



## How online defamation plays out in NZ: 2012 case supports Australian not UK conclusions

*This note follows up our related article, [Google court loss: Shake up for online defamation](#).<sup>1</sup> Earlier this year, an NZ court dealt with a similar claim against Google. Also contrary to the UK cases, this decision points in the direction of the Australian judgment, but notes the issue is yet to be fully resolved. The decision is being appealed and that may end up being an internationally important decision.*

*What is challenging for Google and others in NZ is the more restricted availability of the innocent dissemination defence.*

*This NZ case further confirms the exposure for other online services and steps to be taken to reduce the risk.*

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In *A v Google New Zealand Ltd*,<sup>2</sup> an unnamed psychiatrist sued Google on the basis that a Google search of his name produced results that included reference to defamatory information about him, and linked to a US website that contained defamatory statements.

### ● **Wrong Google company sued, said the court**

The psychiatrist lost the case because the court said he sued the wrong Google company, namely Google New Zealand Ltd. That company did not have sufficient control and involvement in what the parent US company Google Inc, did as to the search functionality, for the NZ subsidiary to be implicated in the alleged defamation.

The psychiatrist is appealing the decision that the wrong company was sued. If he doesn't win on this point, the solution in other cases is to sue only Google Inc, or add Google Inc. Both Google Australia and Google Inc were defendants in the Australian case, and damages were awarded against Google Inc not Google Australia.

The psychiatrist could choose to start over if he loses his appeal, this time naming Google Inc as defendant.<sup>3</sup>

### ● **Could Google Inc be liable if named in the case?**

The judge also touched on, without finally deciding, whether, if the right Google company was joined to the case:

- it could be liable in defamation as a "publisher"; and
- if yes, whether the defence of innocent dissemination is available.

The case was at an early procedural point<sup>4</sup> and the issue was whether it should go forward to trial on the assumption that the statements were defamatory.

The parties had raised a number of the issues under consideration in the Australian case such as:

- the automatic and neutral nature of the search engine (Google);
- the fact that it is not automatic and neutral as Google configures the search functionality: there is what was called the "stamp of human intervention" in the algorithm (the psychiatrist);

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- the chilling effect if the search results could be defamatory (Google);
- that is answered by the innocent dissemination defence available to Google (the psychiatrist).

As the claim involved complex and novel legal and factual issues, the judge would have allowed the case to go to trial,<sup>5</sup> on the publisher and innocent dissemination issues.

In comments that are non-binding, the judge however did indicate that the outcome might be similar to what happened in the Australian case: in relation to search results, Google could be a publisher – and therefore liable for defamation – but it could rely upon the innocent dissemination defence. He said:<sup>6</sup>

[72] Whilst the right to freedom of expression as protected by the [New Zealand Bill of Rights Act] ought to be considered in the development of the law in this area, it may not be an unreasonable limit upon that right to hold that a search engine is a publisher of both specific URLs and words that appear in snippets (which search engine providers have chosen to include and which elevate hyperlinks beyond the status of mere footnotes).

[73] This could mean that search engine providers would be responsible where an offending hyperlink is deactivated but its snippet continues to appear, thus addressing one of the plaintiff's concerns. Such an approach is consistent with the broad common law definition of "publication" as being the communication of a statement to just one other person. To limit this definition to exclude the repetition of information where that repetition occurred without human input could unnecessarily confuse this area

of the law. It may therefore be more appropriate to hold that a search engine is a publisher but with access to the defence of innocent dissemination. The possibility of a defence in innocent dissemination where the defendant has not had notice of the defamatory material may be sufficient recognition of the fact that a search engine is a neutral index. However, these decisions need to be made with all available facts before the Court and with the benefit of legal argument more specifically focussed on the points than was possible on this application.

This goes against the trend of the other decisions from the UK in a pre-trial context, as noted in our related article. It indicates, but in a non-binding way, that the Australian case may be followed instead. The issues are to be resolved in a later case.

● **Google may not be able to use the innocent dissemination defence**

As noted in our related article, the innocent dissemination defences differ from country to country. Google may have a real problem in New Zealand given its narrow compass. To rely on the defence,<sup>7</sup> Google must show it is either a "distributor" or a "processor"<sup>8</sup> as defined in the Defamation Act.

*"processor means a person who prints or reproduces, or plays a role in printing or reproducing, any matter"*

*"distributor includes—*

*(a) a bookseller; and*

*(b) a librarian"*

The first challenge is that these are hard copy-based definitions, although the courts can interpret them to bring into an online context. But only so far.

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As to whether Google is a “processor”, if the Australian decision is applied, the search results may not merely be printing or reproducing. First, the results are different from the original. Second, they are manipulated via the Google algorithm. Google is not like someone who just prints or the online equivalent of printing (such as sending out copies of an email to multiple parties). Maybe “processor” extends to a pure ISP, but not to a search engine taking additional steps.<sup>9</sup>

Is Google a “distributor”? Again the definition, assuming it can extend to cover online equivalents of bookstores and libraries, may not extend to situations where the defendant alters the original version.

● **Appeal by the psychiatrist**

If he wins his appeal on the question of the correct defendant, the Court of Appeal would deal with the publication issue (and the innocent dissemination issue if he wins on publication). A decision on those issues may be important and followed in other countries given the scarcity of appellate decisions and the divergence between UK and Australasia.

One aspect though may mean that the appeal decision has less impact: this is a summary judgment scenario and one option is that the appeal court says that summary judgment is not appropriate and should go to trial. If that happens, the Court of Appeal may choose not to go into detail on the issues.

● **Implications for online providers**

In NZ, online providers should be even more careful, as they could be liable for defamation and not have the important innocent dissemination defence. See our related article *Google court loss: Shake up for online defamation*<sup>10</sup> for more detail as to solutions.

1. <http://wigleylaw.com/assets/Uploads/Google-court-loss-Shake-up-for-online-defamation.pdf>
2. [2012] NZHC 2352.
3. There are pragmatic and cost challenges in this as the Judge summarises at Para 47, especially as to injunctive relief.
4. Both parties had applied for summary judgment, and Google also applied to strike out. As Google won as the wrong defendant was sued, it got summary judgment.
5. So he would not have granted summary judgment to the defendant on these points, and he would not have struck out the claim.
6. At Para 72 and 73 with footnote omitted.
7. At s21 Defamation Act 1992.
8. Or employees and agents of distributors and processors.
9. See Burrows and Cheer, *Media Law in New Zealand* at Page 62 where this issue is discussed.
10. <http://wigleylaw.com/assets/Uploads/Google-court-loss-Shake-up-for-online-defamation.pdf>

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