HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M86/2021

BETWEEN: **Google LLC**
Appellant

and

George Defteros
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Statement of Issues

2. The Notice of Appeal, as filed, raises three principal issues:

    a. whether the appellant, as the operator of the Google search engine, was a publisher of the Underworld article on a third-party webpage to which its search result provided a hyperlink;

    b. whether the appellant has established the defence of qualified privilege at common law; and

    c. whether the appellant has established the defence of statutory qualified privilege pursuant to s 30 of the *Defamation Act 2005* (Vic) (**Act**).

3. In the event that leave is granted to amend the Notice of Appeal in the form proposed, the appeal raises an additional issue, namely, whether the appellant has established the defence of innocent dissemination at common law and/or pursuant to s 32 of the Act.

4. The respondent does not oppose the proposed Amended Notice of Appeal.

Part III: Section 78B Notices

5. The respondent certifies that he has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and has concluded that no such notice is required in this case.

Part IV: Facts

6. The facts, as summarised in the appellant's submissions at [10]-[23], are not in contention, except for the addition of the following:

a. The Search Result comprised the following (TJ [11], CA [38]; CAB 17, 143):

> **Underworld loses valued friend at court - SpecialsGanglandKillings ...**
>
> **www.theage.com.au > Features > Crime & Corruption ▼**
>
> June 18 2004 - Pub bouncer-turned-criminal lawyer George Defteros always prided himself on being able to avoid a king hit – The Age Online

b. The first line, which was the title, was the hyperlink; the second line was a shortened form of the uniform resource locator (URL), and the third part was the snippet (TJ [30], CA [45]; CAB 29, 152).

c. With respect to the appellant's submissions at [15]-[16]:

i. in August 2007, solicitors acting for Mr Defteros wrote to *The Age*, complaining about the ongoing publication of the Underworld article on *The Age* website and claiming it was defamatory. However, Mr Defteros did not issue proceedings against *The Age* (CA [18]; CAB 138);

ii. the respondent had commenced a proceeding in the Supreme Court of Victoria against John Silvester and Andrew Rule, the authors of a book entitled "*Leadbelly: Inside Australia's Underworld Wars*" (Mr Silvester also being the author of the Underworld article). The respondent claimed to have been defamed by a chapter of the book "*Snakes and Ladders*" which the trial judge considered appeared to have been based on the Underworld Article (CA [20]; CAB 138);

iii. that proceeding settled at mediation in September 2010 and the parties entered into a Deed of Release. A term of settlement included an agreement that the defendants would make revisions to the chapter to be included in the reprint of the book. The respondent released those defendants from all liability in relation to various matters including any

article published in *The Age*, *The Age Online* and/or any Fairfax Media or Fairfax Digital publication concerning him. Although the revised chapter, ultimately published, was very similar to the Underworld article, the revisions had the effect that the revised chapter did not convey the imputation that Mr Defteros had crossed the line from professional lawyer for, to confidant and friend of, criminal elements (CA [21]; CAB 138 – 139).

d. In addition to the last sentence in the appellant's submissions at [20], the Underworld article was published well outside Melbourne, and throughout Australia (CA [205], [235]; CAB 218, 228).

Part V: Argument

Ground 1 – Publication and publishers

7. For the reasons developed below, the appellant was a publisher of the Underworld article in accordance with the principles in *Fairfax Media Publications Pty Ltd v Voller*[1] and *Webb v Bloch*.[2] The appellant was instrumental in, or a participant in (or contributed to), the communication of defamatory matter.[3] It intended to facilitate, or provide a platform for, communication of allegedly defamatory matter,[4] even if it did not intend to communicate the defamatory matter in question.[5]

8. The appellant's systems, through its web crawler and indexing programs, and ranking algorithm (TJ [27]-[29], CA [45]; CAB 28-29, 151), produced the Search Result which included the hyperlink.

9. The Search Result enticed the searcher to click on the hyperlink (CA [85], [87]; CAB 171-172), which was the title (TJ [30], CA [45]; CAB 29, 152), and the words of the Search Result were closely connected with relevant words in the Underworld article (CA [86]-[87]; CAB 171-172).

10. Notice, where it is given, is relevant not only to the defence of innocent dissemination, but also to publication. The giving of notice, and the failure to prevent the search engine from producing the Search Result that included the hyperlink,[6] inform questions of instrumentality, participation and contribution.

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1 (2021) 392 ALR 540 (*Voller*).
2 (1928) 41 CLR 331 (*Webb v Bloch*).
3 *Voller* at 544 and 548, [12] and [32] (Kiefel CJ, Keane and Gleeson JJ); at 553, [59] (Gageler and Gordon JJ).
4 Ibid at 554, [66] (Gageler and Gordon JJ), and also at 553, [62].
5 Ibid at 547, [27] (Kiefel CJ, Keane and Gleeson JJ).
6 For example by blocking the URL of the hyperlinked material (CA [92]; CAB 173).

11. The appellant was put on notice of the defamatory material, notwithstanding the inaccuracies in the notice: it was given the full URL of the Underworld article (CA [22]; CAB 139). It failed within a reasonable time to prevent its search engine from producing the Search Result in response to a search request of the name "george defteros" (CA [92]; CAB 173).

12. The appellant's conduct was voluntary[7] and active.[8] The Google search engine is not a passive tool,[9] such as the facility provided by a telephone company.[10] The search engine is designed "*by humans who work for Google to operate in the way that it does, and in such a way that identified objectionable content can be removed, by human intervention, from the search results that Google displays to a user*" (TJ [40]; CAB 32). The Google search engine singles out search results for attention by ranking 'according to relevance' (TJ [29], CA [45]; CAB 28, 151).

13. In this Court in *Voller*, it was observed that the common law publication rule has always been understood to have a very wide operation.[11] A publisher's liability does not depend on their knowledge of the defamatory matter which is being communicated or their intention to communicate it.[12]

14. As also observed in *Voller*, Isaacs J in *Webb v Bloch* may be understood to acknowledge that publication may involve acts of participation other than, and which may precede, the actual physical distribution of the defamatory material – and his Honour is not to be understood to say that a person must intend to communicate the material complained of as defamatory in order to be a publisher.[13] The word "intentionally" as used by Isaacs J in *Webb v Bloch* is "*directed at an intention to facilitate, or provide a platform for, communication of allegedly defamatory matter. Enough for participation in a process that is in fact directed to making matter available for comprehension by a third party to be characterised as intentional is that the participation in the process is active and voluntary. That is irrespective of the degree of active and voluntary participation in the process. And it is irrespective of knowledge or intention on the part of the participant as to the defamatory content of the matter published.*".[14]

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7 *Voller* at 548, [32] (Kiefel CJ, Keane and Gleeson JJ).
8 Ibid at 554, [66] (Gageler and Gordon JJ).
9 TJ [40], CA [48]; CAB 32, 154; cf appellant's submissions, [30].
10 Appellant's submissions, [30].
11 *Voller* at 548, [31] (Kiefel CJ, Keane and Gleeson JJ).
12 Ibid at 547, [27] (Kiefel CJ, Keane and Gleeson JJ).
13 Ibid at 548, [35] (Kiefel CJ, Keane and Gleeson JJ).
14 Ibid at 554, [66] (Gageler and Gordon JJ), and see also at 553, [62].

15. Whatever "devastating" result there might be of a finding that a mere hyperlink is publication,[15] that is not this case. This is not a case of a mere hyperlink[16] appearing on a webpage. The Courts below did not conclude that the provision of such a hyperlink was participation in the communication of defamatory matter for the purposes of the strict common law rule of publication.[17] The Courts below found as set out in the appellant's submissions at [25].

16. There is a distinction between "publication" in the broad sense of meaning actionable, and publication in the narrower sense of whether by its acts, the defendant was instrumental in, or a participant in, the communication of defamatory matter. It is the broad sense in which the term publication was used in *Dow Jones & Company Inc v Gutnick*.[18] It is the narrower sense which is relevant to this appeal.

17. Accordingly, on the question of publication, it is wrong in principle to examine in isolation whether the act or acts of the defendant, *of themselves*, communicate defamatory matter[19] or "result in the tortious communication,"[20] or whether the communication of defamatory matter requires, in addition, a direct act of some other person.[21] That is a conflation of the questions of publication and meaning.[22]

18. A defendant can be instrumental in, or a participant in, the communication of defamatory matter notwithstanding that their acts of themselves convey no defamatory meaning, and notwithstanding that the communication of the defamatory matter requires an additional act by some other person. In *Webb v Bloch*, the defendant Bloch instructed the solicitor, Norman, who was not a defendant, to "*Issue circulars best way you think advisable forward us some copies*."[23] At the meeting of the Victorian Committee held 6 days later, "*Bloch reported what he had done with regard to the circular, and it was resolved that his action in instructing Norman to issue circulars be confirmed. At this time none of the defendants except Bloch had seen the circular or knew what it contained, but the defendant Crocker was supplied with a copy on the following day, and the defendant Pratt saw a copy on 23rd or 24th February 1926. It*

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15 Appellant's submissions, [26].
16 In the sense of a hyperlink which does not itself repeat the defamatory content to which it refers (appellant's submissions, [28]).
17 Cf. Appellant's submissions, [26].
18 (2002) 210 CLR 575 at 600, [26] (Gleeson CJ, McHugh, Gummow and Hayne JJ). And see *Voller* at 546, [23] (Kiefel CJ, Keane and Gleeson JJ).
19 Cf. Appellant's submissions, [30].
20 Ibid, [31].
21 Ibid, [28], [31].
22 TJ [50], [53], CA [83]; CAB 34-35, 171.
23 *Webb v Bloch* at 355 (Knox CJ).

does not appear from the evidence that the defendant Murphy ever saw the circular."[24]

19. In *Hird v Wood*,[25] the action of the defendant in continually pointing at the placard[26] of itself conveyed no defamatory meaning.

20. In each of those cases, the defendants were instrumental in, or participants in, the communication of defamatory matter.

21. The Search Result in this case was not simply an index of a webpage that exists somewhere on the Web with a hyperlink that enabled the user to navigate to it.[27] The appellant's conduct was more than that.

22. The appellant's submission that it is not a publisher of hyperlinked matter, regardless of the text of the search result,[28] should be rejected. That approach excludes from the questions of instrumentality or participation consideration of any other acts of the defendant which bear on those questions, such as the intentional provision of a search engine which facilitates the communication of allegedly defamatory matter, and the return of a search engine result which entices the searcher to click on the hyperlink and incorporates into the search result words closely connected with the hyperlinked material.

23. The decisions of the Courts below were not contrary to the decision of the Full Court in *Duffy*. The Court of Appeal applied the approach taken in *Duffy* of incorporation (Kourakis CJ) and enticement (Hinton J) (CA [84] – [86]; CAB 171 - 172), even though the Search Result did not repeat the defamatory content. The trial judge held as set out in paragraphs [54]-[55] (CAB 35-36). As observed by the Court of Appeal, although it was an important part of Kourakis CJ's reasoning in *Duffy* that the search results were defamatory, the case did not purport to lay down any rule in that respect (CA [78] – [82]; CAB 169 – 171). Instead, the Court of Appeal ultimately observed that both concepts of incorporation and enticement discussed in *Duffy* are the manifestation of the more broadly expressed principle expressed in *Webb v Bloch* that "*fastens on steps that lend assistance to the publication*" (CA [87]; CAB 172).

24. *Crookes v Newton*[29] is distinguishable. That was a case of a mere hyperlink appearing on a website, in the sense of a hyperlink which does not repeat the defamatory content to which it refers, *and nothing more* which goes to questions of instrumentality or

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24 Ibid.
25 (1894) 38 SolJ 234 (*Hird v Wood*); and see *Google Inc v Duffy* (2017) SASR 304 (*Duffy*) at 467, [599] (Hinton J).
26 *Hird v Wood* at 234.
27 Cf. Appellant's submissions, [29].
28 Appellant's submissions, [30].
29 [2011] 3 SCR 269 (*Crookes v Newton*).

participation. The conduct of the appellant in this case, as with the appellants in *Voller*,[30] was of a wholly different character.

25. As for the alternative submission of the appellant at [26] and [32], there are several reasons why there is no requirement to modify the common law rule in the manner contended for.

26. The strict common law rule of publication has not required modification with the advent of the telegraph, telephone,[31] radio or television[32] - nor has the advent of the internet warranted a relaxation of the strictness of the rule.[33] And there should be no special rule for the providers of hyperlinks.[34] Hyperlinks on the internet can occur in a multitude of circumstances.

27. Clear guidance as to the relevant principles is provided by *Voller* and *Webb v Bloch*. Each case depends on the application of those principles to the facts of the particular case.

28. There are uncertainties in the approach contended for by the appellant. To "*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*"[35] and footnote 18 to the appellant's submissions raise unresolved issues. Assuming those passages mean, in the context of this case, that somewhere in the search result (including the hyperlink) there must be a repetition of the defamatory content of the hyperlinked material, the statement in parentheses in footnote 18 that *"(for instance, a suggestion that there is something defamatory to be read about the plaintiff by clicking on the link)*" is, to the contrary, not a repetition of defamatory content, but rather an example of enticement.

Proposed Ground 2 – Notification/Innocent dissemination

29. The respondent addresses proposed ground 2, in the event that leave is granted to amend the Notice of Appeal.

30. As this Court observed in *Voller*, the defence of innocent dissemination was developed by the courts to mitigate the harshness of the law relating to publication,[36] although the defence "*cannot be said to be rooted in principle*".[37]

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30 *Voller* at 562, [95] (Gageler and Gordon JJ).
31 Ibid at 555-556, [71] (Gageler and Gordon JJ).
32 Ibid at 556, [72] (Gageler and Gordon JJ).
33 Ibid at 560, [86] (Gageler and Gordon JJ).
34 Cf. Appellant's submissions, [32].
35 Appellant's submissions, [26].
36 *Voller* at 548, [36] (Kiefel CJ, Keane and Gleeson JJ).
37 Ibid at 549, [39] (Kiefel CJ, Keane and Gleeson JJ).

31. The Court of Appeal correctly observed from the decisions in *Emmens v Pottle*[38] and *Vizetelly v Mudie's Select Library Limited*,[39] that "*the focus is on the subjective knowledge of the subordinate publisher, and the question whether the subordinate publisher knew, or ought reasonably to have known, that the matter published by it was defamatory*" (CA [144]; CAB 195).

32. Therefore, on the basis of the established principles, notice of published defamatory matter is sufficient for a subordinate publisher to be liable as a publisher.

33. It is unsound in principle to expand the defence in accordance with the dictum of Lord Denning MR in *Goldsmith v Sperrings*,[40] or the modified version of that dictum contended for by the appellant at [39].

34. The dictum of Lord Denning MR has not been applied in England or Australia. His Lordship dissented in the result and his remarks were obiter. In *Metropolitan International Schools Ltd v Designtechnica Corpn*,[41] Eady J noted that the other judges in *Goldsmith v Sperrings*, Scarman and Bridge LJJ, "*expressed their disagreement with Lord Denning MR in unusually strong terms*".[42] That is correct only with respect to Bridge LJ.[43] As Eady J stated, "*How could someone hoping to avail himself of the defence know that a defence of justification was bound to fail, save in the simplest of cases? How is he/she to approach the (often controversial and uncertain) question of meaning? How much legal knowledge is to be attributed to him/her in arriving at these conclusions?*"[44]

35. In *Duffy*, Kourakis CJ explained why the approach in *Goldsmith v Sperrings* should not be accepted, observing that that approach "*would impose an impossible burden on the plaintiff and swing the pendulum radically in favour of freedom of expression and against the interest of the individual in protecting his or her reputation*".[45]

36. As for the modified version, setting out the "imputations of concern" and providing an explanation as to why the imputations of concern "cannot be justified or excused"[46] require a certain degree of legal knowledge on the part of the claimant, and are mere allegations on their part.

37. In terms of knowledge as to whether the defamatory matter can be justified or

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38 (1885) 16 QBD 354.
39 (1900) 2 QB 170.
40 [1977] 1 WLR 478 (*Goldsmith v Sperrings*) at 487F.
41 [2011] 1 WLR 1743 (*Metropolitan Schools*).
42 Ibid at 1761 [69].
43 *Goldsmith v Sperrings* at 508.
44 *Metropolitan Schools* at 1761-2, [69].
45 *Duffy* at 335, [98].
46 Appellant's submissions, [39]

otherwise excused, there is no reason why a search engine operator should not be treated the same as the proprietor of a newspaper – or any subordinate publisher. Similar to the position of a newspaper as observed by Scrutton LJ in *E Hulton & Co v Jones*,[47] if Google elects to continue to publish after notification without inquiry as to the truth, in order to make its search engine more attractive (in circumstances that it has a commercial interest in providing a quality service with responsive search results), then it must take the consequences.

38. Some subordinate publishers will not be in a position to assess whether content is true or otherwise defensible, but that has not caused the common law to be modified as contended by the appellant at [39]. It is not an inevitable consequence of the decision below that Google will be required to act as a censor,[48] any more than it is for any other subordinator distributor. If the appellant determines to exclude any webpage about which complaint is made, that will be a commercial decision made by it.

39. Where a plaintiff chooses to sue a subordinate distributor rather than the primary publisher, the balance between freedom of communication and protection of reputation is not upset.[49] A subordinate distributor may be in no different position from any other re-publisher of defamatory material first published by someone else, in terms of knowledge as to whether the publication can be justified or otherwise excused.

40. Ultimately, the current approach provides an appropriate balance between protection of reputation and freedom of expression or communication, and does not require modification.

41. The appellant makes no separate submissions in support of the statutory defence of innocent dissemination in s 32 of the Act. The Court of Appeal stated at [140] (CAB 192-3) that:

> "*The defence of innocent dissemination has, in substance, been replicated, and to an extent elaborated, in s 32 of the Act. In the present case, the competing arguments on the issue of innocent dissemination proceeded on the assumption that, for the purposes of the issues that are in question, there was no relevant difference between the common law defence and the statutory defence*."

42. Section 32 of the Act provides no support for the appellant's modified version of the dictum of Lord Denning MR, as advanced in this Court.

43. Section 32(1) provides that:

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47 [1929] 2 KB 331 at 341-342.
48 Cf Appellant's submissions, [38].
49 Ibid.

> *(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, or as an employee or agent, of a subordinate distributor; and*
>
> *(b) the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory; and*
>
> *(c) the defendant's lack of knowledge was not due to any negligence on the part of the defendant.*

44. The trial judge was correct to conclude that the "*statutory context suggests that matter that is 'defamatory' of a person, for the purposes of the Defamation Act, is simply matter that is likely to lead an ordinary person to think less of the person concerned*,"[50] and that in relation to both the common law and statutory defences of innocent dissemination, "*it was sufficient that the defendant knew that it was publishing the matter that is later found to be defamatory*."[51]

Ground 3 – common law defence of qualified privilege

45. The common law defence of qualified privilege applies where the publisher of a defamatory statement has a duty or interest to make the statement and the recipient of the statement has a corresponding duty or interest to receive it.[52] Reciprocity of duty or interest is essential.[53]

46. The appellant bore the onus of establishing the defence. Applying orthodox principles, the trial judge was correct to conclude (and the Court of Appeal was correct in affirming) that the appellant failed to establish that:

a. it provided its service to its users as a matter of legal, social or moral duty (TJ [187], CA [184]; CAB 66, 209);

b. the appellant had a community of or reciprocity of interest with the search users (TJ [187]; CAB 66); or

c. the automated interaction gave rise to a community of interest between the user and the appellant (TJ [188]; CAB 66).

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50 TJ [245]; CAB 82.

51 TJ [246]; CAB 82-83.

52 *Papaconstuntinos v Holmes a Court* (2012) 249 CLR 534 (*Papaconstuntinos*) at 541, [8] (French CJ, Crennan, Kiefel and Bell JJ); *Adam v Ward* [1917] AC 309 (*Adam v Ward*) at 318 (Lord Finlay LC); at 320-321 (Earl Loreburn); at 334 (Lord Atkinson).

53 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 (*Bashford*) at 373, [9] (Gleeson CJ, Hayne and Heydon JJ); *Adam v Ward* at 334.

47. In determining whether an occasion is privileged, the court examines all of the circumstances of the case, including the nature of the defamatory communication, the status or position of the publisher, the number of recipients and the nature of any interest they had in receiving it, and the time, place and manner of, and reason for, the publication.[54]

48. Common cases of a social or moral duty have included:

    a. the duty to answer a request by a potential employer for information concerning the character, capacity or honesty of an employee;[55] and

    b. the duty to answer a request for information by a person who intends to deal with a business person.[56]

49. The interest must not be a matter of gossip or curiosity, but a matter of substance apart from its mere quality as news.[57] It must be a legitimate and proper interest.[58] It is a communication to the particular person that is protected.[59]

50. The appellant published the defamatory material to anonymous, internet search engine users. The evidence on behalf of the appellant before the trial judge was that when a user enters a search query, it is typically impossible to predict exactly what they are looking for, and that, in general, the appellant strives to provide results that are related to all possible intents that the user may have (TJ [185]; CAB 65). The trial judge found, as a fact, that the Underworld article was published to a small number of persons who accessed it out of "idle interest or curiosity" (TJ [202], CA [182]; CAB 71, 208).

51. The mere making of a search inquiry does not establish that the inquirer has a legitimate interest in the subject matter of each and every answer which is given in response.[60]

52. 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. It is well-settled that those who publish material to the world at large, and particularly to people whose motivation for receiving the material is mere curiosity or idle interest, are not recognised as persons who have a legitimate duty or interest in comprehending the material for the

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54 *Bashford* at 386, [54] (McHugh J).
55 Ibid at 391, [69] (McHugh J); see also *Aktas v Westpac Banking Corporation Ltd* (2010) 241 CLR 79 (*Aktas*) at 110, [98] (Kiefel J).
56 *Bashford* 391-392, [70] (McHugh J).
57 *Howe & McColough v Lees* (1910) 11 CLR 361 (*Howe v Lees*) at 398 (Higgins J).
58 *Stephens v West Australian Newspapers* (1994) 182 CLR 211 at 244 (Brennan J).
59 *Aktas* at 110 [97] (Kiefel J); *Howe v Lees* at 368-369 (Griffith CJ).
60 *Duffy* at 386, [282] (Kourakis CJ).

purposes of the common law defence of qualified privilege.[61] Only in exceptional circumstances has the common law recognised a duty to publish or interest in publishing defamatory matter to the general public.[62]

53. The appellant submits at [41] that 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*". That turns the principles of common law qualified privilege on their head.

54. The words *"the common convenience and welfare of society as a whole"* are not a determinant of whether the privilege exists.[63] The focus is on the duty or interest of both the publisher and the recipients. As McHugh J stated in *Bashford*:[64]

> *"It is of the first importance to understand that references to concepts such as 'the common convenience and welfare of society' and similar phrases record a result and explain why the communication and the relevant duty or interest gave rise to an occasion of qualified privilege. Such concepts are not the determinants of whether the occasion is privileged. They must be distinguished from the question whether society would recognise a duty or interest in the publisher making, and the recipient receiving, the communication in question. As Jordan CJ pointed out in Andreyevich v Kosovich[65], it is necessary to ''show by evidence that both the givers and the receivers of the defamatory information had a special and reciprocal interest in its subject matter, of such a kind that it was desirable as a matter of public policy, in the general interests of the whole community of New South Wales, that it should be made with impunity, notwithstanding that it was defamatory of a third party (Emphasis added.) It is only when the defendant has a duty to publish or an interest in publishing the particular communication and the recipient has a corresponding duty or interest that the occasion is privileged. It is only when this reciprocity of duty and interest is present that the common law regards publication of the communication as being for the common convenience and welfare of society*."

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61 CA [183]-[184]; CAB 209; *Aktas* at 87, [14] (French CJ, Gummow and Hayne JJ).
62 *Bashford* at 378, [26] (Gleeson CJ, Hayne and Heydon JJ).
63 Ibid at 386, [55] (McHugh J).
64 Ibid at 386-387, [55] (McHugh J).
65 (1947) 47 SR (NSW) 357 at 363.

55. The "*common convenience and welfare of society*" describes a result reached on the ground of reciprocity of duty and interest,[66] not the other way around. The correct approach in determining the question of privilege is that:[67]

> *"... the court must consider all the circumstances and ask whether this publisher had a duty to publish or an interest in publishing this defamatory communication to this recipient. It does not ask whether the communication is for the common convenience and welfare of society."*

56. The approach taken by McHugh J in *Bashford* was referred to with approval in *Papaconstuntinos*.[68] There is no separate test of whether what is said in a particular case is a benefit or disbenefit to society.[69]

57. The approach contended for by the appellant means that the appellant, and possibly any publisher, could establish a defence of common law qualified privilege in relation to a response to any anonymous request for information, so long as a substantial proportion of recipients have a legitimate interest in information on the subject. That is antithetical to the defence. The appellant 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.

58. The occasion will not be privileged unless the person making the inquiry has a legitimate interest in obtaining the information, being more than as a matter of gossip or curiosity.[70] The extent of a publication is always a relevant matter in determining whether the occasion is privileged.[71] Just because a substantial proportion of other users may have had a legitimate interest is beside the point. Publication including to users without a legitimate interest is not privileged.

Ground 4 - Statutory qualified privilege – s.30 of the Act

59. To establish the defence under section 30 of *the Act*, the onus of proof is on the defendant to prove each of its requirements in relation to each separate publication.[72]

60. The first requirement of the statutory defence is to delineate both "*the subject*" and "*the interest (or apparent interest)"* in the recipient having information on that

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66 *Bashford* at 387, [56] (McHugh J); *Papaconstuntinos* at 559, [64] (Heydon J)
67 *Bashford* at 389, [63] (McHugh J).
68 *Papaconstuntinos* at 554, [49] (French CJ, Crennan, Kiefel and Bell JJ); at 559-560, [64] (Heydon J).
69 Ibid at 555, [50] (French CJ, Crennan, Kiefel and Bell JJ).
70 *Bashford* at 392, [71] (McHugh J).
71 Ibid at 402, [93] (McHugh J).
72 *Duffy* at 404 [357], 431 [439] (Peek J); at 469 [603] (Hinton J).

subject.[73]

61. The word "interest" is not used in any technical sense; it is used in the broadest popular sense, to connote that the interest in knowing a particular fact is not simply a matter of curiosity, but a matter of substance apart from its mere quality as news.[74] The interest must be definite; it may be direct or indirect, but it must not be vague or insubstantial.[75]

62. The Court of Appeal was correct to conclude that the trial judge did not err in failing to conclude that all of the persons to whom the Underworld article was published had an interest or apparent interest in the subject of the article for the purposes of s. 30(1)(a).[76]

10 63. As the court below observed at [229] (CAB 226):

> "*It may certainly be accepted that the topic of the activities of the Melbourne underworld was a matter of considerable prominence, particularly in Victoria, in the first decade of this century. However, as our discussion of the authorities relating to s 30 demonstrates, that consideration of itself is insufficient to invest that topic with the character of a relevant 'interest' or 'apparent interest' under s 30 of the Act. As we have discussed, while it has been accepted that the concept of 'interest' under s 30 is wider than that at common law, nevertheless it does not extend to or include matters of idle curiosity and the like. In that respect, it is to be remembered that in Duffy*
20 *(FC), which is the most recent appellate authority on the issue, each member of the court accepted that the 'interest' (or 'apparent interest') under s 30 must be a matter of substance apart from its mere quality as news.*"

64. The fact that the Underworld article concerned a matter "*of considerable public interest*" meant no more than, because of the newsworthiness of the activities of the underworld in Melbourne during the relevant period, it might be expected that a number of persons might be attracted to that article in order to satisfy their curiosity or add to their understanding and knowledge of those activities. Based on the authorities to which their Honours correctly referred, such a purpose did not amount to an interest or apparent interest under s 30 (CA [230]; CAB 226-227).

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73 Ibid at 420 [406] (Peek J).

74 *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 (*Barbaro*) at 40 (Hunt J); *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299 (*Austin v Mirror Newspapers*) at 312 (Lord Griffiths for Lord Hailsham LC, Lord Keith, Lord Roskill and Lord Griffiths); *Duffy* at 421, [410] (Peek J).

75 *Barbaro* at 40; *Stone v Moore* (2016) 125 SASR 81 at 100, [114] (Doyle J, with whom Kourakis CJ and Stanley agreed); *Duffy* at 421, [415] (Peek J).

76 CA [226], [240]; CAB 225, 229.

65. The appellant failed to establish that all of the search users had an interest or apparent interest in the published information beyond idle interest or curiosity (TJ [202]-[203]; CAB 71). Simply entering a search query is not sufficient to establish that the inquirer has a legitimate interest or an "*apparent interest*" (TJ [193]-[195]; CAB 69).[77]

66. The Court of Appeal was correct to conclude that the Underworld Article concerned a topic that was likely to arouse curiosity (CA [234]; CA 228). The Underworld article was published outside Melbourne and throughout Australia, which militated against a finding that the unidentified persons who read the article were either considering engaging George Defteros as a lawyer or considering undertaking employment with his firm (CA [235]; CAB 228).

67. For the purposes of s 30(1) of the Act, "*a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest*" (s 30(2)). The evidence was that when the appellant received a search inquiry, it was typically impossible for the appellant to predict exactly what the user is looking for and the appellant strives to provide results that are related to all possible intents that the user may have (TJ [185]; CAB 65-66). The appellant did not know what the user was looking for or what the user's interest was – it could not then believe on reasonable grounds that the user had an apparent interest, regardless of whether the published material came from a "*reputable news source*", or not.

68. There was no error in the reference by the Court of Appeal[78] to "legitimate" interest.[79] That passage was a reference to a topic that was likely to arouse curiosity.[80] It is consistent with *Austin v Mirror Newspapers* at 312 in the quotation from *Barbaro*. The Court below referred to the relevant principles at [208]-[215] (CAB 219-221), including at footnote 167 to paragraph [212] (CAB 220) to *Austin v Mirror Newspapers* and *Griffith v Australian Broadcasting Corporation*.[81] At [213] (CAB 220), the Court of Appeal referred to *Barbaro*.

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77 *Duffy* at 386, [282] (Kourakis CJ); at 419 [400]-[401] (Peek J); at 474, [619] (Hinton J).
78 CA [234]; CAB 228.
79 Cf Appellant's submissions, [45].
80 CA [234]; CAB 228.
81 [2010] NSWCA 257, [104] (Hodgson JA), (Basten JA agreeing at [150]; McClellan CJ at CL agreeing at [151]).

Part VII: Time estimate

69. It is estimated that up to 2 hours will be required for presentation of the respondent's oral argument.

Dated 18 February 2022



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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 RESPONDENT'S SUBMISSIONS

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