HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 21 Jan 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	M86/2021
File Title:	Google LLC v. Defteros
Registry:	Melbourne
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	21 Jan 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M86/2021

BETWEEN: **Google LLC**
Appellant

and

George Defteros
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1 The appellant certifies that these submissions are in a form suitable for publication on the internet.

Part II: Statement of the issues

2 Is an operator of a search engine liable as a publisher of defamatory matter on a third-party webpage to which its search result provides a hyperlink in circumstances where the search result on its own conveys no defamatory imputation of and concerning the plaintiff?

3 What are the necessary qualities of an effective notification for the purposes of the common law doctrine of innocent dissemination and the defence under s 32 of the *Defamation Act 2005* (Vic) (the **Act**)? In particular, is a notification that contains false information and does not identify the imputations of concern effective to constitute the operator of a search engine liable for the publication of a webpage containing defamatory matter to which its search results provide a hyperlink?

4 As between an operator of a search engine and all of the users of the search engine to whom it publishes a webpage in response to a user-initiated search query, is there a relationship involving a reciprocal interest or duty such that the communication is protected for the common convenience and welfare of society?

5 If the publication of a webpage to a substantial proportion of the users of a search engine is protected because they each have a legitimate interest in it, is it for the

common convenience and welfare of society to also protect the publication of the webpage to users who have only an idle curiosity (and to whom publication would not otherwise be defensible) if the alternative is that those with a legitimate interest will no longer be able to use the search engine to locate the webpage?

6 Does the user of a search engine who has a webpage published to them by an operator of a search engine in response to the user's search query have an interest or apparent interest that establishes the defence in s 30(1) of the Act?

7 When a user of a search engine initiates a search for information and clicks on a hyperlink provided in a responsive search result to locate a news article concerning a subject of public interest on the webpage of a reputable news source does the operator of a search engine have reasonable grounds to believe that the user to whom it publishes the news article has an interest in it for the purposes of s 30(2) of the Act?

Part III: Section 78B of the *Judiciary Act 1903*

8 No notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citations

9 This is an appeal from the decision of the Court of Appeal of the Supreme Court of Victoria in *Defteros v Google LLC* [2021] VSCA 167 (**CA**), dismissing an appeal from the judgment in *Defteros v Google LLC* [2020] VSC 219 (**TJ**).

Part V: Facts

10 The respondent is a Melbourne solicitor who specialises in the practice of criminal law. He acted for a number of men who became notorious during Melbourne's 'gangland wars' (TJ [1]; CAB 8). On 17 June 2004, the respondent and Mario Condello were charged with conspiracy to murder and incitement to murder Carl Williams, his father George Williams and Carl Williams' body guard (TJ [2], CA [14]; CAB 8, 137). The prosecution of the respondent and Mr Condello was widely reported in 2004 and 2005, including in *The Age* newspaper, which at all relevant times was a reputable news source (TJ [213]; CAB 74). On 18 June 2004, *The Age* published an article on its website by John Silvester entitled 'Underworld loses valued friend at court' concerning the respondent and the charges against him (the **Underworld article**). The Underworld article remained available on *The Age* website until 24 December 2016 (TJ [5]-[6], [68]; CAB 8-9, 39). It concerned significant events in the Melbourne gangland wars, which

were and remain a matter of considerable public interest in Victoria (TJ [208]; CAB 72).

11 The World Wide Web (the **Web**) comprises trillions of hyperlinked webpages generated by millions of people and organisations worldwide. It is constantly changing and expanding (TJ [21]; CAB 27). A hyperlink is some HyperText Markup Language (**HTML**) code that contains a Uniform Resource Locator (**URL**) which acts as an address for another webpage. When a user clicks on a hyperlink on one webpage, the browser on the user's computer displays text and images from another webpage. It is the myriad of hyperlinks between webpages that make the Web what it is today (TJ [23]; CAB 27).

12 The appellant, Google, is the operator of a search engine designed to enable a user to navigate the extensive information on the Web by the use of user-designed queries (TJ [25]; CAB 27-28). Google's mission is to organise the world's information and make it universally accessible and useful by connecting users to information that is relevant to the search terms they have entered and is of high quality. Google has a commercial interest in providing a quality service with responsive search results; and it is for the common convenience and welfare of society that Google provides those who use its search engine with search results that directly relate to the search terms entered (TJ [182]-[187]; CAB 65-66). Every month, over 100 billion searches are made by users of the Google search engine. Of these, 15% or more than 500 million searches each day are searches that have not been made using the Google search engine before (TJ [32]; CAB 29-30).

13 The search engine uses computer algorithms to make predictions about what webpages among the trillions of pages constituting the Web are most likely to be of interest to a particular user, by responding to the user's search query (TJ [26]; CAB 28).[1] The Google search engine presents the user with a list of search results, ranked according to relevance, as estimated by the ranking algorithm (TJ [29]-[30]; CAB 28-29).[2] The

---

1 The number of results returned by a search engine in response to a particular query might be in the order of 10 or 20, or it might be in the order of many millions, depending on the nature of the query entered by the user and on the volume of available information on the Web (Statement of Raghava Kondepudy dated 27 June 2018 (exhibit D25) (**Kondepudy Statement**), [44]).

2 Given that the ranking is performed so quickly and over so many pages, it cannot realistically be done by a human using a subjective decision-making process (Kondepudy Statement, [78]).

average search response time is about half a second (TJ [32]; CAB 29).[3] Typically, for each of the search results in the list, the user is presented with the title of the webpage, which also operates as a hyperlink to the webpage, a 'snippet' of the content of the webpage, and a shortened form of its URL (TJ [30]; CAB 29).

14 When users of the Google search engine entered the search query 'george defteros' the search engine returned a list of search results including a 'snippet' of the Underworld article which contained a hyperlink (the **Search Result)** (TJ [6]; CAB 9). A click on the hyperlink caused the Underworld article on the website of *The Age* to be displayed to the user (TJ [12], [23], CA [30]; CAB 17, 27, 141).

15 On 4 February 2016, Kevin Dorey, a solicitor employed by Defteros Lawyers, completed a removal request form on Google's website with respect to the Underworld article (the **Removal Request**).[4] In the field that required a detailed explanation as to why he believed the content was unlawful, Mr Dorey wrote: "*In 2007 the subject of this article, Mr George Defteros, sued the publisher in defamation in the Victorian (Australia) Law Courts. The article was found to be defamatory and the publisher settled the matter, paying a confidential settlement sum. It was a term of the settlement that the article be removed from the internet."* (TJ [65]; CAB 38-39). That information was false. The respondent had never sued the publisher of *The Age* in respect of the Underworld article, and *The Age* had not agreed to remove the Underworld article from its website (TJ [66]; CAB 39).

16 Rachel Ahn, an employee of Google who was then a member of Google's Legal Removals team (TJ [80]; CAB 41) considered[5] the Removal Request and sought a copy of the court order from Mr Dorey (TJ [209]; CAB 73).[6] Mr Dorey responded as follows:[7]

---

3 It would not be possible for search results to be returned to the user in such a short response time, or in any reasonable response time, if there was human involvement in any part of the process used by the Google search engine to respond to search queries given the enormous size and complexity of the Web (Kondepudy Statement, [56]).

4 The Removal Request is at TJ [65]; CAB 38-39.

5 Upon receipt of the Removal Request, Ms Ahn cross-checked the country residence and geolocation to ensure both were from Australia, she read through the Removal Request and clicked on the URL to see if it was still live, such that it was available and accessible on the website of *The Age* (transcript of proceedings, Ahn XN T522.1-.22). She also conducted a search for the search query 'George Defteros Australia' to ascertain what results were returned by looking at the first few pages of results (transcript of proceedings, Ahn XXN T569.19-570.22).

6 Her email from removals@google.com to Kevin Dorey dated 9 February 2016 is exhibit P2. Further, as explained by Ms Ahn in her Statement dated 27 June 2018 (exhibit D29) (**Ahn Statement**), at [12],

> We advise that an Australian Court has not ruled that the content of the article is defamatory, as the matter was settled in a Mediation before it proceeded to trial.
>
> The terms of the settlement were confidential. However, we can advise that a term of the terms of settlement was that that [sic] the publisher conceded that the article was defamatory and agreed to remove the article from its website and accordingly from the internet.
>
> If it would assist Google Inc LLC we can seek consent of the publisher to provide a redacted copy of the terms of settlement to you.
>
> In the interim, we remind you that, under Australian Defamation Law, once a search result provider such as Google Inc LLC is on notice that a particular article is defamatory, that search result provider can be liable as a secondary publisher if they refuse to remove access to the article.

That information was also false.

17 Google has a 'Reputable Source Defamation Push Back Policy' (**Reputable Source Policy**) that it applies when a request is made with respect to a webpage of a reputable source.[8] Google also maintains a list of reputable Australian news sources which, at the relevant time, included *The Age* (TJ [211]; CAB 73).[9] Google also has a policy of encouraging complainants to resolve their defamation complaints with the original author of, or the webmaster for, the relevant webpage. The trial judge accepted that the rationale underlying this policy is that Google does not control the Web or the content on it, and is poorly placed to assess whether particular content is true or otherwise defensible (TJ [214]; CAB 74).[10] In accordance with Google's policies, Ms Ahn

---

Google has a third-party court order policy under which it voluntarily removes content that has been found to be illegal by an independent Court.

7 The email from Kevin Dorey to Google dated 12 March 2016 is exhibit P3. See also TJ [209]; CAB 73, which contains a summary of the correspondence.

8 The Reputable Source Policy is exhibit D30.

9 The redacted list is exhibit D31. Michael Gawenda, who was editor-in-chief of *The Age* in 2004, when the Underworld article was first published, gave evidence, which the trial judge accepted, that *The Age* was, at all relevant times, a reputable news source (TJ [213]; CAB 74).

10 Ahn Statement, [7]-[9]. Further, the evidence of Cathy Edwards, a Vice-President of Google, was that reputable news sources that have their own editorial processes, journalism staff and editorial team, are in a much better position than Google to determine whether information should be published (transcript of proceedings, Edwards XN T545.31-546.31).

determined not to remove the Underworld article from the search results produced by the Google search engine (TJ [210]-[211]; CAB 73).[11]

18 Google accepted that, had it determined to do so, it would have been able to prevent the Underworld article from being returned to users of the Google search engine within a week of receipt of the Removal Request (TJ [64]; CAB 38).[12]

19 The respondent instituted proceedings for defamation against Google. He alleged that Google was liable as a publisher of the Search Result and the Underworld article (together pleaded as the Web Matter) a reasonable time after it received the Removal Request. Google denied that it was the publisher of the Underworld article. It also pleaded defences, including common law and statutory qualified privilege.[13]

20 The trial judge held that the Underworld article conveyed the defamatory imputation that the respondent had crossed the line from professional lawyer for, to confidant and friend of, criminal elements (TJ [62], [146]; CAB 38, 57). She held that although a publisher of the Web Matter, Google was an innocent disseminator of it until 11 February 2016, being a reasonable time by which it could have prevented the Search Result from being returned to users of the search engine following receipt of the Removal Request (TJ [67], [134]; CAB 39, 53-54). Both the trial judge and the Court of Appeal held that, despite its inaccuracies, the Removal Request made it clear to Google that the Underworld article contained material that was defamatory of the respondent and was sufficient to provide Google with the requisite knowledge for the purposes of both the common law doctrine of innocent dissemination and the statutory defence (TJ [67], CA [147]; CAB 39, 196). Thereafter, Google published the Web Matter from 11 February 2016 to 24 December 2016, to seven identified people and a number of other unidentified users of its search engine, but only up to 150 people (TJ [106]; CAB 47-48).

---

11 Ms Ahn's email from removals@google.com to Kevin Dorey dated 23 March 2016 notifying him of that decision is at TJ [210]; CAB 73.

12 Kondepudy Statement at [114] explains that if Google determines to prevent a webpage from being included in its search results for a particular country edition of its search engine, the URL for that webpage is manually added by an engineer to a removals list, with the effect that the particular URL will not subsequently be included in the list of search results returned by the search engine to users in that country. This does not however remove the webpage from the Web; Google does not control the Web, or the content on it (TJ [34]; CAB 30).

13 Pursuant to s 30 of the Act.

21 The Courts below held that the Web Matter was not published on occasions of qualified privilege at common law, as Google had no community or reciprocity of interest with the users to whom it presented the specific search results returned in response to the search query 'george defteros' (TJ [187]-[189], CA [181]-[183]; CAB 66-67, 208-209).

22 The trial judge held that a substantial proportion of the up to 150 people to whom the Web Matter was published had an interest or apparent interest in having information on the subject of 'george defteros' (TJ [203], [207], [220]; CAB 71, 72, 75-76) and the Web Matter was published to those people in the course of giving them information on that subject (TJ [202]; CAB 71). She also found that the conduct of Google in not removing the Underworld article from its search results and directing the respondent to the original publisher of the article was reasonable in the circumstances, such that the statutory defence of qualified privilege was made out in relation to the substantial proportion of those people to whom it was published who had an interest or apparent interest in it (TJ [214]-[216], [219]-[220]; CAB 74-76). That finding was not in issue on appeal.

23 The trial judge found that it was likely that a small number of users clicked through to the Underworld article out of idle interest or curiosity and the statutory defence was not made out in those cases (TJ [202], [203], [220]; CAB 71, 75-76). The Court of Appeal held that although the Underworld article concerned a subject of considerable public interest, such interest was not sufficient for the purposes of s 30 of the Act which requires a substantive interest apart from its mere quality as news (CA [229]; CAB 226). Damages were awarded to the respondent in the amount of $40,000.00 (TJ [335]; CAB 104).

Part VI: Argument

24 The Court of Appeal's approach, if upheld, has broad implications for the operation, viability and efficacy of search engines and the use of hyperlinks generally on the Web. It means that Google will be liable as the publisher of any matter published on the Web to which its search results provide a hyperlink a reasonable time after it receives notification from a complainant that the matter may be defamatory of them, regardless of the quality of that notice. Further, that the matter is located on the webpage of a reputable news source and is of legitimate interest to the substantial proportion of people who use the search engine to locate it, will not afford the operator with a

complete defence. In order to prevent publication to those users of its search engine who may have merely an idle curiosity, the search engine operator must prevent all users of its search engine, including those with a legitimate interest in the matter, from being able to locate it by use of the search engine.

Ground 1 – Publication and publishers – Google is not a publisher

25 The trial judge held that Google was a publisher of the Underworld article because its provision of the hyperlink in the Search Result was instrumental to the communication of the defamatory imputation (TJ [54]; CAB 35-36). That was the case even though she found that there was nothing in the Search Result itself that incorporated or drew attention to the defamatory imputation conveyed by the Underworld article (TJ [62]; CAB 38). The Court of Appeal held that the Search Result containing the hyperlink to the Underworld article enticed the user to click on the hyperlink to obtain more information about the respondent and incorporated the content of the Underworld article and that Google had thus lent its assistance to the publication of the Underworld article in accordance with the test in *Webb v Bloch*[14] (CA [85]-[87]; CAB 171-172).

26 For the reasons developed below, Google's primary submission is that the Court of Appeal (and the trial judge) erroneously concluded that the provision of a mere hyperlink was participation in the communication of defamatory matter for the purposes of the strict common law rule of publication. The decision of the Court of Appeal is in this respect contrary to the decisions of the Full Court of South Australia in *Google Inc v Duffy (**Duffy**)*[15] and the Supreme Court of Canada in *Crookes v Newton.*[16] A hyperlink is not, in and of itself, the communication of that to which it links. Nor, on the facts as found below, was the provision of the Search Result containing the hyperlink an act of participation in the communication of the Underworld article that could amount to publication. Alternatively, if the common law with respect to publication has been correctly applied by the Court of Appeal to the facts in this case then, as the Supreme Court of Canada recognised in *Crookes v Newton*, given the core significance of hyperlinking to the effective functioning of the internet, the result is likely to be

---

14 (1928) 41 CLR 331 (*Webb v Bloch*).

15 (2017) 129 SASR 304 (*Duffy*).

16 [2011] 3 SCR 269 (*Crookes v Newton*). The approach taken in *Crookes v Newton* concerning publication of defamatory matter by means of the internet was described by Gageler and Gordon JJ as *"strongly reasoned"* in *Fairfax Media Publications Pty Ltd v Voller* (2021) 392 ALR 540, 560-561 [90] (*Voller*).

devastating.[17] To avoid that result Google contends this Court should modify the strict common law rule of publication in its application to hyperlinks to accord with the common law of Canada following the decision in *Crookes v Newton*. That is, it should hold that a defendant is only liable as the publisher of defamatory content to which it provides a hyperlink if it uses the hyperlink in a manner that actually repeats the defamatory imputation to which it links.[18]

27 This Court, in *Fairfax Media Publications Pty Ltd v Voller* (***Voller***), affirmed that publication is the process by which defamatory matter is communicated and that a person who has been instrumental in, or contributes to any extent to, that process is a publisher.[19] That statement of principle accords with long-standing authority to the effect that an act of publication is one that conveys to the mind of another the defamatory sense embodied in defamatory matter.[20] To constitute publication, participation must, however, be active and voluntary.[21]

28 In *Crookes v Newton*, Abella J (delivering judgment for Binnie, LeBel, Abella, Charron, Rothstein and Cromwell JJ) held that a hyperlink (that does not itself repeat the defamatory content to which it refers) is merely a reference that directs the user to another webpage. When a user clicks on a hyperlink the user navigates to a webpage maintained by a third-party and the bilateral act of publication occurs directly between the third-party and the user.[22] As Abella J observed, hyperlinks, like references, require some direct act by the user before they gain access to the content. The fact that access to

---

17 *Crookes v Newton* (n 16) 288-289 [36] (Abella J for Binnie, LeBel, Abella, Charron, Rothstein and Cromwell JJ).

18 Ibid 291-292 [42]. Such an approach would also accord with the approach of the Full Court of South Australia in *Duffy* (n 15) 360 [187] (Kourakis CJ, Peek J agreeing at 401 [354], Hinton J agreeing at 456 [562], adding additional observations at 467 [599]). At the very least the matter containing the hyperlink ought to convey some defamatory imputation of and concerning the plaintiff (for instance, a suggestion that there is something defamatory to be read about the plaintiff by clicking on the link) in order to constitute the defendant a publisher of the hyperlinked matter.

19 *Voller* (n 16) 544 [12], 546 [23] (Kiefel CJ, Keane and Gleeson JJ, Gageler and Gordon JJ agreeing at 553 [59], adding additional observations at 553 [61]-[62]), 565 [111] (Edelman J).

20 *Hird v Wood* (1894) 38 Sol J 234 (*Hird v Wood*); *Webb v Bloch* (n 14) 363 (Isaacs J); *Lee v Wilson* (1934) 51 CLR 276, 288 (Dixon J) (*Lee v Wilson*); *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600 [26] (Gleeson CJ, McHugh, Gummow and Hayne JJ, Gaudron J agreeing at 610 [56]) (*Dow Jones*); *Duffy* (n 15) 356-357 [172]-[174] (Kourakis CJ, Peek J agreeing at 401 [354], Hinton J agreeing at 456 [562], adding additional observations at 467 [599]).

21 *Voller* (n 16) 548 [32] (Kiefel CJ, Keane and Gleeson JJ, holding that participation must be voluntary), 554 [66] (Gageler and Gordon JJ, holding that participation must be active and voluntary), 565-566 [113] (Edelman J, holding that passive assistance will not manifest an intention to communicate any content), 581-582 [166]-[167] (Steward J, holding that some acts of facilitation are so passive that they cannot constitute publication).

22 *Crookes v Newton* (n 16) 285 [26]-[27], 286 [29]-[30].

that content is far easier with hyperlinks does not change the reality that a hyperlink, by itself, is content neutral – it expresses no opinion, nor does it have any control over, the content to which it refers.[23]

29 Abella J's finding accords with the facts as found in this case and is even more apposite here where it was the search engine users to whom the Underworld article was communicated who used the search engine to locate the webpage by entering search terms and selecting the specific hyperlink from the list of search results returned. Google search results typically span many pages (TJ [26], [30], [43]; CAB 28, 29, 32),[24] and within those search results, no single search result is singled out for attention[25] other than by ranking (TJ [29]; CAB 28-29). Even the text of the search results are an automated extraction of the content of the webpage as it relates to the user's particular search query (TJ [30]; CAB 29). In this respect, Google cannot be characterised as adopting, approving, endorsing or promoting the reading of any webpage to which its search results hyperlink. Google's search results are simply indices of webpages that exist somewhere on the Web with hyperlinks that enable the user to navigate to them.

30 Just as in the case of a modern-day telephone call where the caller communicates directly to the listener over the facilities of the telephone company, with no publication by the company itself,[26] the provision of the search engine facility and the hyperlink does not involve direct participation by Google in the communication of defamatory matter to which it affords a means of navigating. Google's role is passive, in the sense that it has not manifested any objective intention to communicate the defamatory

---

23 Ibid 286 [30]. See also *In re Philadelphia Newspapers LLC*, 690 F 3d 161, 175 (3rd Cir, 2012) (Ambro J for Ambro, Fuentes and Hardiman JJ), holding that a hyperlink is not a publication but merely a means of access.

24 Kondepudy Statement, [44], referred to above at [13] n 1.

25 Cf *Hird v Wood* (n 20), where pointing at a placard displaying defamatory words was held to be evidence of publication.

26 This distinction was drawn by Gageler and Gordon JJ in *Voller* (n 16) 555-556 [71], citing *Lunney v Prodigy Services Co* (1998) 250 AD 2d 230, 235 and *Anderson v New York Telephone Company* (1974) 35 NY 2d 746. See also Edelman J in *Voller* (n 16) 565-566 [113].

matter.[27] Regardless of the text of the search result, Google is not a publisher of the hyperlinked matter.[28]

31 Alternatively, adopting the analysis of Abella J in *Crookes v Newton*, the provision by Google of the hyperlink is only an act in the process of publication which does not in and of itself result in the tortious communication. The communication of the defamatory imputation also requires the separate act of the publisher of *The Age.* There was no suggestion of any relationship between the publisher of *The Age* and Google that would characterise them as joint tortfeasors. It follows that although Google's provision of the hyperlink assisted in publication by *The Age*, it was not sufficient to constitute
10 assistance in law.[29] Consistently with the clear and stable principles underpinning liability in tort, the 'lending assistance' analysis of publication in Isaacs J's judgment in *Webb v Bloch* should be understood to be confined to those who are joint tortfeasors – as it was expressed to be.[30]

32 If its primary submission is not accepted, then Google submits that the approach in *Crookes v Newton* and *Duffy* that holds a hyperlinker liable only where they have repeated the defamatory content of the webpage to which they link, is to be preferred to that of the Court of Appeal. It provides clear guidance as to when a hyperlinker will be liable as a publisher[31] and avoids the chilling effect that a more nuanced, contextual

---

27 *Voller* (n 16) 554 [66] (Gageler and Gordon JJ), 565-566 [113] (Edelman J), 581-582 [166]-[167] (Steward J); *Metropolitan International Schools Ltd (t/as SkillsTrain and/or Train2Game) v Designtechnica Corp (t/as Digital Trends)* [2011] 1 WLR 1743, 1757 [51]-[53] (Eady J), but note the views with respect to the Google search engine of Steward J in *Voller* (n 16) at 582-583 [168], Beach J in *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533 at [18], [27], [29] and this Court in *Trkulja v Google LLC* (2018) 263 CLR 149 at 163 [38] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

28 If the Court were to accept this submission with respect to the Google search engine and its provision of hyperlinks, it would follow that the decision of the Full Court of the Supreme Court of South Australia in *Duffy* (n 15), insofar as it held Google liable as a publisher of the *Ripoff Report* to which its search results provided a link, was in error.

29 *Thompson v Australian Capital Television Pty Limited* (1996) 186 CLR 574, 580-581 (Brennan CJ, Dawson and Toohey JJ), 595 (Gaudron J) (*Thompson*); *Roadshow Films Pty Ltd v iiNet Limited* (2012) 248 CLR 42, 76 [100] (Gummow and Hayne JJ); *Voller* (n 16) 571-573 [129]-[135] (Edelman J), 586-587 [179] (Steward J).

30 *Webb v Bloch* (n 14) 363-364 (Isaacs J).

31 Cf to the 'adoption or endorsement' approach of McLachlin CJ and Fish J in *Crookes v Newton* (n 16) at 293-294 [48] and the 'readily available' and 'deliberate acts' approach of Deschamps J at 297 [59]: see Iris Fisher and Adam Lazier, 'Crookes v Newton: The Supreme Court of Canada Brings Libel Law into the Internet Age' (2012) 50(1) *Alberta Law Review* 205, 208-210. The unduly complex nature of an approach that involves concepts of 'incorporation', 'enticement', 'adoption or endorsement', 'adoption or promotion' or 'approval' is also demonstrated by the somewhat opaque reasoning of the Court of Appeal, the various judgments in *Duffy* and the judgments in *Visscher v Maritime Union of Australia (No 6)* (2014) 98 NSWLR 764, 773 [30] (Beech-Jones J), *Doe v Dowling* [2019] NSWSC 1222, [35] (Fagan J) and *Bailey v Bottrill (No 2)* [2019] ACTSC 167, [49]-[53] (McWilliam AsJ).

approach, requiring the exercise of judgment, might have[32] and that the Court of Appeal approach inevitably has. It also has the advantage of achieving substantial conformity of the Australian common law to the approach taken to resolving this novel issue in the strongly reasoned common law decision of the Canadian Supreme Court.[33]

33 On any approach, ('repeat', 'adopt or endorse', 'entice' or 'incorporate'), the Search Result here would not render Google liable as a publisher. As the trial judge held, there was nothing in the Search Result that incorporated or drew attention to the defamatory imputation conveyed by the Underworld article, and as the analysis above[34] demonstrates, Google did not adopt or endorse the hyperlinked Underworld article. Further, it is difficult to understand how, in the circumstances of a user-initiated search, Google could be understood to be promoting the user to click on any particular hyperlink or hyperlinks among those listed in the results.[35] It follows that Google's conduct, in providing a "mere" hyperlink, should not be considered to be a sufficient basis upon which liability as a publisher is founded.

Proposed Ground 2 – Notification/Innocent dissemination

34 If the Court determines that the mere provision of a hyperlink, without more, is sufficient participation in the communication of defamatory matter as to constitute publication, a subsidiary issue then arises as to what is sufficient notification for the purposes of the common law doctrine of innocent dissemination and s 32 of the Act.

---

32 See *Grant v Torstar Corp* [2009] 3 SCR 640, 648 [2] and 666 [53] (McLachlin CJ for McLachlin CJ, Binnie, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ). When faced with legal uncertainty the understandable response is often to keep quiet. The need for 'bright lines' and consistency across jurisdictions is particularly acute in the context of the internet. The power of the internet as a medium of expression is that it enables ordinary people to share their thoughts and opinions. These publishers, unlike the traditional media organisations that have influenced the development of the common law in the past, are often without significant resources, rarely have access to pre-publication legal advice and it may be unfair and unrealistic to expect them to understand a more nuanced approach to liability: see Fisher and Lazier (n 31) 214-215. See also Emily B Laidlaw and Hilary Young, 'Internet Intermediary Liability in Defamation' (2018) 56 *Osgoode Hall Law Journal* 153.

33 *Voller* (n 16) 560-561 [90] (Gageler and Gordon JJ). In other jurisdictions legislative reform has addressed the issue to provide varying degrees of immunity (or safe harbour) to internet intermediaries who publish defamatory third-party content (United States of America, the *Communications Decency Act of 1996*, 47 USC § 230 (2012); UK, *Defamation Act 2013* (UK) s 5; European Union, *Parliament and Council Directive 2000/31/EC of 8 June 2000 on Certain Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market* [2000] OJ L 178/1).

34 At [29] above.

35 Although the Court of Appeal found, at [87] (CAB 172), that the search terms and the text of the Search Result directed and encouraged the user to click on the hyperlink, it did not explain why that was so or how the Search Result was different to any other search result that is returned to a user of a search engine and contains a hyperlink.

35 Those who are principals in the act of publication are strictly liable for the damage caused to a plaintiff's reputation, in the sense that they may be liable even though no injury to reputation was intended and they acted with reasonable care.[36] The common law doctrine of innocent dissemination holds that subordinate disseminators, as Google is agreed to be,[37] are not.[38] As this Court has explained, the doctrine (or defence) initially emerged as a pragmatic response to the otherwise unjust and unreasonable application of the common law rule.[39] The effect of the Court of Appeal's decision, however, is to render that relief of little value. Its consequence is that upon mere notice of a claim that matter may be defamatory, a subordinate disseminator is liable for the
10 communication of that matter regardless of intention or fault.

36 The development in the common law by which the strict liability basis for defamation became firmly established in the decision of the Court of Appeal,[40] and subsequently the House of Lords[41] in *Jones v E Hulton & Co* arose in the context of a newspaper publication to the world at large. It reflected a view that the balance between freedom of communication and protection of reputation could best be struck by requiring owners and publishers of newspapers to ensure that the content they published was not defamatory.[42]

37 That balance was also reflected in the speeches delivered in *Cassidy v Daily Mirror Newspapers Limited*,[43] where one of the issues that arose was whether the defendant

---

36 *Lee v Wilson* (n 20) 288 (Dixon J, following the decision of the House of Lords in *E Hulton & Co v Jones* [1910] AC 20 (*E Hulton & Co v Jones*)).

37 See TJ [39]; CAB 31.

38 *Emmens v Pottle* (1885) 16 QBD 354, 357 (Lord Escher, MR); *Vizetelly v Mudie's Select Library Limited* (1900) 2 QB 170, 178 (Vaughan Williams LJ), 180 (Romer LJ); *Webb v Bloch* (n 14) 363 (Isaacs J); *Lee v Wilson* (n 20) 288 (Dixon J); *Dow Jones* (n 20) 600 [25] (Gleeson CJ, McHugh, Gummow and Hayne JJ, Gaudron J agreeing at 610 [56]); *Voller* (n 16) 547 [27], 548 [31], 551 [49] (Kiefel CJ, Keane and Gleeson JJ).

39 *Voller* (n 16) 548-549 [36]-[39] (Kiefel CJ, Keane and Gleeson JJ).

40 [1909] 2 KB 444.

41 *E Hulton & Co v Jones* (n 36).

42 Ibid 25 (Lord Loreburn LC, Lord Atkinson and Lord Gorell agreeing at 25, Lord Shaw of Dunfermline agreeing at 25, adding additional observations at 26); Mitchell, *The Making of the Modern Law of Defamation* (2005), pp 101-144, particularly at pp 117-120.

43 [1929] 2 KB 331. The defendants published in the *Daily Mirror* newspaper a photograph of Kettering Edward Cassidy, who was also known as Michael Dennis Corrigan, with a woman who was referred to at trial as Miss X. The photograph was accompanied by the words *"Mr M. Corrigan, the race horse owner, and Miss [X], whose engagement has been announced"*. The plaintiff, Mildred Anna Cassidy, who was the lawful wife of Mr Cassidy, brought an action for libel against the defendants, alleging that the publication imputed that Mr Cassidy was not the plaintiff's husband, but was living with her in immoral cohabitation. The defendants did not know that Mrs Cassidy was the wife of Mr Cassidy at the time of the publication. The jury found in favour of the plaintiff and awarded damages.

newspaper was liable in the circumstance where it did not know the facts which enabled friends of the plaintiff to whom the libel was published to draw an inference defamatory of the plaintiff. Scrutton LJ observed that, since *E Hulton & Co v Jones*:[44]

> …it is impossible for the person publishing a statement which, to those who know certain facts, is capable of defamatory meaning in regard to A, to defend himself by saying: "I never heard of A and did not mean to injure him." If he publishes words reasonably capable of being read as relating directly or indirectly to A and, to those who know the facts about A, capable of a defamatory meaning, he must take the consequences of the defamatory inferences reasonably drawn from his words.
>
> It is said that this decision would seriously interfere with the reasonable conduct of newspapers. I do not agree. If publishers of newspapers, who have no more rights than private persons, publish statements which may be defamatory of other people, without inquiry as to their truth, in order to make their paper attractive, they must take the consequences, if on subsequent inquiry, their statements are found to be untrue or capable of defamatory and unjustifiable inferences…To publish statements first and inquire into their truth afterwards, may seem attractive and up to date. Only to publish after inquiry may be slow, but at any rate it would lead to accuracy and reliability.

38 Where (as here) a plaintiff chooses to sue a subordinate disseminator rather than the primary publisher, the balance between freedom of communication and protection of reputation may be upset.[45] Unlike primary publishers, subordinate disseminators do not control or authorise content[46] and will seldom have an incentive to defend it. Their only involvement is to distribute or assist in distribution. As such, a subordinate disseminator is poorly placed to assess whether particular content is true or otherwise defensible (TJ [214]; CAB 74). That difficulty is compounded when, as here, the imputations of concern are not identified in the notice given and the notice contains false information (TJ [65]-[66], [209]; CAB 38-39, 73). The inevitable consequence of leaving the Court of Appeal's decision undisturbed is that Google will be required to act as censor by excluding any webpage about which complaint is made from its search results, even

---

44 Ibid 341-342. See also the speech of Russell LJ, at 354, observing that although from a business perspective it may pay to not spend time or money in making inquiries or verifying statements before publication, the defendants were paying the price for their methods of business, such that *"if they had not made a false statement they would not now be suffering in damages"*.

45 For instance, alleging to an internet intermediary that content is defamatory can have the same effect as obtaining an injunction, but without meeting the high legal threshold for injunctive relief. In the age of the internet this scenario is likely: see Laidlaw and Young (n 32) 114.

46 *Thompson* (n 29) 589 (Brennan CJ, Dawson and Toohey JJ), 595 (Gaudron J).

when, as here, the webpage may be a matter of legitimate interest to the substantial portion of people who search for it and is published by a reputable news source.

39 As a matter of principle something other than mere notification of a claim should be required to constitute a subordinate disseminator liable for the publication of defamatory matter. At the very least, the notice ought be required to set out the imputations of concern and provide an explanation as to why they cannot be justified or excused.[47] Such a requirement would place subordinate disseminators in the same position as primary publishers.[48] Given the absence of such notice, the finding of the trial judge that the conduct of Google in not removing the Underworld article from its search results and directing the respondent to the original publisher of the article was reasonable in the circumstances (TJ [219]; CAB 75) ought to have resulted in a determination that Google was an innocent disseminator of the Web Matter (even after receipt of the Removal Request).

Ground 3 – Common law defence of qualified privilege – the facts as found established the necessary reciprocity of duty and interest between Google and those users to whom it published the Underworld article

40 For the purposes of the common law defence, the relevant question of law in this case is whether the particular relationship between Google and those users of its search engine who had searched for information about 'george defteros' and who clicked on the hyperlink to the Underworld article within the Search Result was such that the communication to them of the Underworld article should be protected even if it conveyed an imputation defamatory of the respondent.[49]

41 The trial judge found that the substantial proportion of those users to whom Google published the Underworld article, including clients and prospective clients, and employees and prospective employees of the respondent, had a legitimate interest in reading information on its subject (TJ [199]-[201]; CAB 71). If Google is required to prevent such articles from being found by use of its search engine because it cannot prove that all users have a sufficient interest, then the greater interest will be subverted

---

47 See *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478, 487F (Lord Denning).

48 Or, at least, enable them to take reasonable care.

49 *Guise v Kouvelis* (1947) 74 CLR 102, 117 (Dixon J); *Bashford v Information Australia (Newsletters) Pty Limited* (2004) 218 CLR 366, 372-373 [9], 377-378 [23]-[24] (Gleeson CJ, Hayne and Heydon JJ), 412 [126] (Gummow J); *Atkas v Westpac Banking Corporation* (2010) 241 CLR 79, 89 [22], 91-92 [31]-[34] (French CJ, Gummow and Hayne JJ); *Papaconstuntinos v Holmes a Court* (2012) 249 CLR 534, 541 [8] (French CJ, Crennan, Kiefel and Bell JJ).

to the lesser interest. That result does not serve the common convenience and welfare of society as a whole. The common convenience and welfare of society as a whole is best met by recognising that Google has an interest or duty to publish search results that identify by hyperlink matter that is responsive and relevant to the search terms entered by a user of its search engine.

42 Furthermore, as correctly explained by the Court of Appeal, in determining whether a community of duty or interest has been established, it is necessary to consider, *inter alia*, the audience to whom the communication was directed (CA [174]; CAB 205). In this case, in contradistinction to the position of mass media publications,[50] the relevant audience of a publication by a search engine is an individual who enters a search query and selects a particular search result from those presented and clicks on the hyperlink within it and to whom publication is made exclusively.[51] This is not a case of indiscriminate,[52] broad dissemination of information to the world at large. Rather, publication is targeted and, often, unique (TJ [29]; CAB 28-29).

43 Moreover, the evidence concerning Google's mission (TJ [184]; CAB 65), objective (TJ [185]-[186]; CAB 65-66) and commercial interest (TJ [187]; CAB 66) was sufficient to establish the requisite reciprocity of interest for the purposes of the common law privilege.

Ground 4 – Statutory defence of qualified privilege – those users to whom Google published the Underworld article had the necessary interest or apparent interest

44 The trial judge found that Google had made out the statutory defence of qualified privilege with respect to publication of the Underworld article to all but about 50 users of the Google search engine who were not identified and about whom there was no other evidence (TJ [202]-[203], [207], [316]-[317]; CAB 71, 72, 100). Her Honour proceeded on the basis that it was likely that a small number of users who searched the

---

50 With whom, it appears, Google was equated by the Court of Appeal (see CA [178], [183]-[184], [210]; CAB 207, 209, 219).

51 See *Duffy* (n 15) 394 [306]-[307] (Kourakis CJ).

52 Cf the findings of the trial judge that the automated operation of the search engine meant that its response to a user's search query was indiscriminate (see TJ [188]; CAB 66). That was not the case with respect to the publication of the Underworld article, which occurred only after Google had been notified of the Underworld article and had, through the human intervention of Ms Ahn, determined that the Underworld article was published by a reputable news source and that, accordingly, all users of Google's search engine who navigated to it from the Search Result, had an interest in reading it. In making that determination, Google was acting in accordance with the duty and interest that it had to publish the Underworld article to users of its search engine.

respondent's name and clicked through to the Underworld article did so out of idle interest or curiosity (TJ [202]; CAB 71).

45 The Court of Appeal accepted that the Underworld article concerned a matter of considerable public interest but held that such interest was not sufficient for the purposes of s 30 of the Act which requires a substantive interest apart from mere quality as news (CA [229]-[230]; CAB 226-227). It followed the Full Court in *Duffy* which held that in order to succeed under the cognate statutory defence in the *Defamation Act 2005* (SA), it was necessary for Google to establish that its users had a 'legitimate' interest in matter published to them by Google.[53] In so holding, both Courts were in error. The statutory defence is wider than the common law defence and extends to any matter of genuine interest or 'apparent' interest.[54]

46 The facts of this case were sufficient to establish the requisite interest; users of the search engine had specifically sought information about 'george defteros' and had decided to click on the hyperlink in the Search Result in order to read the Underworld article,[55] which concerned a matter that was and remains a subject of considerable public interest (TJ [208]; CAB 72) and was published by a reputable news source (TJ [213]; CAB 74). Those matters, together with the fact that Ms Ahn, on behalf of Google, had determined in accordance with Google's policy that she would not prevent the Underworld article from being returned to users because, in part, it was published by a reputable news source (a policy and conduct, respectively, found by the trial judge to be reasonable – TJ [215], [219]; CAB 74-75) compelled a conclusion that Google believed on reasonable grounds that each of those unidentified users to whom the Web Matter was published had an apparent interest in the Underworld article.

Part VII: Orders sought

47 The appeal be allowed.

---

53 *Duffy* (n 15) 394 [307] (Kourakis CJ), 422 [415], 436 [464] (Peek J).

54 See *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697, 711 (Reynolds JA, Glass JA agreeing at 713); *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749, 797 (Moffitt P, Hope and Reynolds JJA); *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30, 40 (Hunt J); *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299, 311-312 (Lord Griffiths for Lord Hailsham LC, Lord Keith, Lord Roskill and Lord Griffiths); *Seary v Molomby* [1999] NSWSC 981, [29]-[30] (Sully J); *Echo Publications Pty Ltd v Tucker; Fast Buck$ v Tucker (No 3)* [2007] NSWCA 320, [7]-[8] (Hodgson JA, Mason P agreeing at [1]; McColl JA agreeing at [33]); *Griffith v Australian Broadcasting Corporation* [2010] NSWCA 257, [103]-[104] (Hodgson JA, Basten JA agreeing at [150]; McClellan CJ at CL agreeing at [151]).

55 Necessarily confirming their interest in it.

48 Order 2 of the orders of the Court of Appeal made on 17 June 2021 in the application for leave to appeal and the appeal in Supreme Court No S EAPCI 2020 0050 be set aside, and in lieu thereof:

a. the appeal to the Court of Appeal of the Supreme Court of Victoria be allowed;

b. the judgment and order 1 of the orders of Richards J made on 6 May 2020 (based on reasons published 30 April 2020) in Supreme Court No S CI 2016 04954 be set aside;

c. order 1 of the orders of Richards J made on 3 June 2020 (based on reasons published 3 June 2020) in Supreme Court No S CI 2016 04954 be set aside; and

d. proceeding No S CI 2016 04954 be dismissed.

49 The appellant pay the respondent's costs of the appeal.

Part VIII: Time estimate

50 It is estimated that up to 2.5 hours will be required for presentation of the appellant's oral argument.

Dated: 21 January 2022

	Bret Walker	Georgina Schoff	Coral Alden
T	(02) 8257 2527	(03) 9225 7239	(03) 9225 7485
E	maggie.dalton@stjames.net.au	glschoff@vicbar.com.au	calden@vicbar.com.au

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M86/2021

BETWEEN: **Google LLC**
Appellant

and

George Defteros
Respondent

ANNEXURE

LIST OF STATUTES AND PROVISIONS REFERRED TO IN THE APPELLANT'S SUBMISSIONS

1 *Defamation Act 2005* (Vic), ss 30 and 32 (compilation in force from 4 February 2016 to 24 December 2016).