Cutting out internet intermediaries in defamation claims

Google LLC v Defteros [2022] HCA 27

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At a glance

- *Google LLC v Defteros* [2022] HCA 27 and the next stage of the Model Defamation Amendment Provisions process indicate a change in direction away from making claims against internet intermediaries.
- Google LLC succeeded in its appeal to the High Court of Australia (HCA) in its defence of a defamation claim by a lawyer, George Defteros, after it showed search results linking to an article containing defamatory content.
- The leading judgment found that Google's conduct did not meet the element of publication, which is a bilateral process of communication. The various defences were not required because the claim failed on the cause of action.
- In conjunction with the Attorneys Generals' Model Amendment provisions released recently, the High Court's decision indicates a change in direction for liability for 'internet intermediaries' and a refocus of the dispute back to the original author and the claimant.

Background

Google LLC was sued for defamation by Melbourne-based criminal lawyer, George Defteros. Defteros' clients included a number of people who became well-known during Melbourne's 'gangland wars'. In 2004, Defteros and one of those people were charged with conspiracy to murder. The charges were widely reported in the media, including in an article on *The Age*'s website entitled "*Underworld loses valued friend at court*". In 2005, the charges against Defteros were withdrawn. Defteros, who has at all times maintained his innocence, returned to practice as a solicitor.

Some years later, Defteros was informed that a Google search of his name included a snippet of *The Age*'s article amongst the search results. Defteros commenced proceedings in the Supreme Court of Victoria, claiming that, among other things, the snippet in the search results and link to the full article were defamatory, and that Google was liable as the 'publisher' of the materials.

'Publication' is an essential element in the tort of defamation; without publication, the claim fails. Google denied it was a publisher and, in the alternative, raised a number of defences including 'innocent dissemination' and 'qualified privilege'.

At first instance, the trial judge found that Google was liable as a publisher of the article because:

> *"… its provision of a hyperlinked search result is instrumental to the communication of the content of the webpage to the user. The Google search engine lends assistance to the publication of the content of a webpage on the user's device, by enabling the user to enter a search query and, a few clicks later, to view content that is relevant to the user's search."*

Both parties appealed the decision to the Victorian Court of Appeal (regarding findings and costs orders due to the 'mixed' results), and both appeals were dismissed.

The High Court's decision

Google appealed to the High Court on the principal ground that the Court of Appeal was wrong to conclude that Google published the materials, and the further grounds that the Court of Appeal was wrong to reject some of Google's defences raised.

By a majority of 5-2, the High Court allowed the appeal and concluded that Google was not a publisher of the article. Despite the majority being in overall agreement with the outcome, their Honours arrived at their conclusions by taking quite different routes.

The majority

Chief Justice Kiefel and Justice Gleeson delivered the leading judgment. Their Honours considered the High Court's recent judgment in *Fairfax Media Publications v Voller*, which looked at the role of intention in publication, and which decision ultimately held that the only requirement is that it be voluntary. In contrast, their Honours considered the Canadian case of *Crookes v Newton*, which held that (in certain cases), hyperlinks merely provide references to other content and do not, by themselves, communicate that content.

On balance, their Honours considered the threshold of 'publication' in terms of facility and remoteness. Relevantly, they concluded that:

> *"A search result is fundamentally a reference to something, somewhere else. Facilitating a person's access to the contents of another's webpage is not participating in the bilateral process of communicating its contents to that person. To hold that the provision of a hyperlink made* [Google] *a participant in the communication of* [the article] *would expand the principles relating to publication."*

Justice Gaegler cautioned that:

> *"To accept that the provision of a hyperlink is not enough to amount to participation in the process of publication… is not to deny that the provision of a hyperlink might combine with other factors to amount to participation in the process of publication…"*

Justices Edelman and Steward took a different approach to finding that Google was not a publisher of the article. In so doing, they considered that (amongst other things) Google could only be a publisher if it shared a common intention with *The Age* to publish the article, which was not the case.

In dissent

In dissent, Justice Gordon (with whom Justice Keane agreed and provided further commentary) undertook a detailed analysis on how Google searches operate, including the indexing and ranking of websites. In considering this analysis, Her Honour followed the strict publication rule set out (recently) in *Voller*, and concluded that:

> *"Google intended to publish* [the article] *in the sense that its conduct was active and voluntary. Google intentionally participated in, lent its assistance to, was instrumental in and contributed to the communication of* [the article] *by identifying, indexing, ranking and hyperlinking it within the search result".*

Justice Gordon rejected that an objective common intention is necessary for publication, and also rejected that Google did not have an objective common intention with *The Age*.

Phase two amendments

The High Court's decision in *Google LLC v Defteros* aligns with the legislative trend to modernise defamation law and make the law fit-for-purpose for the digital age.

As a further step in this direction, on 12 August 2022 the Attorneys General released their *Model Defamation Amendment Provisions 2022* background paper for consultation.

This canvasses how the legislature is considering tackling the perceived issue of numerous defamation claims involving social media, electronic publications and internet intermediaries. Defamation laws aim to balance protecting reputation with the freedom of speech and public debate on matters of public interest.

The proposed amendments aim to refocus the claims between the author of the matter complained of (the comment objected to) and the complainant, away from the internet intermediaries. These include search engines and passive participants, such as storage or caching facilities and internet service providers, in certain circumstances. At the same time, the aim is to provide a remedy for someone whose reputation is impacted by comments made online, which is often to remove the offending comment. The draft amendments also seek to reward positive behaviour, such as websites moderating comments sections.

Two proposed options are being considered to address the position of search engines performing standard functions (i.e. not sponsored ads):

- amending the current defence of innocent dissemination, subject to a complaints notice process – this option provides a complete defence if the complainant already has adequate information about the author to issue a concerns notice or proceedings against the author, or
- introducing a safe harbour style provision, subject to a complaints notice process.

Both of these options involve:

- a basic complaints notice to the internet intermediary (such as the search engine)
- a specific period of time in which the internet intermediary is to act
- an internet intermediary not being restricted from using the defence because it has a practice of monitoring for, or taking down, unlawful content (i.e. practising good behaviour), and
- the internet intermediary being denied the defence if the conduct was motivated by malice.

The impact for insurers

If one of these options is introduced, it should provide further defences for the passive entities caught in the crossfire between the author of comments and the claimant. It should also dissuade claimants from casting a wide net for defendants and encourage them to focus on their dispute with the author.

These proposed reforms are part of the second phase of amendments to the *Defamation Act 2005* (NSW) and corresponding national legislation. They continue the trend from the first phase of amendments, introduced by legislation passed in 2020, which focus on reducing the number of small defamation claims for low amounts clogging the courts and recalibrating the balance in favour of free speech by potential defendants (whilst still providing adequate protection of reputation). The first phase of reforms included the introduction of a 'serious harm' element to a defamation claim and introduced a compulsory concerns notice process to encourage parties to engage before litigating claims.

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