

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION  
MAJOR TORTS LIST

Not Restricted

No. 10096 of 2009

MILORAD TRKULJA

Plaintiff

v

GOOGLE INC LLC

First Defendant

GOOGLE AUSTRALIA PTY LTD

Second Defendant

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JUDGE: BEACH J  
WHERE HELD: Melbourne  
DATE OF HEARING: 22-26, 29-31 October 2012  
DATE OF JUDGMENT: 12 November 2012  
CASE MAY BE CITED AS: Trkulja v Google (No 5)  
MEDIUM NEUTRAL CITATION: [2012] VSC 533

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DEFAMATION - Publication - Publication on the internet - Jury verdict - Publication defamatory of plaintiff - Defence of innocent dissemination - Damages - *Defamation Act 2005*, ss 21, 22, 32, 34, 35, 36 and 38.

PRACTICE AND PROCEDURE - Jury verdict - Application by first defendant for judgment notwithstanding jury verdict - Leave reserved to first defendant to apply for judgment notwithstanding jury verdict - Application refused.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr C. Dibb	Efron & Associates
For the Defendants	Mr J. Ruskin QC with Mr A.T. Strahan	Baker & McKenzie

HIS HONOUR:

**Introduction and background**

1 During 2009, there was material on the internet about the plaintiff, Mr Milorad Trkulja (also known as Michael Trkulja), which was available for downloading and viewing in Australia. In this proceeding, the plaintiff claims damages from Google Inc LLC, the first defendant, and Google Australia Pty Ltd, the second defendant, in respect of material described by the parties as “the images matter” and “the web matter”.

2 The images matter<sup>1</sup> consisted of four pages of material. On the first page there were pictures of the plaintiff, Tony Mokbel and Denis Tanner. Underneath each of these pictures was the name “Michael Trkulja”. On the third page of the images matter, there was an article (“the article”) headed “Shooting probe urged November 20, 2007” with a larger photograph of the plaintiff. On this page, and above the article, was the heading “Melbourne crime”. Under this heading there were nine photographs of various people either known to have committed serious criminal offences or against whom serious criminal allegations had been made.

3 The web matter<sup>2</sup> consisted of three pages. The first page of the web matter consisted of the first ten results of 185,000 results for the search term “Michael Trkulja”. The third page of the web matter consisted of the article under the same heading with the same nine photographs and the larger photograph of Mr Trkulja as contained in the images matter.

4 The article was as follows:

“Police Chief Christine Nixon has been urged to re-open an investigation into an unsolved murder attempt.

Former music promoter Michael Trkulja was shot in the back by a hit-man wearing a balaclava while dining at a St Albans restaurant in June 2004.

The would-be killer fled after his pistol jammed as he prepared to fire a

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<sup>1</sup> As tendered at trial.

<sup>2</sup> As tendered at trial.

second shot at Mr Trkulja, who had been enjoying a Sunday lunch with his elderly mother.

A Victoria Police document reveals detectives dropped the investigation because of a lack of evidence.

But Mr Trkulja, 58, now claims to know the identity of the hit man and those who hired him.

He says he has passed the names to the police.

'He (the hit man) was offered \$10,000 to kill me. I know who sent him and they know that I know who they are', Trkulja told the Herald Sun.

'I've told the police. I just want justice.'

'Nobody should be shot like this.'

Mr Trkulja's lawyer, high profile solicitor George Defteros, has written to Ms Nixon seeking a fresh investigation and the request is being considered."

5 In respect of the images matter, the plaintiff pleaded three imputations, both as false innuendos and also as true innuendos. Those imputations were:

- (a) the plaintiff was a prominent figure in the Melbourne criminal underworld;
- (b) the plaintiff was so involved with crime in Melbourne that his rivals had hired a hit man to murder him;
- (c) the plaintiff was such a significant figure in the Melbourne criminal underworld that events involving him were recorded on a website that chronicled crime in Melbourne.

6 Additionally, the plaintiff pleaded a further imputation as a true innuendo, namely "The plaintiff is a hardened and serious criminal in Melbourne, in the same league as Tony Mokbel, an alleged murderer and a drug trafficker, and Denis Tanner, an alleged murderer".

7 In respect of the web matter, the plaintiff pleaded the imputations set out in paragraph 5(b) and (c) above, both as false innuendos and also as true innuendos. Further, he pleaded as an additional true innuendo, the imputation set out in paragraph 6 above.

8 By their pleadings, both defendants denied publication, denied that the meanings alleged by the plaintiff were conveyed, put in issue the extrinsic facts relied upon by the plaintiff to support the true innuendo claims, and pleaded defences of innocent dissemination at common law and pursuant to s 32 of the *Defamation Act 2005*.

9 The plaintiff issued this proceeding for trial by judge and jury. Shortly prior to trial, the defendants made application to change the mode of trial from judge and jury to judge alone.<sup>3</sup> That application was rejected for reasons then given.<sup>4</sup>

10 Section 22(2) of the *Defamation Act* provides that, where defamation proceedings are tried by a jury, the jury is to determine whether the defendant has published defamatory matters about the plaintiff and, if so, whether any defence raised by the defendant has been established. Section 22(3) provides that if the jury finds that the defendant has published defamatory matter about the plaintiff and that no defence has been established, then the judge is to determine the amount of any damages. At the commencement of this trial, the parties were in dispute as to whether there should be separate trials of the liability and damages issue, or whether all of the evidence relevant to both liability and damages should be called before the jury. After hearing argument, I ruled in favour of the plaintiff's submission that all of the evidence<sup>5</sup> should be called before the jury.<sup>5</sup>

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<sup>3</sup> Cf Section 21 of the *Defamation Act* and r.47.02 of the *Supreme Court (General Civil Procedure) Rules 2005*.

<sup>4</sup> The background of this proceeding is described further in *Trkulja v Google* [2010] VSC 226, *Trkulja v Google (No 2)* [2010] VSC 490, *Trkulja v Google (No 3)* [2011] VSC 503 and *Trkulja v Google (No 4)* [2011] VSC 560.

<sup>5</sup> My reasons for doing so were as follows:

“In this matter, Mr Dibb for the plaintiff submits that there should be one trial and one trial only conducted in front of the jury in accordance with the provisions of the *Defamation Act 2005*. Mr Ruskin for the defendants submits that there ought in effect be two trials of separate questions, one in front of the jury on liability issues and one in front of me sitting alone in respect of damages issues.

Initially I was persuaded to Mr Ruskin's submission, but on further reflection and having considered the reasons of McClellan J, Chief Judge at common law in *Greig v. WIN Television NSW Pty Ltd* [2009] NSWSC 876 I have come to the conclusion that I should accept Mr Dibb's submissions.

In submissions this morning, Mr Ruskin raised five points as to why I should not accede to Mr Dibb's submissions. First he said that a substantial amount of evidence concerning questions of damages which would be irrelevant to the jury's task, would be given in front of them, risking the pollution of their minds by irrelevant material. His second, third and fourth reasons were bases upon which he said McClellan J's decision in *Greig* should be distinguished: namely His Honour's reasoning concerning s.7A cases; the issue of cross-

11 On 30 October 2012, the jury returned its verdict. The jury's verdict was given by the following answers to the following questions:

- “1. Has the plaintiff established that the first matter complained of (the Images matter) was published by the First Defendant?---Yes.
2. Has the plaintiff established that the first matter complained of (the Images matter) was published by the Second Defendant?---No.
3. Has the plaintiff established that the first matter complained of (the Images matter), in its natural and ordinary meaning, conveyed to an ordinary reasonable reader any of the following meanings or meanings not substantially different from them?
  - (a) the plaintiff was a prominent figure in the Melbourne criminal underworld;---No.
  - (b) the plaintiff was so involved with crime in Melbourne that his rivals had hired a hit man to murder him;---Yes.
  - (c) the plaintiff was such a significant figure in the Melbourne criminal underworld that events involving him were recorded on a web site that chronicled crime in Melbourne;---No.
4. For each meaning where you have answered “Yes” above, has the plaintiff established that that meaning was defamatory of him?
  - (a) the plaintiff was a prominent figure in the Melbourne criminal underworld;---[Not applicable].
  - (b) the plaintiff was so involved with crime in Melbourne that his rivals had hired a hit man to murder him;---Yes.
  - (c) the plaintiff was such a significant figure in the Melbourne

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examination as to credibility in that case, which is different from the present case; and the contextual truth defence in that case, there being no contextual truth defence in the current case.

I do not find these points of difference to be persuasively distinguishable so as to make Grieg's case distinguishable from the present. The fifth point raised by Mr Ruskin concerned the possibility of the jury hearing material irrelevant to their function, concerning an earlier trial between the plaintiff and Yahoo. In my view that matter can be handled in a way which should not deprive the plaintiff of his preferred mode of trial.

Finally I should say while I regard the question of whether ordinarily there should be one trial with all of the evidence being given before the jury or two trials is a matter capable of real debate, I think the better view for me is that having seen the detailed reasons given by Justice McClellan in *Grieg*, I should adopt an approach that is consistent with the approach adopted by his Honour unless persuaded that his Honour was clearly wrong. No one suggests that he was and indeed I do not think he was.

The submissions this morning were confined to attempting to distinguish *Grieg*. For the reasons I have given I do not think *Grieg* is relevantly distinguishable, and so at least at this stage the trial will proceed in front of the jury on all issues with the jury being instructed as to what evidence is relevant so far as their task is concerned, and what evidence is relevant so far as my task is concerned. So for those reasons the matter will proceed in the way I have stated.”

criminal underworld that events involving him were recorded on a web site that chronicled crime in Melbourne;---[Not applicable].

5. Has the plaintiff established that the following statements were facts?
- (a) The second image from the left in the top line of images on the first page of the first matter complained of (the Images matter) is a picture of the plaintiff---Yes.
  - (b) The fourth image from the left in the top line of images on the first page of the first matter complained of (the Images matter) is a picture of Tony Mokbel, a notorious criminal, an alleged murderer and a drug trafficker---Yes.
  - (c) The fifth image from the left in the top line of images on the first page of the first matter complained of (the Images matter) is a picture of Dennis Tanner, a former policeman who is alleged to have murdered his brother's wife, Jennifer Tanner---Yes.
  - (d) The largest image in the extract or reproduction of the "Melbourne Crime" web site is a picture of the plaintiff---Yes.
  - (e) Melbourne had a notorious and violent criminal underworld operating in the central and suburban areas of Melbourne in 2009 and for many years before---Yes.
  - (f) In and around 2004, the Melbourne criminal underworld was involved in a violent internecine war, the prime targets of which were members of competing camps in the underworld--  
-Yes.
  - (g) The nine photographs of faces of men appearing under the title "Melbourne Crime" include photographs of persons who are or who are alleged to be engaged in serious criminal activity in Melbourne---Yes.
  - (h) One of the nine photographs appearing under the title "Melbourne Crime" is a picture of Tony Mokbel, a notorious criminal, an alleged murderer and drug trafficker---Yes.
  - (i) One of the nine photographs appearing under the title "Melbourne Crime" is a picture of Dennis Tanner, a former policeman who is alleged to have murdered his brother's wife, Jennifer Tanner---Yes.
  - (j) [www.melbournecrime.bizhosting.com](http://www.melbournecrime.bizhosting.com) was an internet website which chronicled the conduct of criminals and alleged criminals involved in the Melbourne criminal underworld---  
Yes.
6. Has the plaintiff established that the first matter complained of (the Images matter) was published to at least one person who knew one or more of the facts that you have found to be established in question 5

above?---Yes.

7. Has the plaintiff established that the first matter complained of (the Images matter) conveyed to an ordinary reasonable reader who knew such of the facts as you have found to have been established in Question 5 the following meanings or meanings not substantially different from them?
  - (a) the plaintiff was a prominent figure in the Melbourne criminal underworld;---No.
  - (b) The plaintiff was so involved with crime in Melbourne that his rivals had hired a hit man to murder him;---Yes.
  - (c) The plaintiff is such a significant figure in the Melbourne criminal underworld that events involving him are recorded on a web site that chronicles crime in Melbourne;---No.
  - (d) The plaintiff is a hardened and serious criminal in Melbourne, in the same league as Tony Mokbel, an alleged murderer and drug trafficker, and Dennis Tanner, an alleged murderer.---No.
8. For each meaning where you have answered "Yes", has the plaintiff established that that meaning was defamatory of him?
  - (a) the plaintiff was a prominent figure in the Melbourne criminal underworld;---[Not applicable].
  - (b) The plaintiff was so involved with crime in Melbourne that his rivals had hired a hit man to murder him;---Yes.
  - (c) The plaintiff is such a significant figure in the Melbourne criminal underworld that events involving him are recorded on a web site that chronicles crime in Melbourne;---[Not applicable].
  - (d) The plaintiff is a hardened and serious criminal in Melbourne, in the same league as Tony Mokbel, an alleged murderer and drug trafficker, and Dennis Tanner, an alleged murderer.---[Not applicable].
9. If "Yes" to question 1 and either any part of question 4 or any part of question 8, has the First Defendant established that it is entitled to the defence of innocent dissemination in relation to the first matter complained of (the Images matter)?---Yes.
10. If "Yes" to question 9, was the defence available:
  - (a) for the whole period of alleged publication up to 31 December 2009?---No.
  - (b) or, until some earlier date and if so, what date?---10 October 2009.
  - (c) do you find that the First Defendant published the first matter complained of on or after that date?---Yes.

11. If "Yes" to question 2 and either any part of question 4 or any part of question 8, has the Second Defendant established that it is entitled to the defence of innocent dissemination in relation to the first matter complained of (the Images matter)?---[Not applicable].
12. If "Yes" to question 11, was the defence available:
  - (a) for the whole period of alleged publication up to 31 December 2009?---[Not applicable]
  - (b) or, until some earlier date and if so, what date?---[Not applicable].
  - (c) do you find that the Second Defendant published the first matter complained of on or after that date?---[Not applicable].
13. Has the plaintiff established that the second matter complained of (the Web matter) was published by the First Defendant?---Yes.
14. Has the plaintiff established that the second matter complained of (the Web matter) was published by the Second Defendant?---No.
15. Has the plaintiff established that the second matter complained of (the Web matter), in its natural and ordinary meaning, conveyed to an ordinary reasonable reader any of the following meanings or meanings not substantially different from them?
  - (a) the plaintiff was so involved with crime in Melbourne that his rivals had hired a hit man to murder him;---Yes.
  - (b) the plaintiff is such a significant figure in the Melbourne criminal underworld that events involving him are recorded on a web site that chronicles crime in Melbourne.---[No].
16. For each meaning where you have answered "Yes", has the plaintiff established that that meaning was defamatory of him?
  - (a) the plaintiff was so involved with crime in Melbourne that his rivals had hired a hit man to murder him;---Yes.
  - (b) the plaintiff is such a significant figure in the Melbourne criminal underworld that events involving him are recorded on a web site that chronicles crime in Melbourne.---[Not applicable].
17. Has the plaintiff established that the following statements were facts?
  - (a) The largest image in the extract from or reproduction of the "Melbourne Crime" web site is a picture of the plaintiff;---Yes.
  - (b) Melbourne had a notorious and violent criminal underworld operating in the central and suburban areas of Melbourne in 2009 and for many years before;---Yes.
  - (c) In and around 2004, the Melbourne criminal underworld was involved in a violent internecine war, the prime targets of



which were members of competing camps in that underworld;--Yes.

- (d) The nine photographs of faces of men appearing under the title "Melbourne Crime" include photographs of persons who are or are alleged to be engaged in serious criminal activity in Melbourne;--Yes.
  - (e) One of the nine photographs appearing under the title "Melbourne Crime" is a picture of Tony Mokbel, a notorious convicted criminal, an alleged murderer and a drug trafficker;--Yes.
  - (f) One of the nine photographs appearing under the title "Melbourne Crime" is a picture of Dennis Tanner, a former policeman who is alleged to have murdered his brother's wife, Jennifer Tanner;--Yes.
  - (g) [www.melbournecrime.bizhosting.com](http://www.melbournecrime.bizhosting.com) is an internet web site which chronicles the conduct of criminals and alleged criminals involved in the Melbourne criminal underworld.---Yes.
18. Has the plaintiff established that the second matter complained of (the Web matter) was published to at least one person who knew one or more of the facts you have found to be established in question 17 above?---Yes.
19. Has the plaintiff established that the second matter complained of (the Web matter) conveyed to an ordinary reasonable reader who knew such of the facts as you have found to have been established in Question 17 the following meanings or meanings not substantially different from them?
- (a) The plaintiff was so involved with crime in Melbourne that his rivals had hired a hit man to murder him;---Yes.
  - (b) The plaintiff is such a significant figure in the Melbourne criminal underworld that events involving him are recorded on a Web site that chronicles crime in Melbourne;---No.
  - (c) The plaintiff is a hardened and serious criminal in Melbourne, in the same league as Tony Mokbel, an alleged murderer and drug trafficker, and Dennis Tanner, an alleged murderer.---No.
20. For each meaning to which you have answered "Yes" above, has the plaintiff established that that meaning was defamatory of him?
- (a) The plaintiff was so involved with crime in Melbourne that his rivals had hired a hit man to murder him;---Yes.
  - (b) The plaintiff is such a significant figure in the Melbourne criminal underworld that events involving him are recorded on a Web site that chronicles crime in Melbourne;---[Not applicable].

(c) The plaintiff is a hardened and serious criminal in Melbourne, in the same league as Tony Mokbel, an alleged murderer and drug trafficker, and Dennis Tanner, an alleged murderer.--- [Not applicable].

21. If “Yes” to question 13 and either any part of question 16 or any part of question 20, has the First Defendant established that it is entitled to the defence of innocent dissemination in relation to the second matter complained of (the Web matter)?---Yes.

22. If “Yes” to question 21, was the defence available:

(a) for the whole period of alleged publication up to 31 December 2009?---Yes.

(b) or, until some earlier date and if so, what date?---[Not applicable].

(c) do you find that the First Defendant published the second matter complained of on or after that date?---[Not applicable].

23. If “Yes” to question 14 and either any part of question 16 or any part of question 20, has the Second Defendant established that it is entitled to the defence of innocent dissemination in relation to the second matter complained of (the Web matter)?---[Not applicable].

24. If “Yes” to question 23, was the defence available:

(a) for the whole period of alleged publication up to 31 December 2009?---[Not applicable].

(b) or, until some earlier date and if so, what date?---[Not applicable].

(c) do you find that the Second Defendant published the second matter complained of on or after that date?---[Not applicable].

12 The net effect of the jury’s answers to the questions (subject to any *non-obstante* applications, in respect of which leave to make was reserved to the parties at the conclusion of the evidence) is that the plaintiff established an entitlement to damages against Google Inc in respect of the images matter for publications between 11 October 2009 and 31 December 2009 (both dates inclusive). In respect of the images matter, the plaintiff established one defamatory imputation (both as a false innuendo and as a true innuendo), namely “the plaintiff was so involved with crime in Melbourne that his rivals had hired a hit man to murder him”. The plaintiff’s case against Google Australia failed, in respect of the images matter and the web matter, on the issue of publication. The plaintiff’s case against Google Inc, in respect of the

web matter, failed because Google Inc established the defence of innocent dissemination for the whole of the period of publication the subject of this proceeding (2009).

### **Google Inc's non-obstante application**

13 Following the jury's verdict, Google Inc applied, pursuant to leave reserved, for judgment notwithstanding the jury's verdict. After hearing submissions, I rejected Google Inc's application and said I would publish my reasons later. What follows are my reasons for rejecting Google Inc's application for judgment.

14 The principles to be applied in determining an application by a defendant for judgment notwithstanding the jury's verdict can be found in *Phillips v Ellinson Brothers Pty Ltd*,<sup>6</sup> *Hayward v Georges Limited*,<sup>7</sup> *Naxakis v Western General Hospital*<sup>8</sup> and *Herald & Weekly Times Limited v Popovic*.<sup>9</sup> Kyrrou J helpfully summarised these principles in *King v Amaca Pty Ltd*.<sup>10</sup> His Honour said:<sup>11</sup>

"[7] In order for a defendant's application for judgment notwithstanding the jury's verdict to succeed, the defendant must establish that there was no evidence upon which a reasonable jury, properly directed, could return a verdict for the plaintiff.

[8] Where there is evidence to support the jury's verdict, the verdict cannot be disregarded even if the trial judge were strongly against the jury's conclusion.

[9] A trial judge hearing an application for judgment notwithstanding the jury's verdict should determine the application on the evidence most favourable to the party that carries the onus of proof.

[10] A trial judge should proceed with great caution and only exercise the power to give judgment in disregard of the jury's verdict in the clearest of cases."<sup>12</sup>

15 Google Inc's first submission in support of its application for judgment notwithstanding the jury's verdict was that, as a matter of law, Google Inc was not a

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<sup>6</sup> (1941) 65 CLR 221.

<sup>7</sup> [1966] VR 202.

<sup>8</sup> (1999) 197 CLR 269.

<sup>9</sup> (2003) 9 VR 1.

<sup>10</sup> [2011] VSC 422, and upheld on appeal in *Amaca Pty Ltd v King* [2011] VSCA 447.

<sup>11</sup> [2011] VSC 422 [7]-[10].

<sup>12</sup> Footnotes omitted.

publisher of the images matter.<sup>13</sup> In written submissions on this point, Google Inc contended:

1. To establish publication the plaintiff was required to lead evidence showing, first, Google Inc was in some degree accessory to the communication of the material complained of;<sup>14</sup> and second, that Google Inc had the required mental element, namely, an intention to publish the Images matter.<sup>15</sup>

2. The plaintiff was required to lead evidence capable of proving on the balance of probabilities that Google Inc intentionally lent its assistance to the publication of the impugned material.<sup>16</sup> The plaintiff was required to show more than just that Google Inc knew of the existence of the matter complained of and had the opportunity to remove it.<sup>17</sup> The plaintiff had to demonstrate on the balance of probabilities that Google Inc consented to, or approved of, or adopted, or promoted, or in some way ratified, the communication of the material complained of.<sup>18</sup> In other words, the plaintiff had to establish that Google Inc accepted responsibility for the publication of the material complained of.<sup>19</sup>

3. In *Metropolitan Schools Ltd v Designtecnica Corpn*<sup>20</sup>, a case involving Google Inc's search engine, Eady J stated that a publisher must be shown to be knowingly involved in the process of communication of the matter complained of, and that it is not enough for the plaintiff to demonstrate that the defendants merely played a passive, instrumental role in the process.<sup>21</sup> His Honour concluded that it was not possible to draw the necessary inferences of intention from Google Inc's operations as a search engine, in order to sustain a finding of publication.<sup>22</sup>

4. In *Tamiz v Google Inc*<sup>23</sup> Eady J considered a claim made against Google Inc in its capacity as operator of "Blogger.com" which provides a "platform" for the creation of "blogs" by third parties. Having referred to his earlier decision in *Metropolitan Schools* his Honour stated:

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<sup>13</sup> And of the web matter – but that issue is no longer relevant having regard to the success of Google Inc's innocent dissemination defence with respect to the web matter.

<sup>14</sup> *Webb v Bloch* (1928) 41 CLR 331, 363-4.

<sup>15</sup> *Webb v Bloch* (1928) 41 CLR 331, 363-4; *Metropolitan Schools Ltd v Designtecnica Corpn* [2011] 1 WLR 1743 at [49].

<sup>16</sup> *Webb v Bloch* (1928) 41 CLR 331, 363-4.

<sup>17</sup> *Urbanchich v Drummoyne Municipal Council* [1991] Aust Torts Reports ¶81-127; Unreported NSW SC, Hunt J, 22 December 1988, BC 8801175 at 7.

<sup>18</sup> *Urbanchich v Drummoyne Municipal Council* [1991] Aust Torts Reports ¶81-127 Unreported NSW SC, Hunt J, 22 December 1988, BC 8801175 at 7; *David v Abdishou* [2012] NSWCA 109 at [275].

<sup>19</sup> *Ibid.*

<sup>20</sup> [2011] 1 WLR 1743.

<sup>21</sup> *Metropolitan Schools Ltd v Designtecnica Corpn* [2011] 1 WLR 1743 at [49]; *Bunt v Tilley* [2007] 1 WLR 1243 at [21]. See also *Tamiz v Google Inc* [2012] EWHC 449 at [32]-[39]. Note also that in *Tamiz* content platform providers (i.e. a blog hosts) were held not to be publishers, even after notice was given (at [39]); but c.f *Davison v Habeeb* [2011] EWHC 3031 at [28] to [48]. See also *Crookes v Newton* [2011] 3 SCR 269 to the effect that hyperlinks (absent endorsement) do not constitute publication of the linked content by the person on whose webpage they appear.

<sup>22</sup> *Metropolitan Schools Ltd v Designtecnica Corpn* [2011] 1 WLR 1743 at [53].

<sup>23</sup> [2012] EWHC 449.

It seems to me to be a significant factor in the evidence before me that Google Inc is not required to take any positive step, technically, in the process of continuing the accessibility of the offending material, whether it has been notified of a complainant's objection or not. In those circumstances, I would be prepared to hold that it should not be regarded as a publisher, or even as one who authorises publication, under the established principles of the common law. As I understand the evidence its role, as a platform provider, is a purely passive one. The situation would thus be closely analogous to that described in *Bunt v Tilley* and thus, in striving to achieve consistency in the court's decision-making, I would rule that Google Inc is not liable at common law as a publisher.<sup>24</sup>

5. Google Inc contends that the decision in *Tamiz v Google Inc* reflects the law in Australia, and a content platform operator (i.e. a web host) will not be liable for the defamatory content of blog authors, even with notice of that material. *A fortiori*, Google Inc (as search engine operator in this case) is not capable of being liable in respect of the results produced by use of its search products, even with notice, because no proper inference about Google Inc adopting or accepting responsibility for the content complained of can ever be drawn from Google Inc's conduct in operating a search engine.<sup>25</sup>

16 The plaintiff accepted (correctly in my view) that he had to establish that Google Inc intended to publish the material complained of. While much was made by counsel for Google Inc of the fact that there was no human intervention between the request made to the search engine and the publication of search results, and of the fact that the system was "fully automated", the plaintiff's point was that Google Inc intended to publish everything Google's automated systems (which systems its employees created and allowed to operate) produced. Specifically, the plaintiff contended that Google Inc intended to publish the material complained of because while the systems were automated, those systems were the consequence of computer programs, written by human beings, which programs were doing exactly what Google Inc and its employees intended and required. On this basis, it was contended that each time the material complained of was downloaded and comprehended, there was a publication by Google Inc (the operator and owner of the relevant search engines), as intended by it. So it was submitted by the plaintiff that Google Inc was a publisher throughout the period in respect of which complaint was made.

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<sup>24</sup> *Tamiz v Google Inc* [2012] EWHC 449 at [39].

<sup>25</sup> Footnotes in original.

- 17 The plaintiff's alternative case in respect of publication was that the failure by Google Inc to take steps to remove the relevant URL for the page upon which the article appeared, after a request made by the plaintiff's former solicitors by letter dated 22 September 2009, also constituted publication – at least for the period after 10 October 2009 (if not after 30 September 2009).
- 18 The question of whether or not Google Inc was a publisher is a matter of mixed fact and law. In my view, it was open to the jury to find the facts in this proceeding in such a way as to entitle the jury to conclude that Google Inc was a publisher even before it had any notice from anybody acting on behalf of the plaintiff. 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 By parity of reasoning, those who operate libraries have sometimes been held to be publishers for the purposes of defamation law. That said, newsagents, librarians and the like usually avoid liability for defamation because of their ability to avail themselves of the defence of innocent dissemination (a defence which Google Inc was able to avail itself of for publications of the images matter prior to 11 October 2009, and all of the publications of the web matter that were the subject of this proceeding).
- 20 As was pointed out by counsel for the plaintiff in his address to the jury, the first page of the images matter (containing the photographs I have referred to and each named "Michael Trkulja" and each with a caption "melbournecrime") was a page not published by any person other than Google Inc. It was a page of Google Inc's creation – put together as a result of the Google Inc search engine working as it was intended to work by those who wrote the relevant computer programs. It was a cut

and paste creation (if somewhat more sophisticated than one involving cutting word or phrases from a newspaper and gluing them onto a piece of paper). If Google Inc's submission was to be accepted then, while this page might on one view be the natural and probable consequence of the material published on the source page from which it is derived, there would be no actual original publisher of this page.<sup>26</sup>

21 Google Inc sought to meet this argument in its application for judgment by saying that in any event the jury did not find the first page of the web matter defamatory. The imputation found by the jury could only have come from the page on which the article was reproduced. However, this does not mean that the jury did not find that the first page of the images matter was defamatory – merely that the jury, having followed directions to read the whole of the matter complained of, determined that the whole of the matter complained of bore the imputation in respect of which they gave affirmative answers. It is at least as possible as not that had the jury been asked to consider only the first page of the images matter, it would have determined that that page alone conveyed some similar but less serious defamatory imputation.<sup>27</sup> In any event, the first page of the images matter is an integral part of the matter complained of, and from which the jury found the plaintiff's imputation to have been conveyed.

22 Central to Google Inc's contention that it was not a publisher as a matter of law were the English decisions of *Bunt v Tilley*,<sup>28</sup> *Metropolitan Schools Ltd v Designtecnica Corporation*<sup>29</sup> and *Tamiz v Google Inc*.<sup>30</sup> All three of these cases were judgments of Eady J in interlocutory applications. *Bunt* was a defamation case where three of the defendants were internet service providers. As was said by Eady J:<sup>31</sup>

“The high point of the claimant's case ... [with respect to publication] is to rely upon the fact that the corporate defendants have provided a route as intermediaries, whereby third parties have access to the internet and have

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<sup>26</sup> The same could equally be said of the first page of the web matter, containing the snippets produced by the Google Inc algorithms.

<sup>27</sup> For example, “the plaintiff is an associate of known criminals”.

<sup>28</sup> [2007] 1 WLR 1243.

<sup>29</sup> [2011] 1 WLR 1743.

<sup>30</sup> [2012] EWHC 449.

<sup>31</sup> [2007] 1 WLR 1245 [8].

been able to pass an electronic communication from one computer to another resulting in a posting to the Usenet message board. The Usenet service is hosted by others, who are not parties to these proceedings, such as Google. It is not accepted that the relevant postings necessarily took place via the relevant ISP services, but that would be a matter for the claimant to establish at trial. For the moment, that assumption should be made in his favour.”

23 *Metropolitan International Schools Ltd* was a defamation case concerning whether an internet search engine provider (Google) could be liable for the results of a search produced by its search engine. Eady J referred to his earlier decision in *Bunt*, saying:<sup>32</sup>

“In that case, I held as a matter of law that an internet intermediary, if undertaking no more than the role of a passive medium of communication, cannot be characterised as a publisher at common law ... .”

24 Eady J went on:<sup>33</sup>

“The appropriate question here, perhaps, is whether the third defendant should be regarded as a mere facilitator in respect of the publication of the ‘snippet’ and whether, in particular, that would remain a proper interpretation even after the date of notification. Mr White [who appeared for the defendant] submits that the common law relating to publication by internet intermediaries is currently unclear and uncertain. That being so, the court should develop the law, insofar as it is necessary to do so, in a manner which is compatible with article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. That is true, although I also need to take note of the principle now recognised in English law (and, for that matter, in Strasburg jurisprudence) that no one Convention right is to be regarded as taking automatic precedence over any other. ... .”

25 Eady J was ultimately persuaded by a submission as to the automated way in which search engines operate. His Lordship went on:<sup>34</sup>

“Against this background, *including the steps so far taken by the third defendant to block the identified URLs*, I believe it is unrealistic to attribute responsibility for publication to the third defendant [Google Inc], whether on the basis of authorship or acquiescence.” (emphasis added).

26 Finally, in *Tamiz*, Eady J had to consider the issue of publication with respect to Blogger.com – a platform which allows an internet user to create an independent blog free of charge. His Lordship concluded that the provider of such services

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<sup>32</sup> [2011] 1 WLR 1752 [36].

<sup>33</sup> Ibid [42].

<sup>34</sup> Ibid [64].



should not be regarded as a publisher because the role of a platform provider was a purely passive one.

27 As the judgments in *Bunt*, *Metropolitan Schools* and *Tamiz* show, and as Eady J acknowledged in *Tamiz*,<sup>35</sup> the question of whether a particular internet service provider might be a publisher in respect of defamatory material published through or via or with the assistance of a particular internet product is “fact sensitive”. The facts in *Bunt* and *Tamiz* are substantially different from the facts in the present case – such that the conclusions in those cases give no real assistance to the resolution of the issue in the present case. The facts in *Metropolitan Schools* (involving a search engine) are more applicable to the present case. That said, it is not possible for me to say whether all of the evidence given in the present case was also presented to Eady J in the interlocutory application that his Lordship was required to determine. Specifically, his Lordship does not appear to have given any consideration to the fact that internet search engines, while operating in an automated fashion from the moment a request is typed into them, operate precisely as intended by those who own them and who provide their services. Additionally, his Lordship appears to have been moved to come to his conclusion in part because of the steps taken in that case by the relevant defendant (Google Inc) to block the identified URLs.<sup>36</sup> This was a matter which, on the facts in the present case, was not capable of bearing upon the issue of whether there was publication by Google Inc as contended for by the plaintiff.

28 While much was made by Google Inc in the present case of Eady J’s statements in *Bunt* and *Tamiz* that an internet service provider who performs no more than a passive role cannot be a publisher, those statements have to be seen in the light of the facts in those cases. To say as a general principle that if an entity’s role is a passive one then it cannot be a publisher, would cut across principles which have formed the basis for liability in the newsagent/library type cases and also in those cases where someone with power to remove a defamatory publication chooses not to do so in

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<sup>35</sup> Ibid [33].

<sup>36</sup> Ibid [64].

circumstances where an inference of consent can be drawn.<sup>37</sup>

29 In any event, and putting to one side the factual differences I have identified, to the extent that there is anything written in the judgments of *Bunt v Tilley*,<sup>38</sup> *Metropolitan Schools Ltd v Designtecnica Corporation*<sup>39</sup> and *Tamiz v Google Inc*<sup>40</sup> that might be thought to compel the conclusion that on the facts of the present case it was not open to the jury to conclude that Google Inc was a publisher of either the images matter or the web matter, then the same does not represent the common law of Australia.<sup>41</sup> Further, while on the facts in *Bunt*, the defendants were correctly described as “internet intermediaries” (whatever may be the legal consequences of such a description), it is, with respect, doubtful that that same description can be applied to an internet search engine provider in respect of material produced as a result of the operation of that search engine. That said, any such “internet intermediary” is, in any event, performing more than the “merely passive role ... [of] facilitating

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<sup>37</sup> “In *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1085, Lord Reid warned of the danger of placing reliance on the literal words of particular judgments instead of searching for the applicable principle. His Lordship said:

‘... experience has shown that those who have to apply the decision to other cases and still more those who wish to criticise it seem to find it difficult to avoid treating sentences and phrases in a single speech as if they were provisions in an act of Parliament. They do not seem to realise that it is not the function of noble and learned lords or indeed any judges to frame definitions or to lay down hard and fast rules. It is their function to enunciate principles and much that they say is intended to be illustrative or explanatory and not to be definitive.’

Cited in *Cain v Glass (No 2)* (1985) 3 NSWLR 230, 248 (McHugh JA).

<sup>38</sup> [2007] 1 WLR 1243.

<sup>39</sup> [2011] 1 WLR 1743.

<sup>40</sup> [2012] EWHC 449.

<sup>41</sup> See generally, and further, the discussion about intent by Hunt J in *Urbanchich v Drummoyne Municipal Council* (unreported, Supreme Court of New South Wales, 22 December 1988), wherein his Honour said:

“The law of defamation ... has never required ‘a conscious intent to induce the public or any individual to read the alleged libels’ ... .

The proposition that conduct of a passive nature cannot amount to publication ... was decisively rejected in *Byrne v Dean* ... . Greene LJ said he was quite unable to accept any such proposition. Nor am I. ...

There will, of course, always be issues (which will usually be for the jury to determine) as to whether the defendant has the ability to remove the defamatory statement and whether the time given before the commencement of the action was a reasonable one in which to do so. ...

It is clear from all of those authorities that the facts upon which the plaintiff relies here – notice of the existence of the defamatory statement, an ability to remove it [or in the present case block it] and the failure to comply within a reasonable period where the request to do so – may, if accepted by the jury (in particular, whether the period given was reasonable in the circumstances), give rise to the required inference that the defendant had in fact accepted a responsibility [which can be accepted by showing the defendant consented] for the continued publication ... “.

postings” (Cf *Bunt*).

30 It follows that, in my view, it was open to the jury to conclude that Google Inc was a publisher – even if it did not have notice of the content of the material about which complaint was made. Google Inc’s submission to the contrary must be rejected. However, Google Inc goes further and asserts that even with notice, it is not capable of being liable as a publisher “because no proper inference about Google Inc adopting or accepting responsibility complained of can ever be drawn from Google Inc’s conduct in operating a search engine”.

31 This submission must also be rejected. The question is whether, after relevant notice, the failure of an entity with the power to stop publication and which fails to stop publication after a reasonable time, is capable of leading to an inference that that entity consents to the publication. Such an inference is clearly capable of being drawn in the right circumstances (including the circumstances of this case). Further, if that inference is drawn then the trier of fact is entitled (but not bound) to conclude that the relevant entity is a publisher.<sup>42</sup> Google Inc’s submission on this issue must be rejected for a number of reasons, the least of which is that it understates the ways in which a person may be held liable as a publisher.

32 On the question of notice, Google Inc made an alternative submission that there was no evidence upon which the jury could resolve the issue of publication in favour of the plaintiff. This submission concentrated on the difference between the images matter and the complaint made in the letter of 22 September 2009.

33 The letter of 22 September 2009 did not contain a copy of the images matter. The letter provided:

“We are litigation counsel for Mr Michael Trkulja (‘our client’).

We are writing with respect to certain photographs, images and text that is accessible by typing in our client’s full name Michael Trkulja into the Google Images Search Engine (‘the material’). We enclose for your reference a copy of the material.

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<sup>42</sup> *Webb v Bloch* (1928) 41 CLR 331; *Urbanchich v Drummoynne Municipal Council* (unreported, NSW Supreme Court, Hunt J, 22 December 1988).

In particular, we note that the image circled in the enclosure to this demand letter is of worldwide well known criminal Tony Mokbel. You will note that the text to that photograph refers to our client directly Michael Trkulja. Immediately adjacent to that photo is a photograph of a well known ex-Victoria policeman Dennis Tanner also accompanied by a text reference to our client. The material is viewable by anyone worldwide who searches our client's name directly and/or anyone with the appropriate URL address and/or anyone who has previously bookmarked those web pages. As at the date of this letter, the material remains viewable.

It goes without saying that the material is grossly defamatory of our client and conveys the imputation to members of the general public that our client is a criminal and a member of Melbourne's criminal underworld, which is malicious and without any factual basis whatsoever.

...

Accordingly, we demand that by 4.00 pm 28 September 2009 you immediately remove the material resulting from search results returned against our client Michael Trkulja and as well [and other demands were made]."

34 There appears to have been some difficulty as to whether any and what material was enclosed with the original of the 22 September letter. However, some time before 10 October 2009 a page of photographs on a document headed "Google Images Michael Trkulja" was sent to Google Inc. This page had a number of photographs on it, including the three small photographs of the plaintiff, Mr Mokbel and Mr Tanner (to which I have already referred) - each captioned "Michael Trkulja - Melbourne ... Melbournecrime Bizhosting". The page containing the larger photograph of the plaintiff, the nine smaller photographs that I have also already described and the article, was not forwarded to Google Inc. Nevertheless, on 10 October 2009 an email was sent from "help @ Google.com", in which it was stated:

"At this time, Google has decided not to take action based on our policies concerning content removal. Please contact the webmaster of the page in question to have your client's name removed from the page."

35 Notwithstanding the defendants called Mr Madden-Woods from Google Inc's offices in the United States, Google Inc did not call the person who made the decision (or any person involved in the decision) referred to in the 10 October 2009 email. Indeed, the defendants did not call anyone with any knowledge of the receipt of the 22 September letter or any subsequent communications between the parties. In the

circumstances, and with due regard to the evidence (without engaging in mere speculation), it was open to the jury to infer that notwithstanding the failure by the plaintiff's former solicitors to specifically provide a copy of the webpage upon which the article appeared, Google Inc was well aware of what was being requested of it. Indeed, Google Inc's witness Mr Madden-Woods conceded the obvious (perhaps somewhat begrudgingly) that it would not take very much effort to work out, from the page of photographs supplied to Google Inc, the identity of the website that linked the plaintiff's name to Mr Mokbel and Mr Tanner. All one had to do was click on one of the images (the text beneath each image showing that the one web page was involved). At that point it would have been open to Google Inc to block the URL of that page from Google Inc's searches, in compliance with the plaintiff's former solicitors' request.<sup>43</sup>

36 It follows that Google Inc's contention that there was no evidence to sustain a finding of publication against it must be rejected. It was open to the jury to conclude that when the email of 10 October 2009 was written Google Inc was aware of the defamatory material which gave rise to the images matter. Further, as I have already said, in my view it was telling that while the defendants called two witnesses in support of their cases on publication as a matter of generality, no witness was called by them (or more specifically, by Google Inc) as to what, if any, knowledge Google Inc had in relation to the matters complained of between 30 September 2009 and 10 October 2009 – and this notwithstanding the terms of the 10 October 2009 email.

37 Finally, Google Inc submitted that notwithstanding the jury's verdict, it was entitled to judgment on the basis that it had established its innocent dissemination defence in respect of the images matter for the whole of the period the subject of this proceeding (not just up to 10 October 2009 as the jury found).

38 Section 32(1) of the *Defamation Act* relevantly provides:

“It is a defence to the publication of defamatory matter if the defendant proves that –

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<sup>43</sup> See T 240.6-T 242.7.

- (a) the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor; and
- (b) the defendant neither knew nor ought reasonably to have known, that the matter was defamatory; and
- (c) the defendant's lack of knowledge was not due to any negligence on the part of the defendant.<sup>44</sup>

39 In support of its submission that the jury was bound to find in its favour on the question of innocent dissemination for the whole of the relevant period, Google Inc advanced submissions along the same lines as those advanced in respect of its submission that there was no evidence to sustain a finding of publication against it. These submissions must be rejected for the reasons I have already given.

40 Further, in advancing its submissions on this aspect of the case, Google Inc referred to the evidence of Mr Madden-Woods and the plaintiff's former solicitor's letter of 22 September 2009, and contended that "the only available inference was that Google Inc had no knowledge of the images matter without notice". However, as I have said, it was open to the jury to conclude that as infelicitous as the letter of 22 September 2009 might have been, it gave notice because with it (or shortly after it was first sent) went three of the pictures (at least) taken from the first page of the images matter (with plaintiff's name under each picture, and words showing that the images originated from the same web page: "melbournecrime...").

41 In any event, Google Inc's submissions overlook the fact that in order to establish the defence of innocent dissemination it had to establish not only that it did not know that the matter was defamatory, but also that it ought not reasonably to have known of that matter and that such lack of knowledge was not due to any negligence on its part. The jury may well have concluded that Google Inc failed to establish that it ought not have reasonably known that the relevant matter was defamatory and/or that it had not established that any lack of knowledge on its part was not due to its negligence.

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<sup>44</sup> "Subordinate Distributor" is defined in s 32(2). See further the common law defence of innocent dissemination – upon which Google Inc also relied.

42 For these reasons, on 31 October, I rejected Google Inc's application for judgment notwithstanding the jury's verdict. I turn now to the question of damages.

### Damages

43 The plaintiff gave evidence that he is a show business manager, having engaged in that occupation for some 40 years. He came to Australia in the late '60s from the former Yugoslavia. He is an elder in the Serbian Orthodox Church in Springvale. At one stage in the 1990s he had his own television show on Channel 31. He said it was the second highest rating show on Channel 31 for twelve months. He gave evidence "my life is my reputation, and you know, if a person loses his reputation, he has nothing". He said he received pleasure from the recognition and respect in which he was held.<sup>45</sup>

44 At trial, four witnesses gave evidence as to the plaintiff's reputation: Jason Vladusic, Raso Vasic, Sam Smith and Stanka Railic. The effect of their evidence was that the plaintiff was very well known among Australians of Serbian, Croatian, Slovenian and Macedonian origin. As one witness put it, he is "well known in our Yugoslav community". His reputation was variously described as "a great reputation", "a clean reputation", "a very high reputation" and "fine".<sup>46</sup>

45 The plaintiff gave evidence of the devastation, hurt feelings and stress caused to him by the publication of the images matter and the web matter. I accept that these matters were significant. However, I also accept Google Inc's submissions as to the difficulty of disentangling the consequences of the publication of the images matter (being the only publication upon which the plaintiff was successful) from not only the publication of the web matter – but also the publications for which the plaintiff has received damages from Yahoo.<sup>47</sup> Additionally, it must be remembered that no damages are awardable in respect of the imputation found to have been conveyed by the images matter prior to 11 October 2009.

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<sup>45</sup> A further description of the plaintiff's background can be found in *Trkulja v Yahoo! Inc & Anor* [2012] VSC 88 [17]-[20], which description was supported by the evidence of the plaintiff given in that case – a transcript of which was tendered by the defendants in the present case (Exhibit 2).

<sup>46</sup> T 94.31-T 95.1, T 107.18-.23, T 113.23-.28 and T 162.5-.6.

<sup>47</sup> See *Trkulja v Yahoo! Inc & Anor* [2012] VSC 88.

46 The principles concerning the award of damages in defamation cases are conveniently summarised in the judgment of Gillard AJA in *Herald & Weekly Times Ltd v Popovic*.<sup>48</sup> It is not necessary to set them out in any detail here. Compensatory damages are awarded as a vindication of the plaintiff's reputation, reparation for the harm done to the plaintiff's reputation and consolation for the distress, upset and injury to the plaintiff's feelings occasioned by the publication.<sup>49</sup>

47 In this case the plaintiff also claimed aggravated damages. Aggravated damages are awarded if there is an increase in the hurt to the plaintiff's feelings because of the plaintiff's knowledge or perception of a defendant's misconduct – which, as a result, increases the damages. The misconduct in this case was alleged to be the failure to exclude the relevant URL from Google's search engines after the letter of 22 September 2009. However, in my view the failure by Google Inc to block the relevant URL did not involve any relevant misconduct which might found an award of aggravated damages. As I have said above, the letter was not as felicitously expressed as it might have been. Further, Google Inc had legitimate and arguable points of law which it wanted to contend precluded it being held to be liable for either the images matter or the web matter. There was no relevant impropriety in seeking to maintain this position. Accordingly, the plaintiff's claim falls to be assessed as one for compensatory damages without any element of aggravation.

48 In addition to the principles to which I have just referred, the assessment of damages in this case is governed by Division 3 of Part 4 of the *Defamation Act*. Specifically so far as this case is concerned:

- (a) There must be an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded (s 34).
- (b) The maximum amount of damages for non-economic loss (non-economic loss being the only claim in this case) is \$339,000 (s 35(1)).<sup>50</sup>

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<sup>48</sup> (2003) 9 VR 1, 76 [377] and following.

<sup>49</sup> See also *Cassell & Co Ltd v Broome* [1972] AC 1027, 1070-1071.

<sup>50</sup> See the Victorian Government Gazette, No G 25, 21 June 2012.



- (c) The state of mind of the defendant is not relevant except to the extent that its malice or other state of mind affects the harm sustained by the plaintiff (s 36).
- (d) The fact that the plaintiff has already recovered damages for defamation in relation to another publication of matter having the same meaning or effect as the matter complained of is admissible in mitigation of damages for the publication of the matter complained of (s 38(1)(c)).<sup>51</sup>

49 In *Trkulja v Yahoo! Inc & Anor*,<sup>52</sup> the plaintiff was awarded damages in the sum of \$225,000 in respect of the publication of the articles through the “Yahoo! 7” search service. In that case the jury accepted that Yahoo’s publication<sup>53</sup> conveyed not only the imputation the jury in the present case found was conveyed – but also the imputation that “the plaintiff is such a significant figure in the Melbourne criminal underworld that events involving him are recorded on a website that chronicles crime in Melbourne”.

50 Of course, in assessing damages in the *Yahoo* case, Kaye J was required to (and did) take into account in mitigation of damages the fact that the plaintiff had brought the present proceeding against Google Australia and Google Inc (see 38(1)(d) of the *Defamation Act*).

51 In making submissions about the amount of damages that should be awarded to the plaintiff in the present case, senior counsel for Google Inc identified the following differences between the Yahoo matter and the present proceeding:

- (a) Damages in the Yahoo matter were awarded on the basis that that publication was first and struck the first substantial blow.<sup>54</sup>
- (b) Google Inc is only liable in respect of the less serious of the two imputations that were found against the defendants in the Yahoo matter.

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<sup>51</sup> See further, s 38(1)(e) of the *Defamation Act*.

<sup>52</sup> [2012] VSC 88.

<sup>53</sup> For the sake of completeness I should say that the issue of publication was conceded by the defendants in the Yahoo proceeding – notwithstanding that the material published in that case was also the result of the use of an “automated” search engine service.

<sup>54</sup> *Trkulja v Yahoo! Inc* [2012] VSC 88 [40].

(c) The extent of publication and the grapevine effect was probably greater in the Yahoo matter.<sup>55</sup>

(d) The Yahoo matter was published for a significantly longer period of time than the period during which Google Inc has a liability for in the present case.

52 While all of these matters are relevant to the assessment of damages, they have particular relevance in respect of the issues of damage to reputation and hurt feelings and the like – rather than to the issue of vindication. However, the imputation found to have been conveyed by the jury in the present case is a very serious one. The plaintiff is entitled to an award of damages that vindicates him. Further, I do not accept the submission made by Google Inc that the imputation found by the jury in this case is substantially less serious than the second of the imputations found in the Yahoo matter. Both imputations are very serious (“so involved with crime in Melbourne that his rivals had hired a hit man to murder him”, compared to “was such a significant figure in the Melbourne criminal underworld that events involving him were recorded on a website that chronicled crime in Melbourne”). Additionally, the fact that the jury in the present case did not find the second imputation does not say anything about relative seriousness of each imputation. The failure of the jury to find the second imputation says only that the jury was not persuaded that the second imputation was conveyed.

53 In my view, whatever view one takes of the actual damage to reputation and hurt feelings, the amount of the damages to be awarded must be sufficient (in the words of some of the authorities) to “nail the lie” in respect of the imputation upon which the plaintiff has succeeded.<sup>56</sup>

54 While there was debate before me as to the relative popularity of Google and Yahoo search engines, neither side made any attempt to lead evidence of the precise number of publications brought about by a Yahoo search engine as compared to a Google search engine. That said, as was noted by counsel for the plaintiff, in support

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<sup>55</sup> Ibid [37].

<sup>56</sup> See for example, *Hewitt v Pacific Magazines Pty Ltd* [2009] SASC 323 [11].

of a submission that I should find that there were more Google publications than Yahoo publications, while the word “Googling” has entered the vernacular, there is no corresponding word in respect of Yahoo’s products.

55 In the end, because I think this case is more about vindication and “nailing the lie”, it is not necessary to attempt to resolve this issue further. Taking into account all of the matters to which I have referred, in my view, the appropriate amount of damages in this case is \$200,000.

### **Conclusion**

56 There will be judgment for the plaintiff against the first defendant in the sum of \$200,000. I will hear the parties on any question of interest, costs and the appropriate form of orders.