

# “Secondary Publisher Blues”: Online Platforms and Liability in Defamation

Amidst an increasing number of defamation claims against internet platforms, including a recent High Court judgment in *Trkulja v Google LLC*,<sup>1</sup> the NSW Department of Justice has issued a statutory review paper that recommends reform. Sophie Dawson and Joel Parsons consider the current state of play in this fraught area.

## 1. Introduction

Australian defamation law is widely regarded as a maze of arcane legal principles. The position of online platforms which “host” third party content is a particularly complex area which continues to evolve. However, the allocation of liability to those who do not create defamatory content, but somehow participate in its publication, is not a new phenomenon in defamation law. In the 1880s, it was the newspaper vendor, sued over the sale of newspapers containing defamatory articles (*Emmens v Pottle*).<sup>2</sup> In the 1980s, a local council found itself defending a defamation claim after failing to remove defamatory posters plastered on bus shelters in its locale by a third party (*Urbanchich v Drummoyne Municipal Council*).<sup>3</sup>

Against this background, Australian courts seem to be adopting a similar approach in relation to online platforms. Courts have determined that in certain circumstances, when defamatory content is generated on an internet platform, once the prospective plaintiff complains about it, the proprietor of the platform may become liable. However, despite thousands of

words of judicial contemplation, significant uncertainties remain. The decision in *Trkulja v Google LLC*<sup>4</sup> indicates that evidence in such cases is critical; where there are novel allegations of publication, there cannot be certainty as to the nature of a platform’s involvement in such publication, until at least after discovery.<sup>5</sup>

## 2. *Google Inc v Duffy*<sup>6</sup>

Much Australian judicial attention in the area of intermediary liability in recent times has been focused on defamation claims against search engines, one such example being *Google Inc v Duffy*.<sup>7</sup> The plaintiff in that case discovered that a Google search involving her name generated certain search results which she alleged defamed her. The plaintiff sued Google in relation to these search results (and autocomplete search terms), which were created by way of Google’s algorithm, from the content on various webpages of a third party website. At first instance, Blue J determined that Google had defamed the plaintiff,<sup>8</sup> however, Google appealed.

Each of the appellate judges delivered separate judgments. The Chief Justice, Kourakis CJ, decided that Google had a qualified

privilege defence, but he was in the minority on this point, and so Google’s appeal failed. There was, however, broad agreement as to the findings on publication, which can be summarised as follows:

- Google established the algorithm and the programs that generate search results, so Google is a participant in the publication of the material (although it is derived from content on another website written by a third person).<sup>9</sup>
- Google is a secondary participant because the words selected are electronically reproduced from other publications on the internet.<sup>10</sup>
- It is impossible to attribute to Google advance knowledge of the contents of search results on its search platform, but Google has knowledge of the likely content of future search results on its platform after it is notified of the existence of defamatory material in the search results.<sup>11</sup>
- Google is excused from liability for a reasonable time as is required to ‘take down’ references to the defamatory material.<sup>12</sup>

1 [2018] HCA 25.

2 (1885) 16 QBD 354.

3 (1991) Aust Tort Reports 81-127.

4 Above n 1.

5 *Ibid*, [39].

6 [2017] SASCF 130.

7 *Ibid*.

8 *Duffy v Google Inc* (2015) 125 SASR 437.

9 *Google Inc v Duffy* [2017] SASCF 130, [181].

10 *Ibid*.

11 *Ibid*, [183].

12 *Ibid*, [184].

Accordingly, in *Duffy*, Google was found to be a secondary publisher of the search results complained of, but was not liable for defamatory material in those search results, until (1) it has been notified of them, and (2) a reasonable period of time for the removal of the offending search results has passed.

A further question arose as to whether Google is liable, as a publisher of the webpages “underlying” the search results. While clearly Google does not replicate the entire text of the webpages upon which search results are based, hyperlinks to those webpages are included in those search results. Search results can point to the defamatory material on the underlying webpage, meaning that Google might become liable for the webpage itself. Kourakis CJ confirmed that Google can be liable for such webpages if there is “incorporation” of the defamatory material into the search snippet.<sup>13</sup> The question appears to be whether the search snippet includes enough of the defamatory material from the linked webpage, and whether the level of facilitation of the reading of the linked webpage is both “substantial and proximate”.<sup>14</sup> It was expressed by way of analogy:

A Google search paragraph is the electronic analogue of the person who places a post-it note on a book which reads ‘go to page 56 to read interesting gossip about X’.<sup>15</sup>

Interestingly, in a recent Victorian defamation claim against Google,<sup>16</sup> the plaintiff sought to rely on the findings in *Duffy*, to strike out Google’s pleading to the effect that

it was not a publisher of allegedly defamatory search results. The Victorian Supreme Court of Appeal said, however, that *Duffy* does not stand for the proposition that the owner of an internet search engine, as a matter of law, is a publisher of material produced in response to a search undertaken by a user.<sup>17</sup>

### 3. *Trkulja v Google*<sup>18</sup>

One of the plaintiff’s witnesses in the *Duffy* case, Milorad Trkulja, has himself successfully sued search engines over defamatory search results, winning against both Yahoo! and Google in 2012. Mr Trkulja currently has another claim pending against Google, which involves allegations that the appearance of his photo in a Google image search, amongst images of certain third parties, is defamatory. Google sought summary judgment on the basis that the claim had no real prospect of success. That application failed at first instance,<sup>19</sup> but succeeded before the Supreme Court of Victoria Court of Appeal,<sup>20</sup> before failing again before the High Court in *Trkulja v Google LLC*.<sup>21</sup>

The Court of Appeal had found that the “images matter” did not have the capacity to convey the defamatory imputations. This was largely because it agreed with Google that the ordinary reasonable user of Google image search understands the context of a search engine - many search results are generated at extreme speed, from a vast array of source material, such that they could not be produced manually. So the user would recognise that “the search results in their entirety did not reflect the meaning of inputted words considered as a phrase”.<sup>22</sup>

The High Court heard Mr. Trkulja’s appeal. It was arguably, however, not the best vehicle for the determination of platform liability issues, because the question before the High Court was essentially limited to whether the case should have been dismissed summarily, and didn’t invite definitive adjudication of outstanding legal issues. Ultimately, the High Court concluded that there was no reason why the claim had no prospects of success, and it should have had the benefit of a full trial.<sup>23</sup> For example, it is by no means a forgone conclusion that everyone understands how Google works, and the user’s ability to navigate Google, the comprehension of how it works, and what it produces, may vary significantly.<sup>24</sup> The case simply serves to underscore the complexity of online publication, and indicates that courts will continue to apply the well-established defamation principles, but with close reference to the evidence of the particular circumstances of internet publication in the case (as this will determine how those principles should apply).

### 4. Beyond search engines

The proliferation of defamation claims faced by search engines is extending to other online platforms. Webpages inviting comments can very easily become places in which defamatory comments are made, and on many platforms, interactivity and user-generated content are enthusiastically encouraged. Many different individuals or entities can be said to have a hand in publication. Consider for example, a Facebook group - Facebook provides the

<sup>13</sup> *Ibid*, [187].

<sup>14</sup> *Ibid*, [173].

<sup>15</sup> *Ibid*.

<sup>16</sup> *Defferos v Google Inc LLC* [2018] VSCA 176.

<sup>17</sup> *Ibid*, [8].

<sup>18</sup> Above n 1.

<sup>19</sup> *Trkulja v Google Inc* [2015] VSC 635.

<sup>20</sup> *Google Inc v Trkulja* [2016] VSCA 333.

<sup>21</sup> Above n 1.

<sup>22</sup> Above n 18, [151].

<sup>23</sup> Above n 1, [39].

<sup>24</sup> *Ibid*, [54].

platform, a particular user creates the group (being a place for comments), and members of the group comment.

There are now several decisions considering the liability of intermediaries on social media that have somehow participated in the dissemination of other users' defamatory content, and the precise time at which that liability arose. In *Murray v Wishart*,<sup>25</sup> the New Zealand Court of Appeal was asked to consider whether it was arguable that the administrator of a Facebook page was a publisher of defamatory third party comments on the page. The Court preferred the "actual knowledge" test,<sup>26</sup> that is, the administrator would only be liable, if they had actual knowledge of the defamatory post, rather than simply "constructive knowledge" (where the circumstances are such that the defendant administrator "ought to have known" of the defamatory material).

In *Von Marburg v Aldred & Anor*,<sup>27</sup> Dixon J considered the position of a Facebook group administrator of a page on which an allegedly defamatory comment was posted. Dixon J said that "awareness of the existence of the impugned material is a precondition before an internet intermediary such as an administrator or sponsor of a Facebook page will be held to be a publisher",<sup>28</sup> before immediately approving of the approach in *Wishart*, suggesting that merely "constructive knowledge" would not be sufficient.

In the recent decision of *Johnston v Aldridge*<sup>29</sup>, however, Judge Brebner of the South Australian District Court, found that the publisher of certain Facebook

posts, was a secondary publisher of the defamatory comments subsequently added to those posts by other users, apparently on the basis of constructive knowledge. Although the comments were "streaming in"<sup>30</sup> and running into the thousands, "volume cannot create its own shield".<sup>31</sup> While it was not established that the defendant actually knew of the existence of each of the defamatory comments, the posts were of a character that might attract inappropriate comments.<sup>32</sup> Because the defendant could, with reasonable diligence, have known of the existence of the comments the defendant was liable. It is not clear whether that outcome is entirely consistent with the views expressed in *Wishart* or *Von Marburg*, but it is a clear application of the reasoning in *Duffy*.<sup>33</sup> The reasoning in *Aldridge* seems to require people posting controversial material on Facebook to diligently monitor subsequent user interactions with that content, lest those users defame someone.

There has been, however, comparatively little defamation litigation in Australia involving other types of online platforms, where the platform itself is a defendant. This is probably because in many instances the actual author of the libel is readily identifiable, and is the immediate focus of the plaintiff's frustration, rather than the platform. Recent cases such as *Hockey v Fairfax Media Publications Pty Limited*,<sup>34</sup> where the plaintiff claimed against Fairfax Media (as author of the tweets), illustrate the continued prevalence of the mass media as defendant on social media platforms. On a secondary publisher/innocent disseminator analysis, however,

there is no reason why a social media platform operator, in certain circumstances, might not also be drawn into such a claim.

## 5. Reform

Platform operators may be able to argue for the novel application of traditional defamation defences (such as the qualified privilege defence advanced in *Duffy*), but it remains to be seen whether these are likely to provide any real comfort to these defendants. Any reprieve may arise from legal reform, but that is also some way off.

In June 2018, a New South Wales Statutory Review delivered a report on the current state of defamation law. The report does note the existence of some protections for platforms, such as that under the *Broadcasting Services Act 1992* (Cth), which protects an "internet content host" ("ICH") from liability for hosting or carrying particular content where the ICH is not aware of the nature of the content. The operation of this section, with respect to platforms, is still unclear.

The Review did identify that the administrative burden placed on search engine operators, in requiring them to act promptly on all blocking requests, has significant potential to obstruct freedom of expression. Recommendation 15 is that a reconvened Defamation Working Party consider whether the existing protections for digital publishers are sufficient, and whether safe harbour provisions would be beneficial. It has taken almost 10 years for this report to be delivered. It will be some time before any reform is implemented. In the meantime, defamation claims against platforms continue to arise.

25 [2014] NZCA 461.

26 [2014] NZCA 461, [114].

27 [2015] VSC 467, [37].

28 *Ibid*, [37].

29 [2018] SADC 68.

30 *Ibid*, [180].

31 *Ibid* [185].

32 *Ibid*.

33 *Ibid*, [181].

34 [2015] FCA 652.