HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M86/2021

BETWEEN: **Google LLC**
Appellant

and

George Defteros
Respondent

APPELLANT'S REPLY

Part I: Certification

1 The appellant certifies that this reply is in a form suitable for publication on the internet.

Part II: Reply

Ground 1 – Publication and publishers

2 Properly understood, the authority of *Webb v Bloch*[1] does not extend to subordinate disseminators.[2] In that case, the defendants admitted publication, but claimed that it took place on an occasion of qualified privilege. The issue that arose was whether the malice of the solicitor who composed and distributed the defamatory circular defeated the privilege of his principals. Knox CJ and Isaacs J held that because the solicitor was a principal in the act of publication (*"His was no subordinate part"*), he was a joint tortfeasor and his malice defeated the privilege of all.[3] Accordingly, *Webb v Bloch* did not concern the liability of those who are subordinate disseminators[4] and should be confined to joint tortfeasors.

3 The respondent's submission that Google's argument conflates the questions of publication and meaning[5] overlooks the well-established principle that an act of

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

2 Cf respondent's submissions filed 18 February 2022 (the **Respondent's Submissions**), [7], [14], [18], [20].

3 *Webb v Bloch* (n 1) 359 (Knox CJ), 363 (Isaacs J).

4 See *Fairfax Media Publications Pty Ltd v Voller* (2021) 392 ALR 540, 548 [33] (Kiefel CJ, Keane and Gleeson JJ, Gageler and Gordon JJ agreeing at 553 [59]) (*Voller*).

5 Respondent's Submissions, [16]-[20].

publication is one that conveys to the mind of another the defamatory sense embodied in the defamatory matter.[6] Accordingly, a defendant acting alone cannot be characterised as being instrumental in, or a participant in, the communication of defamatory matter if its act, in and of itself, conveys no defamatory meaning.[7] This position is consistent with the findings of the Supreme Court of Canada in *Crookes v Newton*,[8] the Full Court of South Australia in *Google Inc v Duffy*,[9] and Gageler and Gordon JJ in *Fairfax Media Publications Pty Ltd v Voller*.[10]

4 The respondent seeks to distinguish *Crookes v Newton* on the basis that, whilst it was concerned with a 'mere' hyperlink,[11] the hyperlink in this case was provided as part of 10 *"the intentional provision of a search engine which facilitates the communication of allegedly defamatory matter, and the return of a search result which entices the searcher to click on the hyperlink and incorporates into the search result words closely connected with the hyperlinked material"*.[12] Whilst the respondent appears to suggest that those factors amount to 'instrumentality' or 'participation',[13] he fails to explain how the use of the hyperlink by the defendant in *Crookes v Newton* justified a different characterisation.[14] In this case, the respondent made no complaint that the Search Result, on its own, defamed him (TJ [60]; CAB 37) and the trial judge found that there

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6 Appellant's Submissions filed 21 January 2022 (**Google's Submissions**), [27]. See also *Voller* (n 4) 546 [23] (Kiefel CJ, Keane and Gleeson JJ, Gageler and Gordon JJ agreeing at 553 [59], adding additional observations at 553 [61]).

7 Cf Respondent's Submissions, [18].

8 [2011] 3 SCR 269, 291 [40], 291-292 [42] (Abella J for Binnie, LeBel, Abella, Charron, Rothstein and Cromwell JJ) (*Crookes v Newton*). Abella J held that unless a defendant uses a reference in a manner that in itself conveys defamatory meaning about the plaintiff, making reference to the existence and/or location of content by hyperlink or otherwise, without more, is not publication of that content. Abella J reached this finding on the basis that *"[c]ommunicating something is very different from merely communicating that something exists or where it exists. The former involves dissemination of the content, and suggests control over both the content and whether the content will reach an audience at all, while the latter does not"*.

9 (2017) 129 SASR 304, 360 [187] (Kourakis CJ, Peek J agreeing at 401 [354]; Hinton J agreeing at 456 [562], adding additional observations at 467 [599]). Contrary to the findings of the Court of Appeal in this case (CA [84]-[86]; CAB 171-172), Hinton J did not consider that the mere provision of a hyperlink was sufficient to constitute Google a publisher of the webpage to which it provided a hyperlink, nor did Kourakis CJ speak of incorporation in the absence of the search result repeating and drawing attention to the defamatory text of the underlying webpage. Rather, Hinton J agreed with Kourakis CJ that to constitute publication of the underlying webpage it is necessary that the text of the search result repeat and draw attention to the defamatory imputation conveyed by the underlying webpage.

10 *Voller* (n 4) 560-561 [90], 562 [95] (Gageler and Gordon JJ).

11 Respondent's Submissions, [15], [21], [24].

12 Ibid [22].

13 Ibid.

14 *Crookes v Newton* (n 9) 277-278 [4]-[8] (Abella J for Binnie, LeBel, Abella, Charron, Rothstein and Cromwell JJ). The defendant authored the article and selected the hyperlinks to insert into it.

was nothing in the Search Result itself that incorporated or drew attention to the defamatory imputation that was conveyed by the Underworld article (TJ [62]; CAB 38). It is on that basis, like the hyperlink in *Crookes v Newton,*[15] that the hyperlink may be characterised as a 'mere' hyperlink.

Proposed Ground 2 – Notification/Innocent dissemination

5 The respondent contends that a plaintiff ought not be required to identify the imputations of concern or explain why they cannot be justified or excused and that if Google continues to publish following notification without inquiry as to the truth of the matter *"in order to make its search engine more attractive"*, it must take the consequences.[16] Two points can be made in response.

6 *Firstly*, how can it be said that a subordinate disseminator must assess the truth of the matter or risk liability, but that the plaintiff, who is in the best position to identify the imputations of concern and to explain why they cannot be justified or excused, should not be required to explain those matters?[17] Should every search result that is the subject of a generalised, non-particularised complaint be removed? The respondent accepts that *"[s]ome subordinate publishers will not be in a position to assess whether content is true or otherwise defensible"*, but argues that this has not caused the common law to be modified.[18] The explanation for that perhaps lies more in the fact that historically, at least, plaintiffs have generally not sued the subordinate disseminator *instead* of the primary publisher. Further, in the cases from which the doctrine of innocent dissemination emerged the issue did not arise. In *Emmens v Pottle,*[19] the jury accepted that the defendant newsvendor had no notice that the newspaper it sold contained a libel and, in *Vizetelly v Mudie's Select Library Ltd*,[20] the plaintiff had first established the unlawful nature of the publication by complaint against the primary publisher.

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15 Ibid 279 [10], 292-293 [44].

16 Respondent's Submissions, [36]-[37].

17 Placing this onus on the plaintiff would overcome the difficulties identified by Eady J in *Metropolitan International Schools Ltd (t/as SkillsTrain and/or Train2Game) v Designtechnica Corp (t/as Digital Trends)* [2011] 1 WLR 1743, 1761-1762 [69], as cited in the Respondent's Submissions at [34]. It would then be a matter for the defendant as to whether it assumes the risk of being liable as a publisher in the face of evidence which may support a finding that it knew, or at least ought to have known, that the matter in question was defamatory of the plaintiff and that the matter could not be justified or excused.

18 Respondent's Submissions, [38].

19 (1885) 16 QBD 354.

20 [1900] 2 QB 170. The book was the subject of an apology, the payment of damages and a notice to the defendants recalling it from distribution and, in these circumstances, the defendants were liable as publishers for continuing to circulate copies of it.

7 *Second*, although Google has a commercial interest in providing a quality service with responsive search results (TJ [187]; CAB 66), it does not follow (as the respondent suggests by the word 'attractive') that results linking to defamatory matter rank more highly than non-defamatory results. No such finding was made. Instead, the evidence was that Google, in providing a search engine, seeks to provide relevant and high quality, authoritative results (TJ [184]; CAB 65). In this context it is not apt to equate the Google search engine with a tabloid newspaper that seeks to attract an increased readership by the nature of the stories that it publishes. It is a search engine, used by an individual to locate matter relevant to a specific search query.

10 ***Grounds 3 and 4 – Common law and statutory defences of qualified privilege***

8 The respondent submits that this case involved publication to the world at large, *"in the sense of the return of the Search Result to any user who entered the search term"*.[21] The qualifying words, italicised, highlight the dissonant nature of the respondent's submission, which conflates the distinction that must be drawn between publication to the world at large, which is indiscriminate and not specifically targeted to an individual reader, and publication to only those users of the Google search engine who enter a particular search query and then select the search result from the list of those returned and choose to click on the hyperlink, which is on every occasion a unique and discrete act of publication to an individual user.[22] Further, the evidence was that different results
20 may be returned to different individuals entering the same search query (TJ [29]; CAB 28-29).

9 Google has not erroneously treated 'the common convenience and welfare of society as a whole' as a determinant of whether an occasion of common law qualified privilege exists.[23] On the contrary, Google's submission proceeds upon the finding below that the requisite interest and duty existed in the case of publication by Google to the substantial proportion of those to whom the Underworld article was published (TJ [199]-[201]; CAB 71). That duty cannot be acquitted without also publishing to the small proportion of search engine users who, it was inferred, did not have a legitimate interest in locating and reading the article. The rationale of the qualified privilege defence is founded upon

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21 Respondent's Submissions, [52].

22 If the facts of *Bashford v Information Australia (Newsletters) Pty Limited* (2004) 218 CLR 366, where publication of a newsletter to subscribers sufficed to establish the common law privilege (at 378 [26] (Gleeson CJ, Hayne and Heydon JJ)), then the facts here provide an ever stronger case.

23 Cf Respondent's Submissions, [53]-[54].

the general welfare of society.[24] To deny the defence on the basis that a small proportion of those to whom publication is made do not possess the requisite interest would not advance the purpose of the defence.[25]

10 For the purposes of the statutory defence of qualified privilege, the respondent repeats the Court of Appeal's observation that a number of persons might be attracted to the Underworld article in order to satisfy their curiosity or add to their understanding and knowledge of the activities of the Underworld in Melbourne (CA [229]-[230]; CAB 226-227).[26] An interest in adding to one's understanding and knowledge of matters of *"considerable public interest"* is one of substance.

10 **11** Additionally, whilst Google admitted that its Web Search service was targeted to users in Australia (CA [205]; CAB 218), it does not follow that the Underworld article was published throughout Australia, as was found by the Court of Appeal (CA [235]; CAB 228).[27] No evidence was given at trial to directly support, or infer, any publication of the Underworld article beyond Melbourne and no finding to that effect was made by the trial judge.[28]

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24 *Howe v Lees* (1910) 11 CLR 361, 369 (Griffith CJ). So long as the interest is one of substance (which is expedient to protect for the common convenience and welfare of society as identified by O'Connor J in *Howe v Lees* (1910) 11 CLR 361, 377) that is sufficient for the defence to be established.

25 Any other result would mean that the functionality and utility of the Google search engine, at least insofar as it concerns the substantial proportion of users, would be fundamentally impaired. The argument in the Respondent's Submissions, at [57], that this approach means that Google would have a defence, regardless of the content of any search, the identity of the recipients and the interests of the recipients as a whole, disregards the facts as found in this case (TJ [199]-[201], [213]; CAB 71, 74).

26 Respondent's Submissions, [64].

27 Cf Respondent's Submissions, [6](d), [66].

28 All publication witnesses gave evidence that the Underworld article was published to them within Victoria (see TJ [94]-[106]; CAB 44-48).