of control in the context of possible liability for online defamation. For the reasons given by the Supreme Court in Canada in *Crookes* regarding a website operator, and in particular because of concepts of control, or the lack of it, a search engine should not be seen as a publisher.

I will discuss the innocent dissemination defence in more detail in Option 2.

## OPTION 2: SEARCH ENGINES ARE LIABLE FOR CONTENT DISPLAYED AS A RESULT OF SEARCHES, BUT ONLY WHERE A COMPLAINT HAS BEEN MADE ABOUT THE MATERIAL SHOWN AND THE MATERIAL HAS NOT BEEN REMOVED

This option is arguably closest to the current position under s 32 of the uniform defamation legislation, under which "subordinate distributors" enjoy a defence if they meet various criteria, including that they neither knew nor reasonably could have known that the relevant material was defamatory.

The availability of a s 32 defence to a search engine in Australian law is not entirely clear. The Victorian Court of Appeal indicated it would usually be available, but the High Court was non-committal on the issue. In the same case, the High Court indicated the "strong arguability" of a finding that Google was a publisher. The (current) wording of s 32 seems to contemplate that a publisher can also be a "subordinate distributor", in contrast with the equivalent position in the United Kingdom.<sup>93</sup> The argument might be that although the defence is or may be applicable, it ceases to be applicable when the search engine receives a notice from an aggrieved person that online material about them is considered to be defamatory. This seems to be the position taken by the Victorian Court of Appeal in *Trkulja*,<sup>94</sup> though Beach J of the Victorian Supreme Court believes that they can be held liable even prior to the notice. This suggestion of the Victorian Court of Appeal is based on the wording of s 23 which requires for the defence to apply that "the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory". It seems to have been the position of the English Court of Appeal in *Tamiz v Google Inc*.

With respect, it is suggested there is an unacceptable conflation of two points in this kind of reasoning. It is one thing for someone to complain that material is defamatory. Individuals regularly complain that they have been wronged. It is quite another for them to prove their case to the requisite standard. For this reason, it is considered wrong to conflate the fact that a complaint has been made with a finding that the material is defamatory, or that once the search engine receives a complaint that material is defamatory, this means the defendant should reasonably know the material is defamatory. With respect, this is not correct. A plaintiff who has not made out their case is not entitled to relief. Others should not be required to assume that a claim will be successful. The burden of proof is of course on the one alleging wrongdoing to make out their claim to the required standard. The law and courts do not assume wrongdoing. Nor should they apply that standard to a tech company.

<sup>88</sup> *Crookes v Newton* [2011] 3 SCR 269, 294 (McLachlin CJ and Fish J). Similarly in Australia, the court in *Urbanchich v Drummoyne Municipal Council* [1991] Aust Torts Reports 81-127, Hunt J referred to such notions in determining that a council was not liable in defamation for posters plastered on bus shelters.

<sup>89</sup> *Crookes v Newton* [2011] 3 SCR 269, 297 (Deschamps J).

<sup>90</sup> In the United States, *Stratton-Oakmont v Prodigy* (1995) NY Misc Lexis 229 and in the United Kingdom *Tamiz v Google Inc* [2013] 1 WLR 2151.

<sup>91</sup> *Delfi As v Estonia* [2015] ECHR 586, [145]–[146] (Grand Chamber).

<sup>92</sup> *Google Spain SL v Agencia Espanola de Proteccion de DEatos (AEPD) Mario Costeja Gonzalez* [2013] EUECJ C-131/12.

<sup>93</sup> *Defamation Act 2006* (UK) s 1, a defence, is confined, to those who are *not* authors, editors or publishers of material.

<sup>94</sup> *Trkulja v Google (No 5)* [2012] VSC 533, [353].

Now, of course, the only way in which anyone can know for sure whether material is defamatory, has been published, and no defences apply, is for the court to determine these matters. It is argued that (effectively) requiring search engines to take down material as soon as a complaint is made is problematic, when the matter has not been heard in court. Adoption of such an approach will undoubtedly have a chilling effect on speech on the internet, as search engines err on the side of caution in immediately removing material as soon as a complaint is made, for fear of liability:

When intermediaries are forced to act as gatekeepers ... they are forced to make quasi-legal decisions normally reserved to courts, as to what is or is not illegal. This is problematic partly because they have neither the independence nor the expertise of the judiciary and partly because their incentives are such that they are more likely to remove material than not, even if the allegations of wrongdoing are tenuous. In short, the involvement of intermediaries in the regulatory process is as promising as it is problematic.<sup>95</sup>

For these reasons, the liability of a search engine for defamation should not turn on the simple fact that there has, or has not, been a complaint about allegedly defamatory material. Of course, if the position were that the mere filing of a complaint was enough to affect the liability position of the search engine, this would have the practical consequence of encouraging the making of complaints, even if there was nothing defamatory about the material at all. This presents a serious threat to the kind of freedom of speech upon which our democracy depends. In conclusion, the question whether a search engine is or is not liable for defamatory material accessible through its services should not turn on whether the search engine has received a complaint about it. This conclusion is not inconsistent with the approach taken by the Federal Parliament in its recent *Enhanced Online Safety Act 2015* (Cth). While that legislation does in some circumstances make tech companies such as social media companies liable for online material such as cyberbullying or sharing of intimate material, such potential liability only arises where an independent third party government office has determined that the material meets the description of cyberbullying or sharing of intimate material, and has directed the tech company to remove the material. In other words, recent federal legislation directed to online companies does not require them to make their own assessment regarding whether online material falls within the definition of statutory prohibitions. The mere fact, without more, that a complaint has been made about online material does not make the tech companies liable under that legislation for the available content. A similar argument is made here.

This reasoning should also be applied to interpretation of Sch 5 cl 91 of the *Broadcasting Services Act 1992* (Cth). This section provides internet service providers with a defence to the laws of defamation in cases where they were not aware of the “nature of the internet content”. It might be argued that once a complaint is made to an internet service provider that material available online is defamatory, this makes them aware of the nature of the content, such that if they continue to permit access to it, they might lose the defence. However, the provision should be interpreted narrowly. It should be interpreted so that the mere fact a complaint has been made that material is defamatory does not make the internet service provider aware of the nature of the internet content. Only a court finding that the material is defamatory would be considered sufficient to make them aware of the “nature” of the internet content; in other words, the fact that it is defamatory. Such a reading of this clause would be consistent with what I have argued in respect of search engines, and accords with the well-accepted approach to statutory interpretation, whereby statutes are interpreted in cases of ambiguity in a way that is least invasive of human rights. In this case, such an approach is appropriate, the relevant human right obviously being the right to free speech.

### **OPTION 3: SEARCH ENGINES ARE COMPLETELY IMMUNE FROM LIABILITY FOR ONLINE DEFAMATION**

At one time I considered whether search engines should have any liability at all for online defamation authored by another. The facts of a case such as *Zeran* convince me that some liability should be possible, and that the American law has gone too far in protecting tech companies, at the expense of an

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<sup>95</sup> Uta Kohl, “The Rise and Rose of Online Intermediaries in the Governance of the Internet and Beyond – Connectivity Intermediaries” (2012) 26 *International Review of Law, Computers & Technology* 185, 191. This argument was accepted in *Zeran v America Online*, 129 F 3d 327 (1997).

individual's reputation. Of course, all jurisdictions have the right to balance the competing interests and values surrounding speech as they see fit and reach the balance that best reflects a country's broad culture and values. It is trite to observe that American law is fiercely protective of free speech, more so than any other jurisdiction of which the author has knowledge.

That said, my assessment is that the factual scenario in *Zeran* should call for some legal liability on the tech company. The case was against an internet service provider rather than a search engine, but the principles are similar. In my view, a tech company that has knowledge that a person is being impersonated by others, with potentially very serious implications for the person, should be required to respond. The potential for this kind of behaviour to damage the reputation of the person impersonated is very real. The reality is that the victim might find it very difficult to identify the person or persons responsible for impersonation.

Thus, in my view, if a person complains to a search engine or tech company that they are being impersonated, presumably in a way that is not flattering to them and in fact to their detriment, the tech company has an obligation to reasonably investigate this. This is purely a factual inquiry. The person complaining should provide their evidence to the tech company. The tech company should investigate. If it is reasonably satisfied that the complaint is made out, it has an obligation to remove the relevant material so that it is not accessible. If it is not reasonably satisfied the complaint is made out, it need not remove the material. However, its decision not to do so would be taken into account if the person claiming to have been wronged later takes the matter to court. If it either refuses to investigate the allegation, or investigates it but reaches an unreasonable conclusion, the action by the aggrieved party might be in negligence in relation to the investigation, rather than seeking to implicate the company in the actual act of defamation. I would rather not complicate matters by imposing defamation liability on an online facilitator, where they have not produced the content. In the alternative, when such a complaint is made, it could be referred to a proposed new office of Defamation Commissioner, which is discussed in more detail below.

Some readers might wonder why I impose this requirement on tech companies in the case of alleged impersonation, as opposed to cases of alleged defamation. In my view, one important difference is that whether or not there has been impersonation is purely a question of fact. This is something that can be investigated, and the truth usually readily obtained by the tech companies. On the other hand, the question of whether material is defamatory or not is a legal question, about which reasonable minds would differ. One is purely a question of fact, whether or not a person has been impersonated, and the other is a mixture of fact and law where there is often ambiguity. I am satisfied it is reasonable to expect the tech company to respond to a complaint about impersonation by thorough investigation, when it is not reasonable to expect them to do the same in a case of alleged defamation.

#### **OPTION 4: CHANGES TO DEFINITIONS IN DEFAMATION LEGISLATION**

The word "publication" is not defined in the existing uniform defamation legislation. The innocent dissemination defence is, to put it mildly, expressed in convoluted terms, involving an outline of three issues a defendant must prove, followed by two definitional aspects, expressed as negatives. The drafting can be substantially improved.

The first suggestion is to define publication in such a way as to require a mental element in order that a person or organisation be said to have published material. For instance, that the defendant knows or ought to reasonably know that the material is defamatory. This is consistent with the United Kingdom decisions in *Bunt v Tilley*, *Metropolitan International Schools* and *Tamiz v Google*, and with the decision of the New South Wales Supreme Court in *Bleyer v Google Inc*, and with the High Court's broad approach in a different context in *Google v ACCC*. It is contrary to the High Court's dicta comments in *Trkulja* and with the Victorian Court of Appeal decision in *Trkulja* and that of the Supreme Court of South Australia in *Duffy*. In one sense this suggested narrowed definition of publication has been caused by the exponential growth of the Internet, such that the opportunities for publication and the scope of the potential audience has been magnified exponentially. It is one thing to find a newspaper proprietor liable for "publishing" material they did not author but published, but quite another to make a search

engine liable for “publishing” material accessible through their service, in terms of the scope of material being considered, scope of distribution etc. It is here that our old concepts of defamation law can “show their age”, and where attempts to simply transpose such concepts to the online world, tempting as it is for the common law, can be very fraught. That said, it should be acknowledged that even in 1885 in *Emmens v Pottle*, the “fairness” of making such entities liable as publishers was being questioned. It is expected that, if this reform were made, that tech companies such as search engines would not generally be considered to be publishers for the purposes of the law of defamation.

This is the preferred amendment. It casts the onus of proof on the plaintiff to show that the defendant in fact is a publisher, not for the defendant to have to prove the existence of a defence. And it avoids the possible complexity involved in trying to craft a defence that balances competing interests.

There is an alternative approach. It is an alternative because if an organisation or individual is not a publisher or the author of defamatory material, it would not usually be liable for it. The alternative might be viable if, for example, Parliament does not wish to define the meaning of publication in statute at all, or does not wish to re-define it in the way suggested above. If this is the position, then the question of defences to which a tech company might point becomes critical. Specifically, the question of the defence of “innocent dissemination”. The defence must be simplified. Parliament may wish to retain the principle that the defence is available when a defendant can show they did not know and should not reasonably have known that material was defamatory etc. If so, it must be made clear that the mere fact that a complaint has been made that material available online is defamatory does not, of itself, mean that the defendant can no longer avail themselves of this defence after a reasonable time has elapsed after the complaint has been received. The issues of (a) reasonable knowledge that material is defamatory and (b) the fact that an allegation that material is defamatory must not be conflated, as (respectfully) the Victorian Court of Appeal did. The law must continue to reflect the principle that an allegation of wrongdoing is, at that stage, simply that – an allegation. It must not be presumed, directly or indirectly, to be correct. Laws that, as applied, effectively create potential for liability as publisher for online defamation if tech companies do not respond to a mere untested allegation of defamation create an unacceptable chill on free speech which is the hallmark of Australian democracy and a flourishing liberal state.

Another option might be consideration of a complaint and take-down approach. This might apply, for example, if an independent government regulator (“Defamation Commissioner”) takes the view, probably after a complaint is made to them, that online material is defamatory according to the pertinent law. They could have the power to order that a search engine remove the material. This would obviate a court process in order to have material removed. There would be no possible liability on the search engine if it complied with the order within a prescribed timeframe. This would be preferable to making tech companies potentially liable as publishers shortly after they receive notice of an allegation that material available through their service is defamatory, in circumstances where they refuse to remove it. It would mirror the federal government’s approach to cyberbullying of minors and online distribution of intimate images in its *Enhancing Online Safety Act 2015* (Cth) with its use of an eSafety Commissioner to vet material. One advantage of this suggestion is that it would reduce the number of defamation cases that are going to court.

## CONCLUSION

The current review into the uniform defamation laws provides an opportunity to re-consider whether defamation law remains “fit for purpose” in relation to the needs of current society, factoring in that the ways in which individuals, communities and organisations interact has changed radically since the time when defamation law principles were fully crafted. While the common law generally seeks to adapt slowly and by analogy with prior principles, sometimes the extent of change in society means that more radical reform is required. Parliaments around Australia recognised this need in 2005 with national uniform defamation legislation. It is hoped that significant reforms will occur in 2020. Fifteen years is a very long time in the online world.

We need clarity on the extent to which search engines are liable for defamatory material available through their service. This article has demonstrated the range of ways in which comparable common

law countries have approached the issue of liability of tech companies for defamation which they did not author, but access to which they may have facilitated. Several options for reform were canvassed, including making them liable as a publisher of the material, subject a possible defence, only making them liable once they have notice of an allegation that material is defamatory, and completely exempting them from liability. It was concluded that for various reasons, none of these options was desirable. Instead, it was suggested that the best way forward was for a new uniform defamation law in Australia to define publication. This definition should make clear that a tech company, including search engines, that merely facilitated access to the defamatory material, without more, should not be considered to be a publisher of that material. It would need to be shown that the company was aware, or ought to have been aware, that the material was defamatory. In the alternative, if parliaments did not wish to legislate a definition of publication along the lines suggested, it must re-craft the defence of innocent dissemination. The present version is poorly drafted. If Parliament wishes to retain use of the “did not know or could not reasonably have known” that the material was defamatory concept as part of this defence, it should make clear that the mere fact that a complaint has been made that material available online is defamatory does not necessarily mean that the search engine or tech company could reasonably have known the material was defamatory. A presumption of innocence should apply.

The other reform option worth considering, in an effort to reduce the number of defamation cases heard in court, is for a notice and take-down system. An office equivalent to the eSafety Commissioner in the 2015 *Enhancing Online Safety Act* might be established in the defamation space. This “Defamation Commissioner” could investigate complaints of online defamation and, if they believe that the material is defamatory, direct a tech company to remove the material or prevent access to the material. The tech company would have to do so within a short timeframe. Of course, the Defamation Commissioner’s ruling does not have the status of a court ruling on the matter, and if the tech company refused to comply with the request, the person claiming they had been wronged would be entitled to go to court and have their claims assessed. However, they would need to make out the elements of their defamation claim. There is also a good argument that in cases where a person is being impersonated online, that the tech companies should be required to respond to a complaint quickly. This is purely a factual inquiry, rather than a debatable legal issue, thus justifying a different rule being applied in such cases.

I commend the Standing Committee of Attorneys-General for announcing this review into defamation law, and trust that meaningful reforms will be made to bring defamation law into line with the realities of modern communication. The issue of whom should be deemed to be liable for online defamation must be considered in this reform milieu.

## POSTSCRIPT

Subsequent to the writing of this article, the NSW Supreme Court rendered its decision in *Voller v Nationwide News Pty Ltd; Voller v Fairfax Media Publications Pty Ltd; Voller v Australian News Channel Pty Ltd*.<sup>96</sup> The case involved a number of newspaper outlets which operated public Facebook pages. These pages encouraged members of the public to post comments in response to news stories. Mr Voller claimed he had been defamed by some of the posts, and sought to make the news companies liable for the posts made on their public Facebook pages as a publisher of the material. In a landmark judgment, a single judge of the New South Wales Supreme Court found that the news companies were publishers of the relevant material. At the time of writing, this decision is being appealed. Rothman J took into account the special nature of the relevant Facebook page. The news companies had control over what was posted. They could permit or not permit posting. They could apply filters, so that posts containing certain words would not appear. They could monitor posts, and hide them if they so wished. The court also found that the news companies were primary publishers, such that the defence of innocent dissemination would not be available to them. If the reform I suggested above are made to the law of defamation, facts of this nature would not give rise to liability for the news companies in the situation

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<sup>96</sup> *Voller v Nationwide News Pty Ltd; Voller v Fairfax Media Publications Pty Ltd; Voller v Australian News Channel Pty Ltd* [2019] NSWSC 766.



suggested, unless and until a court finds that the news company knew or ought reasonably to have known that the material was defamatory.

If the decision in *Voller* is confirmed on appeal, it is likely to have a significant chilling effect on online discussion of important political, economic and social issues, by making providers of such opportunities potentially liable for content. At its best, the online environment can connect vast numbers of individuals, and allow individuals to be exposed to a broad range of ideas and opinions on a vast array of matters. It is conceded that some of the material is not valuable, and may be abusive, nasty, or factually incorrect. However, the internet has vastly expanded the space in which the “marketplace of ideas” operates. Facilities whereby members of society can post contributions and comments are an important feature of this marketplace. They need to be nurtured, not effectively shut down through the chilling effect provided by the spectre of liability on companies that offer this service.