

BETWEEN:

MILORAD TRKULJA (aka MICHAEL TRKULJA)

Appellant

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and

GOOGLE INC

Respondent

APPELLANT'S SUBMISSIONS

Part I:

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

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Part II:

2. This was an application to set aside service out of the jurisdiction. Three matters were advanced to suggest that the proceedings had no real prospect of success or were 'manifestly groundless'.¹ They were:
 - (i) Google is not a publisher;
 - (ii) The matter was not capable of being defamatory because of the way it is promulgated;
 - (iii) Google should have indemnity.

¹ *Agar v Hyde* (2000) 201 CLR 552. Refer McDonald J at [3], CoA at [3]. The Vic CoA accepted this test as applicable to the Vic Act in *Madden Internat. v Lew Footwear* [2015] VSCA 90, [24], [25]. The second test in *Agar* is akin to the summary judgment test in s.63 of the Civil Procedure Act 2010 (Vic).

The last was not pressed at the Court of Appeal stage and need not be considered. NB the Respondent is hereafter referred to as 'Google'.

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3. Both the first and second matters involved factual issues capable of being disputed. In that event, the question arose as to whether setting aside service, akin to summary dismissal, was appropriate. This is a matter considered previously in the High Court in *Spencer v Cth.* [2010] 241 CLR 118 at [25] – [27]. Relevant to this issue is s.64 of the Civil Procedure Act 2010, Vic., (reproduced in para. 55 hereunder).

Part III:

4. The appellant certifies that he has considered whether any notice should be given in compliance with section 78B of the Judiciary Act 1903. It is not required to give such notice.

Part IV:

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5. Reasons for judgment of the primary court: *Trkulja v Google Inc* [2015] VSC 635; reasons for judgment of the intermediate court: *Google Inc v Trkulja* [2016] VSCA 333.

Part V:

6. Relevant facts found or admitted. Five affidavits were filed in support of the application at first instance. Two addressed technological aspects of the operation of the internet and search engines.
7. Relevant facts found (with the para. no. in the Reasons) or admitted are:
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- (a) [153] – [201]: a basic description of the internet;
- (b) [285]: a search engine provider has no connection, other than by operation of algorithms, with websites, created by others, which contain matter that the search engine crawls, indexes, and then returns as results in response to a search term;

- (c) [285]: a search engine provider has no role in the selection of the search term which is inputted by an internet user;
- (d) [19] – [20]: Annexure A ('the images matter') contains 20 search results, 19 of which were conducted on the dates indicated on the result, those date being between 30 September 2012 and 10 November 2013;
- (e) [23]: the search terms giving rise to the 20 results had a consistent theme being a variation on 'Melbourne underworld criminals'; an image of the plaintiff was displayed on most searches;
- (f) [25]: the searches also included images of members, actual or reputed, of the Melbourne underworld, and of others, not members of the Melbourne underworld;
- (g) [26]: at the time of the search it was possible for the searcher to ascertain the webpage on which an image ('thumbnail') appeared by clicking on the image;
- (h) [33] – [39]: Annexure B ('the webpage matter') consisting of 7 pages of screenshots was published between 23 November 2012 and 24 June 2013, each page being described in paras. [35]–[39];
- (i) [49]: the plaintiff gave notice to the defendant in writing on or about 3 December 2012 of the complained of material;
- (j) It was not contentious that the material was not thereafter removed or blocked by the defendant;
- (k) It was an agreed fact (Summary for Court of Appeal, para.28) that differences in Annexures A and B in the Amended Statement of Claim as filed (the relevant version) and as purportedly served did not materially change the nature of the materials alleged to be defamatory.

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Part VI:

8. Preliminary submission

The Court of Appeal placed some reliance upon the affidavits notwithstanding that:

- (a) no Defence had been filed and issues thereby delineated;
- (b) no discovery had been made in respect of delineated issues;
- (c) no cross-examination had occurred.

The appellant says that an application such as this (to set aside service) is an inappropriate vehicle if detailed factual issues need to be considered. The affidavits restrict the evidence to that chosen by Google.

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9. The appellant addressed the Court of Appeal on the significance of the affidavits at Transcript p.66. At Transcript p.67, l.14 and l.21 McLeish J and Fergusson J indicate the perceived limitations of the evidence.

10. Capacity to defame – the second ground

The appellant considers it appropriate to deal first with the second ground, upon which the order of the Court of Appeal is based.

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11. It is necessary to consider the material complained of. Consider the Statement of Claim, Annexure A at pp.1, 5 and 14 by way of example. Each has a heading and a date.

11.1 Pg.1: the search term is 'Melbourne criminal underworld photos' and the plaintiff's image is the first shown with the majority of other images comprising notorious members of the Melbourne underworld – actual or reputed – including Tony Mokbel, Andrew Venjamin, Mario Condello and Carl Williams;

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11.2 Pg.5: the search term is 'Melbourne underworld criminals' and the same comment as is made re pg.1 can again be made save that only Mokbel and Williams are clearly depicted;

- 11.3 Pg. 14: depicts an image of the Google logo with an autocomplete replication including the terms, inter alia,
- michael trkulja criminal
 - michael trkulja melbourne crime
 - michael trkulja melbourne underworld crime

12. Consider Annexure B at pp.4, 5 (autocomplete).

12.1 Pg.4: the search term is 'melbourne underworld criminals' containing a snippet entitled 'images for melbourne underworld criminals' which has the plaintiff as the first image and three other images each of a notorious member of the Melbourne underworld including Tony Mokbel;

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12.2 Pg.5: a replication akin to that described in 11.3 supra.

13. The imputations – six - pleaded in para.18 of the Amended Statement of Claim (reproduced in [44] of the Reasons of the Court of Appeal) include the following:

13.1 (a) The plaintiff is a hardened and serious criminal in Melbourne;

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13.2 (e) The plaintiff is an associate of Tony Mokbel, the Australian notorious convicted murderer and drug supplier and trafficker;

13.3 (f) The plaintiff is such a significant figure in the Melbourne criminal underworld that events involving him are recorded on a website that chronicles crime in Melbourne criminal underworld.

14. Google asserted that the material relied upon was created in such a way (i.e. by way of search on a search engine) that it is incapable of giving rise to defamatory imputations. That Google's case was so confined is apparent from Google's Written Case – para. 5(2), as addressed further at paras. 16-18; from the way the case was advanced orally – Transcript, p.13, ll.20-29; and as summarized by the Court of Appeal – Reasons at [376]-[377].

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15. The Court of Appeal on its own initiative considered the particular material – this was not a case that was anticipated or addressed by the appellant other than in the most peripheral of ways.²

10 16. The Court of Appeal introduces a consideration which neither formed part of Google’s ground 2 nor was raised by Google – that of whether a ‘composite’ publication was advanced. Having done so the Court of Appeal is inconsistent as to how it is going to approach the material. At Reasons [30] it suggests that it is regarding ‘each instance’ (presumably each search return) as composite in the sense that the image must be read with the search term displayed, i.e. ‘composite of the search term and the search result’.

17. However, at Reasons [387] it proceeds on a theory that what the plaintiff was advancing was one composite publication incorporating all 20 search results. This is difficult to contemplate, and nor was it advanced by Google.

20 18. The Court of Appeal commences with acceptance that it is the ‘ordinary reasonable user of a search engine’ who must be considered rather than the ‘ordinary reasonable reader or viewer’. This is a novel proposition unrecognized by any of the current texts. It is a proposition which is not recognized as arising or potentially arising under the Uniform Defamation Act. It is moreover contrary to the test adopted in the High Court in *Favell v Queensland Newspapers* [2005] HCA 52 – “ordinary reasonable reader”: [9], [11].

30 19. A defamation pleading should only be disallowed as not capable of bearing a defamatory meaning with great caution and bearing in mind that reasonable minds may differ about different meanings:

² Transcript before Court of Appeal, p.74.

Favell, supra, at [6]; *Corby v Allan & Unwin Pty Ltd* [2014] NSWCA 227 at [134] – [137] (per McColl JA with whom Gleeson JA agreed).

20. The test is: what would ordinary reasonable people understand by the matter complained of? The general principles on the determination of meaning commence with Lord Reid’s speech in *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 259:

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*Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naïve. One must try and envisage people between these two extremes and see **what is the most damaging meaning that they would put on the words in question.*** (emphasis added)

21. It is accepted by the High Court that it is appropriate to consider the “most damaging meaning” conveyed by the publication.³ Kirby J in *Chakravati v Advertiser Newspapers* put the exercise of determining meaning thus:⁴

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*Where words have been used which are imprecise, ambiguous or loose, **a very wide** latitude will be ascribed to the ordinary person to draw imputations adverse to the subject.* (emphasis added)

22. The exercise is one of generosity, not parsimony. In *Berezovsky v Forbes*⁵ Sedley LJ delivering judgment on behalf of the Court of Appeal, dealing with the defendant’s challenge to capacity, stated:⁶

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The real question in the present case is how the courts ought to go about ascertaining the range of legitimate meanings. Eady J regarded it as a matter of impression. That is all right, it seems to us, provided that the impression is not of what the words mean but of what a jury could sensibly think they

³ *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 531[15] their Honours are approving the passage from Lord Reid’s speech. As the High Court did again in *Favell* (supra) at [17].

⁴ *Ibid* at 574 [134], his Honour relying upon *Lewis v Daily Telegraph* [1963] 1 QB 340 at 374 and *Farquhar v Bottom* [1980] 2 NSWLR 380 at 386.

⁵ [2001] EWCA Civ 1251.

⁶ *Ibid* at [16].

meant. Such an exercise is an exercise in generosity, not in parsimony.

23. The test has also been considered by the High Court in *Radio 2UE Sydney P/L v Chesterton* (2009) 83 ALJR 654.

24. It will often be a first impression; and the text should not be subjected to an "over meticulous scrutiny": *Random House v Abbott* (1999) 167 ALR 224 at 257.

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25. The law is summarized by the South Australian Full Court in *Chapman & Chapman v ABC* (2000) 77 SASR 181 at 189-190 and is uncontentious. The imputation which any particular words might bear is to be determined as an objective test and the issue is to be approached by reference to the hypothetical ordinary reasonable reader, who:

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(a) is a person of fair, average intelligence, neither perverse nor morbid nor suspicious of mind or avid of scandal: *Lewis* (supra) at 258; *Favell* (supra) at [10];

(b) does not live in an ivory tower but can and does read between the lines in light of that person's general knowledge and experience of worldly affairs: *Lewis* (supra) at 258; *Favell* (supra) at [10];

(c) considers the publication as a whole, and the most damaging meaning that would be put on the words in question: *Lewis* (supra) at 259-260; *Favell* (supra) at [17];

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(d) is a layman (not a lawyer) who does not read the article cautiously or carefully but casually and who is prone to a certain amount of loose-thinking: *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239;

- (e) draws implications much more freely than a lawyer, especially when they are derogatory: *Lewis* (supra) at 277; *Favell* (supra) at [11];
- (f) takes into account emphasis given by conspicuous headlines or captions: *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293 at 301.

26. Google here places no limits on the capacity for implication. It is appropriate to recall again the words of Lord Devlin in *Lewis v Daily Telegraph* (supra):

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“(I)t is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis. A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done. One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man; you cannot make a rule about that.

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27. The Court of Appeal identifies the matters – ‘context’ – within which such viewer will bring to bear his/her deliberation at Reasons at [147]. In parenthesis the Court of Appeal immediately misstates the position. The ‘terms propounded by the user’ might not be so propounded. Someone might intend on searching ‘Melbourne Cricket Club’ and get to ‘Melbourne cr.’ when the autocomplete throws up ‘Melbourne criminal underground’. The user might say ‘that looks interesting’ and access it only to find the photo of a member of his church – Trkulja – in the front row of images.

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28. The Court of Appeal embarks on an extensive factual ‘inquiry’ (note use of the word at Reasons [390]) (based on Google’s evidence) such as:

- (i) evidence of Madden-Woods that by mid-2013, the Google search engine had located “over 60 trillion unique URLs” by mid-2013: Reasons at [156];
- (ii) evidence of Herscovici that “the outcomes of Autocomplete depend on what the user does ... and what the user and all other users of the Google Search Engine have done in the past (in terms of completed search queries)” at [202].

10 29. In so proceeding the Court of Appeal infects its determination of the ‘capacity’ issue with the same criticism as attends its approach to the ‘publication’ issue – it relies upon untested (and untestable) evidence.

30. The Court of Appeal attributes specific technical knowledge of ‘how Google works’ to the ordinary reasonable reader, including:

- (i) that a user of the search engine would understand that “a search engine such as the Google search engine, without which the facility to navigate trillions of pages on the world wide web would be gravely compromised” (Reasons [390]);
- 20 and
- (ii) that the user would understand that “autocomplete predictions which are returned in a particular instance are strongly influenced by the particular user’s previous searches” (Reasons [393]).

31. This ‘inquiry’ based on evidence shouldn’t have been undertaken (the Court of Appeal appeared to question this itself (Transcript, p.39, ll.20 – 30), and is a matter for the factual stage of the test. Further, this wrong formulation of the ‘ordinary reasonable reader’ at the legal stage (based on evidence) will cause considerable
30 confusion.

32. In concentrating only on the search the Court of Appeal ignores the 'grapevine effect' whereby the original searcher prints out the search result and includes the print copy in, for example, a dossier being prepared on a job applicant.

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33. The Court of Appeal initiates its own enquiry by considering going behind the 'thumbnail' image: Reasons [42]. Similarly, at Reasons [151] the Court of Appeal raises the issue that there are some images returned of people who are clearly not criminals – viz. police officers, barristers.

34. These are matters that were not raised by the appeal. They fall outside ground 2 as promulgated. They are clearly matters that would exercise the mind of the fact finder – be it jury or single judge – at the trial stage. Capability to defame, however, must clearly exist as was found by McDonald J in his Honour's Reasons at [70], [71].

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35. Finally, the Court of Appeal muses over whether there is any truth in the imputations: Reasons [69]. That is clearly not a matter for consideration absent a plea in a defence of justification.

36. Google is not a publisher – the first ground

The appellant says that it is totally unsatisfactory that principles were arrived at and promulgated on untested evidentiary material which is incomplete. The appellant further says that this criticism infects the whole approach of the Court of Appeal, including as to the 'capacity' issue. If the matter was remitted solely on a successful appeal on the 'capacity' issue the trial judge would be hampered in the conduct of the trial by what the Court of Appeal has said on 'publication'.

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37. It is this criticism of the decision below which forms the principal contention by the appellant on ground 1. As the Court of Appeal did

not have a proper evidentiary base to so consider the issue, neither does this Court.

38. Google's Written Case (to the Court of Appeal) indicates the basis of its submission. It is summarized at para. 5(1) and expanded upon from paras.20 to 33. The submission focusses upon an intention to defame. It should be noted that no part of the submission relates to whether the publisher might be said to be a 'primary' or a 'secondary or subordinate' publisher.

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39. The appellant's response to the submission was that the *Agars v Hyde* test could not be established where there was a decision of the Victorian Supreme Court, unchallenged on appeal, deciding directly to the contrary.⁷

40. Prior to notification the evidence as to the editing that might be done at the 'crawling' stage, Reasons, [190] - [192]), and the 'indexing' stage, Reasons: [194] – [195] needs to be considered. It is clear that editing does occur; that explains why child pornography is not produced in Google's search results.⁸ Consider the need for discovery of policies of content removal at the crawling stage, and indexing stage.

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41. In any event the appellant said that his case was a 'post-notification' case: Reasons at [225]. Consider what might follow a Defence which either (a) denied publication or (b) raised a s.32 defence. The plaintiff might in his Reply plead that defendant's conduct in not taking action constituted adoption, acquiescence or authorization:

⁷ *Trkulja v Google* (2012) VSC 533 at [20], [29]. Beach J's decision has been followed in another jurisdiction: *Yeung v Google* [2014 HKCFI 1404 at [103]. It should also be noted that the decision gave rise to the potential of a plea of 'issue estoppel' depending upon the content of the Defence.

⁸ And note *Google Inc. v Equustek Solutions Inc.* 2017 SCC 34 at [50].

concepts recognized in the golf club notice board case (*Byrne v Deane* (1937) KB 878). Discovery would follow which would necessarily require the defendant to discover such documents as policies or manuals on content removal, or content moderation following notification of a grievance.

10 42. It is appropriate to note some of the exchanges in the Court of Appeal. Note McLeish J at Transcript, p.27, l.17. The question does not appear to be thereafter answered – unless it is at Transcript, p.31 l.40. Refer to the Reasons at [213] and [226]. This submission should also be considered against Google’s Application for Leave to Appeal to the Court of Appeal, and the suggested summary of the evidence appearing there – (at 6.4 on p.4 thereof) - note what the evidence does not address. See also p.8 at para.33 – which suggests that some matters ‘could be done’. And refer to Justice Blue in *Duffy v Google* [2015] SASC 170 at [243].

20 43. Google advance a particular case, namely that because the Web is always changing the same search result will never come up again. In the event Google asserts that notification is meaningless because no action can be taken anyway to prevent the precise result complained of being reproduced. Refer Reasons at [206]; and the Court of Appeal then latches on to this contention to make strong obiter remarks as to whether Google can ever lose the defence of innocent dissemination, thereby raising serious doubt as to whether Google can be liable at all in defamation): Reasons [320]. This submission can only lead to immunity for search engines.⁹

30 44. The Court of Appeal then goes off on its own initiative and deals with the appeal outside its parameters. It becomes fixated with whether the plaintiff (appellant) was advancing a case that Google is a primary or secondary publisher. In doing so the Court of Appeal

⁹ The submission in any event appears questionable, even on Google’s untested evidence (AB239 – Maddern-Woods affidavit at [161], [162] to [164]).

makes clear errors: it asserts that the plaintiff pleads that Google is a primary publisher. The plaintiff does not so plead. The words “primary publisher” do not appear in the Statement of Claim. The common law does not acknowledge the existence of primary or secondary publishers. (Refer Duncan and Neill on Defamation, 2nd Edit., Butterworths, 1983). The common law defence of innocent dissemination does not categorize publishers as primary or secondary. It appears that the concept of secondary or subordinate publishers arose from the Defamation Act 1996 (UK) s.1 and the Uniform Defamation Act 2005 (Aust.) s.32 which constitutes the statutory defence of innocent dissemination. In the ordinary course the issue of subordinate publisher will be raised by the defendant pleading a s.32 defence. No defence had yet been filed.

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45. The Court of Appeal consistently asserts that the plaintiff’s case is that Google is a primary publisher: Reasons [204], [360], [367], [368]. The plaintiff denied any obligation or reason to do so, or that that was what he was advancing.¹⁰

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46. The Court of Appeal asserted that it was necessary for the plaintiff to plead that Google was a secondary or subordinate publisher: Reasons [365]. This has never been the case in defamation proceedings¹¹. The plaintiff says that it is a matter for Google if it wishes to avail itself of the s.32 defence to assert that it is a subordinate publisher. The plaintiff is then left to deal with the plea in his Reply.

47. The appellant asserts that in a defamation action and on an application like this for either summary judgment or to set aside

¹⁰ Refer Reasons [7]. And refer to Transcript before the Court of Appeal: pp.54-55.
¹¹ It is noted that none of the precedents for particulars of claim in defamation actions appearing in *Gatley on Libel and Slander* 12th Edit., (2013), at A1.6 to A1.11, nor in *Bullen & Leak & Jacob’s Precedents of Pleadings*, 17th Edit., (2012), Vol.1 at 37-11 to 37-19 contemplate identification of a publisher as primary or secondary, and Tobin & Sexton, *Australian Defamation Law & Practice*, at [25,075] and [25,085] addressing pleading of publication, makes not reference to primary and secondary publishers.

service the court will consider whether each of the elements of the cause of action are pleaded. If they are, subject to the clearest of factual error or errors, the court will go no further. Otherwise, the assertions are presumed in the plaintiff's favour thus:

- (i) publication by the alleged defendant (paras.13, 16, 17);
- (ii) of defamatory words (paras.21, 22);
- (iii) by the defendant to a third person (para.13);
- (iv) that person being in the jurisdiction of Victoria (para.13);
- (v) damage results (presumed) (para.24).

10 Each of these matters were pleaded in the case at bar.

48. As Justice Beach found in the first *Trkulja* case (supra) the question of whether Google is a publisher is a mixed question of fact and law: [18]. The question of publication must therefore be decided after the relevant evidence has been fully considered and tested under trial conditions. Google seeks to have the court on an application to set aside service of a writ consider issues such as 'public interest' – Written Case for the Applicant, at [33]). It seeks to do so without a proper evidentiary base.

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49. The appellant refers to Google's Written Case a noted in para. 39 supra. Google asserts that "(t)he tort of defamation requires a plaintiff to prove that the defendant intended the communication to a third party of the particular words (or matters) complained of. There is no authority for this proposition and the evidence, such as it is, is insufficient to form the basis for the proposition. The issue is a substantial one exercising courts worldwide at this time¹² and it could only be properly addressed following a trial which has itself followed normal interlocutory processes of discovery, exchange of experts' reports, etc.

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¹² For example refer to *Yeung v Google* [2014] HKCFI 1404 at [103]

50. Google's state of mind is that of a publisher **post notification**. Blue J. in *Duffy v Google*, supra, is specifically addressing post-notification at [205].

51. *Webb v Bloch* (1928) 41 CLR 331, relied upon by Google, is not authority for the proposition that a defendant must intend to publish defamatory material. The true position about intention is addressed in uncontentious terms in *Gatley* at [1.8] thus:

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Fundamentally, and despite many qualifications, defamation is a tort of strict liability. The law looks at the tendency and consequences of publication rather than the motive or intention of the publisher.

And in *Gatley* at [3.15] thus:

It is clearly established at common law that in determining the meaning of words the intention and knowledge of the publisher are immaterial.

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52. Where there is a failure to act following notification and a reasonable time has elapsed the general consensus *world wide* is that an actionable publication has or has arguably occurred.

53. The respondent points to the following authorities:

United Kingdom

- *Mosley v Google Inc.* [2015] EWHC 59 (QB)
- *Galloway v Google Inc.* HCJNI (Northern Island) (27.1.2016)

New Zealand

- *A v Google NZ* [2012] NZHC 2352

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Hong Kong

- *Yeung v Google* [2014] HKCFI 1404

Spain

- *Google Spain SL, Google Inc v AEPD and Gonzalez* (Case C-131/12)

France

- *Mosley v Google Inc* TGI Paris, 17th c., November 6, 2013, RG 11/07970

Germany

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- *Mosley v Google Inc.*, LG Hamburg, 24 Jan. 2014 AZ 324 264/

54. In *Mosley v Google Inc.* [2015] EWHC 59 (QB) Google's capacity 'to block access to individual images ... without disproportionate effort or expense' was noted: [54], [55]. In the German *Mosley v Google Inc.* at p.5/29 the Court records the concession by Google of 'no...major technical or resource intensive problem to block access to certain content on the internet'.

Part VII:

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55. Constitutional provisions and statutes at the relevant time.

Statutes:

Civil Procedure Act 2010 (Vic.), s.63

(Relevantly)

Summary judgment if no real prospect of success

(1) Subject to section 64, a court may give summary judgment in any civil proceedings if satisfied that a claim, a defence or a counterclaim or part of the claim, defence or counterclaim, as the case requires, has no real prospect of success.

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S.64 Court may allow a matter to proceed to trial

Despite anything to the contrary in this Part or any rules of court, a court may order that a civil proceeding proceed to trial if the court is satisfied that, despite there being no real prospect of success the civil proceeding should not be disposed of summarily because –

- (a) it is not in the interests of justice to do so; or
- (b) the dispute is of such a nature that only a full hearing on the merits is appropriate.

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Defamation Act 2005 (Vic), s.32:

(Relevantly)

Defence of innocent dissemination

32 (1) It is a defence to the publication of defamatory matter if the defendant proves that –

- (a) the defendant published the matter merely in the capacity, ..., of a subordinate distributor; and
- (b)

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(2) For the purposes of subsection (1), a person is a **subordinate distributor** of defamatory matter if the person –

- (a) was not the first or primary distributor of the matter; and
- (b) was not the author or originator of the matter; and
- (c) did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published.

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Rules:

Supreme Court (General Civil Procedure) Rules 2015 – Reg 8.09

Setting aside writ or originating motion

Notwithstanding Rule 8.08, the Court, on application made by the defendant before filing an appearance, whether conditional or not, may exercise its jurisdiction to –

- (a) set aside a writ or originating motion or its service;
- (b) make an order under Rule 46.08; or
- (c) stay a proceeding.

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Part VIII: Orders sought

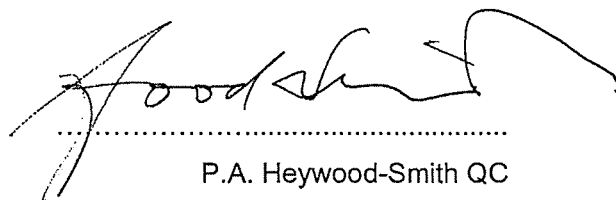
- (a) Appeal allowed with costs.
- (b) The orders of the Court of Appeal made on 20 December 2016 be set aside and in lieu thereof it is ordered that:
 - (i) the Appellant's appeal be dismissed with costs;
 - (ii) the Appellant to pay the Respondent's costs of and incidental to the Appellant's application of 12 February 2015.

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Part IX: The appellant estimates 2.5 (if no Notice of Contention) hours for presentation of his oral argument.

Dated 21 July 2017

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