An Analysis of Defamatory Capacity, the Reasonable User, and Search Engine Liability for Defamation in Australia After *Trkulja v Google* (2018 HCA 25)

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Abstract

This paper analyses the law's response to the challenge posed by search engine results when assessing liability for defamation. Unlike traditional publications, search engine results are created by an algorithm in response to a user's search query. Can, or should, search engine operators be liable for results returned by this automated process if they are defamatory? To answer this question, this paper analyses the recent High Court case of Trkulja v Google *as well as existing case law and commentary from the perspective of two distinct questions: first, are search engine results capable of conveying a defamatory imputation when viewed by the ordinary reasonable reader; and secondly, are the operators of the search engine liable as publishers, and if so, are they protected by any defences such as innocent dissemination? In response to the first question, this paper supports the conclusion of the High Court that search engine results are capable of conveying a defamatory imputation, but provides an alternative interpretation of when this might occur in light of the level of knowledge the reasonable person holds. This paper argues specifically that a reasonable user would have knowledge that a search engine may lack ownership and control of the third party webpage it links to, and that this is a key factor that should inform the assessment of defamatory capacity, because authorship of content is inextricably linked to how content is understood. In response to the second question, this paper generally supports the view of the Court of Appeal that search engine providers are publishers that should be protected by the defence of innocent dissemination, prior to notification, in the absence of legislative change. However, the High Court was correct to conclude that it was inappropriate to develop the law in the given case and that the onus is on the defendant to plead the degree of publication if they wish to make use of the defence.*

1 Introduction

People approach search engines with varying levels of skill and experience. Notwithstanding this, the law has recently been required to consider how the reasonable user interprets search engine results when assessing liability for defamation. This paper will address two questions: first, whether the reasonable user is capable of viewing search results, image results, or autocomplete

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suggestions as having a defamatory capacity. Secondly, whether search engines should be liable for indexing and linking to defamatory content hosted by third party websites, or whether they should be protected either through the defence of innocent dissemination, or through legislative reform.

To address the above issues, the facts and reasoning of the High Court decision of *Trkulja v Google LLC* [2018] HCA 25 will be analysed, as well as that case's earlier litigation history, other relevant decisions, and academic commentary. This paper recommends that the High Court was correct to restrict, at the level of capacity, the reasonable user of a search engine test developed by the Court of Appeal, as that test inappropriately imparted technical knowledge onto users that was not notorious or widely known. However, there is now uncertainty about the knowledge held by a reasonable user of a search engine, and this paper seeks to provide guidance on this point. The paper also argues that the findings of the Court of Appeal regarding the innocent dissemination defence are sound, despite the High Court holding that it was inappropriate to develop the law on this point in the current case, though legislative reform is also a viable option.

2 *Background of Trkulja v Google*

2.1 Facts

Milorad (Michael) Trkulja was shot whilst eating at a restaurant in 2004. This incident was subsequently reported by various news sources, including in an article written by the Herald Sun which described how Mr Trkulja was shot in the back by a hitman and how he knew the identity of the hitman and those who hired him.[1] The article then appeared on a website called Melbourne Crime, which also displayed a photo of Mr Trkulja. The Melbourne Crime website was 'picked up' by internet search engines using web crawling algorithms. These web crawling algorithms automatically discover content from third-party websites.[2] The content of these pages is then indexed, which transforms the data into a form that is more easily searched by computer algorithms.[3] When a user enters a query into a search engine, results are returned to users sorted by relevance to the keywords a user entered. The order of this sorting is determined by a proprietary algorithm that considers things such as the content of the indexed page,[4] the number of times a user's search terms appear on the page, how often other websites link to that page, and how recently the content of that page was

1 *Trkulja v Yahoo! Inc* [2010] VSC 215, [2].

2 *Google Inc v Trkulja* [2016] VSCA 333, [181], quoting the Madden-Woods affidavit [65]-[66].

3 Ibid [194].

4 *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435, [22].

updated.[5] The web crawlers are coded so that this process occurs automatically for every search with no direct human intervention.

When members of the public entered Mr Trkulja's name into Yahoo or Google, the search engines returned results that their algorithm determined was relevant to the user's query. These results included images from, and links to, third-party websites such as Melbourne Crime (as well as snippets of the content on these websites). Thus, when a Google or Yahoo image search was undertaken of 'Michael Trkulja', Mr Trkulja's photo appeared along with those of criminal figures such as Tony Mokbel, because Mr Trkulja's photo was considered relevant by the search engine web crawler given the presence of keywords that matched the user's search term on the webpage containing the image.[6]

2.2 Earlier Litigation Against Google and Yahoo

Mr Trkulja was distressed when he became aware search results were being returned that could lead others to believe he was a criminal or associated with criminals. He contacted the search engines to have the content removed. This was ultimately unsuccessful, Yahoo's response for example being that they would not remove the content and that that he should instead contact the owner of the website where the content originated.[7] Mr Trkulja decided this was not an adequate response and commenced separate defamation proceedings against Yahoo[8] And Google.[9] This is of course consistent with the principle established by the High Court in *Dow Jones & Co Inc v Gutnick*[10] that for the tort of defamation, jurisdiction is determined where the harm is suffered, not from where the matter was published.[11] Since the harm from a website is only suffered when the publication is downloaded and comprehended by the reader,[12] this is the place where the damage to reputation occurs.[13] Therefore, an Australian may commence defamation proceedings against a foreign publisher if the harm to their reputation is suffered in Australia.

It should be noted that these two cases (referred to as 'the Yahoo action' and 'the first Google action') have been fully resolved and were not the subject of the High

5 *Google Inc v Trkulja* [2016] VSCA 333, [196], quoting the Madden-Woods affidavit [114].

6 *Google Inc v Trkulja* [2016] VSCA 333, [183], quoting the Madden-Woods affidavit [74].

7 *Trkulja v Yahoo! Inc LLC* [2012] VSC 88, [22].

8 *Trkulja v Yahoo* [2010] VSC 215.

9 *Trkulja v Google* [2012] VSC 533.

10 (2002) 210 CLR 575.

11 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, [42].

12 Ibid [26].

13 Ibid [44].

Court appeal. However, it is necessary to explain them briefly before proceeding to the case in issue (the 'second Google action').

The initial cases both involved an image search of Mr Trkulja's name that returned results of his picture alongside other criminals, provided a link to the site where the content originated, and provided a snippet of text from the page the image was from. In the Google case, there was also a web search issue, however ultimately the images matter and web matter were not separated and Mr Trkulja relied upon both to support his imputations.[14] Thus, in both cases Mr Trkulja essentially argued that because the search engines had provided the image result and the snippet of text, as well as a link for users to view the third party page, the search engines had defamed him.

In the Yahoo action, Yahoo conceded that people had downloaded and read the article, and to those people they were a publisher, but they denied it was defamatory.[15] The jury however disagreed, holding that the article (both in terms of ordinary meaning and innuendos) conveyed the second and third imputations claimed.[16] Mr Trkulja succeeded and was awarded $225,000 in damages for the injury to his reputation.[17]

In the first Google action, Google did not concede publication. However, the jury disagreed and held they were publishers. The jury also accepted the second imputation in relation to the images matter.[18] Google applied to have the jury decision overruled, arguing they could not have intended to publish defamatory content. Beach J denied this:

> The jury were entitled to conclude that Google Inc intended to publish the material that its automated systems produced, because that was what they were designed to do upon a search request being typed into one of Google Inc's search products. In that sense, Google Inc is like the newsagent that sells a newspaper containing a defamatory article. While there might be no specific intention to publish defamatory material, there is a relevant intention by the newsagent to publish the newspaper for the purposes of the law of defamation.[19]

Beach J subsequently noted that, like newsagents, Google could make use of the innocent dissemination defence to avoid liability,[20] but an inference that Google

14 *Trkulja v Google [No 2]* [2010] VSC 490, [53].

15 *Trkulja v Yahoo! Inc LLC* [2012] VSC 88, [7].

16 Ibid [9].

17 Ibid [60].

18 *Trkulja v Google [No 5]* [2012] VSC 533, [11].

19 Ibid [18].

20 Ibid [18].

had consented to the publication by not removing the content after notification was clearly 'capable of being drawn.'[21] Damages of $200,000 were awarded.[22]

2.3 The Second Google Action and the Issues on Appeal to the High Court

After winning these cases, Mr Trkulja was not finished. He commenced a further action against Google (the second Google action), with a vastly expanded list of matter said to be defamatory.

Unlike the previous cases where defamation resulted from the search engine finding and disclosing content contained on third party sites[23] (and the claim including this underlying webpage),[24] this time defamation was said to occur from the web and image results displayed by Google alone — in isolation of any text or link to an external site.[25] For instance, Mr Trkulja alleged that a Google image search could be defamatory merely by reason of the other images that surrounded the search result depicting the plaintiff (essentially, defamation by association with other search results). Additionally, Mr Trkulja now claimed that Google's search autocomplete function (a service that suggests words contextually based on what a user has already entered and their past search history) had defamed him.

The ratio of the Court of Appeal, delivered in response to Mr Trkulja's above claims, can be summarised as follows:

1. The ordinary reasonable user of a search engine would not find that Google search results are capable of conveying a defamatory meaning;[26] and

2. Search engines should not be liable as the primary publisher of defamatory material. They should instead be regarded as secondary publishers who have a defence of innocent dissemination available prior to notification.[27]

It is this case that ultimately went to the High Court. However, a key factor of the second Google action that differentiated it from the earlier decisions was that the case had never gotten to the point of a jury trial. Instead, early on Google had

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21 Ibid [31].

22 Ibid [55].

23 *Trkulja v Google Inc* [2015] VSC 635, [23].

24 *Google Inc v Trkulja* [2016] VSCA 333, [67].

25 *Trkulja v Google Inc* [2015] VSC 635, [17].

26 *Google Inc v Trkulja* [2016] VSCA 333, [404]–[405].

27 Ibid [353]

applied to have the case summarily dismissed on the basis that it had no real prospect of success.[28]

Given that the decision on appeal to the High Court was not the result of a full trial, but instead a summary dismissal, a significant aspect of the High Court's reasoning relates to the appropriateness of the Court of Appeal developing the law in what should have been a simple summary judgement. Nevertheless, the case still provides useful guidance on the two questions raised at the start of this paper: first, are search engine results capable of conveying a defamatory imputation when viewed by ordinary readers; and secondly, are the operators of the search engine liable as publishers, and if so, are they protected by any defences such as that of innocent dissemination?

3 Defamatory Capacity of Search Results

3.1 Requirements

Defamation law requires that the published matter convey a defamatory imputation. It must cause the ordinary reasonable person to think less of the plaintiff,[29] resulting in damage to the plaintiff's reputation.[30]

What is the ordinary reasonable reader in the context of defamation? The existing law has been summarised by Hunt J in *Farquhar v Bottom.*[31] An ordinary reasonable reader is a person of fair and average intelligence, who is neither perverse nor morbid or suspicious of mind, nor avid for scandal.[32] The ordinary reader does not live in an ivory tower and can read between the lines in light of his general knowledge and experience of worldly affairs. The reasonable reader is a layperson, who has a higher capacity for implication than a lawyer. Finally, it is recognised that the reasonable reader may be affected by the format of a publication, with more care given to the information in books than to a newspaper article, for instance.[33]

In assessing defamatory capacity, the court will first consider two questions as a matter of law, by reference to this ordinary reasonable reader:[34]

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28 *Trkulja v Google Inc* [2015] VSC 635, [2].

29 *Radio 2UE v Chesterton* (2009) 238 CLR 460, [5].

30 Ibid [36].

31 [1980] 2 NSWLR 380 ('*Farquhar*').

32 Ibid 386.

33 Ibid.

34 David Rolph, 'Before the High Court: The Ordinary, Reasonable Search Engine User and the Defamatory Capacity of Search Engine Results in *Trkulja v Google Inc*' (2017) 39(4) *Sydney Law Review* 601, 608 ('Before the High Court').

1. First, is the matter complained of capable of conveying the pleaded imputation?[35]

2. Secondly, is the pleaded imputation capable of being defamatory to the plaintiff?[36]

Assuming both questions of law above are answered in the affirmative, a second step occurs where the matter proceeds to trial and is placed before a jury to assess (as a matter of fact):[37]

1. Whether the material does in fact convey the imputation alleged (when read by the ordinary reasonable reader);[38] and

2. Whether the material is in fact defamatory to the plaintiff (by causing the ordinary reasonable reader to think less off the plaintiff).[39]

Noting, however, that the uniform *Defamation Acts* allow trial by jury in most States, but in South Australia, the Northern Territory and the Australian Capital Territory this is not an option and a judge will undertake this second inquiry as well.[40]

It is possible for defendants to argue that a claim against them has no chance of success and request a judge to dismiss the matter summarily before the case reaches the question of fact. Though, as David Rolph notes, for a judge to determine as a matter of law that a case should not proceed is a serious step to take, and where there is any doubt the preferable course for the judge is to leave the matter to the jury.[41]

3.2 The Decision of the Court of Appeal

The Court of Appeal dismissed the matter summarily under the first limb (without the action proceeding to a jury to evaluate the matter of fact) because the Court was of the opinion Mr Trkulja's action had no real prospect of success. This reasoning reversed that of the trial judge, McDonald J, who had found that

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35 *Farquhar* (n 31) 385.

36 Ibid 385; see also Rolph, 'Before the High Court' (n 34) 607 who expressed the matter of law itself as having two distinct questions: first whether a matter is capable of conveying the pleaded meanings and second, whether the pleaded meanings are capable of being defamatory to the plaintiff.

37 *Farquhar* (n 31) 385.

38 Ibid.

39 Ibid.

40 See *Defamation Act 2005* (Tas) s 21; *Defamation Act 2005* (Vic) s 21; *Defamation Act 2005* (NSW) s 21; *Defamation Act 2005* (Qld) s 21; *Defamation Act 2005* (WA) s 21.

41 Rolph, 'Before the High Court' (n 34) 607.

it was 'certainly arguable' a reasonable internet search engine user would assume Mr Trkulja was a criminal.[42]

Central to the Court of Appeal's reasoning was their adoption of the test of an 'ordinary reasonable user of a search engine.'[43]

> It is quite clear that the use 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.[44]

They then proceeded to explain why in their view, such a user would not find defamatory meaning in the search results.

The Court first dealt with autocomplete results. In determining there was no defamatory capacity, the Court adopted the reasoning from Blue J in *Duffy v Google Inc*[45] that ordinary people would understand results are not a statement from Google, but a mere collection of words that have been entered by previous searches by other users, or from a user's own past searches.[46] They then turned to examine each item of the pleaded content discretely. For instance, they noted that:

> A reasonable user of the internet, aware of the unpredictable results which are generated by an image search … would immediately apprehend, in our opinion, that the thumbnails on page four of Annexure B … could not convey the defamatory imputations pleaded by the plaintiff.[47]

They then concluded that when the pages were viewed in their entirety (as Trkulja had pleaded), ordinary reasonable users would not understand the content as conveying a defamatory imputation.[48] They subsequently exercised their discretion under s 63 of the *Civil Procedure Act 2010* (Vic) to dismiss the case on the grounds that it had no real prospect of success.

What constitutes a reasonable user of a search engine? The Court explained several characteristics this hypothetical user would have in their judgement. They would be aware that results are presented with extreme speed;[49] they

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42 *Trkulja v Google Inc* [2015] VSC 635, [71].

43 *Google Inc v Trkulja* [2016] VSCA 333, [390].

44 Ibid [390].

45 *Duffy v Google Inc* (2015) 125 SASR 437, [375].

46 *Google Inc v Trkulja* [2016] VSCA 333, [393].

47 Ibid [402].

48 Ibid [404].

49 Ibid [149].

would know that because of this speed and the enormous scale of the search the results have not been produced manually;[50] and users:

> would inevitably give thought to just what relationship there could possibly be between the words inputted and the compilation produced, and very probably perceive a disconnect between the images and the search terms; whilst a repeat user would inevitably, in our view, 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.[51]

Additionally, the Court endorsed the reasoning from *Duffy* that suggested that the reasonable user would understand autocomplete predictions are not statements from Google, and that autocomplete results come from past user searches (both other people's and their own).[52]

3.3 The High Court's Decision

The Court of Appeal's reasoning would be overturned by the High Court, restoring the findings of the trial judge, on the basis that search engine results do indeed have the capacity to convey a defamatory meaning. The High Court agreed with the appellant that the Court of Appeal had acted improperly by dismissing a matter summarily that should have been decided by a jury as a matter of fact. It was evident that at least some of the results had the capacity to defame and the Court of Appeal's conclusion to the contrary was unacceptable.[53]

The Court held that capacity of a published matter to defame must be assessed by reference to the most damaging meaning that could reasonably be put upon the words in question,[54] and the court reiterated that the question the Court of Appeal should have asked was whether the search results are capable of conveying a defamatory meaning, not whether the defamatory meaning was arguably conveyed.[55] Given this, it was inappropriate to dismiss the case summarily for it having no chance of success.

The High Court went further, explaining that the test used by the Court of Appeal (ordinary reasonable user of a search engine) was applied incorrectly. In the High Court hearing of the matter, Nettle J stated that the test from the Court of Appeal seemed to '[create] a subset of society who was skilled in knowledge of the underlying machinations of the search engine.'[56] The High Court found

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50 Ibid [150].

51 Ibid [151].

52 Ibid [393].

53 *Trkulja v Google LLC* [2018] HCA 25, [52].

54 Ibid [64].

55 Ibid [52].

56 Transcript of Proceedings, *Trkulja v Google Inc* [2018] HCATrans 48, 2430 (Nettle J).

that this extension of the reasonable user test was incorrect. The test must be understood to go no further than an ordinary reasonable person who has made the Google search in issue:[57]

> No doubt, as the Court of Appeal said, it can be assumed that the ordinary reasonable person who has used the Google search engine to make a search contemplates that the results of his or her search bear some connection to the search terms. But in the absence of tested, accepted evidence to the contrary, it must also be allowed that the ability to navigate the Google search engine, and the extent of comprehension of how and what it produces, whence it derives, and how and to what degree Google contributes to its content, may vary significantly among the range of persons taken to be representative of the hypothetical ordinary reasonable person.[58]

The High Court also noted that the standard of knowledge assumed to be possessed by this hypothetical reasonable person has yet to be determined. The law has not yet accepted that the answer would be a user of an average midpoint skill level[59] (that is, someone who falls between a complete novice and someone with many years of browsing experience). Rather, the Court suggested that the standard of knowledge (and therefore the types of defamatory inferences these users might draw) from search results would differ, and it may be necessary to distinguish between inexperienced and experienced users.[60]

3.4 Discussion and Recommendations

Defamatory capacity has long been assessed using the hypothetical referee who is taken to form a 'uniform view' of the meaning of the language used and of the moral and social standards by which to judge the imputation.[61] When assessing this uniform view, it is clear that defamatory capacity should be judged by general community standards, not by reference to sectional attitudes.[62] Thus, the uniform view applied by the court must be one common to all of society, rather than a view that reflects only a section of it.[63] Defamatory capacity is therefore not established by showing a class of persons might draw a defamatory inference from the material due to their knowledge or expertise in the area. Instead, the test is confined to the knowledge and standards held by the general community.[64] If the plaintiff wants to plead that a class of persons may draw a (different) meaning from those of the general community, the plaintiff is required to plead

57 *Trkulja v Google LLC* [2018] HCA 25, [53].

58 Ibid [54].

59 Ibid [55].

60 Ibid.

61 *Readers Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 506.

62 Ibid 507.

63 *Radio 2UE v Chesterton* (2009) 238 CLR 460, [49].

64 Ibid [60].

a true innuendo instead.[65] There is no warrant for the application of the knowledge or attitudes of a hypothetical referee other than those of the ordinary reasonable person.[66]

The High Court's reasoning in *Trkulja* that a search engine user's understanding could differ between individuals is problematic and is inconsistent with prior law governing how a court forms a uniform view of the ordinary reasonable reader. Stating that there are different classes of search engine user (a class of inexperienced users and a class of experienced users) conflicts with established principles of defamation law that require that there can only be one hypothetical referee from which to assess defamatory capacity. It appears that the High Court chose not to engage in this topic in detail and provide authoritative guidance on the level of technical knowledge held by the reasonable user as they expect that a more appropriate case in which to do so would be one with the benefit of a full trial and a jury, not one that relates to summary dismissal of an action based on prospect of success. However, until this occurs, their current guidance remains problematic.

Regarding the level of knowledge held by users, the High Court did make some specific points though. They rejected the Court of Appeal's statement that users would give thought to the relationship between their search term and the results produced and perceive a disconnect between the two. On the contrary, the logical conclusion was that users *would* contemplate there is a connection between their search term and the results, such that if they searched for 'Melbourne criminal', that is what the results would likely be.[67] The fact that some search results do not match the criteria searched for (e.g. results of the Police Commissioner appearing in a search for criminals) does not prevent the finding of a defamatory imputation, and it will still be open to a jury to conclude that the reasonable person would make a defamatory inference.[68] This is consistent with the approach supported by Hunt J in *Farquahar v Bottom*,[69] that where men of reasonable intelligence may differ as to the conclusion to be drawn, the issue must be left to the jury.[70]

The High Court also stated that unlike in the case of *Google Inc v Australian Competition and Consumer Commission* ('*Google v ACCC*'),[71] which involved Google's liability for sponsored links under claims for misleading and deceptive

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65 Ibid.

66 Ibid.

67 *Trkulja v Google LLC* [2018] HCA 25, [60].

68 Ibid [61].

69 *Farquhar* (n 31).

70 Ibid 368.

71 *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 ('*Google v ACCC*').

conduct, there was no evidence here that users would be able to distinguish that the results were not authored or contributed to by Google.[72] In *Google v ACCC,* the High Court agreed with the trial judge's findings that an ordinary reasonable user would have understood the sponsored links were not statements from Google.[73] Importantly, these findings were reached because the judge implied that users possess a base level of knowledge:

> The relevant class will consist of people who have access to a computer connected to the internet. They will also have some basic knowledge and understanding of computers, the web and search engines including the Google search engine. They will not necessarily have a detailed familiarity with the Google search engine but they should be taken to have at least some elementary understanding of how it works. It is not possible to use a search engine in any meaningful way without knowing something about how it operates.[74]

This reasoning would appear to conflict with the High Court's more recent statement in *Trkulja v Google LLC* that a Court must not impart a level of technical knowledge onto the reasonable user.

It is worth noting that *Google v ACCC* dealt with misleading and deceptive conduct under the *Australian Consumer Law* ('ACL'). Unlike defamation law (which is assessed on the basis of a uniform view held by one ordinary reasonable reader), under the ACL representations are assessed against a class of persons who may have a range of potential responses.[75] Indeed, the Federal Court has recently clarified that there need not be one hypothetical referee with a single response, but that consumers may have multiple responses (though the court can disregard extreme or fanciful responses).[76] However, whilst this class may have a wide variety of members, the court still engages in a process of attributing certain characteristics onto the ordinary or reasonable members of that class.[77] Therefore this author believes for the purpose of a court establishing what level of technological knowledge a reasonable user (or users) have, the outcome would be the same. Apart from this, the author is of the view the more substantial difference between the cases comes down to the extent of the knowledge imparted and how a user reaches their conclusion. In *Google v ACCC*, users were not required to possess technical knowledge about how the search engine worked to determine the content was not authored by Google. The sponsored content identified itself as such on screen by being marked as an advertisement.

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72 *Trkulja v Google LLC* [2018] HCA 25, [59].

73 *Google v ACCC* (n 71) [70].

74 Ibid [56], quoting *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* (2011) 197 FCR 498, [122].

75 *See, eg, Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45.

76 *Australian Competition and Consumer Commission v Google LLC [No 2]* [2021] FCA 367, [16].

77 *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45, [102].

This can be contrasted to the search results in *Trkulja v Google LLC*, where the interpretation of whether search engine results are defamatory (and whether the content is endorsed by Google) may hinge on the technical understanding a user has about how search engine results are gathered and presented. There is a difference between assuming a user will read what is on the screen, and requiring a user to turn their mind to the relationship between their search term and the results given by a search engine. The former is acceptable knowledge to impart, the latter is not.

A question posed by Bell J in the hearing of *Trkulja v Google* helps draw out the distinction between the two. On the subject of attributing knowledge onto the reasonable user, her Honour asked whether you attribute onto the hypothetical referee of a newspaper an understanding of aspects of journalism and the role that a subeditor plays on the preparation of a headline.[78] While the answer to this question must be no, users would have a level of general knowledge of how the newspaper is made and this would differ between individuals. In the context of search engines, the High Court felt that the Court of Appeal erred because they implied that the reasonable user held knowledge that went beyond what could be described as general knowledge. Phrased another way, the knowledge the Court of Appeal determined users had went too far and was too technical, it was closer to a detailed familiarity with search engines than a basic knowledge of how search engines work, and it was only the former general knowledge that was implied in *Google v ACCC*.[79]

Prior to the High Court's decision, academic commentary on the Court of Appeal's reasoning suggested that the 'reasonable user of a search engine' could be a logical extension of the reasonable user test,[80] as one must construe defamatory capacity in the context of the mode and matter of publication.[81] That author drew an analogy by explaining that whilst users may not know how a television works at a technical level, a hypothetical referee of an allegedly defamatory broadcast would bring to bear their understanding of the medium (gained from consuming that form of communication) when assessing defamatory capacity.[82] However, they also stated it was unclear at this stage how the reasonable search engine user would approach the task of ascertaining meaning from a search engine imputation.[83] The author expressed concern that it was inappropriate for the Court to strike out the proceeding as a matter of law,

78 Transcript of Proceedings, *Trkulja v Google Inc* [2018] HCATrans 48, 2020 (Bell J).

79 *Google v ACCC* (n 71) [56].

80 Rolph, 'Before the High Court' (n 34) 609.

81 Ibid 608.

82 Ibid 609.

83 Ibid.

as it could not be confidently determined search engine results were incapable of conveying defamatory imputations in this novel area of law.[84]

The High Court would later agree that it was inappropriate for the Court to dismiss the matter summarily (on the basis the pleadings did in fact have the capacity to defame), but disagreed regarding the extension of the reasonable user test, deciding that the test must be understood to go no further than an ordinary reasonable person who has made the Google search in issue.[85] The Court also explained that the knowledge held by the reasonable user has yet to be determined, but that it is possible there could be different classes of user.[86] Further, through their criticism of the manner in which the Court of Appeal developed the law,[87] they have effectively mandated that that a full trial with the benefit of a jury would be the more appropriate forum to develop a test covering search engine users.

Trkulja v Google shows the dangers of imparting knowledge that is not notorious or widely known onto reasonable users and extending the reasonable user concept too far. Clearly, one must be very careful about making assumptions about the knowledge of search engine users. This need for care is reinforced by research that has asked search engine users what they do in fact understand. For instance, one study of Australians in 2014 found that of those surveyed, 68% did not understand a fundamental component of Google's search engine: that organic search results could not be purchased.[88]

How, then, is a court to develop the reasonable user standard to accommodate search engines? Consider the following statement from Murphy J in *Readers Digest Services Pty Ltd v Lamb*:[89]

> The jury are there as referees to decide whether they would understand the words in defamatory sense. The jury stand for the community, it is their opinion which is decisive, not, despite what has been said in some cases, their estimate of what "reasonable" or "right-thinking members of society generally" (whatever that means) or "ordinary men not avid for scandal" would think.[90]

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84 Ibid 610–611.

85 *Trkulja v Google LLC* [2018] HCA 25, [53].

86 Ibid [55].

87 Ibid [38].

88 Angela Daly and Amanda Scardamaglia, 'Profiling the Australian Google Consumer: Implications of Search Engine Practices for Consumer Law and Policy' (2017) 40(3) *Journal of Consumer Policy* 299, 313–314 ('Profiling the Australian Google Consumer'); see also Amanda Scardamaglia and Angela Daly, 'Google, Online Search and Consumer Confusion in Australia' (2016) 24 *International Journal of Law and Information Technology* 203.

89 *Readers Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500.

90 Ibid 502.

His Honour was in dissent on the point of juries being preferable to the reasonable user standard, and this standard has since become entrenched in defamation law. However, the author of this paper believes his statement about the utility of the jury has a high degree of relevance in situations such as the present, where the level of understanding the reasonable user has is yet to be determined for novel technologies. In such cases, one should return to the jury to develop the standard. This is because jurors bring varying levels of experience into the jury room, including various levels of experience with search engines. Rather than a judge attempting to distinguish between inexperienced and experienced users or create different classes of user,[91] the reasonable approach would be to rely on the differing skills of the members of the jury directly. The result would be reflective of the ordinary reasonable search engine user, because jurors are representatives of the community. Indeed, it can be inferred from the High Court's reasoning in *Trkulja v Google* that determining the ordinary reasonable reader standard is reliant upon the community input of the jury.[92]

However, though the reasonable user standard has not been determined and one must be careful in making assumptions about user's knowledge, it would be insufficient to simply conclude this section by stating that a jury will solve this problem. The author of this paper wishes to make the argument that a reasonable user's understanding (general knowledge) could — and should — include the following: that a search engine provides links to third party websites; and that these third-party websites may not be controlled by the search engine. This knowledge then acts as a circumstance that would tend to reduce the defamatory capacity of a search engine result.

The author recognises that the knowledge imparted by the Court of Appeal went too far. However, suggesting that the reasonable user of a search engine has, as a matter of their general knowledge, an understanding that search engines deliver results to web pages that are often not within the control of the search engine provider arguably does not go so far. *Google v ACCC* demonstrates that if a reader can clearly identify that content is not authored by the search engine (in the context of advertisements), the search engine may not be liable for any misleading statements made. Thus, that case is authority for the proposition that if a user can see clearly on screen the authorship of content, it is permissible to imply this into their understanding. A user would likely see, by viewing different web pages and experiencing different webpage designs (including various names, images, font sizes, and logos for example) that the web pages returned by Google search are operated by different entities. Both the study of search engine users in 2014 (which asked about the nature of search results, including the relationship between search terms, organic results, ads, and whether organic

91 *Trkulja v Google LLC* [2018] HCA 25, [55].

92 J C Gibson, 'Adapting Defamation Law Reform to Online Publication' (2018) *Media and Arts Law Review* 119, 144.

results could be purchased),[93] and the Court of Appeal's judgement (which stated that users would give thought to the relationship between the search term and the results),[94] do not relate to content that is clearly on the screen, but knowledge of how a system works that is not displayed on screen; and can therefore be distinguished. This author asserts, following *Google v ACCC,* it is likely to be the case the reasonable search engine user has knowledge of authorship (or lack thereof) as part of their general understanding.

Before expanding on the importance of this point further, it is necessary to first consider the existing case law on newspaper publications, as there are three principles that this author asserts are relevant to search engines and the argument about users recognising website authorship.

First, In *Mirror Newspapers Ltd v Harrison*,[95] Mason J explains that a newspaper announcing that a person has been arrested, without commenting on the appropriateness of such a sentence,[96] will not be taken to have made an imputation that the person is in fact guilty. This is because the reasonable reader, who is mindful of the principle a person is innocent until proven guilty, understands that a statement by a paper of a person's arrest is not a statement of guilt.[97] Rather, the article may place the reader in a position where they view the plaintiff with a degree of suspicion.[98]

Secondly, in *Hockey v Fairfax Media Publications Pty Ltd*,[99] White J (summarising earlier established case law) noted that it is accepted that the ordinary reasonable reader is taken to have read the whole of a newspaper article and not just the headline or the particular portion of which the complaint is made.[100] A reader does not look at the matter in isolation, but rather in the whole context in which it is published.[101]

Thirdly, in *John Fairfax Publications Pty Ltd v Rivikin*[102] McHugh J stated that if one part of the publication (the bane) states something disreputable about the

93 Daly and Scardamaglia, 'Profiling the Australian Google Consumer' (n 88) 313–314.

94 *Google Inc v Trkulja* [2016] VSCA 333, [151].

95 *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293.

96 Ibid 303.

97 Ibid 301.

98 Ibid.

99 (2015) 237 FCR 33 ('*Hockey*').

100 Ibid 50.

101 Ibid.

102 *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50, [26].

plaintiff, but elsewhere this statement is tempered (the antidote), the two must be taken together.[103]

Consider the comments from *Mirror Newspapers Ltd v Harrison*.[104] Mason J was of the view that a reader is placed in a position where they view the plaintiff with 'suspicion' (rather than jumping to an assumption of guilt) when they read a report that a person has been arrested. This is because the reader is mindful of the principle that a person is innocent until proven guilty. Therefore, a reader's level of general knowledge, at least in regards to the operation of the legal system, can be used to inform whether they view a statement as defamatory. If the reasonable reader can be placed on suspicion as a result of extrinsic knowledge in this manner when reading a newspaper article about arrested persons, it is arguable that the reasonable reader may view search engine results with a degree of suspicion as well, due to their knowledge of the authorship of the content. Namely, that the search engine may not be the author of the content and may not control the third-party webpage that it links to.

The law as stated in *Hockey v Fairfax Media* lends support to this theory by suggesting that a person reads the whole of the article in context and not merely the headline. Though search engines are a different form of media than newspapers, an analogy can be drawn. Print media has a heading that draws a reader's attention and then a larger body of information that provides the full story or the entirety of the matter. A search engine result is similar: a search engine snippet (if a text search) acts as the heading to grab your attention, and by clicking the link you can read the entirety of the matter. A key difference appears to be there is a step required by users of a search engine to get the full story (clicking a link). But this extra step is not necessarily unique to search engines — consider for example the front page of a newspaper that displays a headline with some text and tells the user the full story is inside on page three, requiring the reader to turn to that page. Therefore, this author asserts a reasonable user should have, as part of their general knowledge, the understanding that these two publications go together and that it is necessary to click through to the third-party website to get the full story.

As McHugh J noted in *John Fairfax Publications Pty Ltd v Rivikin*, it is necessary to take into account separate parts of the publication (such as a headline and text) if one acts as the bane but the other acts as the antidote.[105] In the context of search engine results, a fraction of the content of the underlying webpage is displayed as a snippet, which acts as a link to the web page and gives users some information about what that website contains. Where only a fraction of the content of the website is available, it is possible that this may create a defamatory imputation when viewed in isolation. But, if the search result produces a bane,

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103 Ibid [26].

104 (1982) 149 CLR 293.

105 *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50, [26].

this could be tempered by a user clicking on the result and viewing the webpage in its full context. It should be a required step for the reasonable user to view the webpage in the same manner that it is required for the reasonable reader of a newspaper to view a headline and the body of text together. Thus, a search engine result or snippet could more accurately be described as merely placing a user on suspicion (of a defamatory meaning), but the reasonable user is required to investigate further by clicking on the link and viewing the material in context before this suspicion is converted into a defamatory imputation.

Now, returning to the argument that the reasonable search engine user has knowledge of authorship (or lack thereof) as part of their general understanding. It is suggested that authorship is highly important because the issue of publication can implicitly inform the analysis of defamatory capacity.[106] Rolph argues that it should not be problematic, in principle, to allow the mode of publication to be relevant to the assessment of defamatory capacity, because what the ordinary reasonable person understands words to mean is intimately connected with who the ordinary reasonable person understands to be communicating those words.[107] Thus, defamatory capacity and publication are not wholly discreet from each other and it there is an element of artificiality in treating them in this way.[108] Consider the difference between a news story published by a source such as ABC News and one published by the Betoota Advocate (for non-Australian readers the latter is a satirical news website). When reading a news story about a political figure, one would likely give more credence to the accuracy of the former and would anticipate a laugh from the latter. This then influences how defamatory an article discussing a political figure is viewed to be, with the ordinary reasonable reader taking a different degree of care when reading a sensational versus a sober article.[109] A statement on a reputable news website disparaging the character of that political figure is more likely to be viewed as defamatory than if that same statement was made by a website the reader knows to be satire. Thus, in many cases the source (author) of a publication alters how the reader views the publication. The author of this paper asserts that knowledge of a search engine's lack of authorship reduces (if not outright removes) the defamatory capacity of search engine results.

Existing case law poses a challenge to the above proposition, however. In *Hockey v Fairfax Media*,[110] Fairfax Media published articles both in print and online with the heading 'Treasurer for sale,' and with a body of text that described how Mr Hockey was providing privileged access in return for political donations. Mr

106 Rolph, 'Before the High Court' (n 34) 610.

107 Ibid 611.

108 Ibid 610.

109 Ibid 609; *Farquhar* (n 31) 386.

110 *Hockey* (n 99).

Hockey argued they were defamatory to him by suggesting he was corrupt.[111] The court held that these articles were not defamatory because when viewing the articles as a whole, the text was balanced enough to water down the effect of the headline.[112] However, Fairfax had also promoted these articles through the use of posters and Tweets, and these forms of media only contained the headline (and a hyperlink in the case of the Tweet). White J held that the poster advertising the newspaper was defamatory, even if a user were to have the initial defamatory understanding removed by subsequently reading the full article the poster advertised.[113] White J also determined that links on Twitter to a news story contained on a separate website are capable of being defamatory. His Honour held that the meaning conveyed by a Tweet can be determined in isolation, without reference to the article which it hyperlinks; and that the greater ease of obtaining access is no reason to conclude all users will exercise that access.[114] In other words, some users might only see the 'bane' without clicking through to see the 'antidote'. Thus, *Hockey v Fairfax* establishes that where a webpage exists that has the 'full story' and this is advertised or linked to by another form of media (such as a poster or Tweet), the advertising/linking material can have the capacity to defame irrespective of whether the full article is defamatory; and there is no need for the two to be read together or a requirement the reader click through to see the full story.

Whilst the author of this paper recognises these statements as persuasive, with respect the reasoning of White J is inconsistent with existing common law as previously explained in the same case. This is that the ordinary reasonable reader is taken to have read the whole of a newspaper article and not just the headline or the particular portion of which the complaint is made,[115] and that the ordinary reasonable reader does not look at the matter in isolation but rather 'in the whole context in which it is published … This context includes all the surrounding circumstances.'[116] Though the first statement specifically refers to newspapers, in this section of the case White J was describing the ordinary reasonable reader generally; and this is broadened by the paragraph requiring the context and circumstances to be considered. The context in which it is published, applied to the poster, Tweet or even search engine result, must require consideration that this work is referring or linking to another article.

The reasoning of White J regarding the ease of access and whether a user would click through to the full article produces an interesting result if applied in reverse to newspapers. Consider a newspaper that has on its front page a headline, a

111 Ibid 37–8.

112 Ibid 60.

113 Ibid 67.

114 Ibid 71.

115 Ibid 50.

116 Ibid (emphasis added).

small body of text, and a picture and tells the reader: 'full story inside on page three'. Per White J's analysis, one does not need to consider the content on page three as capable of reducing or tempering the defamatory capacity of the content on the front page because some readers might only see the front page if viewing the paper on the shelf and not turn to the third page. This is clearly not looking at the whole of the article in context as is required by the common law.

This author concedes that there is a distinction between the requirement to consider the newspaper in its context (by assuming the reader will read the rest of the story on page three), and a Tweet or a search engine result that provides a link to view the full story. This is that in the latter case, the full story is likely to be contained in a separate matter or a separate publication (authored by a different entity), whilst the different pages of a newspaper are part of the one publication. However, White J's analysis was not focused on whether a user realises there are separate publications, but on whether they are likely to exercise their access to the material that produces the antidote to the bane. This author is of the view that if this is the criterion, clicking a link to see a search engine result is no harder than being required to turn the page on a newspaper.

Indeed, if the above distinction about them being separate publications is adopted to justify the different treatment of Tweets and search engine results to newspapers, this leads to a curious result where a newspaper proprietor who has full editorial control over their publication (and may deliberately choose to design a defamatory front page in the knowledge they will get away with this by tempering it with the full story on page 3) might not be liable; yet a search engine provider (who lacks editorial control over the content on the third party page) would not be able to benefit from this same protection. Such an outcome is particularly egregious in the case of search engine results, which this author argues should not be treated in isolation in any event. Search engine results are automatically created by an algorithm based on a user's search query, and the search results only exist *because* of the third-party webpage it has found. The underlying page is the *sine qua non* of the search engine result — without which the search engine result would not exist. Though defamation law might be required to treat them as separate publications (particularly if this is what the plaintiff pleads), when assessing defamatory capacity the court should be mindful that treating them in isolation is artificial given the context and surrounding circumstances in which the search engine result exists.

Expanding upon the lack of authorship point briefly, in the Canadian case of *Crookes v Newton,*[117] the majority found that a lack of authorship (control) over a third party page was an important reason to find that a website which merely provides a hyperlink to another website that contains defamatory material will not ordinarily constitute a publication of that material.[118] Further, the website

[117] [2011] 3 SCR 269.

[118] *Crookes v Newton* [2011] 3 SCR 269, [42].

with the hyperlink was not defamatory itself because it contains the hyperlink, even if a user follows the hyperlink and accesses the defamatory content on the other page.[119] It should be noted that this case was focused on liability for publication, not defamatory capacity, and hence will be discussed in detail in the next section of this paper (along with a response to this case by an Australian court). However, for now it is referred to at the level of defamatory capacity to reinforce the importance of authorship and control.

Thus, if we return to the argument that the reasonable search engine user has knowledge of authorship (or lack thereof) as part of their general understanding, and adopt Rolph's argument that the authorship of content can inform the analysis of defamatory capacity, the correct position in this author's view cannot be to treat the publications in isolation as White J did in *Hockey v Fairfax* when assessing defamatory capacity. Rather, the court (in considering the context and surrounding circumstances of the publication) should also consider that the reasonable reader understands search engines do not exercise authorship or control over the third-party website and that search engine results would not exist but for this third-party website. It is true that a search engine result may contain a bane which damages a plaintiff's reputation, but the search result must be considered in the context of the underlying webpage. The two are inextricably linked and cannot be accurately analysed in isolation. The underlying page may (or may not) provide an antidote. At the very least, however, it would be clear to users as part of their general knowledge that the authors of the third-party website are not Google. This alone may temper any defamatory meaning provided by the search result, even if that user chooses not to click on the link to proceed to the third-party website. Whilst the risk of a reader not following a link and viewing the full article is a valid concern, if this risk were so great it would also apply to newspapers where content is spread over multiple pages, and yet this is not the case.

Finally, it is also worth remembering that in *Mirror Newspapers,*[120] Mason J stated that a distinction needs to be drawn between what the reader understands the newspaper is saying, and between judgements or conclusions which the reader may reach as a result of their own beliefs and prejudices.[121] White J also identified in *Hockey v Fairfax Media* that context of surrounding events (such as a heightened consciousness of issues such as corruption due to recent media reports) may lead the reader to be more likely to understand the content as conveying an imputation.[122] Given that search engines locate content, which would include news articles about contemporary events that would exist in the reasonable readers heightened consciousness, even if the search engine provides an entirely content neutral snippet in a search result the reasonable reader may draw a

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119 Ibid [44].

120 *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293 ('*Harrison*').

121 Ibid 301.

122 *Hockey* (n 99) 55.

defamatory inference from this material due to the prejudices they hold and their knowledge of contemporary issues. However, these same readers may also understand that unlike newspaper articles, which are authored by a human and may be written with a particular bias, a search engine is not really 'saying' anything,[123] but merely delivering access to websites that are. Recognition of this fact is another circumstance to consider when assessing liability.

It is understandable that given the complexity and lack of clarity around the level of understanding of the reasonable user, many courts internationally have chosen to deal with search engines on the basis of their liability as publishers instead of focusing on defamatory capacity.[124] Thus, this paper will now evaluate the liability of search engines for publication (and possible defences they could make use of).[125]

4 Liability of Search Engines as Publishers

4.1 Publication and the Defence of Innocent Dissemination

The current liability of online intermediaries in Australia as publishers of third party content has been described as 'a mess', developing in an incoherent manner across different fields including defamation, copyright, and contract.[126] Regarding defamation, Pappalardo and Suzor suggest the problem exists because the concept of publication is a relatively poor mechanism to delineate responsibility.[127]

Defamation requires a 'publication', which is defined as a communication to one or more persons other than the plaintiff.[128] The level of participation search engines have to this communication is a key issue when evaluating liability. Unlike traditional publishers (where there is direct human involvement and an intention behind a publication — even if this is as simple as a newsagent handing over a paper whilst being unaware of the content inside) here we are dealing with algorithms that produce results automatically. Is a search engine's contribution to the algorithm (the fact that they coded it) enough in terms of participation to attract liability?

Existing defamation case law has recognised a distinction between publication that occurs through an intentional or positive act, and publication that occurs

123 *Harrison* (n 120) 301.

124 Rolph, 'Before the High Court' (n 34) 607.

125 Nicholas Olson, 'Googling Defamation Law' [2018] (47) *Law Society Journal* 84, 85.

126 Kylie Pappalardo and Nicolas Suzor, 'The Liability of Australian Online Intermediaries' (2018) 40(4) *Sydney Law Review* 469, 469–70.

127 Ibid 481.

128 *Pullman v Walter Hill* [1891] 1 QB 524.

through an omission.[129] It has also recognised a third category where there is no liability for publication, which applies to entities classified as 'passive facilitators', a notable example of which are Internet Service Providers. Some past case law has categorised search engines as passive facilitators, however the correct position (which the Court of Appeal recognises; discussed below) is that search engines cannot be passive facilitators because they have input into how content is structured and presented.

Recently, the High Court has provided clarity to liability for publication that was not available at the time of the Trkulja decision. In *Fairfax Media Publications Pty Ltd v Voller ('Voller')*,[130] the majority stated that there are not separate 'streams' of publication that have different requirements to be a publisher, but rather there is a single rule for what constitutes publication, and that the circumstances of the case (active contribution to initial publication or adoption by omission) will be assessed to determine whether a person has participated in the publication.[131] For analysis purposes, this paper will continue to explore the active and omission line of cases separately.

The intention that is required is an intention to assist in the publication process, and this does not require an intention to publish defamatory material or knowledge that the material was defamatory.[132] Any act of participation in the communication of a defamatory matter to a third party is sufficient to make a defendant a publisher.[133] In *Voller,* the owners of Facebook pages were found to be publishers of comments made by third-party users because posting stories that facilitated and encouraged comments was sufficient participation in the publication process.[134] The case law has also recognised that publishers are not one single group, but rather are categorised into being either primary or secondary publishers. This classification is made on the basis of intent (actual or inferred).[135]

For the omission line of cases, the question is whether by not removing the defamatory material (the omission to act), the defendant has made themselves

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129 Ryan J Turner, 'Internet Defamation Law and Publication by Omission: A Multi-Jurisdictional Analysis' (2014) 37(1) *University of New South Wales Law Journal* 34, 35–6 ('Internet Defamation Law and Publication by Omission').

130 [2021] HCA 27.

131 *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27, [54].

132 Ibid [27].

133 Ibid [30].

134 Ibid [55], [98].

135 Kylie Pappalardo and Nicolas Suzor, 'The Liability of Australian Online Intermediaries' (2018) 40(4) *Sydney Law Review* 469, 490–1.

responsible for the publication,[136] though this of course requires knowledge of the publication as a pre-requisite to the imposition of liability.[137] The author of this article agrees with the sentiment expressed by Turner that the level of knowledge required to be liable for an omission must be actual knowledge, not inferred knowledge, as the latter would unduly impose responsibility on entities for the publications of others.[138] Given the automated nature of search engines and the vast number of searches conducted daily, a search engine attaining this actual knowledge alone (without being notified) is currently impractical.

Therefore, the problem for courts when evaluating whether search engines are liable as publishers involves a choice — whether it is expressed clearly in the ratio or not — of how to assign responsibility for publication. They can either classify search engines as active publishers and base culpability at the time humans coded the algorithm, or can classify search engines as falling within the omission stream based on the later passive act of the search engine operator[139] (at the later time, post notification, when the defamatory result is returned to a search engine user because it has not been removed). Under the active publication stream, courts utilise the intent of the coders as the relevant intent for liability purposes, stating that they designed the system to publish content regardless of knowledge of its defamatory nature. Under the omission stream, the search engine is only transformed into an active wrongdoer when they are notified of material and fail to remove it, the failure to act constituting the omission.[140]

Many of the cases have not evaluated publication by applying the above framework clearly.[141] However, as will be discussed below, they have concluded it is now undoubtable that a search engine result is a publication. What appears to be contentious, though, is the search engine's level of participation to this publication.[142] This is highly relevant due to a common law defence known as innocent dissemination. This defence recognises that entities have different levels of participation in the publication process, including different levels of knowledge and intention. Consider, for example, the newsagent mentioned previously who sells a newspaper but is unaware of the nature of the content inside it. Should they face the same degree of liability as the entity who actively wrote the article? No. Whilst both are publishers, one is more 'innocent' than the other. Hence, a distinction has emerged in defamation law between primary

136 Turner, 'Internet Defamation Law and Publication by Omission' (n 129); *Byrne v Deane* [1937] 1 KB 818, 838.

137 Ibid 38.

138 Ibid 52.

139 Kylie Pappalardo and Nicolas Suzor, 'The Liability of Australian Online Intermediaries' (2018) 40(4) *Sydney Law Review* 469, 490.

140 Ibid 491–2.

141 Turner, 'Internet Defamation Law and Publication by Omission' (n 129) 54.

142 *Trkulja v Google LLC* [2018] HCA 25, [39].

publishers and secondary publishers. In defamation legislation, this defence has been placed on a statutory footing and refers to 'subordinate distributors,'[143] who are those that publish material that are not the primary authors, who do not know (or ought to know) that the material was defamatory, and who did not exercise editorial control over the content.[144] Of note is that innocent dissemination at common law continues to subsist alongside this statutory provision.[145] Only secondary publishers/subordinate distributors have been able to make use of the defence of innocent dissemination. Thus, the level of participation a search engine has to the publication process becomes an important inquiry. If a search engine could make use of such a defence, they would remain a publisher but would be absolved of liability for defamatory content prior to notification.[146]

Importantly, a requirement of innocent dissemination is that the entity did not know the content was defamatory.[147] An interesting outcome of this requirement is that if a court were to ground responsibility at the time the search engine result is delivered to and comprehended by the reader, and the plaintiff can prove that the time the result was returned was after the search engine had been notified of the defamatory content and failed to remove it, then the search engine would be precluded from using the defence of innocent dissemination.[148]

4.2 Decisions of the Courts Below

McDonald J of the Supreme Court found that Google was a publisher, and noted that this includes the period before they were notified of the defamatory content:

> To conclude that, prior to notification, Google is not a publisher because there is 'no human input in the application of the Google search engine apart from the creation of the algorithm' obscures the significance of the human input involved in the creation of the algorithm. Google employs highly skilled programmers to develop its algorithms. The linking of Mr Trkulja's name with images of members of Melbourne's criminal underworld is no coincidence but a direct consequence of the operation of the search engine in the way in which it was intended to operate.[149]

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143 See, eg, *Defamation Act 2005* (Tas) s 32(2).

144 See, eg, *Defamation Act 2005* (Tas) s 32; Nicholas Olson, 'Googling Defamation Law' [2018] (47) *Law Society Journal* 84, 85.

145 See, eg *Defamation Act 2005* (Tas) s 24.

146 See Mohammud Jaamae Hafeez-Baig and Jordan English, 'The Liability of Search Engine Operators in Defamation: Issues Relating to Publication and Qualified Privilege' (2017) 24 *Torts Law Journal* 218, 231 ('The Liability of Search Engine Operators in Defamation').

147 See, eg, *Defamation Act 2005* (Tas) s 32(1)(b).

148 Turner, 'Internet Defamation Law and Publication by Omission' (n 129) 55, citing Justice Gaudron in *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

149 *Trkulja v Google Inc* [2015] VSC 635, [45].

The outcome of this is that search engines would be liable for defamatory search results that are returned by their algorithm, even where the search engine operator does not know they are returning defamatory results.

The Court of Appeal agreed that search engine results are a publication, but took a different view regarding Google's liability for that publication. The physical element of publication was established when the results were displayed on the screen,[150] and Google clearly intended to publish results [of some kind].[151] The Court also accepted that publication does extend to cover autocomplete predictions.[152] Regarding the applicability of the innocent dissemination defence, the Court fist distinguished search engines from traditional 'innocent' publishers who could make use of this defence (such as newsagents). Those entities hold a passive role in the publication process, in that they do not contribute to the content and/or they are unaware of nature of the content. The Court of Appeal concluded that this was not the case with search engines: they take an active role in the publication process by gathering information and structuring the way it is presented.[153] The Court was therefore of the view that the existing case law that suggested that search engines could escape liability for publication on the basis of being a 'passive facilitator' or 'mere conduit' was wrong (cf *Metropolitan International Schools*,[154] and *Bleyer*,[155] two cases advocating this position). The question that the Court chose to expand upon however was not whether the search engine algorithm contributed to the publication, but whether Google as a corporate entity should take liability for this publication, given their *knowledge* about what publications the algorithm was creating.

The Court of Appeal held that Google should not be liable in this situation. Instead, they should be considered secondary publishers and the defence of innocent dissemination should apply prior to the time they are notified of defamatory content.[156] This reasoning was adopted because:

> the secondary publisher/innocent dissemination defence analysis appears to be both the preferable outcome in point of principle, and to be a rational way of dealing with the problem of results produced by a search engine.[157]

(As an aside, unfortunately the Justices did not go on to determine what standard of 'notification' is required to vitiate the defence of innocent dissemination,

150 *Google Inc v Trkulja* [2016] VSCA 333, [324].

151 Ibid [325].

152 Ibid [348].

153 Ibid [326]–[332].

154 *Metropolitan International Schools Ltd v Designtechnica Corporation* [2010] 3 All ER 548, 561.

155 *Bleyer v Google Inc LLC* (2014) 88 NSWLR 670, [83].

156 *Google Inc v Trkulja* [2016] VSCA 333, [353].

157 Ibid [357].

meaning the type of notification required — is this merely an email from a concerned user or something with more legal force? — has not been determined).[158]

Why did the Court consider a secondary publisher analysis to be the preferable outcome? In reaching this conclusion, the judges appear to be influenced by the practical considerations raised in a number of other cases, such as *Niemela*[159] and *Duffy*.[160] *Niemela* considered that due to the sheer volume of material search engines deal with, it would be difficult to detect and screen out defamatory words automatically without also potentially filtering out millions of pages of non-defamatory content.[161] *Duffy,* when considering intent, said that Google must have known (or ought to have known) of the existence of the defamatory material before they can be liable, and this will not arise until notification.[162] It is when Google's personnel are made aware of the existence of defamatory content generated by their own software, and fail to remove it, that the mental element is satisfied by human action (or inaction) and it is no longer 'just the operation of a machine'.[163]

However, in the case at hand, Mr Trkulja had argued his case on the basis of primary publication and not secondary publication, thus the Court of Appeal stated they could not find in his favour.[164]

4.3 The High Court's Decision

The unanimous judgement of the High Court heavily criticised the Court of Appeal's reasoning. Their criticism was focused towards the manner in which the ratio was handed down. In their view, deciding whether to stay the proceedings for 'no real prospect of success', should have been a simple summary judgment and not a mixed finding of fact and law,[165] prior to a full trial where both sides could make use of discovery, evidence and cross examination:[166]

> … Nor does it profit to conjecture what defences might be taken and whether, if taken, they would be likely to succeed. For whatever defences are taken, they will involve questions of mixed fact and law and, to the extent that they involve

158 Ibid [353].

159 *Niemela v Malamas* [2015] BCSC 1024.

160 *Duffy v Google Inc* (2015) 125 SASR 437.

161 *Niemela v Malamas* [2015] BCSC 1024, [105].

162 *Duffy v Google Inc* (2015) 125 SASR 437, [205].

163 Ibid [206].

164 *Google Inc v Trkulja* [2016] VSCA 333, [370].

165 *Trkulja v Google LLC* [2018] HCA 25, [38].

166 Ibid [39].

> questions of fact, they will be matters for the jury. Given the nature of this 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.[167]

The High Court also held it was inappropriate to require a plaintiff to plead a degree of publication (primary or secondary), as both constitute publication for the purposes of defamation law.[168] Secondary publication is only relevant for the defendant if they want to claim the defence of subordinate distributor/innocent disseminator (and it is up to the alleged publisher to argue this).[169]

Therefore, it should be noted that the High Court did not dismiss the Court of Appeal's development of the law on publication itself, but rather the means with which it was reached. It was inappropriate to develop the law in this case, and it was inappropriate to place a burden on the plaintiff to plead a degree of publication. Even so, the Court did not dismiss the reasoning surrounding secondary publishers as incorrect. There is a possibility that if another case proceeded to trial and Google argued a defence of innocent dissemination, the common law could continue to recognise search engines as falling within the scope of this defence.

4.4 Recommendation

Notwithstanding that it was inappropriate in the case at hand, it is the view of this paper that the Court of Appeal's analysis — that Google is a secondary publisher and that the innocent disseminator defence may apply — is correct and practicable. The secondary publisher standard does not subject Google to the task of reviewing every search result it produces. It allows for a notification mechanism where defamatory content can be reported, and the imposition of liability where this notification is not complied with. This is consistent with the uniform defamation legislation, which promotes (through the offer to make amends procedure) [170] the goal of resolving disputes without resorting to litigation. Upon notification, Google can take steps to address defamatory content. It is only when the steps taken by publishers are considered inadequate that litigation should be considered.

Search engines should be viewed in the context in which they operate. They enhance people's ability to find and access other publications, and a search engine does not exercise editorial control over the content of third-party websites. Even when search engines are notified of defamatory content, they

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167 Ibid.

168 Ibid [40].

169 Ibid [41].

170 See, eg, *Defamation Act 2005* (Tas) s 13.

cannot control its removal from the third-party website. Their power is limited to preventing the result from being returned in future searches.[171]

The Canadian case of *Crookes v Newton,*[172] though dealing with hyperlinks, found that a lack of editorial control over the third-party page is a key element that may remove liability; and this author argues the principles of that case should be applicable to search engines. The court held that merely providing a hyperlink to another website that contains defamatory material will not constitute a publication of that material.[173] This was because '[a] reference to other content is fundamentally different from other acts involved in publication. Referencing on its own does not involve exerting *control* over the content.'[174] Whilst causing content to reach a larger audience may constitute publication, in the case of a hyperlink even where it was made with the goal of increasing the audience of the defamatory publication, the hyperlink is merely ancillary to that other publication,[175] and the more important factor is that the author of the hyperlink has no control over the content of the secondary article to which they have linked.[176] Further, if liability were imposed on hyperlinks, this would severely impact access to information and freedom of expression on the internet.[177]

The Court noted that if an entity not only provided the hyperlink but also expressed other information alongside this (such as repeating the defamatory content) this may attract liability.[178] For search engines, this is a critical point that may distinguish them from hyperlinks and place them outside the rule in *Crookes*: text search results have a snippet of text that extracts a selection of content from the underlying page, thus repeating it. Is this (automated) repetition of content enough to attract liability? This author suggests it might be, which would have the potential to greatly impact access to information on the internet.

However, the majority's judgement in *Crookes v Newton* has been criticised by Australian authority, which suggests that treating hyperlinks as mere references and basing liability on a test of control would not accord with existing Australian law. In *Visscher v Maritime Union of Australia [No 6],*[179] Beech-Jones J explained that the actionable wrong in defamation is the publication of the libel and not its

171 Hafeez-Baig and English, 'The Liability of Search Engine Operators in Defamation' (n 146) 232.

172 [2011] 3 SCR 269.

173 *Crookes v Newton* [2011] 3 SCR 269, [42].

174 Ibid [26] (emphasis in original).

175 Ibid.

176 Ibid [27].

177 Ibid [36].

178 Ibid [40].

179 [2014] NSWSC 350.

composition,[180] (thus, the level of control an entity has is not the correct test). The majority judgement in *Crookes v Newton* (that a hyperlink is a mere content neutral reference and does not attract liability unless there is a repetition of that content) should not be followed. This is because that court's reasoning was partially informed by the Canadian Charter of Rights and Freedoms, to which we do not have an equivalent, and because caution should be adopted in crafting a legal principle specific to the internet.[181] Beech-Jones J examined a flaw in the majority's reasoning, in that a hyperlink which did not repeat any of the content of the page but nevertheless endorsed it (by stating something along the lines of 'for a true and terrible story about the plaintiff please click here') would circumvent the rule proposed.[182]

Instead, Beech-Jones J endorsed the reasoning of McLachlin CJ and Fish J in *Crookes* which (whilst agreeing with the majority regarding the outcome), provided a different view of the circumstances in which a repetition of content from a defamatory page would constitute publication. In their view, this would only be when the text indicates *adoption or endorsement of the content of the hyperlinked text*, and a more general reference to a website is not enough.[183] Though they noted publication in defamation law does not usually require adoption or endorsement, hyperlinks are conceptually different and without this they remain content-neutral references.[184] *Visscher v Maritime Union of Australia [No 6]*[185] adopted this reasoning, and stated the approach in Australia should be to ask whether the defendant accepted responsibility for the publication of the hyperlinked material, and this could be answered in the affirmative if it could be concluded there was an approval, adoption, promotion or some other form of ratification of the content of the hyperlinked material.[186] This might be considered sufficient participation in the publication process to attract liability.

If the approach as stated above is accepted in Australian law, the question turns to whether the principle can be extended to cover search engines. This author suggests that given a search engine result is determined by an algorithm based on a user's search query, and this occurs automatically without human intervention for every search that is conducted, it is hard to see that any endorsement has occurred. Rather, search results are the 'more general reference to a website' that the judges identified would not attract liability. The reason there is a lack of adoption or endorsement is that search engines cannot 'intend' to publish defamatory content: they merely intend to publish *relevant* content to

180 *Visscher v Maritime Union of Australia [No 6]* [2014] NSWSC 350, [19].

181 Ibid [28].

182 Ibid.

183 *Crookes v Newton* [2011] 3 SCR 269, [48] (emphasis in original).

184 Ibid [51].

185 [2014] NSWSC 350.

186 *Visscher v Maritime Union of Australia [No 6]* [2014] NSWSC 350, [29].

what a user searches for. This may include defamatory and non-defamatory content, but an algorithm cannot intend to publish or adopt a defamatory statement, as the algorithm itself is not capable of evaluating the content of the webpage in the way humans understand it (for instance, making a judgment call as to the standpoint of the author on a particular topic and whether statements are true or not).[187] It is true that it is not an entirely mechanical affair, the proprietary algorithms and methods Google use to determine results are designed in ways that involve value judgements from humans regarding how to collect and present the data.[188] Even so, attempts by courts to place liability on search engine providers 'because they coded it' stretches liability too far. This is because, as other commentators have correctly recognised, Google has no practical capacity to check in advance, for every search that may be conducted, whether the results produced by its search engine would contain defamatory material.[189] A search engine should not face such wide and unrestricted liability where they do not have the requisite mental element to attach legal responsibility,[190] at least until after notification.

One could correctly argue that 'but-for' the use of Google, the defamatory content would not have received such a large audience. This is true, and the law does indeed recognise that the ability to increase viewership can constitute publication. In *Pedavoli v Fairfax Media Publications*,[191] a Tweet that provided a link to an article was held to be a separate publication because it had the potential to provide access to a wider audience and it invited comments and discussion.[192] Indeed, to show how broad the definition of publication is on the internet, see *Dods v McDonald*,[193] which held that proof of publication for websites (page viewership) can be inferred if a page is easily accessible (such as by being one of the first results available in a Google search) and the subject matter is of public interest or controversy.[194] However, it is also true that 'but-for' the underlying webpage the search engine result would not exist. The two are inextricably linked. Search engine search results are automatically created by an algorithm

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187 *Google Inc v Trkulja* [2016] VSCA 333, [200], quoting the Madden-Woods affidavit [158].

188 Amanda Scardamaglia and Angela Daly, 'Google, Online Search and Consumer Confusion in Australia' (2016) 24 *International Journal of Law and Information* Technology 203, 216.

189 Hafeez-Baig and English, 'The Liability of Search Engine Operators in Defamation' (n 146) 231–2.

190 See Susan Corbett, 'Search Engines and the Automated Process: Is a Search Engine Provider "a Publisher" of Defamatory Material?' (2014) 20 *New Zealand Business Law Quarterly* 200, 212; *Metropolitan International Schools Ltd v Designtechnica Corporation* [2010] 3 All ER 548.

191 *Pedavoli v Fairfax Media Publications Pty Ltd* [2014] NSWSC 1674.

192 Ibid [60].

193 *Dods v McDonald [No 1]* [2016] VSC 200.

194 Ibid [10].

based on a user's search query. Though the majority judgment in *Crookes* may not be able to be followed in Australia, they were arguably right on one point in this authors view — that given the context of the internet, imposing liability for merely linking to other material (whether it be hyperlinks or search engine results) would greatly impact access to information and freedom of expression on the internet.

On this basis, imposing liability on a search engine provider for content they do not know exists (prior to notification) goes too far. There must be a level of protection from liability that extends, at least, to the time the search engine is made aware of the content. This is particularly necessary given that results of search engines can be manipulated by humans to make particular results rise to the top (known as 'Google bombing').[195] However, a blanket exclusion from liability for search engines would also be inappropriate. This is because the consequences of online defamation can be severe, and there may be no legal recourse for a plaintiff against the owner of the third-party webpage if that owner is anonymous or resident overseas.[196]

The Court of Appeal in *Google Inc v Trkulja* came up with a logical solution to the problem. They recognised that results are created with an algorithm, but that Google is unaware of the content that could be returned for a given result. Thus, search engines are secondary publishers who have a defence of innocent dissemination, at least until notified of the existence of defamatory material. With the qualification made by the High Court that a plaintiff is not required to plead a degree of publication (primary or secondary);[197] and that the burden is on the search engine to make out a defence of innocent dissemination,[198] this is the best balance between a plaintiff's right to redress for defamation and the practical operation of search engines.

There are two alternatives. The first is to recognise that instead of basing liability for search engines on their intentional publication and applying an innocent dissemination defence to search engines prior to notification, we could deal with search engines under the omission stream of defamation law. This approach is workable if done in accordance with the view expressed in *Visscher*[199] that the question is whether there has been adoption or endorsement of the material. One of the prerequisites to an adoption or endorsement of material is actual

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195 David Meyer, 'Reddit Users Are Manipulating Google Images to Associate 'Idiot' with Donald Trump', *Fortune* (online, 19 July 2018) <http://fortune.com/2018/07/19/donald-trump-idiot-google-bombing/>.

196 Corbett (n 190) 207.

197 *Trkulja v Google LLC* [2018] HCA 25, [40].

198 Ibid [41].

199 *Visscher v Maritime Union of Australia [No 6]* [2014] NSWSC 350.

knowledge of the material,[200] thus search engine providers would only be liable if they have been notified of the defamatory content and fail to remove it, this notification being the required knowledge. The inference the court may then draw is that the continued availability on the search engine result may constitute adoption or endorsement.

The second alternative would be to recognise that it is possible the Courts have stretched existing concepts of defamation law too far, and rather than trying to make either of the publication streams fit search engines, the better approach would be a legislative change to the Defamation Acts. This would recognise that Google is not a traditional publisher, but an interactive framework that relies on a user queries before it can make any publication, and search results are merely a collection of material relevant to a keyword at a point in time, not a statement from the search engine.

One approach to legislative reform that has been suggested is to re-write defamation law entirely, removing current notions of publication and innocent dissemination, and instead create a simplified cause of action based on the moral responsibility of an entity for the publication.[201] In this authors opinion, that seems a little extreme, given that a 2018 review of the defamation legislation has found that (with minor exceptions) the legislation remains appropriate and operates effectively.[202]

A simpler solution would be the insertion of a new section into the Defamation Acts which recognises that internet intermediaries such as search engines have a defence to publication in the time prior to notification, but that they are required to take action after notification or the defence is waived. An example where legislation has been amended to take websites into account is the *Defamation Act 2013* (UK), where website operators can rely on a similar defence. There, the defence is available to website operators if they are not the entity who posted the defamatory statement.[203] This means for instance that the owner of a website that contains a user forum would generally not be liable for another user's post. The defence is not absolute though, and can be defeated if three elements are established: if the plaintiff cannot identify the primary publisher of the content (ie the identity of a forum poster or the owner of a third party website);[204] where the plaintiff has given notice to the website operator of the defamatory content;[205]

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200 Ibid [20], citing *Urbanchich* v *Drummoyne Municipal Council* [1991] Aust Torts Reports 81-127.

201 Turner, 'Internet Defamation Law and Publication by Omission' (n 129) 55.

202 Department of Justice (NSW), *Statutory Review – Defamation Act 2005* (Report, June 2018) 4; Judge JC Gibson, 'Adapting Defamation Law Reform to Online Publication' (2018) *Media and Arts Law Review* 119, 131.

203 *Defamation Act 2013* (UK) s 5(2).

204 Ibid s 5(3)(a).

205 Ibid s 5(3)(b).

and where the operator failed to respond to this notice.[206] The notice must be responded to by the operator by either communicating with the third party website operator or removing the link to the material complained of within 48 hours.[207] Importantly, it is worth highlighting that the plaintiff must prove that they could not identify the person who posted the statement (the owner/author of the content or the third-party site). This requirement, which in effect requires plaintiffs to first try to proceed against the primary publisher (the third-party website), acts as a balance between the liability of an entity for content they did not publish and recourse for plaintiffs where an online poster is anonymous and the primary publisher cannot be identified.

It should be noted that reforms to the Australian *Defamation Acts* are currently in progress across Australia and have so far resulted in the creation of a public interest defence.[208] Importantly, stage 2 of these reforms will attempt to address the liability question regarding internet intermediaries for third party content.[209]

One negative aspect about legislation that needs to be considered, however, is its persistence. With the advance of AI algorithms, it may one day become possible for search engines such as Google to easily identify defamatory content without having to be notified. If a statuary provision is enacted that requires actual knowledge (notification by the plaintiff), this may very well hinder the common law developing to recognise a form of constructive knowledge as being sufficient. Consider for example how content flagging on YouTube currently works. Whilst videos can be 'flagged' (reported) by users if they breach the community guidelines — such as containing harassment, pornography, or hate speech[210] — nowadays the majority of flagging actually occurs as a result of automated processes that utilise machine learning, with over six and a half million videos having been flagged in this manner already.[211] We may, sooner than later, reach a point where algorithms are capable of flagging pages as defamatory with the option for human review. If or when such a point is reached, legislation requiring actual knowledge may be detrimental, as the balance between the search engine's interest and that of the plaintiff would have shifted.

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206 Ibid s 5(3)(c).

207 *Defamation (Operators of Websites) Regulations 2013* (UK) reg 3, sch cl 3(1).

208 *Defamation Act 2005* (NSW) s 29A.

209 Attorneys-General, *Review of Modal Defamation Provisions – Stage 2* (Discussion Paper, 31 March 2021).

210 Google, *Transparency Report: YouTube Community Guidelines enforcement* (Report, 23 April 2018) <https://transparencyreport.google.com/youtube-policy/overview>.

211 Ibid.

5 Conclusion

This paper has analysed whether the reasonable search engine user is capable of viewing search engine results as conveying a defamatory imputation, and whether search engines should be liable for publishing results that may be defamatory.

This paper supports the findings of the High Court that search engine results are capable of conveying a defamatory imputation, and that the test developed by the Court of Appeal went too far by imparting knowledge that was not widely known. It will take a jury trial to gain guidance on the level of understanding of the reasonable user. However, this author believes it is appropriate that this understanding include knowledge of a search engine's lack of authorship, which may reduce the defamatory capacity of search results that link to third-party content. This paper also supports the reasoning of the Court of Appeal in regard to the defence of innocent dissemination, and this should be preferred in the absence of legislative change to the Defamation Acts. If such an amendment were to be considered, adopting a position similar to that in the UK would be preferable.