

# *Before the High Court*

## The Ordinary, Reasonable Search Engine User and the Defamatory Capacity of Search Engine Results in *Trkulja v Google Inc*

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### *Abstract*

The liability of search engine operators for defamation is a contentious issue that has engaged the attention of courts across the world. The principal focus of such cases is ordinarily the issue of whether the search engine is a publisher for the purposes of defamation law. The High Court of Australia will decide its first case involving a search engine operator's liability for defamation not directed at the issue of publication, but at the issue of defamatory capacity. In determining whether the search results were capable of conveying the pleaded imputations, the High Court will also have to consider whether to approach the question by reference to a new, hypothetical referee for the internet age — 'the ordinary, reasonable search engine user'.

## I Introduction

Fifteen years ago, with its decision in *Dow Jones & Co Inc v Gutnick*,<sup>1</sup> the High Court of Australia became the first court of final appeal to deal with the issue of jurisdiction over internet defamation claims. Since that time, internet technologies have proliferated and developed, creating additional difficult legal issues. One of those issues is the liability of search engine operators for defamation. Search engines are not ordinarily responsible for the creation and first dissemination of the underlying matter. However, when third parties enter search terms, search engines generate and provide access to that underlying matter in response to users' requests. That is what search engines are designed to do; that is what makes them so useful and so pervasive in everyday life. Where those search results bring underlying defamatory matter to the attention of users, there is the difficult question of whether the search engine is liable for defamation.

The reason a search engine may be liable for defamation in such circumstances is that liability for publication in defamation is broad and strict. Publication is a term of art in defamation law;<sup>2</sup> it is the essential ingredient that

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<sup>1</sup> (2002) 210 CLR 575.

<sup>2</sup> *Tom & Bill Waterhouse Pty Ltd v Racing New South Wales* (2008) 72 NSWLR 577, 585–6 (Palmer J).

completes the tort.<sup>3</sup> Whether search engines are, or should be held, liable as publishers of defamatory matter is a difficult doctrinal issue, compelling a reconsideration of the basic principles of publication. It is an issue that is likely to arise more frequently in the future, as search engines are sued for defamation in Australia and overseas.<sup>4</sup> Even if a search engine is held to be a publisher, there may be a further issue as to whether the results generated by the search engine are defamatory of the plaintiff.

The issue of the defamatory capacity of search results, and the related issue of the liability of search engines as publishers of defamatory matter, are raised by the case of *Trkulja v Google Inc*,<sup>5</sup> which the High Court of Australia granted special leave to appeal in June 2017.<sup>6</sup> In this case, the Victorian Court of Appeal set aside the appellant's writ and statement of claim, as well as its purported service on Google Inc, on the basis that the matters relied upon by the appellant were incapable of conveying the pleaded imputations.<sup>7</sup> In so doing, the Court applied a test of 'the ordinary, reasonable search engine user' and considered what the hypothetical referee would have understood Google to have conveyed. Although the Court disposed of the case on the basis of defamatory capacity, it dealt at length with the issue of whether a search engine is a publisher and, if so, on what basis. On one view, the Victorian Court of Appeal's treatment of the issue of defamatory capacity is interconnected with the issue of whether a search engine is a publisher. Even if the High Court of Australia does not need to express a concluded or considered view on whether a search engine is a publisher for the purposes of defamation law, the concept of 'the ordinary, reasonable search engine user' and what that hypothetical referee understands to be conveyed by search engines will be sufficiently novel to engage the attention of defamation lawyers, not to mention search engine operators.

## II Procedural History

Milorad Trkulja brought defamation proceedings against Google Inc in the Supreme Court of Victoria. This was not the first time that Trkulja had sued a search engine for defamation. Indeed, it was not the first time he has sued Google. Five years ago, Trkulja successfully sued Yahoo! and Google in separate proceedings. In the former, he was awarded \$225 000 damages against Yahoo!;<sup>8</sup> in the latter, he was awarded \$200 000 damages against Google.<sup>9</sup>

In the current proceedings, the writ and the amended statement of claim were served on Google. It sought to have them set aside, pursuant to the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 8.09.<sup>10</sup> Google argued that Trkulja's

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<sup>3</sup> *Byrne v Deane* [1937] 1 KB 818, 837 (Greene LJ); *Bunt v Tilley* [2007] 1 WLR 1243, 1248 (Eady J).

<sup>4</sup> See, eg, *Metropolitan International Schools Ltd v Designtecnica Corporation* [2011] 1 WLR 1743; *Google Inc v Duffy* [2017] SASFC 130 (4 October 2017).

<sup>5</sup> (2016) 342 ALR 504.

<sup>6</sup> *Trkulja v Google Inc* [2017] HCATrans 129 (16 June 2017).

<sup>7</sup> *Google Inc v Trkulja* (2016) 342 ALR 504.

<sup>8</sup> *Trkulja v Yahoo! Inc LLC* [2012] VSC 88 (15 March 2012) [63] (Kaye J).

<sup>9</sup> *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533 (12 November 2012) [56] (Beach J).

<sup>10</sup> *Trkulja v Google Inc* [2015] VSC 635 (17 November 2015) [1] (McDonald J).

claim had no real prospect of success.<sup>11</sup> It relied on three arguments: first, that Google was not a publisher; second, that the particular search engine results are incapable of being defamatory of Trkulja; and third, that Google was entitled to an immunity from suit.<sup>12</sup> Trkulja complained that the search results had imputed that he was a ‘hardened and serious criminal’, as well as an associate of various named Melbourne underworld figures.<sup>13</sup> These were similar to the allegations upon which he relied in his claims against search engines in earlier proceedings.<sup>14</sup>

At first instance, McDonald J rejected all three arguments. The principal basis upon which his Honour relied, and the focus of most attention in his reasons for judgment, was whether Google was a publisher of the defamatory matter. In relation to this issue, his Honour stated that he was bound by the decision of Beach J in *Trkulja v Google Inc LLC (No 5)*,<sup>15</sup> unless satisfied that it was plainly wrong. In that case, the jury found that Google was liable for defaming Trkulja. Google applied for judgment notwithstanding the jury’s verdict on the ground that it was not a publisher. Justice Beach held that it was open to the jury to conclude that Google was a publisher even before Google was put on notice that its search engine results generated and disseminated defamatory material. This was because Google had established automated systems to act in this way and those systems were acting in the way Google intended.<sup>16</sup> Prior to notice, Google might avail itself of a defence of innocent dissemination, like a library or a newsagent.<sup>17</sup> Following notice, such a defence would not be available. Justice Beach rejected the reasoning developed by Eady J in a line of authority, beginning with *Bunt v Tilley*,<sup>18</sup> wherein his Honour drew a distinction between publishers and mere passive facilitators.<sup>19</sup> Justice Eady accepted that certain internet intermediaries, such as search engines like Google, were not publishers for the purposes of defamation law, but provided the infrastructure, or acted as a conduit, for others to disseminate defamatory matter, drawing an analogy with the postal service or the telephone service.<sup>20</sup>

Google had not appealed against Beach J’s earlier judgment, raising an issue as to whether it was estopped from advancing the contention previously rejected by Beach J.<sup>21</sup> As Google had neither entered an appearance nor filed a defence, McDonald J was not willing to find against it on that ground.<sup>22</sup> Rather, his Honour found that Google had not established that Trkulja’s submissions that the search

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<sup>11</sup> Ibid [2]–[3], [5], citing *Civil Procedure Act 2010* (Vic) s 63 on principles applicable to summary judgment and *Agar v Hyde* (2000) 201 CLR 552, 575–6 [57] (Gaudron, McHugh, Gummow and Hayne JJ) on the test for setting aside service effected on an overseas defendant.

<sup>12</sup> *Trkulja v Google Inc* [2015] VSC 635 (17 November 2015) [2] (McDonald J).

<sup>13</sup> *Google v Trkulja* (2016) 342 ALR 604, 513.

<sup>14</sup> *Trkulja v Yahoo! Inc LLC* [2012] VSC 88 (15 March 2012) [5] (Kaye J); *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533, [5] (12 November 2012) (Beach J).

<sup>15</sup> [2012] VSC 533 (12 November 2012) (Beach J).

<sup>16</sup> Ibid [18].

<sup>17</sup> Ibid [19].

<sup>18</sup> [2007] 1 WLR 1243.

<sup>19</sup> *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533 (12 November 2012) [29] (Beach J).

<sup>20</sup> See, eg, *Bunt v Tilley* [2007] 1 WLR 1243, 1246–52; *Metropolitan International Schools Ltd v Designtecnica Corporation* [2011] 1 WLR 1743, 1755–60.

<sup>21</sup> *Trkulja v Google Inc* [2015] VSC 635 (17 November 2015) [24] (McDonald J).

<sup>22</sup> Ibid [29].

engine was a publisher of the defamatory matter had no real prospects of success.<sup>23</sup> Reviewing the English and Australian authorities, McDonald J observed that Google's position was not supported by the English Court of Appeal's decision in *Tamiz v Google*<sup>24</sup> and the Supreme Court of New South Wales decision in *Bleyer v Google*<sup>25</sup> in relation to Google's liability after the search engine had been notified as to the defamatory content. In so doing, McDonald J disagreed with McCallum J's suggestion in *Bleyer* that Beach J had erred in the earlier *Trkulja* case by holding that the performance of the function of the algorithm could help establish that Google was a publisher of the defamatory matter.<sup>26</sup> In endorsing Beach J's approach, McDonald J considered that McCallum J in *Bleyer* had failed to give adequate weight to the human input into the development of Google's algorithms. Google's 'highly skilled programmers' had developed the algorithms to work in this way, such that the linking of Trkulja's name with images of Melbourne's criminal underworld was 'no coincidence but a direct consequence of the operation of the search engine in the way in which it was intended to operate'.<sup>27</sup>

Justice McDonald accepted that there were a number of Australian and international authorities on the basic principles of publication in defamation law and the defence of innocent dissemination, which established that it was strongly arguable that Google was a publisher.<sup>28</sup> In this context, his Honour canvassed *Webb v Bloch*,<sup>29</sup> *Thompson v Australian Capital Television Pty Ltd*,<sup>30</sup> *Duffy v Google Inc*,<sup>31</sup> *Yeung v Google Inc*<sup>32</sup> and *Oriental Press Group Ltd v Fevaworks Solutions Ltd*.<sup>33</sup>

Justice McDonald also dealt briefly with the second ground relied upon by Google — that Trkulja had no real prospect of establishing that the matter was defamatory of him — to dismiss it.<sup>34</sup> In addition, his Honour dealt briefly with the submission that Google was entitled to an immunity from suit. Justice McDonald indicated that, if such an immunity were to be conferred, it was properly a matter for the legislature.<sup>35</sup> In his Honour's view, 'Google's invitation to a trial judge sitting at first instance to conjure an immunity out of nothing must be rejected'.<sup>36</sup>

Google sought leave to appeal against McDonald J's decision. Not only was leave granted, but the appeal was allowed. In a joint judgment, the Victorian Court of Appeal (Ashley, Ferguson and McLeish JJA) found that Google had established that Trkulja's claim had no real prospect of success.<sup>37</sup> Like McDonald J at first instance, the Victorian Court of Appeal devoted the most space in its judgment to

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<sup>23</sup> Ibid [30].

<sup>24</sup> [2013] 1 WLR 2151.

<sup>25</sup> (2014) 88 NSWLR 670 ('*Bleyer*').

<sup>26</sup> *Trkulja v Google Inc* [2015] VSC 635 (17 November 2015) [43]–[47] (McDonald J).

<sup>27</sup> Ibid [45].

<sup>28</sup> Ibid [47]–[67].

<sup>29</sup> (1928) 41 CLR 331.

<sup>30</sup> (1996) 186 CLR 574.

<sup>31</sup> (2015) 125 SASR 437.

<sup>32</sup> [2014] 4 HKLRD 493.

<sup>33</sup> [2013] HKCFA 47 (4 July 2013).

<sup>34</sup> *Trkulja v Google Inc* [2015] VSC 635 (17 November 2015) [68]–[71] (McDonald J).

<sup>35</sup> Ibid [72]–[76].

<sup>36</sup> Ibid [73].

<sup>37</sup> *Google Inc v Trkulja* (2016) 342 ALR 504, 507 [9].

the issue of whether Google was a publisher. Unlike McDonald J, however, the Victorian Court of Appeal did not determine the case on this basis. Given that their Honours grounded their decision on defamatory capacity, it is not necessary to rehearse their discussion on the issue of publication. However, it is worth noting that their Honours provisionally concluded that

[o]n first principles, ... a search engine, when it publishes search results in response to a user's enquiry, should be accounted a publisher of those results — [including] autocomplete predictions. It is a participant in a chain of distribution of material.<sup>38</sup>

The Victorian Court of Appeal further stated that search engines should be classified as secondary, not primary, publishers.<sup>39</sup> In particular, it relied upon the fact that search engines do not add anything to the material that is disseminated through its results.

Ultimately, the Victorian Court of Appeal allowed the appeal on the issue of defamatory capacity. Their Honours were satisfied that Google had established that Trkulja had no real prospect of success in attempting to prove that the matter complained of was capable of conveying any of the pleaded imputations.

In doing so, the Victorian Court of Appeal applied the test of 'the ordinary, reasonable search engine user', rejecting Trkulja's submission that such a test could not be applied in the absence of evidence. Their Honours stated their reasons for doing so thus:

The law constantly adapts to changing circumstances. The ordinary reasonable reader of a book or newspaper became the ordinary reasonable viewer of a television program. The internet, in its various manifestations, is a newer — though now by no means a new — vehicle for viewing printed words and images. It is quite clear that the user of search engines, and in particular the Google search engine, is ubiquitous worldwide. The capability of displayed search results to defame should be considered by reference to the ordinary reasonable user of such a site.<sup>40</sup>

Applying such a test to the matters in suit, the Victorian Court of Appeal was not satisfied that Trkulja could succeed in showing that the matters were capable of conveying the pleaded imputations. In part, this was because of the matters themselves, which were compilations of thumbnails, not only of actual or alleged Melbourne underworld figures, but also of

a former Chief Commissioner of Victoria Police, two well-known crime reporters, a barrister dressed in wig and gown, a solicitor, a murder victim, a radio and television journalist who is now a senator for the State of Victoria, actors who appeared in film and television productions concerned with the Melbourne underworld, the late Marlon Brando, report headings of defamation proceedings brought

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<sup>38</sup> Ibid 590 [348].

<sup>39</sup> Ibid 590 [349].

<sup>40</sup> Ibid 597 [390].

by the plaintiffs at an earlier time against Yahoo! and Google, the St Kilda pier, and a Melbourne tram.<sup>41</sup>

In part, this was because of the context of the publication. Their Honours described the relevant context thus:

(1) the world wide web; (2) a particular ‘search engine’ website; (3) the ability of any internet user to access that website, using a web browser to input search terms; and (4), the form of the search engine’s response to the terms propounded by the user.<sup>42</sup>

The Victorian Court of Appeal noted that there were a number of additional aspects of context relevant to the issue. A search engine user would understand that searches were conducted at great speed; would appreciate the enormous scale of such searches; and would understand that such searches ‘could not possibly have been performed manually’.<sup>43</sup> Finally, their Honours observed that the perceptible disconnect between the image search results and the search terms would cause the ordinary, reasonable search engine user to reflect upon the relationship between the words inputted and the compilation. The Victorian Court of Appeal went further, stating that

a repeat user would inevitably ... recognise — without necessarily understanding why it is so — that the search results in their entirety did not reflect the meaning of the inputted words considered as a phrase.<sup>44</sup>

Their Honours also accepted that the size and multiple uses of the internet were matters of general community knowledge.<sup>45</sup> Significantly, their Honours expressly acknowledged that issues of defamatory capacity and publication overlapped when dealing with internet-based matters.<sup>46</sup>

Analysing the pleaded matters, individually and collectively, the Victorian Court of Appeal was satisfied that they were incapable of defaming Trkulja.<sup>47</sup> Their Honours specifically endorsed the view expressed by Blue J in *Duffy v Google Inc* as to the defamatory capacity of autocomplete predictions, wherein his Honour stated that

[t]he ordinary reasonable person reading the Autocomplete predictions would understand that they are neither a statement by Google nor a reproduction by Google of a statement by someone else ... Rather, they comprise a collection of words that have been entered by previous searchers when conducting searches.<sup>48</sup>

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<sup>41</sup> Ibid 509–10 [25] (citations omitted).

<sup>42</sup> Ibid 537 [147].

<sup>43</sup> Ibid 537 [148]–[150].

<sup>44</sup> Ibid 537 [151].

<sup>45</sup> Ibid 537–9 [152]–[159].

<sup>46</sup> Ibid 537 [152].

<sup>47</sup> Ibid 597–9 ([391]–[407]).

<sup>48</sup> *Duffy v Google Inc* (2015) 125 SASR 437, 527 [375] quoted in *Google Inc v Trkulja* (2016) 342 ALR 504, 597 [393].

Having determined that the matters were incapable of being defamatory, the Victorian Court of Appeal set aside the writ and statement of claim and their purported service on Google.<sup>49</sup>

### III Defamatory Capacity

It is noteworthy that the first consideration of search engine liability for defamation by the High Court of Australia turns upon the issue of defamatory capacity, not publication. Internationally, the principal issue concerning search engine liability for defamation has been whether they are a publisher for the purposes of defamation law and, if so, whether they should be classified as a primary or a secondary publisher. In this way, search engines present challenges, as a matter of principle and policy, to the concept of publication in defamation law.

By contrast, the principles relating to defamatory capacity in Australian defamation law are relatively well settled. Whether the matter is capable of being defamatory is ordinarily characterised as a question of law.<sup>50</sup> This issue in turn consists of two questions. The first is whether the matter is capable of conveying the pleaded meanings.<sup>51</sup> The second is whether the pleaded meanings are capable of being defamatory of the plaintiff.<sup>52</sup> If the answer to either question is negative in respect of any pleaded meaning, that imputation should not be placed before the tribunal of fact. A finding that a matter is incapable, as a matter of law, of conveying pleaded meanings or of defaming the plaintiff concludes the proceedings in favour of the defendant at an early stage, with a hearing on the merits of the claim. This is a serious step for a judge to take, given that, where either party elects to have a jury, the jury is the tribunal of fact, determining the issue of whether the matter is in fact defamatory of the plaintiff. Consequently, a judge determining the defamatory capacity of a matter should only reject meanings that are ‘strained, or forced, or utterly unreasonable interpretation’ of the matter.<sup>53</sup> Where there is any doubt as to whether the imputation is capable of being conveyed by the matter or is capable of being defamatory of the plaintiff, the preferable course is to leave the matter to the jury, given that the jury is responsible for determining whether the matter in fact bears a defamatory meaning.<sup>54</sup> A court dealing with the issue of defamatory capacity should only exclude a meaning from consideration by a jury if it is satisfied that the jury could not reasonably find in favour of the plaintiff in respect of that meaning.<sup>55</sup> As Kirby J described the statutory equivalent under the now repealed *Defamation Act 1974* (NSW) s 7A, the test of defamatory capacity acts as ‘a judicial filter’,

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<sup>49</sup> *Google Inc v Trkulja* (2016) 342 ALR 504, 601 [415].

<sup>50</sup> *Jones v Skelton* [1964] NSW 485, 491 (PC); *Farquhar v Bottom* [1980] 2 NSWLR 380, 385 (Hunt J). See also *Lloyd v David Syme & Co Ltd* (1985) 3 NSWLR 728, 733 (PC); *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158, 164 (Hunt CJ at CL).

<sup>51</sup> *Farquhar v Bottom* [1980] 2 NSWLR 380, 385 (Hunt J).

<sup>52</sup> *Ibid.*

<sup>53</sup> *Jones v Skelton* [1964] NSW 485, 491 (PC); *Farquhar v Bottom* [1980] 2 NSWLR 380, 385–6 (Hunt J).

<sup>54</sup> *Jones v Skelton* [1964] NSW 485, 492 (PC); *Farquhar v Bottom* [1980] 2 NSWLR 380, 386 (Hunt J).

<sup>55</sup> *Corby v Allen & Unwin Pty Ltd* [2014] NSWCA 227 (18 July 2014) [136] (McColl JA).

preventing ‘the more imaginative and remote imputations of the pleader from coming before the jury at all’.<sup>56</sup>

Whether the matter is capable of conveying the imputations and whether those imputations are capable of being defamatory of the plaintiff is assessed by reference to the standard of reasonableness.<sup>57</sup> As with other areas of tort law, this standard of reasonableness is embodied in defamation law as a ‘hypothetical referee’<sup>58</sup> by which the defendant’s conduct is assessed. The hypothetical referee in defamation law is customarily referred to as ‘the ordinary, reasonable reader’. The ordinary reasonable reader is imbued with a range of characteristics in the case law. One of the most famous and oft-cited distillations of the ordinary, reasonable reader is by Hunt J (as his Honour then was) in *Farquhar v Bottom*, where that hypothetical referee was described thus:

[T]he ordinary reasonable reader is a person of fair, average intelligence ... who is neither perverse ... nor morbid or suspicious of mind ... nor avid for scandal ... This ordinary reasonable reader does not ... live in an ivory tower. He can and does read between the lines, in light of his general knowledge and experience of worldly affairs.<sup>59</sup>

The principal novel point of law raised by the Victorian Court of Appeal’s approach to this issue is whether the hypothetical referee at the centre of the inquiry as to defamatory capacity should be imbued with a general understanding of how search engines work. Put another way, the issue is whether it is legitimate to assess defamatory capacity by reference to the ordinary, reasonable search engine user. Addressing this question in light of the well-established principles of defamatory capacity suggests that the application of such a standard should not be problematic. In articulating and applying the response of the ordinary, reasonable recipient of the matter in suit, it has always been important to construe the matter in context and to have regard to the mode and manner of publication.<sup>60</sup> The ordinary, reasonable recipient is not strictly confined to considering the text of the matter as a somewhat arid comprehension exercise.<sup>61</sup> It is well settled that the ordinary, reasonable reader, listener or viewer will approach the task of understanding matter differently, depending upon the mode and manner of communication.<sup>62</sup> Defamation law accepts that a person reading a book will take more care than a person reading a newspaper

<sup>56</sup> *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77, 96 (Kirby J). See also *Corby v Allen & Unwin Pty Ltd* [2014] NSWCA 227 (18 July 2014) [133] (McColl JA).

<sup>57</sup> *Jones v Skelton* [1964] NSW 485, 491 (PC); *Farquhar v Bottom* [1980] 2 NSWLR 380, 385 (Hunt J); *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158, 165 (Hunt CJ at CL).

<sup>58</sup> *Reader’s Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 506 (Brennan J).

<sup>59</sup> *Farquhar v Bottom* [1980] 2 NSWLR 380, 386 (Hunt J) (citations omitted). See also *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158, 165 (Hunt CJ at CL); *Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186, 190 (Gleeson CJ, McHugh, Gummow and Heydon JJ); *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460, 467 (French CJ, Gummow, Kiefel and Bell JJ).

<sup>60</sup> *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158, 165 (Hunt CJ at CL).

<sup>61</sup> *Contra Google Inc v Duffy* [2017] SASCFC 130 (4 October 2017) [219]–[223] (Kourakis CJ) (4 October 2017).

<sup>62</sup> *Farquhar v Bottom* [1980] 2 NSWLR 380, 385–6 (Hunt J); *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158, 165–6 (Hunt CJ at CL).

article.<sup>63</sup> Defamation law accepts that a person reading a written document will take more care than a person consuming transient media – listening to the radio or watching television. A reader will have the opportunity to consider, re-read and check and will devote greater concentration to the task of reading than a listener listening to the radio or a viewer watching television.<sup>64</sup> It accepts that a reader of a sensational article will take less care than a reader of a sober one, and will have a commensurately lower expectation of accuracy.<sup>65</sup> The concept of the ordinary reasonable search engine user seems simply to be a principled and logical extension of established principle to deal with a new technology.

How search engines operate need not be the subject of evidence before a test of the ordinary, reasonable search engine user can be applied. Defamation law does not require the ordinary, reasonable reader to understand how a newspaper is assembled; does not require the ordinary, reasonable listener to understand how radio works; and does not require the ordinary, reasonable viewer to understand how television works before that hypothetical referee can bring to bear his or her experience of the relevant medium on the determination of defamatory capacity. It assumes that the ordinary, reasonable person will acquire some understanding of the conventions, and form some expectations, of newspapers, radio and television as media by consuming them. Using a search engine is such a quotidian task that it should be treated in the same way as newspapers, radio and television. Judges themselves have recognised the pervasiveness of using a search engine in everyday life.<sup>66</sup> In ascertaining the natural and ordinary meaning of the words, the ordinary, reasonable reader is ‘guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction’.<sup>67</sup> Using a search engine is now very much part of the ‘general knowledge and experience of worldly affairs’ that should be attributed to the ordinary, reasonable search engine user.<sup>68</sup>

How the ordinary, reasonable search engine user will approach the task of ascertaining the meaning of the matter is not yet clear, which is understandable, given the relative novelty of the technology. This is precisely the point of the appeal in *Trkulja v Google Inc*: to provide the High Court with the opportunity to begin to address this issue. What emerges from the case law is that defamation law has adapted to incorporate the particular conventions of radio and television when determining defamatory capacity and meaning. There is no reason why Australian defamation law cannot adapt to the particular, emerging conventions of internet searches.

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<sup>63</sup> *Farquhar v Bottom* [1980] 2 NSWLR 380, 385–6 (Hunt J); *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158, 165 (Hunt CJ at CL).

<sup>64</sup> *Farquhar v Bottom* [1980] 2 NSWLR 380, 385–6 (Hunt J); *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158, 166 (Hunt CJ at CL).

<sup>65</sup> *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158, 165 (Hunt CJ at CL).

<sup>66</sup> *Google Inc v Duffy* [2017] SASCFC 130 (4 October 2017) [21] (Kourakis CJ). See also *Trkulja v Yahoo! Inc LLC* [2012] VSC 88 (15 March 2012) [36] (Kaye J); *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435, 447–8 [17]–[24] (French CJ, Crennan and Kiefel JJ); *Cripps v Vakras* [2014] VSC 279 (20 June 2014) [268] (Kyrou J).

<sup>67</sup> *Jones v Skelton* [1964] NSWLR 485, 491 (PC). See also *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460, 467 (French CJ, Gummow, Kiefel and Bell JJ).

<sup>68</sup> *Lewis v Daily Telegraph Ltd* [1964] AC 234, 258 (Lord Reid).

Accepting that the standard of ‘the ordinary, reasonable search engine user’ is applicable to the instant case, however, does not mean that the Victorian Court of Appeal was correct to find that the matters in suit were incapable of conveying the pleaded imputations. Finding a matter is incapable of being defamatory is a significant step, shutting out a plaintiff from litigating his or her claim. It may be that a jury would ultimately find that the pleaded matters are not in fact defamatory of Trkulja. It is more difficult to accept that a jury would be wholly unreasonable in finding that the pleaded matters are in fact defamatory of Trkulja. Australian defamation law has not yet developed to the point where it is clear that no reasonable jury could find that a search engine did not, as a matter of law, convey defamatory meanings by generating search results in response to third party user enquiries.

The potential implications of finding that the pleaded matters are incapable of being defamatory of Trkulja should be recognised. The Victorian Court of Appeal noted that there was an interaction between the issues of defamatory capacity and publication in this case. These issues are ordinarily analysed separately, without reference to each other. Yet defamation cases involving search engines suggest that these issues can be interconnected.

This is most clearly demonstrated by the treatment of autocomplete predictions by Blue J in *Duffy v Google Inc*,<sup>69</sup> as endorsed by the Victorian Court of Appeal in *Google Inc v Trkulja*.<sup>70</sup> The meaning of the autocomplete predictions attributed to ‘the ordinary, reasonable person’ is that he or she would not understand it as ‘a statement by Google’, nor as ‘a reproduction by Google of a statement by someone else’, but rather as ‘a collection of words that have been entered by previous searchers when conducting searches’.<sup>71</sup>

There is arguably a tension in the reasoning of the Victorian Court of Appeal on the issue of autocomplete predictions. Their Honours accepted that Google was a publisher of those autocomplete predictions — that it voluntarily participated in the communication of that defamatory matter — yet also found that that matter is incapable of communicating a defamatory meaning, or at least, one for which Google should be held responsible. The issue of publication then implicitly informs the analysis of the issue of defamatory capacity, without being explicitly acknowledged and without the possible contradictions or at least the implications being addressed. This is arguably not limited to the Victorian Court of Appeal’s treatment of the autocomplete predictions, but extends more generally to its treatment of the defamatory capacity of the matters in suit more generally.

As a matter of principle, there should be nothing wrong with having regard to matters relevant to publication when addressing the issue of defamatory capacity and meaning. Indeed, there is a degree of artificiality in suggesting that they are wholly discrete elements of the plaintiff’s case as to liability for defamation. Defamatory capacity and meaning turn significantly upon whether the matter conveys an imputation to the ordinary, reasonable reader, as a matter of law and fact, respectively; publication turns upon whether the matter is communicated in a

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<sup>69</sup> (2015) 125 SASR 437, 527 [375].

<sup>70</sup> (2016) 342 ALR 504, 597 [393].

<sup>71</sup> (2015) 125 SASR 437, 527 [375].

comprehensible form to a person other than the plaintiff. Although conventionally parsed and analysed separately, these elements of the tort of defamation are evidently interconnected by a common concern with conveyance or communication of meaning. What the ordinary, reasonable person understands the words to mean is intimately connected with who the ordinary, reasonable person understands to be communicating the words. However, it is undesirable to foreclose the issue of publication as it relates to search engines at this relatively early stage in the development of the case law. If the issue of whether a search engine is a publisher for the purposes of defamation law is to be decided, it should be done so directly, following full argument, rather than obliquely, in the course of dealing with the issue of defamatory capacity.

#### IV Conclusion

The liability of search engines for defamation presents a range of difficult doctrinal issues. The most frequently litigated issue is whether search engines are publishers for the purposes of defamation law and, if so, upon what precise juridical basis. This is a significant issue, but it is not the only one. As *Google Inc v Trkulja* demonstrates, there are issues of defamatory capacity. Many cases involving search engines involve the defence of innocent dissemination.<sup>72</sup> As Kourakis CJ's recent, dissenting judgment in *Google Inc v Duffy* indicates, there is also scope for addressing search engine liability for defamation through defences of qualified privilege.<sup>73</sup> There is no single way to analyse the issue of whether or why search engines should be held liable for defamation.

The appeal to the High Court in *Trkulja v Google Inc* provides an opportunity to recognise the ordinary, reasonable search engine user as the hypothetical referee in defamation cases involving search engine results. The recognition of such a hypothetical referee should be uncontroversial. The effect on the disposition of the case, though, is a different matter. The state of the case law suggests that Australian defamation law has not developed to the point where it can confidently be concluded that, as a matter of law, search engine results are incapable of conveying defamatory imputations for which search engines are responsible. It may be that such an argument can be put and might be accepted by a jury determining defamatory meaning as a question of fact. However, as a matter of defamatory capacity, such a position at least blurs the issues of defamatory capacity and publication, and may implicitly proceed upon the basis that a search engine is not a publisher for the purposes of defamation law. As argued then, *Trkulja v Google Inc* is not a useful vehicle for dealing with the vexed issue of whether search engines are publishers for the purposes of defamation law. That difficult doctrinal issue is likely to present itself again to the High Court in the near future. It is not an issue that is likely to go away.

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<sup>72</sup> See, eg, *Metropolitan International Schools Ltd v Designtecnica Corporation* [2011] 1 WLR 1743; *Oriental Press Group Ltd v Fevaworks Solutions Ltd* [2013] HKCFA 47 (4 July 2013).

<sup>73</sup> [2017] SASFC 130 (4 October 2017), [276]–[294], [307], [313]–[322].

