

## **TRKULJA v GOOGLE INC (M88/2017)**

Court appealed from: Court of Appeal of the Supreme Court of Victoria  
[2016] VSCA 333

Date of judgment: 20 December 2016

Date special leave granted: 16 June 2017

The respondent ('Google') sought to set aside a defamation proceeding brought against it in the Supreme Court of Victoria by the appellant, on the basis that the proceeding had no real prospect of success. In support of its application, Google submitted, inter alia, that as a matter of law it could not be held to have published the alleged defamatory matter; and that it would not be open to the trier of fact to conclude that the matter relied upon was defamatory of the appellant. McDonald J rejected these submissions, and ordered that the summons be dismissed.

Google's appeal to the Court of Appeal (Ashley, Ferguson and McLeish JJA) was successful. The Court held that a search engine, when it publishes search results in response to a user's enquiry, should be accounted a secondary publisher of those results. The fact that the defamatory matter complained of is the product of an automated response does not necessarily gainsay an intention to publish that material. When that consideration is supplemented by the facts that the Google search engine holds itself out as providing a means of navigating the web, that its role is not passive and that in providing a search result it does more than merely facilitating contact between A and B, the Court concluded that intention to publish that which is in fact published is an available conclusion.

Further, the Court found that an innocent dissemination defence will almost always, if not always, be maintainable in a case such as this, in a period before notification of an alleged defamation. Despite reservations as to whether, and how, notification of a past defamatory publication by way of search results could lead to innocent dissemination becoming something else, the Court considered it was arguable that notification could have some part to play upon the question of innocent dissemination.

The Court concluded that the secondary publisher/innocent dissemination defence analysis appeared to be both the preferable outcome in point of principle, and to be a rational way of dealing with the problem of results produced by a search engine.

With respect to the second issue raised in the appeal, the question to be determined was whether Google had established that the plaintiff had no real prospect of success in attempting to show that the matter complained of was capable of conveying any of the pleaded imputations. The Court held that the question must be determined by reference to the understanding of an ordinary reasonable user of a search engine such as the Google search engine, and concluded that, so approached, the appellant would have no prospect at all of establishing that the images he complained of conveyed any of the defamatory imputations relied upon.

The appellant relied on a printout of results produced by the images section of the Google search engine in response to a search term entered by him. For the most part, the printouts were compilations of 'thumbnails' photographs. In each instance of a compilation of thumbnails, the compilation included a thumbnail of the plaintiff. In each instance, also, thumbnails of members, actual or reputed, of the Melbourne underworld appeared. But the Court noted that the trier of fact would immediately notice that the compilations variously included thumbnails of others, who were not Melbourne underworld figures; and other images altogether, including thumbnails of a former Chief Commissioner of Victoria Police, two well-known crime reporters, a barrister dressed in wig and gown, a solicitor, a murder victim, actors who appeared in film and television productions concerned with the Melbourne underworld, the late Marlon Brando, report headings of defamation proceedings brought by the plaintiff at an earlier time against Yahoo! and Google, the St Kilda pier, and a Melbourne tram. When the pages were viewed in their entirety, Google's submission that the matter complained of was not capable of making out the defamatory imputations complained of, because the ordinary reasonable user of the internet would not understand the content of the search results in such a way, was emphasised.

The grounds of the appeal include:

- The Court of Appeal erred in law by holding that the Plaintiff had no real prospect of success (and hence setting aside service) in proving that Google Inc was a publisher in the circumstances of the case as pleaded.