IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M88 of 2017

BETWEEN: MILORAD TRKULJA (aka MICHAEL TRKULJA)
Appellant

and

GOOGLE INC
Respondent

APPELLANT'S REPLY

Part I: This submission is in a form suitable for publication on the internet.

Part II:

1. The Respondent's Submissions (RS) confirm two principal themes of the Appellant's Submissions (AS):
   (a) the use of untested and incomplete affidavit material; and
   (b) the use of such material in particular in the exercise of determining whether the material has the 'capacity' to comprise a defamatory imputation and that the respondent's case on 'capacity' was limited to a consideration of the medium.
2. As to (a) refer RS15 and 16.
3. As to (b) refer RS43-48 and 55-61. The appellant asserts (contrary to RS45), that it cannot be assumed that the ordinary user of the internet has the knowledge which the respondent asserts, even were such knowledge to be considered relevant to the 'capacity' exercise.

George Liberogiannis & Associates
Level 1, 265A Springvale Road,
Glen Waverley,
Victoria.3150
Telephone: 0409-182-389
Fax: (03) 9887-9550
Email:g.liberogiannis@gmail.com
Ref: George Liberogiannis

The appellant's position was that this was always the respondent's case, that the medium used, i.e. search engine, could never give rise to a defamatory imputation: refer AS14 and 15. RS37 and fn.45 are not accepted by the appellant.

4. There follows direct comment upon particular paragraphs in the RS.
5. RS33 (see also RS40) seeks to pick up upon the suggestion of the Court of Appeal that the images matter (20 searches in Annexure A) might or must be considered as a 'composite' whole. The appellant rejects such a suggestion. Here, twenty separate publications are asserted: AS16-17.
6. RS34 (last sentence) incorrectly asserts that page 2 (of the 20 in Annexure A) does not include the appellant's image. It is in fact the last image in the fourth row.
7. RS38 is rejected. It has never been an element of the tort of defamation (AS47) that it is necessary to consider how the third person, to whom publication is made, came to read, view, or whatever, the publication, or how many intermediaries the publication may have passed through as the natural and ordinary consequence of the original publication.
8. In RS39, first sentence, and fn.48, the respondent seeks to make too much of the cited passages. Obviously if words appear in a business letter, that might be a relevant 'context'. The context might require the whole publication to be read and considered. The context might include the fact that the words are spoken in jest. Such matters do not arise in this case.
9. RS42, fn.54 requires comment. The appellant's handwriting, if it is indeed his of which there is no evidence, has no relevance: it is not seen by the third party viewer.
10. RS50 and fn.68 advance a submission that the court may need evidence to determine the characteristics of the ordinary reasonable reader. This submission confirms the appellant's submission as to the use of untested evidence in this matter (para.1 supra). The *RWIND* case cited is not addressing the tort of defamation.

11. RS51 seeks to use the cause of action of misleading and deceptive conduct to a similar end. The analogy has obvious limitations for the tort of defamation.

12. RS58, fn.75 raises the concept of 'inference upon an inference'. That concept has never been embraced in this Court.[1] Whatever the submission to the final determiner of meaning, it is difficult to find a use for the concept at the capacity stage.

13. RS62-66 address the facility of the autocomplete. This Court would not embark upon a consideration of what it conveys without proper evidence as to its control. There is a compelling argument that it is not to the benefit of society that a google search of the name "John Doe" result in an autocomplete "John Doe paedophile" where there is no basis upon which the obvious imputation could be justified.

14. RS67 ignores the real danger that that is how the Court of Appeal authority might be presented to lower courts here and courts overseas generally.

15. RS70 identifies significant issues which can only be properly addressed by this court following a proper trial with properly tested evidence. RS71.1 provides a good example. Until it is properly understood what material Google 'edits out' at the crawling and indexing stages, or might edit out if it wished, the question of responsibility for the publication pre-notification cannot be properly considered. Evidence is required for this.

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[1] *John Fairfax v Gacic* (2007) 230 CLR 291, [2007] HCA 28 at [194].

Dated 25 August 2017

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P.A. Heywood-Smith QC
Counsel for Appellant
Tel: 0410 596 717
Fax: (08) 8228 0022
E:pheywoodsmith@anthonymason chambers.com.au

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