



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M86/2021

BETWEEN:

Google LLC
Appellant

and

George Defteros
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

This outline is in a form suitable for publication on the internet.

Part II: Outline of Propositions

Ground 1 – Publication and publishers

1 Liability as a publisher requires an act that communicates (“conveys to the mind of another”) the defamatory sense embodied in the defamatory matter. A person whose act does not, in and of itself, communicate the defamatory matter can still be liable as a publisher if he or she intentionally assists another (or others) in an act of publication with a common intention to publish: AS [27]; Rep [3]; *Webb v Bloch*; *Fairfax Media Publications v Voller*.

2 A hyperlink is used by a person to assist that person to access the hyperlinked material; it is no part of the enterprise of the publisher of that pre-existing material. The provision of a “mere” hyperlink to matter is not, in and of itself, an act sufficient to communicate the matter to which it links. A hyperlink only communicates that something exists or where it exists. If, and when, a user chooses to click on a hyperlink, the user navigates to the webpage where the content is hosted. It is the operator of the webpage who communicates the content to the user: AS [26], [28]-[29], [31]-[33]; Rep [2]-[4]; *Crookes v Newton*; *Google Inc v Duffy*; *Fairfax Media Publications v Voller*.

3 Further, or alternatively, publication must be voluntary. An act in the process of publication which is merely “passive” (eg the act of a cashier in a bookstore, a courier or postal

worker or a telephone company) does not manifest an intention to participate in the process of publication: AS [30]; *Fairfax Media Publications v Voller*.

4 Google merely provides a search engine which facilitates user-initiated and designed searches. The user enters a search query, selects a particular search result of interest and clicks on the hyperlink within it to navigate to a third-party webpage. Google does not, and cannot, control the content of a changeable third-party webpage: AS [27], [29]-[30].

Ground 3 – Common law defence of qualified privilege

5 Google’s search engine provides an indispensable means by which users can locate information of interest to them on the internet. The publication of search results which respond to the search query entered by a user (and of defamatory matter which the user chooses to view by clicking on the hyperlink within a particular search result) will in every case be an occasion that should be protected for the common convenience and welfare of society: AS [42]-[43]; Rep [8]; *Bashford v Information Australia (Newsletters)*; *Crookes v Newton*.

6 In this case, a substantial proportion of those users to whom the Underworld article (itself held to be concerned with matters of considerable public interest) was published had a legitimate interest in it: AS [10], [23], [41].

7 If Google is required to prevent defamatory matter from being published to users of its search engine because not all users have a sufficient interest in it then, those who do have the necessary interest will be unable to locate it. Such a result does not advance the common convenience and welfare of society: AS [41]; Rep [9]. The evidence concerning Google’s mission, objective and commercial interest was sufficient to establish the requisite reciprocity of interest for the purposes of the common law defence of qualified privilege: AS [43].

Ground 4 – Statutory defence of qualified privilege, s 30 of the Act

8 The statutory defence of qualified privilege is wider than the common law defence and extends to any matter of genuine or “apparent” interest: AS [45]. It is available to a defendant who acted reasonably in publishing, as Google did: AS [22].

9 The facts of this case established the requisite interest. Users specifically sought information about “george defteros” and decided to click on the hyperlink in the Search Result in order to read the Underworld article, which concerned a matter that was and remains a subject of considerable public interest and was published by a reputable news source: AS [46]; Rep [10]. Also, these circumstances and the decision of Google’s representative, Ms Ahn,

established that Google believed on reasonable grounds that each of those to whom it published the Underworld article had an apparent interest in it: AS [46].

Proposed Ground 2 – Notification/innocent dissemination

10 The function of notification in the doctrine of the common law defence of innocent dissemination, and the evident purpose of notification in the statutory defence, are both to permit the innocent disseminator, as a subordinate publisher, time to consider, without negligence, its position and possible response thereafter.

11 A notice which is materially misleading as to the alleged concerns should not be considered as imposing that burden on an innocent disseminator. The notice in this case was egregiously misleading.

3 May 2022

A handwritten signature in black ink, appearing to read 'Bret Walker', written in a cursive style.

Bret Walker