

Ability to bring defamation proceedings against search engines

Daniel Klineberg reports on *Trkulja v Google LLC* [2018] HCA 25

Introduction

In a unanimous decision, the High Court¹ has rejected a claim that a defamation proceeding brought against Google Inc (now Google LLC) by the appellant had no real prospect of success. The proceeding concerned text and images seen by people undertaking searches on the Google website for ‘melbourne criminals’ and the like. Google sought summary dismissal of the proceeding on the basis, in particular, that the material was not defamatory of the appellant. The High Court held that the material was capable of conveying the defamatory imputations pleaded.

Facts

The appellant, Mr Trkulja alleged in a proceeding commenced in the Supreme Court of Victoria, that Google had defamed him by publishing material which conveyed imputations that he ‘is a hardened and serious criminal in Melbourne’, in the same league as figures such as ‘convicted murderer’ Carl Williams, ‘underworld killer’ Andrew ‘Benji’ Veniamin, ‘notorious murderer’ Tony Mokbel and ‘Mafia Boss’ Mario Rocco Condello, that he is an associate of Veniamin, Williams and Mokbel and that he is ‘such a significant figure in the Melbourne criminal underworld that events involving him are recorded on a website that chronicles crime in [the] Melbourne criminal underworld’.

Mr Trkulja alleged that Google published the defamatory material between 1 December 2012 and 3 March 2014 to persons in Victoria upon those persons accessing the Google website, searching for Mr Trkulja’s name or alias (Michael Trkulja and Milorad Trkulja) and then viewing and perceiving the material presented on-screen in response to the search.

There were two groups of alleged defamatory material. The first concerned Google images search results pages that were alleged to display images of Mr Trkulja mixed with images of convicted Melbourne criminals and included one of the following phrases:

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‘melbourne criminals’, ‘melbourne criminal underworld figure’, ‘melbourne criminal underworld photos’, ‘melbourne underworld crime’, ‘melbourne underworld crime photos’, ‘melbourne underworld criminals’, ‘melbourne underworld killings’ and ‘melbourne underworld photos’.

The second group of allegedly defamatory material concerned individual web pages with various statements. By way of example, one was a post which said ‘I hear Milorad ‘Michael’ Trkulja is a former hitman who shot a music promoter in the balaclava’,

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under which was an image of predictions generated by Google’s autocomplete functionality showing the phrases ‘michael trkulja’, ‘michael trkulja criminal’, ‘michael trkulja melbourne crime’ and ‘michael trkulja underworld’.

Mr Trkulja alleged that the material was

defamatory in its natural and ordinary meaning and, further, that the material carried various defamatory imputations to the effect summarised above.

Proceeding history

Google applied to set aside the proceeding brought against it (and also the service on it out of the jurisdiction). At first instance, McDonald J rejected Google’s contention that the proceeding had no real prospect of success.² On appeal, the Court of Appeal held to the contrary, finding that the proceeding had no real prospect of success.³

Before McDonald J, Google put its application for summary dismissal on three grounds: (i) that it did not publish the images or the web material; (ii) that the material in issue was not defamatory of Mr Trkulja; and (iii) that Google was entitled to immunity from suit.

As to the first ground, McDonald J held that it was strongly arguable that Google’s intentional participation in the communication of the allegedly defamatory search results relating to Mr Trkulja to users of the Google search engine supported a finding that Google published the allegedly defamatory results. His Honour also rejected Google’s second contention that a Google search engine user would not think less of a person such as Mr Trkulja because his photograph is included in the search results or because his photograph or references to his name appear in ‘snippets’ and hyperlinks returned by web searches and autocomplete predictions.⁴

McDonald J further rejected Google’s third contention that Google should be immune from suit as a matter of public interest. The High Court said that his Honour was correct in holding that the range and extent of the defences provided for in Division 2 of Part 4 of the *Defamation Act 2005* (Vic) ‘mitigate heavily against the development of a common law search engine proprietor immunity’.⁵

Google advanced the same grounds before the Court of Appeal. The Court of Appeal found it unnecessary to decide the



Photo: iStockphoto.com

first ground. It rejected the third ground. However, it upheld the second ground ruling that Mr Trkulja 'would have no prospect at all of establishing that the images material conveyed any of the defamatory imputations relied upon' and, in relation to the web material, that Mr Trkulja 'could not possibly succeed in showing that the web matter upon which he relies carried any of the pleaded defamatory imputations'.⁶

Reasoning of the High Court

The High Court upheld the appeal by Mr Trkulja from that decision. In so doing, the High Court criticised strongly the judgment of the Court of Appeal. The High Court said:⁷

- the judgment was 'of extraordinary length and complexity for the resolution of an appeal against dismissal of a summary disposition application in which the only real question was the capacity of the published matters to defame';
- it ranged 'across a broad tract of the law of defamation extending to a substantial, proleptic analysis of the juridical basis of primary and secondary publication in relation to computer search engine proprietors, of the application of innocent publication defences to computer search engine proprietors, and of how and why, in view of the social utility of computer search engines, the existing law of defamation might better be shaped to relate to search engine proprietors or relieve them from liability';
- 'problematically', the judgment 'also effectively treats the judgment of Beach J in *Trkulja v Google (No 5)*⁸ as if it were plainly wrong (despite the fact that Google did not appeal against that judgment and that it has been considered with implicit approval in another common law jurisdiction⁹);
- the Court of Appeal mischaracterised the observations of Blue J in *Duffy v Google Inc*¹⁰ (that they went to capacity to defame, 'notwithstanding that Blue J was describing the process of reasoning by which his Honour, sitting as trial judge, reached findings of mixed fact and law in the trial of a defamation proceeding before judge alone');
- the judgment is 'replete with direct and indirect references to Google's affidavit evidence ... and, despite the summary nature of the application and, therefore, the impracticability of affording Mr Trkulja access to an opportunity for meaningful cross-examination of Google deponents, ordinary interlocutory processes and tendering opposing evidence, the judgment includes a range of purportedly definitive findings of mixed fact and law drawn from Google's affidavit evidence adverse to Mr Trkulja'. The making of a purportedly determinative finding of mixed fact and law was 'not an appropriate way to proceed' and that given the nature of the proceeding, there should have been no thought of summary determination of issues relating

to publication or possible defences, ‘at least until after discovery, and possibly at all’, with the High Court noting that no defence yet had been filed; and

- the Court of Appeal was incorrect to say that it was incumbent on Mr Trkulja to plead that Google was a primary or secondary publisher of the allegedly defamatory matters since it is not the practice to plead the degree of participation in the publication of defamatory matters, for the reason that all degrees of participation in the publication are publication.

The High Court said that the question of whether words or images complained of are capable of conveying a pleaded defamatory imputation is a question of law. Such a question ‘permits of only one correct answer’ however it is a question ‘about which reasonable minds may sometimes differ’. Therefore, ‘it is only ever with great caution that a defamation pleading should be disallowed as incapable of bearing a defamatory imputation’. Their Honours noted also that on an application for summary dismissal, the plaintiff’s case as to the capacity of the publications to defame is to be taken at its highest.¹¹

The High Court noted that the test for whether a published matter is capable of being defamatory is what ordinary reasonable people would understand by the matter of which complaint is made. Their Honour’s referred to the observations of Lord Reid in *Lewis v Daily Telegraph Ltd*¹² that ‘[s]ome [people] are unusually suspicious and some are unusually naïve’ and said that what is required is ‘attempting to envisage a mean or midpoint of temperaments and abilities and on that basis to decide the most damaging meaning that ordinary reasonable people at the midpoint could put on the impugned words or images considering the publication as a whole’ which is an exercise in ‘generosity not parsimony’. The question of what words convey to an ordinary reasonable person is often a matter of first impression.¹³

Their Honours distinguished between the way in which the Court of Appeal approached the matter and the way in which the case was pleaded. The Court of Appeal considered Mr Trkulja’s claim to be a composite claim such that all of the search results comprised in the images were to be looked at as one single composite publication and all of the search results comprised in the web material were to be looked at as another single composite publication. However, Mr Trkulja’s pleading conveyed that each search and the result which appeared in response to it were to be considered together but separately from each other separate search and response, for the reason that each search may have been conducted by a different person without engaging in any of the other searches.

The High Court held that the way the case

was pleaded accorded with the view expressed by Callinan J in *Dow Jones & Co Inc v Gutnick*¹⁴, namely that each hit on a website is a separate publication. Their Honours agreed with McDonald J that at least some of the search results complained of had the capacity to convey one or more of the defamatory imputations alleged and, whether viewed individually or as a composite did not affect that conclusion. Their Honours rejected the Court of Appeal’s reasoning to the contrary.¹⁵

*The making of a purportedly
determinative finding of mixed
fact and law was ‘not an
appropriate way to proceed’*

Their Honours described the Court of Appeal’s conclusions on Google’s capacity to defame as ‘unacceptable’.¹⁶ The test of capacity of a published matter to defame is whether any of the search results of which complaint is made are capable of conveying any of the defamatory imputations alleged and not, as the Court of Appeal stated whether ‘any of the defamatory imputations which are pleaded [are] arguably conveyed’. To express the test as the Court of Appeal did runs the risk of judging the issue according to what the court may think the allegedly defamatory words or images say or depict rather than what a jury could reasonably think they convey.

The High Court also said the Court of Appeal erred in treating the earlier High Court decision of *Google Inc v Australian Competition and Consumer Commission*¹⁷ as

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supportive of the conclusion that, although an image of Mr Trkulja may have appeared in responses to Google searches which included the words ‘criminal’, ‘melbourne’ and ‘underworld’, that was simply because those terms appeared in a webpage which contained that image, and for that reason were not capable of conveying to the ordinary reasonable user of a search engine the imputation that Mr Trkulja was a criminal or part of the Melbourne criminal underworld. *Google v ACCC* concerned whether Google

had engaged in misleading and deceptive conduct contrary to s 52 of the *Trade Practices Act 1974* (Cth) by displaying misleading and deceptive ‘sponsored links’. In contrast, the present case concerned the law of defamation in relation to responses to Google searches of another kind.¹⁸

The result was that the High Court rejected the Court of Appeal’s conclusion that the matters upon which Mr Trkulja relied were incapable of conveying any of the defamatory imputations which were pleaded and that, therefore, the Court of Appeal erred in concluding that Mr Trkulja’s proceeding had no real prospect of success.

END NOTE

- 1 Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.
- 2 *Trkulja v Google Inc* [2015] VSC 635.
- 3 *Google Inc v Trkulja* (2016) 342 ALR 504 (Ashley, Ferguson and McLeish JJA).
- 4 *Trkulja v Google LLC* [2018] HCA 25 at [25]-[26].
- 5 *Ibid.*, at [27].
- 6 *Ibid.*, at [28].
- 7 *Ibid.*, at [36]-[40].
- 8 [2012] VSC 533.
- 9 *i.e. Dr Yeung Sau Shing Albert v Google Inc* [2014] HKCFI 1404; [2014] 4 HKLRD 493 at [103]-[106].
- 10 (2015) 125 SASR 437; [2015] SASC 170 at [375].
- 11 *Trkulja v Google LLC* [2018] HCA 25 at [30].
- 12 [1964] AC 234 at 259.
- 13 *Trkulja v Google LLC* [2018] HCA 25 at [31]-[32].
- 14 (2002) 210 CLR 575; [2002] HCA 56 at [197]-[199].
- 15 *Trkulja v Google LLC* [2018] HCA 25 at [34]-[35].
- 16 *Ibid.*, at [52]-[55].
- 17 (2013) 249 CLR 435; [2013] HCA 1.
- 18 *Trkulja v Google LLC* [2018] HCA 25 at [56]-[62].