*Lachlan Dorey**

TO PUBLISH OR NOT TO PUBLISH? *GOOGLE LLC V DEFTEROS* (2022) 403 ALR 434

> 'in its impact on the law of defamation, the Internet will require "almost every concept and rule in the field … to be reconsidered in the light of this unique medium of instant worldwide communication"'[1]

I Introduction

The development of internet technologies has shed light on the confusion surrounding the law of publication in actions for defamation.[2] As recognised by Kirby J, 'the remarkable features of the Internet … makes it more than simply another medium of human communication'.[3] It is therefore difficult to apply the law developed in the context of more 'traditional' forms of media. This difficulty was even pre-empted by the High Court of Australia ('High Court') in *Trkulja v Google LLC* ('*Trkulja*'),[4] where it was recognised that '[i]t is the application of [the law] to the particular facts of the case which tends to be difficult, especially in the relatively novel context of internet search engine results'.[5] Yet, the rules applicable to publication continue to be described as settled,[6] and even so far as 'tolerably clear'.[7] This appears to be far from the case, as courts continue to grapple with the meaning of publication.[8] Still, *Google LLC v Defteros* ('*Defteros*')[9] represents a win

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* LLB (Hons) (Adel); Associate, District Court of South Australia; Student Editor, *Adelaide Law Review* (2022).

1 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 612 [66] (Kirby J) ('*Gutnick*'), quoting Lord Bingham of Cornhill, 'Foreword' in Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 2001) v, v.

2 Joachim Dietrich, 'Clarifying the Meaning of "Publication" of Defamatory Matter in the Age of the Internet' (2013) 18(2) *Media and Arts Law Review* 88, 88, 104. See also David Rolph, 'Publication, Innocent Dissemination and the Internet After *Dow Jones & Co Inc v Gutnick*' (2010) 33(2) *University of New South Wales Law Journal* 562, 562–4.

3 *Gutnick* (n 1) 642 [164].

4 (2018) 263 CLR 149 ('*Trkulja*').

5 Ibid 163–4 [39] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

6 David Rolph, 'The Concept of Publication in Defamation Law' (2021) 27(1) *Torts Law Journal* 1, 2.

7 *Trkulja* (n 4) 163 [39].

8 See, eg, *Fairfax Media Publications Pty Ltd v Voller* (2021) 273 CLR 346 ('*Voller*'). See also *Barilaro v Google LLC* [2022] FCA 650 ('*Barilaro*').

9 (2022) 403 ALR 434 ('*Defteros*').

for a digital intermediary[10] such as Google, as the High Court held that Google was not the publisher of a hyperlink to an article containing defamatory statements and imputations.[11]

This case note argues the overall outcome of the High Court's decision in *Defteros* was correct. However, it also argues the High Court's attempt to reconcile its approach with the principles outlined and applied in *Fairfax Media Publications Pty Ltd v Voller* ('*Voller*')[12] has further convoluted the law of publication. The body of law surrounding publication in the context of the internet has become more confusing than ever and the resulting issues must be properly addressed. Part II will illustrate the background facts, history of proceedings, and applicable legal principles. Part III will then provide an overview and critique of the reasons for the High Court's decision, before Part IV provides a comment on its broader impact on the interpretation of publication and likely subsequent statutory reform in this area.

II Background

A *Facts*

George Defteros was a solicitor who acted for Dominic Gatto and Mario Condello during Melbourne's 'gangland wars'.[13] Defteros and Condello were charged with conspiracy to commit murder in 2004, before charges against Defteros were withdrawn in 2005.[14] The prosecution of Defteros and Condello was highly publicised, including reports on the website of *The Age*.[15]

In 2016, Defteros became aware that using Google's search engine to run a search of his name produced part of an article published by *The Age* in 2004.[16] The title of the article, which appeared in a hyperlink to the complete article on *The Age*'s web page, was 'Underworld loses valued friend at court'.[17] Defteros claimed that the search result defamed him and instituted proceedings, asserting that Google was the publisher of the article on *The Age's* web page by providing the hyperlink in question.[18]

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10 See generally Parliamentary Counsel's Committee, Draft Part A Model Defamation Amendment Provisions (12 August 2022) 2 [1] ('Draft Provisions').

11 *Defteros* (n 9) 444 [34] (Kiefel CJ and Gleeson J), 451 [66], 453 [74] (Gageler J), 497 [240] (Edelman and Steward JJ).

12 *Voller* (n 8).

13 *Defteros* (n 9) 436 [1] (Kiefel CJ and Gleeson J).

14 Ibid.

15 Ibid.

16 Ibid 436 [2].

17 Ibid.

18 See ibid 436–7 [2]–[4].

B *Prior Proceedings*

The matter had been before the courts since 2016.[19] Justice Richards of the Supreme Court of Victoria found that Google was the publisher of the search engine results based on the significance of the provision of a hyperlink.[20] When the decision was appealed by Google to the Victorian Court of Appeal, Beach, Kaye and Niall JJA dismissed the appeal and maintained that Google was the publisher of the search results.[21] Google then sought special leave to appeal to the High Court on the question of whether it was the publisher of the hyperlinks, which was granted.[22]

C *Law of Publication*

The element of publication has been described as 'the foundation of the action' of defamation.[23] It is the act of making material available to a third party.[24] Justice Isaacs' statement in *Webb v Bloch* that it is the 'participation' in publication that attracts liability[25] has consistently been applied by Australian courts,[26] and was recently upheld by the High Court in *Voller*.[27] Thus, the test of 'participation' remains key, particularly in the context of third-party material.[28] What amounts to 'participation', though, is a difficult question[29] — something that the High Court continues to grapple with and did so in *Defteros*. Based on the majority in *Voller*, participation includes 'facilitating, encouraging and … assisting' the dissemination of the defamatory material.[30] Whether this test can be adequately applied to the unique circumstances in *Defteros*, though, is another difficult question.

19 *Defteros v Google LLC* [2020] VSC 219, [6] (Richards J).

20 Ibid [61]–[62].

21 *Defteros v Google LLC* [2021] VSCA 167, [89], [261].

22 *Defteros* (n 9) 437 [7]–[8] (Kiefel CJ and Gleeson J).

23 See *Powell v Gelston* [1916] 2 KB 615, 619 (Bray J).

24 See *Gutnick* (n 1) 600 [26] (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also Patrick George, *Defamation Law in Australia* (LexisNexis, 2nd ed, 2012) 135.

25 (1928) 41 CLR 331, 363–4.

26 See, eg: *Noble v Phillips [No 3]* [2019] NSWSC 110, [54]; *Rush v Nationwide News Pty Ltd [No 2]* [2018] FCA 550, [124]–[125]; *Dank v Whittaker [No 1]* [2013] NSWSC 1062, [23]–[24]; *De Kauwe v Cohen [No 4]* [2022] WASC 35, [427].

27 *Voller* (n 8) 352 [12] (Kiefel CJ, Keane and Gleeson JJ), citing *Webb v Bloch* (n 25) 363–4.

28 *Voller* (n 8) 357 [32] (Kiefel CJ, Keane and Gleeson JJ).

29 David Rolph, 'Liability for Third Party Comments on Social Media Pages' (2021) 13(2) *Journal of Media Law* 122, 131. See Dietrich (n 2) 90.

30 *Voller* (n 8) 362 [55] (Kiefel CJ, Keane and Gleeson JJ), see also 378 [105] (Gageler and Gordon JJ).

III Decision

The majority in *Defteros*, comprising Kiefel CJ and Gleeson J, Gageler J, and Edelman and Steward JJ, held that Google was not the publisher of the article on *The Age*'s web page by providing the hyperlink.[31] Justice Keane and Gordon J dissented.

A *Majority*

Chief Justice Kiefel and Gleeson J suggested that because the creation of the hyperlink had 'no connection to the creation' of the article on *The Age*'s web page itself, the creation of the article 'was in no way approved or encouraged' by Google.[32] In this sense, the provision of a hyperlink did not constitute 'participation' in the publication as per *Webb v Bloch* and *Voller*.[33] Providing a hyperlink was therefore, at most, 'passive' involvement — Google merely 'assisted persons searching the Web to find certain information and to access it'.[34] This reasoning is sound. It is difficult to see how such 'passivity' in the creation or distribution of a publication can attract liability.[35]

The question, then, was whether the hyperlink, in and of itself, was within the scope of liability. On this point, Kiefel CJ and Gleeson J held search engine results 'do not come within the purview of publication',[36] as a hyperlink 'without endorsement or adoption remains content-neutral'.[37] This is an interesting finding, as the title of the article — which could be described as a defamatory imputation — suggests the hyperlink was not necessarily 'content-neutral'. What their Honours appear to be emphasising, though, is rather that more than simply providing the hyperlink is needed for 'participation' to be satisfied. In this sense, hyperlinks are 'content-neutral' until there is some further action by Google (ie promotion).

Justice Gageler took the position that the provision of a hyperlink, in combination with other factors, may 'amount to participation in th[e] process of publication'.[38] This is an important point, as previous decisions have indicated that liability may be incurred for search results.[39] While Gageler J did not reconcile these decisions, the possibility was left open for them to remain authoritative and/or binding. Further,

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31 See above (n 11).

32 *Defteros* (n 9) 444 [34].

33 Ibid.

34 Ibid 447 [49].

35 Cf *Voller* (n 8).

36 *Defteros* (n 9) 445 [41].

37 Ibid 446 [44].

38 Ibid 451 [66].

39 See, eg: *Gutnick* (n 1) 600 [26]; *Trkulja* (n 4) 156 [16], 163 [38]; *Google Inc v Duffy* (2017) 129 SASR 304, 358 [181] (Kourakis CJ), 401 [354] (Peek J), 467 [597] (Hinton J) ('*Duffy*'); *Tamiz v Google Inc* [2013] 1 WLR 2151, 2165 [34]–[35] ('*Tamiz*').

Gageler J described a relatively high threshold for establishing publication.[40] This is important as liability would otherwise be unjustly attracted for the most minor acts of 'participation'.

Justices Edelman and Steward made a similar finding, asserting Google was not a publisher because '[t]he critical step that results in publication is that of the person searching and clicking on the chosen hyperlink', not the provision of the hyperlink itself.[41] It was the lack of participation in searchers' actions that went against Google being a publisher[42] — there was no encouragement or enticement on Google's behalf.[43] Instead, the actions amounting to publication were entirely outside Google's control. Again, the point is made that '[m]ore is needed to be a publisher', as was argued by Steward J in *Voller*.[44] Consequently, Edelman and Steward JJ held Google 'in no way participated in the vital step of publication without which there could be no communication of defamatory material'.[45]

B *Justice Keane's Dissent*

Justice Keane's dissent was largely based on the idea of a 'symbiotic relationship between Google and *The Age*'.[46] His Honour contended that publication 'occurred by reason of the assistance intentionally provided by Google in the course of its business'.[47] There are several issues with his Honour's position. First, it is arguable that this construes Google's involvement too broadly. The provision of a hyperlink is a natural function over which Google has no active control — it is generated when a web page is created by a user.[48] The 'assistance', as described by Keane J, was likely intentional to some extent, but this does not mean Google has 'participated' in publication. As asserted by Keane J in *Voller*, there is no requirement 'that a person must intend to communicate the material … in order to be a publisher'.[49]

Second, Keane J's suggestion that 'Google's search engine cannot be accurately described as a passive instrument'[50] goes against the reality of its operation. This suggests that Google has ultimate control over whether publication occurs.

40 *Defteros* (n 9) 451 [66]–[68].

41 Ibid 493 [220].

42 Ibid 493 [221].

43 Ibid 495 [233].

44 See *Voller* (n 8) 406 [173].

45 *Defteros* (n 9) 493 [221].

46 Ibid 458 [101].

47 Ibid 457–8 [98].

48 'How Google Search Works', *Google* (Web Page) <https://www.google.com/intl/en_au/search/howsearchworks/how-search-works/>; Google, Submission to Council of Attorneys-General, *Stage 2 Review of the Model Defamation Provisions: Part A* (9 September 2022) 2 ('Google Submission').

49 *Voller* (n 8) 357–8 [35] (Kiefel CJ, Keane and Gleeson JJ).

50 *Defteros* (n 9) 458 [100].

While Google undoubtedly has some control, it must also be recognised that the search result — which is automatically and involuntarily generated by the search engine[51] — would not appear if the article was not published on *The Age*'s web page in the first instance. In turn, the article would not be viewed — and thereby published in a legal sense — unless the voluntary decision is made by the searcher to click on the hyperlink provided. With respect, Keane J exhibits a fundamental lack of understanding of the operation of Google's search engine. It is automated, passive, and involuntary.[52] Moreover, publication is largely dependent on the actions of third parties. Justice Keane's dissent is not persuasive.

C *Justice Gordon's Dissent*

Justice Gordon's dissent relied heavily on the premise that absolving Google of liability would be 'contrary to the strict publication rule'.[53] It is worth noting there are several issues surrounding strict liability and significant debate as to whether an element of fault should be introduced.[54] This is exacerbated by the fact that Gordon J goes on to use concepts such as 'intention', which is inextricably linked to fault, to justify her Honour's decision.[55] With respect, Gordon J's contradictory reasoning and confused treatment of the concept of strict liability means her Honour's dissent lacks weight. This is yet another instance of the courts convoluting the concept of strict liability in the law of defamation.[56] As observed by Anthony Gray, 'there is little left by way of justification for the imposition of strict liability'.[57] *Defteros* may be another indication of this.

Further, Gordon J's assertion that liability was attracted by way of 'identifying, indexing, ranking and hyperlinking [the article on *The Age*'s website] within the search result' takes an overly broad view of publication.[58] As highlighted above, these are automated and passive functions.[59] To consider these actions within the scope of publication is inconsistent with the previously narrower view of publication taken by the courts.[60] As put by Matthew Collins, liability for unintentional publication should not be incurred 'unless the publication is a direct cause or a natural and

51 'Ranking Results: How Google Search Works', *Google* (Web Page) <https://www.google.com/intl/en_au/search/howsearchworks/how-search-works/ranking-results/>.

52 'How Google Search Works' (n 48); ibid.

53 *Defteros* (n 9) 461 [109].

54 See generally: Anthony Gray, 'Strict Liability in the Law of Defamation' (2019) 27(2) *Tort Law Review* 81; Rolph, 'The Concept of Publication in Defamation Law' (n 6).

55 *Defteros* (n 9) 461–2 [109]–[110].

56 See, eg, *Voller* (n 8).

57 Gray (n 54) 86.

58 *Defteros* (n 9) 461 [109].

59 See above n 52 and accompanying text.

60 See above Part II(C).

probable consequence' of a party's actions.[61] Providing a hyperlink does not mean the article on *The Age*'s web page will be accessed by a searcher — this choice is independent of Google's involvement. Google cannot reasonably be held liable on this reasoning.

IV Comment

While the outcome in *Defteros* represents a rare win for Google, it may be a loss for the law of publication. The decision in *Defteros* means that courts in Australia have recognised several different circumstances which dictate liability for internet search results. For example: the provision of a hyperlink alone is not publication;[62] the provision of a hyperlink in a manner which may 'entice' a user to view the material to which it links is publication;[63] and the provision of a hyperlink and subsequent failure to remove the hyperlink upon reasonable notice is publication.[64] The High Court did not clarify whether *Defteros* overrules previous decisions in this area, or the extent to which it may operate concurrently with them.

However, Parliaments are seeking to introduce much-needed clarity in this area. As part of the Stage 2 Review of the Model Defamation Provisions,[65] the Draft Part A Model Defamation Amendment Provisions ('Draft Provisions') released provide a defence for publication of search results by search engine providers, such as Google:

> **9A Certain digital intermediaries not liable for defamation**
>
> …
>
> (3) A search engine provider for a search engine is not liable for defamation for the publication of digital matter if the provider proves:
>
> (a) the matter is limited to search results generated using the search engine from search terms inputted by the user of the engine rather than terms automatically suggested by the engine, and

61 Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 3rd ed, 2010) 73 [5.19].

62 *Defteros* (n 9) 451 [66] (Gageler J).

63 *Duffy* (n 39) 360 [187] (Kourakis CJ), 467 [599] (Hinton J). See also ibid 451 [66]–[68]. This encompasses 'sponsored' hyperlinks: *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435, 442 [3], 447–8 [18]–[24] (French CJ, Crennan and Kiefel JJ). While this case involved an action in misleading or deceptive conduct and not defamation, a key issue remained as to whether Google had 'published' the sponsored hyperlinks.

64 *Trkulja* (n 4) 156 [16], 163 [38].

65 See generally Attorneys-General, *Review of Model Defamation Provisions: Stage 2* (Discussion Paper, 7 April 2021).

(b) the provider's role was limited to providing an automated process for the user to generate the search results.[66]

This may be useful in reconciling the different positions taken by the courts in previous decisions. The defence uses the position in *Defteros* to suggest that search engine providers are prima facie not liable. Then, it appears factors from other decisions may be used in considering whether the search engine provider has played a 'limited' part in publication, or not. This could include:

1. *Voller*, where participation was held to be 'facilitating, encouraging and thereby assisting' publication;[67]

2. *Trkulja*, where intentional participation in conveying the material was held to amount to publication;[68]

3. *Google Inc v Australian Competition and Consumer Commission*, where Google was held as the publisher of hyperlinks which were sponsored;[69] and

4. *Google Inc v Duffy*, where the failure to remove search results once put on notice was held to amount to publication.[70]

The introduction of this defence may therefore be the best way to reconcile the different approaches taken by the High Court and other courts, while still essentially upholding the decision in *Defteros*.

Still, there is some debate surrounding whether this defence should be legislated. For example, the Law Council of Australia has taken the position that the defence may not be necessary due to the similar safe harbour already provided for in s 235 of the *Online Safety Act 2021* (Cth) ('*OSA*').[71] However, it appears — noting this has not been considered by the High Court as of yet — that the *OSA* safe harbour would only operate where a search engine provider has no knowledge or awareness of the allegedly defamatory content.[72] There is a possible scenario where a search engine provider does have knowledge but plays such a limited role in conveying the material that liability should not be attracted. In this scenario, the *OSA* safe harbour is not enlivened, but the proposed defence may be. This was alluded to by the eSafety Commissioner, suggesting that the defence in the Draft Provisions could

66 Draft Provisions (n 10) 2–3 [2].

67 *Voller* (n 8) 362 [55] (Kiefel CJ, Keane and Gleeson JJ), see also 378 [105] (Gageler and Gordon JJ).

68 See *Trkulja* (n 4) 163 [38].

69 (2013) 249 CLR 435, 442 [3], 447–8 [18]–[24] (French CJ, Crennan and Kiefel JJ).

70 See *Duffy* (n 39) 359 [185] (Kourakis CJ), 455 [555] (Peek J), 467 [598] (Hinton J). See also: *Tamiz* (n 39); *Byrne v Deane* [1937] 1 KB 818.

71 Law Council of Australia, Submission to Meeting of Attorneys-General, *Stage 2 Review of the Model Defamation Provisions: Part A* (19 September 2022) 10 [31].

72 See *Online Safety Act 2021* (Cth) s 235.

operate concurrently with the *OSA* safe harbour.[73] This may also be true for the current common law. Michael Douglas takes a different position: that this issue of liability was resolved in *Defteros* and therefore the suggested defence lacks utility.[74] With respect, this appears unlikely due to a lack of explicit comment on the application of past decisions in this area. Douglas also fails to recognise the impact of inconsistencies between *Voller* and *Defteros*.

This was and remains the key issue with *Defteros*, that the High Court distinguished its reasoning in *Voller* on a similar issue of publication within 12 months of the judgment.[75] In *Voller* the majority of the High Court held that liability was attracted for third-party comments on social media pages because the action of making the original posts 'facilitated' the comments.[76] This appears akin to the passive involvement of Google in *Defteros*. The creation of defamatory comments was outside the control of the alleged publishers, just as the creation of a hyperlink containing a defamatory statement was outside the control of Google. Yet, the outcomes of *Voller* and *Defteros* were opposite, and these decisions are therefore difficult to reconcile.

It could be argued that *Defteros* better aligns with the dissent of Steward J in *Voller*, where his Honour considered that more than 'passivity' was required for publication.[77] Given the issues posed by *Voller*, this shift may be desired. There are further issues with this, such as the implication of an element of fault,[78] but at the very least it is important to again recognise that a more restricted approach should be taken with respect to 'publication', as was the case prior to *Voller*. The dire need for statutory reform has again been emphasised by the High Court's own inconsistent reasoning, which may also quash debate surrounding whether the Draft Provisions lack utility.

Regardless of any disagreement regarding which standard of publication should be upheld, it cannot be denied that uniformity in this area is desired, as was noted by Gageler J in *Defteros*.[79] Any reform in this area must strive to achieve this uniformity.

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73 See eSafety Commissioner, Submission to Attorneys-General, *Stage 2 Review of the Model Defamation Provisions: Part A* (9 September 2022) 4.

74 Michael Douglas, Submission to Council of Attorneys-General, *Stage 2 Review of the Model Defamation Provisions: Part A* (9 September 2022) 3.

75 Of note, also, is the decision by the Federal Court in *Barilaro*. While the Federal Court does not clearly distinguish *Voller*, its decision could be interpreted as inconsistent with *Voller* in a similar manner, albeit less so, than the High Court's in *Defteros*: *Barilaro* (n 8).

76 *Voller* (n 8) 362 [55] (Kiefel CJ, Keane and Gleeson JJ), 378 [105] (Gageler and Gordon JJ).

77 Ibid 406 [173].

78 See Michael Douglas, 'Publication of Defamation by Encouraging Third Party Comments on Social Media' (2022) 138 (July) *Law Quarterly Review* 362, 365.

79 *Defteros* (n 9) 450–1 [65].

V Conclusion

The struggles of the courts in interpreting the principles of publication in the context of the internet may finally be eased to some extent. But, not because of the High Court's decision in *Defteros*. While the outcome of the decision was correct, the issue is with the High Court's convoluted reasoning, which further confuses this area of law. In turn, the extent to which *Voller* operates is now entirely uncertain. Parliaments look to come to the aid of the courts in this respect, providing a specific defence for the publication of search engine results.[80] However, it remains to be seen whether the operation of this defence is as effective as it appears it could be, or whether it is even legislated by Parliaments.

Meanwhile, it will be a difficult task for courts to reconcile *Defteros* and *Voller*, due to the opposite outcomes of each decision despite similar features of 'passivity'. Ultimately, the lack of uniformity and struggles in interpreting 'publication' in the age of strict liability may favour introducing an element of fault into publication. While not the explicit focus of this case note, this is a highly significant debate and is worth further consideration. But regardless of the position taken in this respect, two considerations must be paramount for any reform: uniformity and clarity. Without any such reform, it would be no surprise if the High Court were to contradict *Defteros* in the same manner as *Voller* in the near future.

80 Draft Provisions (n 10) 2–3 [2].