The High Court Considers: Does Google Search Publish Every Website on the Internet? Looking Forward to *Google LLC v Defteros*

Alex Tharby, Fabienne Sharbanee and **Mhairi Stewart,** media lawyers at Bennett + Co, consider the Google LLC v Defteros defamation litigation.

Although many are slow to admit it, most of us have succumbed to the urge to type our own names into Google. For some, the search results link to defamatory third-party websites. Should Google be liable for those websites' content when it merely hyperlinks those websites in its results? This is the question the High Court is considering in the *Google v Defteros* appeal after Google was held liable for such content at first instance and on appeal.

This article traces the case history and the submissions made by the parties, and predicts the outcome of the High Court appeal that was argued before the full bench of the High Court on 3 May 2022.

Procedural history

In 2016 Victorian criminal lawyer George Defteros commenced defamation proceedings against US behemoth Google. Online searches for Mr Defteros' name produced a page of results which included links to news articles which defamed him. Google failed to remove the links after Mr Defteros complained of them. The hyperlinks were eventually removed from search results during the course of the proceedings.

Mr Defteros' argument that Google is liable for those links was accepted by the Victorian Supreme Court and Court of Appeal, which also rejected defences of innocent dissemination and common law qualified privilege.

At first instance: *Defteros v Google LLC* [2020] VSC 219[1]

The trial judge, Richards J, held that Google could be liable as a 'publisher' of defamatory matter by the inclusion in search results of hyperlinks to websites that were defamatory. Her Honour followed the seminal case of *Webb v Bloch* (1928) 41 CLR 331 in which Isaacs J held that any degree of participation in the publication of defamatory matter was sufficient to attract liability as a publisher. This case was recently affirmed by the High Court in *Voller* (which was published after the first instance and appeal decisions in the *Defteros* matter).[2] Her Honour found (at [55]) that:

> The inclusion of a hyperlink within a search result naturally invites the user to click on the link in order to reach the webpage referenced by the search result … the provision of a hyperlink within a search result facilitates the communication of the contents of the linked webpage to such a substantial degree that it amounts to publication of the webpage.

Thus by presenting a hyperlink within search results, Google had participated in the publication of its content to the user.

Google also raised defences of innocent dissemination and common law qualified privilege. Google relied on inaccuracies (and apparent falsities) in Mr Defteros' notifications of the defamatory websites to assert that his notifications were insufficient to impute 'knowledge' of them. Richards J rejected this submission and held that the defamatory websites were sufficiently identifiable for Google to have identified them and removed the hyperlinks from search results. The evidence established that Google could have removed hyperlinks to defamatory websites within 7 days, so Google was liable thereafter.

Richards J considered the relevant authorities relating to common law qualified privilege and concluded that although Google provides a service to its users it does not do so as a matter of legal, social or moral duty but as a result of its commercial interests. Her Honour noted that Google's search engine process was fully automated and did not limit its provision of hyperlinks to persons who had a legitimate duty or interest in the search results. Her Honour considered that a user entering a search query and Google presenting search results in response did not necessarily establish a relationship involving a community or reciprocity of interest between the user and Google.

However, her Honour largely upheld Google's defence of statutory qualified privilege. Her Honour inferred that most but not all of the 150 search engine users who 'clicked through' to the defamatory website would have had some interest in the search results, such as seeking Mr Defteros' contact details or services as a lawyer or employment with his firm.

Richards J awarded $40,000 damages to Mr Defteros.

The Court of Appeal's decision: *Defteros v Google LLC* [2021] VSCA 167[3]

The Victorian Court of Appeal (Beach, Kaye and Niall JJA) upheld Richards J's decision on appeal. The Court placed emphasis on the decision in another case involving Google,

1 See our detailed review of the first instance decision: Michael Douglas, Alex Tharby and Jessica Border, 'Google as publisher of everything defamatory on the internet: Defteros v Google LLC [2020] VSC 219', *Bennett + Co* (online) (7 May 2020) < https://bennettandco.com.au/areas/defamation/google-as-publisher-of-everything-defamatory-on-the-internet-defteros-v-google-llc-2020-vsc-219/>.

2 *Fairfax Media Publications Pty Ltd v Voller* (2021) 95 ALJR 767.

3 See our detailed review of the Court of Appeal's decision: Alex Tharby, 'Google Liable in Defamation for Links to Defamatory Websites: Defteros v Google LLC [2021] VSCA 167', *Bennett + Co* (online) (13 May 2020) <https://bennettandco.com.au/areas/defamation/google-liable-in-defamation-for-links-to-defamatory-websites-defteros-v-google-llc-2021-vsca-167/>.

Google Inc v Duffy (2017) 129 SASR 304. That case involved 'snippets' generated by Google that provide a snapshot, or snippet, of part of the hyperlinked website which snippets were themselves defamatory. The Court of Appeal explained the result in *Duffy* in the following terms (at [87]):

> The concepts of incorporation by Kourakis CJ and enticement by Hinton J [ie, the Judge at first instance in *Duffy*] are used to explain why Google was a publisher of material that is linked by means of a URL contained within a search result. They are both a manifestation of the more broadly expressed test in *Webb v Bloch* that fastens on steps that lend assistance to the publication. Here, both concepts can be applied ... The combination of the search terms, the text of the search result and the insertion of the URL link filtered the mass of material on the internet and both directed and encouraged the reader to click on the link for further information.

The Court of Appeal applied the principles from *Webb v Bloch* and *Duffy* and held Google was liable as a publisher of the websites, despite the hyperlinks not themselves being defamatory.

The Court of Appeal upheld Richards J's reasoning and findings in relation to innocent dissemination and the effectiveness of Mr Defteros' notifications and, in effect, in relation to common law qualified privilege. The Court of Appeal also rejected an appeal by Mr Defteros in relation to other matters.

Issues for the High Court to consider

The four issues before the High Court are:

1. whether, by providing a hyperlink to a defamatory third party website in search results, Google is a 'publisher' – in the technical defamation law sense of the content of the third party website;

2. for the purposes of the common law qualified privilege defence, whether Google and all search engine users have a reciprocal duty or interest in relation to search results;

3. for the purposes of the statutory qualified privilege defence, whether all search engine users have 'an apparent interest' in search results by reason of having entered search terms that generated those results; and

4. what is effective notification to a publisher for the purposes of the defence of innocent dissemination?

Analysis of Google's arguments in the High Court[4]

Publication

Google relied on the Canadian Supreme Court decision in *Crookes v Newton* [2011] 3 SCR 269 to submit that the provision of a 'mere collection of mere references' that themselves were devoid of any defamatory content is insufficient to render a defendant a publisher of the website's content. Counsel for Google drew an analogy between search engine operators and a supplier of motor vehicles which carry newspapers with defamatory content in support of Google's position.

Mr Defteros submitted that, on the facts of the case the application of the *Webb v Bloch* and *Voller* tests of any degree of participation in the process of publication, Google should be held liable.

The High Court in *Voller* has already confirmed that "the publication rule has always been understood to have a very wide operation".[5] It is therefore difficult to see Google's appeal on this issue succeeding. During submissions, Kiefel CJ noted that the High Court in *Voller* did not adopt any of the reasoning in *Crookes v Newton*, and Gordon and Gageler JJ each pushed back on Google's submissions. Google's argument might, however, enjoy some support from Edelman and Steward JJ, both of whom engaged with Google's analogy and delivered dissenting judgments in *Voller*.

Common law qualified privilege

Google submitted that a "search engine provides an indispensable means by which users can locate information of interest to them on the internet" and therefore operated for the common convenience and welfare of society. Accordingly, search engine operators have a duty or interest to publish search results and because, as Richards J found, the majority of users use search engines for legitimate interests, the common law should protect search engine operators in respect of publication of results to *all* users.

Mr Defteros submitted that Google's search algorithms were fully automated to return results, whether or not relevant to the user's purposes (whatever those purposes might be), and further, that Richards J had found as a fact that some users accessed the article out of idle interest or curiosity.

The conclusion called for by Google would delineate a new category of qualified privilege between search engine operators and users. Google's submission to the effect that it provides a public service is somewhat undermined by the fact that it operates for profit with its own terms of use. If Google's argument in this regard were affirmed, it would afford search engine operators a defence regardless of the intention of the user and regardless of the content of the search results.

In our view, the High Court is highly unlikely to extend common law qualified privilege this far. The Court might go so far as to afford protection at common law to search engine operators where the user has a recognisable duty or interest in the results, but not otherwise.

Statutory qualified privilege

Google submitted that in addition to the 'interest' it had in publishing search results, it had an 'apparent interest' because its representative reasonably believed that users searching for Mr Defteros' name had an apparent interest in the search results.

Mr Defteros responded that because of the automated nature of the search results that were typically impossible to predict, Google could not have had a reasonable belief that users had an apparent interest in the results.

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4 *Google LLC v Defteros* [2022] HCATrans 77.

5 *Voller* [31] (Kiefel CJ, Keane and Gordon JJ) and see [88]–[89] (Gageler and Gordon JJ).

The difficulty with Google's submission is one of timing. At the time of the search results' publication – that is, when the search engine user clicks the hyperlink and comprehends the defamatory website – Google has not (and could not have) considered the interests of the *particular* user. It cannot therefore hold the relevant belief at the time of publication. For this reason, it is difficult to see the High Court concluding that Google's blanket belief, that all users searching Mr Defteros' name had an apparent interest in the search results, was reasonable.

Innocent dissemination

Google submitted that: (i) Mr Defteros' notifications contained 'materially' or 'egregiously' misleading statements; (ii) the function and purpose of the innocent dissemination defence is to permit a publisher time to consider its position and response; and (iii) a defendant should not be burdened with having to consider the defamation unless the notice is 'sufficiently square and proper'.

Mr Defteros responded that the notifications included the relevant website addresses and so were sufficient for Google to have identified the material the subject of the complaint.

In our view, Google's submission in this regard ignores the fact that it was provided with sufficient information to identify and remove the hyperlinks from its search results.

The initial "removal request" made through Google's standard process identified the offending URLs. It was only in responding to subsequent requests for further information that Mr Defteros' representatives provided inaccurate information. Nothing in the defence deprives a plaintiff of a cause of action or remedy on the basis that its notification contained inaccuracies, no matter how significant or whether deliberate or not, if the defamatory material has been brought to the defendant's notice.

Prediction

We expect that the appeal will be dismissed in a majority decision that will reaffirm the strictness of 'publication' in defamation law that was affirmed in *Voller*. Unless members of the Court develop the law, Google's prospects of success on its defences are also, in our view, marginal.

Such a decision may re-agitate calls for law reform in the vein of the lapsed and misleadingly-titled *Anti-Trolling Bill*, which has been convincingly derided in many different publications.

From our perspective, Google enjoys sufficient protection with the innocent dissemination defence and under the *Online Safety Act 2021* (Cth). Our current law strikes a fair balance between Google's commercial interests, the public's interest in having access to information, and individuals' interests in seeing their reputations protected.

Event Report: International Privacy and Data Developments with Bird & Bird

Anna Kretowicz (CAMLA Young Lawyers Committee representative)

Privacy. We all want it, especially in a world where data leaks and hacking seem to be happening with increasing frequency, and you think your phone is listening to you because you mentioned to your friend one time that you wanted an Oodie and now your Facebook feed is covered in ads for them. And not to mention the looming spectre of artificial intelligence.

The seminar was held remotely on the evening of 31 March by **Bird & Bird**, with an expert panel of Francine Cunningham (Regulatory and Public Affairs Director), Alex Dixie (Partner and Head of AdTech Practice), Sophie Dawson (Partner), Joel Parsons (Senior Associate) and Emma Croft (Associate). Attendees were given a global view of the trends, developments and forecasts in data and privacy law, with a special focus on the European Union and United Kingdom and how that landscape compares to Australia.

At a high level, the key trends in privacy and data were identified as increasing regulation, giving consumers more control, and cyber security. These changes will have implications across the technology, media and telecom (TMT) environment, affecting businesses, how media is delivered and how journalists can conduct their work.

Summarising the EU position, Francine identified the "Big 5" pieces of legislation in relation to data and privacy that, together, demonstrate a shift towards a "Data Access By Design" model. That is, there's a focus on mandating data portability, making data accessible to users and opening up the market to smaller players in business. Alex added that there is increasing regulation and enforcement of cookies in the UK, which is a predominantly political movement driven by privacy activism, high-profile regulatory decisions and key regulatory opinions.

Turning to Australia, Joel and Emma focussed on the *Privacy Legislation Amendment (Enhancing Online Safety and Other Measures) Bill 2022*, or the OP Bill, which is a direct response to findings made by the Australian Competition and Consumer Commission's Digital Platforms Inquiry in its Final Report of June 2019. Within that, the Online Privacy Code was identified as the key reform to watch out for, which will establish a code of conduct in relation to privacy practices of online platforms.

Privacy law reform doesn't stop there, though, with longer-term changes being explored in the *Privacy Act Review: Discussion Paper*, submissions for which closed earlier this year. That paper explores bigger picture reforms, like changes to the definition of "personal information", the journalism exemption and individual rights like a statutory tort of privacy.

When asked what the future holds, Sophie wrapped up the seminar by saying that it will be important to map and understand data and data practices, be ready for privacy and data portability changes, and generally, to stay abreast of the ever-changing legislative landscape and what it requires.

On behalf of CAMLA, the CAMLA Young Lawyers Committee would like to extend its thanks to Bird & Bird for hosting and leading the discussion with such a knowledgeable and engaging panel, and would like to acknowledge and thank Julie Cheeseman and James Hoy for their work in preparing the seminar.