Defamation Law and the Search Engine Operator Exception

Cheng Vuong, sessional academic at Swinburne Law School, presents his paper which won the 2019 CAMLA Essay Competition.

I. Introduction

The cornerstone of the action for defamation is the publication of defamatory matter.[1] In previous times, this has normally been through traditional media. However, the advent of the internet has been met with defamation against various internet intermediaries.[2] One such internet intermediary is the search engine. The question that arises is that given search engines throw up search results from other sources, can they be liable for defamation?

This paper canvasses the position with respect to search engine liability in the United Kingdom and Australia, and then discusses whether search engines should be liable for defamation. Ultimately, it is concluded that search engine providers should not be liable for defamatory content that appears in search results of their search engines.

II. Defamation Law and Internet Intermediaries

Defamation law aims to protect the reputation of the person defamed. The cause of action is the publication of defamatory matter.[3] '[A] person who communicates defamatory matter to another is liable only if the communication is intentional or negligent'[4] so accidental publication does not attract liability.[5] However, anyone who 'takes part in'[6] to whatever degree or authorises[7] the publication of defamatory matter may attract liability as a publisher for the purposes of defamation law. The author of the defamatory matter is clearly a publisher but it has been held that newspaper vendors,[8] circulating libraries,[9] a printer's servant[10] and television stations[11] are also liable as publishers because these parties have some involvement in communicating the defamatory matter as intermediaries.

It should also follow that internet intermediaries are liable for the publication of defamatory matter; internet intermediaries have taken part in communicating defamatory matter because the services that they provide are complicit in publication, which is arguably analogous to the newspaper vendor, circulating library or television station. In some cases, this is not in doubt. In the leading case of *Godfrey v Demon Internet Ltd* (***Demon Internet***),[12] the defendant was an Internet Service Provider (**ISP**). Among the services it provided to its customers was access to the USENET bulletin board (**Bulletin Board**). A defamatory message was posted on the Bulletin Board by an unknown author accessible from the defendant's news server. The plaintiff sent a letter to the defendant's managing director requesting removal of the message from its news server. The defendant did not remove the message, and it remained accessible on its news server until it was removed automatically. Morland J held that the defendant was a publisher of the defamatory message because each transmission from their news server was considered a publication of the posting.[13]

His Honour also held that the defendant's actual knowledge of the defamatory posting meant that they could not avail themselves of a statutory defence under the *Defamation Act 1996* (UK) (**UK Act**)[14] to absolve themselves of liability.[15]

However, not all internet intermediaries are analogous to the internet content host in *Demon*

1 *The Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, 59.

2 These are discussed in this paper.

3 *The Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, 59.

4 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 596 (Gummow J).

5 Ibid 595 (Gaudron J).

6 Legal commentators have used this term to describe the act that attracts liability for publication under defamation law: see David Lindsay, 'Liability for the Publication of Defamatory Material via the Internet' (Research Paper No 10, Centre for Media, Communications and Information Technology Law, University of Melbourne, March 2000).

7 *Webb v Bloch* (1928) 41 CLR 331, 364 (Issacs J).

8 See *Emmens v Pottle* (1885) 16 QBD 354; *Bottomley v FW Woolworth & Co Ltd* (1932) 48 TLR 521; *Sun Life Assurance Co of Canada v WH Smith & Son Ltd* [1933] All ER 432; *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566.

9 *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QBD 170; *Weldon v "The Times"Book Co Ltd* (1912) 28 TLR 143.

10 *R v Clerk* (1728) 94 ER 207.

11 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

12 [2001] QB 201.

13 Ibid 208-9.

14 Section 1.

15 [2001] QB 201, 212.

Internet.[16] In *Demon Internet*,[17] it was within the control of the defendant ISP to remove the defamatory posting. But not all internet intermediaries have control over the content that is viewed through the services that they provide. A search engine operator (**SEO**) is a type of internet intermediary that does not have total control over the content that its search engine displays. While the organic search results that a search engine generates depend partly on the web crawlers the search engine controls via a pre-programmed algorithm, search results are influenced largely by the search terms that the user enters. Given the differences between internet intermediaries that have control over the content they host, and SEOs, which arguably lack such control, the question that arises is whether SEOs can be considered publishers for the purposes of defamation law.

If an SEO were found to be a publisher under defamation law, it may be able to plead the defence of innocent dissemination.[18]

III. Search Engine Operator Liability

The liability of SEOs for defamatory matter that appears in the organic search results of their search engines centres on two questions:

(1) Can an SEO be considered a publisher under defamation law?

(2) If an SEO is a publisher, can it plead the defence of innocent dissemination?

In the UK and Australia, there are very few decided cases on the liability of SEOs for defamatory matter appearing in their search engines. However, the limited case law available shows a divergence in the approach of UK and Australian courts to these two questions.

A) United Kingdom

In the UK, the first and only case at present to examine the liability of SEOs for defamatory matter appearing in their search engines was that of *Metropolitan International Schools Ltd v Designtechnica Corp* (***Metropolitan Schools***).[19]

1. Metropolitan International Schools Ltd v Designtechnica Corp

The Facts

In *Metropolitan Schools*,[20] the plaintiff was a provider of adult distance learning courses in computer game design and development under the name 'Train2Game'. It brought proceedings for defamation against the first defendant, Designtechnica Corp, for allegedly defamatory postings made by third parties on bulletin boards hosted on its website and against Google UK and Google Inc (**Google**) as second and third defendants. The claim against Google UK and Google was that Google UK and/or Google published or caused to be published snippets of the allegedly defamatory material in search results on the search engines it operated in the respective jurisdictions.

Permission was granted for the plaintiff to serve Google outside of the jurisdiction. Google made various arguments in an application to set aside that order, including that it was not responsible for the publication of the allegedly defamatory snippet. In the course of considering whether to set aside that order, the Court considered whether Google, an SEO, could be considered a publisher for the purposes of defamation law.

The Decision

Eady J held that Google was not a publisher under defamation law. His Honour noted that the Google search engine operates automatically without any intervention from Google.[21] He reasoned that as the user - and not Google - formulates the search terms, it could not prevent the snippet from appearing.[22] Therefore, Google could not be considered a publisher as it had 'not authorised or caused the snippet to appear on the user's screen in any meaningful sense'.[23] In other words, Google lacked the intention to publish. His Honour considered that Google was merely a facilitator in the process of the snippet appearing in response to the user's search terms.[24]

His Honour also considered whether Google would incur liability after being informed of the defamatory content appearing in search returns. He distinguished the present case from the decision in *Demon Internet*[25] because an SEO lacks control to prevent defamatory content appearing in search returns because users effectively dictate what appears through their search terms whereas a website host does not.[26] According to Eady J, the fact that Google took steps to block certain Uniform Resource Locators (**URLs**) from where the defamatory content originated was a key factor in Google not incurring liability for publication on the basis of authorship or acquiescence.[27]

16 Ibid.

17 Ibid.

18 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 585 citing *Emmens v Pottle* (1885) 16 QBD 354. This is the common law defence of innocent dissemination. It has been effectively superseded by a statutory defence in various formulations: see, eg, *Defamation Act 2005* (NSW) ss 6, 32; *Defamation Act 2005* (Qld) ss 6, 32; *Defamation Act 2005* (Vic) ss 6, 32; *Defamation Act 1996* (UK) s 1.

19 [2010] 3 All ER 548.

20 Ibid.

21 Ibid 561.

22 Ibid.

23 Ibid.

24 Ibid.

25 [2001] QB 201.

26 [2010] 3 All ER 548, 562.

27 Ibid.

The finding that Google was not a publisher under defamation law meant that the application of the defence of innocent dissemination was not considered.[28] However, Eady J did make obiter comments about whether the defence of innocent dissemination under common law (**common law defence**) and statute (**statutory defence**)[29] would apply to Google. The statutory defence is made out if a person shows that:

- s/he was not the author, editor or publisher of the statement complained of;
- s/he took reasonable care in relation to its publication; and
- s/he did not know, and had no reason to believe, that what s/he did caused or contributed to the publication of a defamatory statement.[30]

His Honour noted the common law defence would not assist Google; a defendant who had notice that certain content was, or was likely to be defamatory could not avail themselves of the common law defence.[31] Although his Honour does not expressly state his reasons for this conclusion, given Google would need to be put on notice to take remedial action to block defamatory content from appearing in search returns, this would preclude it from relying on the common law defence.

Eady J also thought that Google could not avail themselves of the statutory defence for two reasons. First, he noted that it would be difficult for Google to make out the second limb of the defence relating to reasonable care because the defamatory snippet 'was brought about entirely by the search terms of the web user'.[32] Secondly, Google would not come within the definition of publisher under the first limb of the defence.[33] He notes that Google 'appear[s] to be a business which issues material to the public, or a section of the public', which comes under the definition of publisher in the UK Act[34] but later states that 'it is difficult to see how it would then qualify under [the first limb of the statutory defence]'.[35] It is submitted that Eady J's earlier interpretation is correct, which seems to make his Honour's conclusion contradictory. In any event, the difficulty in Google demonstrating that it has exercised 'reasonable care in relation to [the publication of the statement complained of]'[36] meant that Google could not rely on the statutory defence.

B) Australia

There have been a number of cases that have considered this issue.[37] In contrast to the UK, Australian courts appear to have adopted the view that SEOs are publishers for the purposes of defamation law. This discussion will focus on two cases that provide appellate court authority on this question.

1. First Trkulja Case

Milorad 'Michael' Trkulja has had a long-running battle with Google regarding material defaming him generated by Google's search engine.

In *Trkulja v Google Inc LLC (No 5)* (***Trkulja No 5***),[38] Trkulja sought damages from Google Inc (**Google**) and Google Australia Pty Ltd for allegedly defamatory material derived from image and web search results that suggested he was a criminal and a prominent figure in the Melbourne criminal underworld.

Beach J held that Google was a publisher even before it was notified of the defamatory material.[39] His Honour took the view that Google intended to publish the material the search engine produces because this was how its automated systems were designed to work.[40] His Honour contended that Google is much like a newsagent or library; such intermediaries have been held to be publishers for the purposes of defamation law.[41] The defence of innocent dissemination is not discussed in great detail but Google was able to establish the defence in respect of the web search results.[42]

Beach J distinguished *Metropolitan Schools*[43] on two points. First, his Honour noted that Eady J did not consider that search engines operate as intended despite their automated nature.[44] Secondly, the remedial actions that Google took in that case to block certain URLs from where

28 Ibid 568.
29 *Defamation Act 1996* (UK) s 1.
30 Ibid s 1(1).
31 Ibid 566.
32 Ibid 567.
33 Ibid.
34 Ibid; *Defamation Act 1996* (UK) s 2.
35 *Defamation Act 1996* (UK) s 1(1)(a).
36 Ibid s 1(1)(b).
37 *Trkulja v Yahoo! Inc LLC* [2012] VSC 88; *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533; *Rana v Google Australia Pty Ltd* [2013] FCA 60; *Bleyer v Google Inc* (2014) 88 NSWLR 670; *Duffy v Google Inc* (2015) 125 SASR 437; *Google Inc v Duffy* (2017) 129 SASR 304; *Trkulja v Google Inc* [2015] VSC 635; *Google Inc v Trkulja* (2016) 342 ALR 504; *Trkulja v Google Inc* (2018) 263 CLR 149.
38 [2012] VSC 533.
39 Ibid [18].
40 Ibid.
41 Ibid.
42 Ibid [12].
43 [2010] 3 All ER 548.
44 *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533, [27].

defamatory content originated were not applicable in the present case to determine the question about whether Google is a publisher.[45]

2. Second Trkulja Case

Trkulja commenced further defamation proceedings against Google five years later with this case reaching the High Court in *Trkulja v Google LLC* (***Trkulja***).[46] The allegedly defamatory material comprised:

(i) Google image results in response to search terms such as 'melbourne underworld crime photos'. Images of Trkulja were mixed with images of convicted criminals including Tony Mokbel and Carl Williams.

(ii) web results that generated image results similar to the above, and autocomplete predictions after a user typed in a portion of Trkulja's name. These predictions included 'milorad trkulja criminal' and 'michael trkulja melbourne underworld crime'.

Trkulja argued that the material conveyed various imputations including that he was a 'hardened and serious criminal', and associated with various underworld figures.

Google applied to set aside the proceeding because it had no real prospect of success for three reasons: (i) it is not a publisher; (ii) the search results were not defamatory;[47] and (iii) it was entitled to immunity from suit.

At first instance, McDonald J rejected all of Google's arguments.[48] His Honour followed Beach J's judgment in *Trkulja No 5*,[49] holding that it was 'strongly arguable that Google's *intentional* participation'[50] in publishing the search results meant it was a publisher. His Honour also held that it was 'certainly arguable' that the material was defamatory of Trkulja.[51] Google 'fell well short' of showing that Trkulja had no real prospect of success establishing that Google was a publisher and/or that the material was defamatory.[52]

Google advanced essentially the same arguments on appeal.[53] While Google's appeal was allowed on the ground that the search results were not defamatory of Trkulja,[54] the Victorian Court of Appeal considered at length whether Google was a publisher. The Court held that SEOs are publishers of the search results that they generate because they participate in the distribution of that defamatory material.[55] Their Honours considered SEOs should be classed as secondary publishers because they do not add anything to the material they disseminate[56] but that the defence of innocent dissemination would 'almost always, if not always' be applicable before notification of the defamatory matter.[57]

The High Court disagreed with the Court of Appeal's conclusion that Trkulja's claim had no prospect of success. The Court concurred with McDonald J that it was 'strongly arguable' that Google was a publisher because it intentionally participated in the communication of the allegedly defamatory material.[58] Their Honours were critical with the Court of Appeal's purportedly determinative findings on the issue of publication in the absence of evidence and before Google filed a defence.[59]

The Court held that the search results were capable of defaming Trkulja. Their Honours considered that the ordinary reasonable search engine user would contemplate a connection between the search terms and the results displayed.[60] As the impugned search terms related to the Melbourne criminal underworld, the ordinary reasonable search engine user would infer a connection between Trkulja and criminality.[61]

As the appeal centred on Google's application for summary judgment, the High Court did not come to definitive conclusions on the issues of publication and defamatory capacity of search engine results. Their Honours noted that the outcomes on these issues would depend on the evidence. The Court's judgment is nonetheless significant because its reasons indicate how future cases may resolve these issues.

45 Ibid.

46 (2018) 263 CLR 149.

47 It is beyond the scope of this paper to examine the defamatory capacity of search engine results, including autocomplete predictions. See generally David Rolph, 'The Ordinary, Reasonable Search Engine User and the Defamatory Capacity of Search Engine Results in Trkulja v Google Inc' (2017) 39(4) *Sydney Law Review* 601.

48 *Trkulja v Google Inc* [2015] VSC 635, [6].

49 Ibid.

50 Ibid [67] (emphasis added).

51 Ibid [71].

52 Ibid [77].

53 *Google Inc v Trkulja* (2016) 342 ALR 504, 527 [96].

54 Ibid 597 [391], 598 [396].

55 Ibid 590 [348].

56 Ibid 590 [349].

57 Ibid 591 [353].

58 *Trkulja v Google LLC* (2018) 263 CLR 149, 163 [38].

59 Ibid 163-4 [39].

60 Ibid 171-2 [60].

61 Ibid 172 [61].

3. Duffy Litigation

The case of *Google Inc v Duffy* (***Duffy***)[62] concerned search engine results from a search of the respondent's name displaying extracts and hyperlinks to articles and comments on a website containing allegedly defamatory imputations, including that Duffy stalks and harasses psychics. Autocomplete predictions suggesting the phrase 'janice duffy psychic stalker' were also at issue. Google denied publication and pleaded various defences, including the defence of innocent dissemination.

At trial, Blue J held that Google was a secondary publisher of the extracts after notification and failed to remove them in a reasonable time.[63] His Honour followed *Trkulja No 5*,[64] finding Google 'played an active role' in generating and communicating the extracts to users which was not affected by the automated nature of their search engine.[65] The same finding was made in relation to the hyperlinks[66] (with the accompanying extracts)[67] and autocomplete predictions.[68] Once it was made aware of the offending material, the innocent dissemination defence[69] could not protect Google from liability.[70]

The Full Court of the South Australian Supreme Court dismissed Google's appeal.[71] The Court, also following *Trkulja No 5*,[72] held that Blue J was correct to find that Google was a secondary publisher of the defamatory material after notification.[73] Kourakis CJ explained that the inordinate number of searches Google conducted coupled with the vast amount of material on the internet meant that advance knowledge of the defamatory material was 'unrealistic'.[74] For this reason, the Court modified the common law innocent dissemination defence so that it ceases to operate after a reasonable time to remove the defamatory material has elapsed, and found it was not made out.[75]

IV. The Search Engine Operator Exception

Australian courts have tended to take an orthodox view about SEO liability for publication of defamatory content whereas UK courts have taken a very reformist view. In *Trkulja No 5*,[76] Beach J's conclusion that Google was a publisher appears correct as a matter of law. In *Urbanchich v Drummoyne Municipal Council*,[77] Hunt J noted that defamation law in the UK or Australia has never required a conscious intention to publish defamatory statements.[78] Beach J notes that Google did intend to publish the material that its automated search engines produced because this was how they were designed.[79] The judges in the *Duffy*[80] and *Trkulja*[81] cases observed that Google participates in the publication of the organic search results through the programmed operation of its search engine algorithm. Their Honours are technically not incorrect in their views, and given defamation is a tort of strict liability,[82] it appears correct that Google was found to be a publisher in *Trkulja No 5*,[83] *Duffy*[84] and *Trkulja*.[85]

However, as a matter of policy, the view taken by Eady J in *Metropolitan Schools*[86] about SEO liability for defamatory content is to be preferred. A pragmatic view is that SEOs do not intend to publish the material their search engines throw up because they have no control.[87] Indeed, this cannot be overlooked. Beach J in *Trkulja No 5*[88] took the view that SEOs were akin to newsagents and libraries in ascribing liability for publication to Google. However, a fact

62 (2017) 129 SASR 304.
63 *Duffy v Google Inc* (2015) 125 SASR 437, 496 [207], 497 [210]-[213].
64 [2012] VSC 533.
65 *Duffy v Google Inc* (2015) 125 SASR 437, 495-6 [204].
66 Ibid 499 [221].
67 Ibid 499-500 [225]-[230].
68 Ibid 503 [252].
69 At common law and statute: *Defamation Act 2005* (SA) s 30.
70 *Duffy v Google Inc* (2015) 125 SASR 437, 527-8 [380]-[387].
71 *Google Inc v Duffy* (2017) 129 SASR 304.
72 [2012] VSC 533.
73 *Google Inc v Duffy* (2017) 129 SASR 304, 358-9 [181]-[184] (Kourakis CJ), 401 [354] (Peek J), 456 [562], 465 [594], 467 [597]-[599] (Hinton J).
74 Ibid 359 [183]-[184].
75 Ibid 359 [184] (Kourakis CJ), 401 [354] (Peek J), 467 [598] (Hinton J).
76 [2012] VSC 533.
77 (Supreme Court of New South Wales, Hunt J, 22 December 1988).
78 Ibid 10.
79 *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533, [18].
80 *Duffy v Google Inc* (2015) 125 SASR 437; *Google Inc v Duffy* (2017) 129 SASR 304.
81 *Trkulja v Google Inc* [2015] VSC 635; *Google Inc v Trkulja* (2016) 342 ALR 504; *Trkulja v Google LLC* (2018) 263 CLR 149.
82 See Lindsay (n 6) 127.
83 [2012] VSC 533.
84 *Duffy v Google Inc* (2015) 125 SASR 437; *Google Inc v Duffy* (2017) 129 SASR 304.
85 It should be noted that the High Court concurred with Justice McDonald's finding on this question at first instance: *Trkulja v Google LLC* 263 CLR 149, 163 [38].
86 [2010] 3 All ER 548.
87 Joachim Dietrich, 'Clarifying the Meaning of 'Publication' of Defamatory Matter in the Age of the Internet' (2013) 18 *Media and Arts Law Review* 88, 102.
88 [2012] VSC 533.

that his Honour seems to overlook is that newsagents and libraries will exert control over the collections they house but SEOs do not have this ability given they operate in an automated fashion. The lack of human control an SEO has in the makeup of search returns[89] is one reason why the starting point should be that they are not classed as publishers.

The other reason is that whatever control they can exercise, it is unlikely to be very effective. In *Metropolitan Schools*,[90] Eady J made the point that an SEO blocking certain URLs does not prevent that search result appearing on another search engine nor another URL for that matter to avoid the block.[91] In contrast, when a website host takes down offending content, there is no way to circumvent that.[92] Admittedly, that offending content may appear on another website in the near future. Nonetheless, the salient point is that the controls of some internet intermediaries will be more effective than others.

The Victorian Court of Appeal in *Trkulja*[93] found that the innocent dissemination defence 'would almost always, if not always, be maintainable…before notification'.[94] The Full Court of the South Australian Supreme Court in *Duffy*[95] went so far as to modify the common law innocent dissemination defence to fit the unique circumstances of SEOs.[96] While these statements indicate that the innocent dissemination defence is broad enough to shield SEOs from liability, they ignore the fact the defence is very fact-sensitive and will not act as a 'safe-harbour'. The policy reasons outlined above demonstrate why legislatures should institute one for SEOs.

V. Conclusion

SEOs are a unique type of internet intermediary because they do not have control over the content that appears in the search returns of their search engines because of their automated. Nonetheless, this has not prevented SEOs from being sued for defamation by aggrieved persons. Despite the very limited cases that have emerged, we can tentatively say that two views have emerged on the liability of SEOs for defamation. The salient question to ask is whether an SEO can be considered a publisher for the purposes of defamation law.

While it is somewhat fact-sensitive, in the UK, the view taken is that SEOs are not publishers for the purposes of defamation law. In contrast, the opposite view is taken in Australia. For particular policy reasons, the position in the UK is to be preferred. This recognises the special characteristics of search engines, their automated nature and the limited ability of SEOs to police their search engines.

89 See especially *Bleyer v Google Inc* (2014) 88 NSWLR 670, 685 [83] (McCallum J).
90 [2010] 3 All ER 548.
91 Ibid 564.
92 See, eg, *Godfrey v Demon Internet Ltd* [2001] QB 201.
93 (2016) 342 ALR 504.
94 Ibid 591 [353].
95 (2017) 129 SASR 304.
96 Ibid 359 [184] (Kourakis CJ), 401 [354] (Peek J), 467 [598] (Hinton J).

Contributions & Comments

Contibutions and Comments are sought from the members and non-members of CAMLA, including features, articles, and case notes. Suggestions and comments on the content and format of the Communications Law Bulletin are also welcomed.

Contributions in electronic format and comments should be forwarded to the editors of the Communications Law Bulletin at: **clbeditors@gmail.com**