HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M86/2021
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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 OUTLINE OF ORAL ARGUMENT

Part I: CERTIFICATION

1. The respondent certifies that the outline is in a form suitable for publication on the internet.

Part II: OUTLINE

Publication

2. The appellant was a publisher of the Underworld article in accordance with the principles in *Fairfax Media Publications Pty Ltd v Voller* (2021) 392 ALR 540 and *Webb v Bloch* (1928) 41 CLR 331. The appellant was instrumental in, or a participant in, the communication of defamatory matter.
3. The principles in *Webb v Bloch* are broad and general. They extend to subordinate distributors; and they are not confined to joint tortfeasors.
4. There are a number of indicia in this case which inform instrumentality or participation: they are the systems employed by the appellant, enticement, incorporation and notice.
5. The appellant's systems, through its web crawler and indexing programs, and ranking algorithm (TJ [27]-[29], CA [45]; AB 28-29, 151), produced the Search Result which included the hyperlink.
6. The Search Result enticed the searcher to click on the hyperlink (CA [85], [87]; AB 171-172), which was the title (TJ [30], CA [45]; AB 29, 152). The words of the Search Result excited interest in the reader to click on the hyperlink.
7. In addition, the words of the Search Result were closely connected with relevant words in the Underworld article (CA [86]-[87]; AB 171-172). That is part of

Kourakis CJ's principle of "incorporation" in *Google Inc v Duffy* (2017) SASR 304 at 356 [172] - [173].

8. Notice, where it is given, is relevant not only to the defence of innocent dissemination, but also to publication. 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]; AB 139).

9. Whatever "devastating" result there might be of a finding that a mere hyperlink is publication (appellant's submissions, [26]), that is not this case. This is not a case of a mere hyperlink appearing on a webpage.

10. The decisions of the Courts below were not contrary to the decision of the Full Court in *Duffy*.

11. *Crookes v Newton* [2011] 3 SCR 269 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 participation.

12. Paragraphs [16] to [20] of the judgment of Abella J expounded the common law rule about publication in terms consistent with *Webb v Bloch*. Her Honour then goes on, however, from para [40] and following in a manner that is inconsistent with *Webb v Bloch* and *Voller*. At [40], in particular, her Honour conflates meaning with publication

13. The strict common law rule of publication has not required modification with the advent of the telegraph, telephone, radio or television - nor has the advent of the internet warranted a relaxation of the strictness of the rule. There should be no special rule for the providers of hyperlinks. Hyperlinks on the internet can occur in a multitude of circumstances.

Innocent dissemination at common law

14. It is unsound in principle to expand the defence in accordance with the dictum of Lord Denning MR in *Goldsmith v Sperrings* [1977] 1 WLR 478, or the modified version of that dictum contended for by the appellant at [39].

Statutory defence of innocent dissemination (s 32)

15. 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.

16. 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" (TJ [245]; AB 82), 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*" (TJ [246]; AB 82-83).

Common law qualified privilege

17. 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. Reciprocity of duty or interest is essential (*Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 373, [9] (Gleeson CJ, Hayne and Heydon JJ)).

18. 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]; AB 66, 209); b) the appellant had a community of or reciprocity of interest with the search users (TJ [187]; AB 66); or c) the automated interaction gave rise to a community of interest between the user and the appellant (TJ [188]; AB 66).

Statutory qualified privilege

19. 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).

20. The Underworld article was published in Australia. The appellant admitted at trial that between February 2016 and December 2016 there were *in Australia* 1258 searches for the query "George Defteros" and 184 clicks from the search results to Underworld article (exhibit P15 contained in the Respondent's Supplementary Book of Further Materials).

21. There was no error in the reference by the Court of Appeal (CA [234]; AB 228) to "legitimate" interest. That passage was a reference to a topic that was likely to arouse curiosity. It is consistent with *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299 at 312.

Dated: 3 May 2022

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David Gilbertson QC