



Précis Paper

Defteros v Google LLC [2021] VSCA 167 – DEFAMATION

Abstract – The contentious issues surrounding defamation arising from a google search and its implications are discussed in the context of the recent case *Defteros v Google LLC* [2021] VSCA 167.

Discussion Includes

- Background
- Publishing
- Innocent Dissemination
- Defamation in a Search Result
- Request to Remove Content
- Qualified Privilege
- Triviality and Proportionality
- Subsequent Cases

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Defteros v Google LLC [2021] VSCA 167 – DEFAMATION

1. In this edition of BenchTV, Alex Haslam, principal, and Richard Mitry, partner, discuss the developing issues surrounding online defamation produced through online search engine behemoth Google, in the recent case *Defteros v Google LLC* [2021] VSCA 167.

Background

2. In June 2004, Mr Defteros was charged with conspiracy to murder and incitement to murder high profile figures in the Melbourne gangland wars.
3. The prosecution of the charges was extensively publicised and reported in 2004 and 2005, inclusive of the Age newspaper and online. The prosecution later dropped the charges.
4. In around 2016, Mr Defteros became aware that a google search of his name produced articles by The Age at the time of his prosecution, known as the gangland article.
5. Mr Defteros sued Google at the time, and in the following year, but they denied being the publisher. Google's primary defence was that it could not be liable as a secondary publisher, as its automated search engine does not intend to produce any specific content.
6. The proceedings were heard together in Nov 2019. The trial judge found in favour of Mr Defteros in the sum of \$40,000 for the earlier proceeding and dismissed the later proceedings. This meant that the court answered yes to the question of Google being the publisher of the content of the websites produced from its search results.

Publishing

7. Google denied being the publisher on two key grounds. First, they denied being a publisher, as they are just a search engine, affirming that it was an innocent disseminator at common law. However, that was found not to be the case, according to the principles in *Webb v Bloch* [1928] HCA 50; (1928) 41 CLR 331.
8. The second and more novel ground was that it was not the publisher of hyperlinked material, based on the findings in *Google Inc v Duffy* [2017] SASCFC 130. However, in this case, the findings were that Google could be the publisher of the google search results and the web page that those hyperlinked search results lead to, so long as there was a causal link.
9. Google did in fact have an active intention. It was not considered passive in these circumstances, as once on notice of such material, they become the publisher and should have removed it from their search engine.

Innocent Dissemination

10. Under the *Defamation Act 2005* (Vic) a party that innocently disseminates materials that is not theirs' has a full defence in defamation. The issue here is that a request was made to Google by Mr Defteros to remove the first link to the article, but Google did not act on this request for about seven days. The court determined that Google could not be held responsible for the time period that they were innocently disseminating the defamatory material.
11. When Google knew, or ought to have known that defamatory materials were in its publications, they should have removed it.

Defamation in a Search Result

12. Google argued that only if defamatory material appears in the snippet should they be liable. However, the court determined that they were liable if it was instrumental in leading to the defamatory material.
13. Google's default response to requests for content to be removed is that they are not the publisher of third-party material. However, this case is the authority for that not being the case.

Request to Remove Content

14. In the initial removal request to Google, Mr Defteros' employee gave false information. Google affirmed that the initial request was invalid and not sufficient to put Google on notice. However, the court determined that Google should have investigated the hyperlinks.
15. The court of appeal determined that the defence of innocent dissemination must fail as Google had the active step available to determine whether the information produced from the particular search result should remain in place, yet they took no immediate action.

Qualified Privilege

16. Google raised both the common law and statutory defence of qualified privilege. There is an extra element of having a legal, social, or moral duty to publish content in the common law defence.
17. Google presumably has a commercial interest in providing a quality service.
18. People who googled Melbourne underworld or Melbourne mafia and saw the relevant articles had no apparent interest, and therefore they did not receive this content in a privileged manner, meaning the common law and statutory defence of qualified privilege did not apply to those people.

Triviality and Proportionality

19. The statutory defence of triviality is established where the circumstances of the publication of the web matter were such that the plaintiff was unlikely to sustain any harm.
20. In the second proceeding, the court found that there was a triviality defence as the number of people who had a genuine interest was very limited, and therefore, he could not be said to have suffered any harm.
21. The issue of proportionality is similar to the defence of triviality. However, proportionality is an issue for the court to determine whether it is an abuse of process to the court and whether they should proceed with a particular case.
22. In *Bleyer v Google Inc.* [2014] NSWSC 897, McCallum J permanently stayed the proceedings on the basis that as only three people had read the alleged defamatory article, and it would be an abuse of process on the basis that the legal costs and court resources required to determine that claim severely outweigh the interests at stake.

Subsequent Cases

23. An issue that came up in *Bleyer* is that Google Inc, the primary entity that needs to be sued regarding search engines, is an American based company protected by the US *SPEECH Act 28 USC* (2010).
24. The *SPEECH Act 28 USC* (2010) essentially states that if you sue Google from another country that does not have the same level of freedom of speech as the USA, an American court will not enforce the judgement. This means that if someone successfully sues Google for damages, it will never be enforceable in the USA.
25. With legal precedent developing in this area and Google not being able to rely upon potential defences, including denying publication, proceedings of this nature may be seen to proliferate.

BIOGRAPHY

Alex Haslam

Principal, Gilchrist Connell, Sydney

Mr Haslam is an insurance, construction and insolvency dispute resolution specialist. He publishes in the Law Society of New South Wales Journal and other industry publications, and presents in video and podcast formats that he contributes articles to. He is also the Chief Editor of Gilchrist Connell's industry newsletter 'Limelight'.

Richard Mitry

Partner, Mitry Lawyers, Sydney

Mr Mitry is a partner of Mitry Lawyers, and was one of the firm's founders in 2009. Prior to this, he worked with top-tier firms in Sydney and Dubai. He is an accredited mediator (NMAS) conducting mediations in commercial disputes. Mr Mitry also has an academic appointment as an Adjunct Professor of Law at OP Jindal Global University.

BIBLIOGRAPHY

Focus Case

Defteros v Google LLC [2021] VSCA 167

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_03-07-2020_insurance_banking_construction_government.pdf

Judgment Link

https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2020/324.html?context=1;query=Defteros%20v%20Google%20;mask_path=

Cases

Bleyer v Google Inc. [2014] NSWSC 897

Google Inc v Duffy [2017] SASCFC 130.

Webb v Bloch [1928] HCA 50; (1928) 41 CLR 331

Defteros v Google LLC (Costs) [2020] VSC 324

Legislation

Defamation Act 2005 (Vic)

SPEECH Act 28 USC (2010)