

**ORDER PROHIBITING PUBLICATION OF NAME OR IDENTIFYING
PARTICULARS OF PLAINTIFF**

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV: 2011-404-002780
[2012] NZHC 2352**

BETWEEN

A
Plaintiff

AND

GOOGLE NEW ZEALAND LTD
Defendant

Hearing: 5 March 2012

Counsel: M F McClelland for plaintiff
T J Walker/S L Jackson for defendant

Judgment: 12 September 2012

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 12 September 2012 at 5.00 pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors:

P Ryder-Lewis, Bartlett Law, PO Box 1852, Wellington for plaintiff
T J Walker, Simpson Grierson, Private Bag 92518, Auckland for defendant

Counsel:

M F McClelland, PO Box 10-242, Wellington for plaintiff

[1] This proceeding raises, for the first time in New Zealand, the question of responsibility of a search engine service provider for the content of information on third party websites accessed from search results.

[2] The plaintiff is a medical practitioner who practices as a psychiatrist. Defamatory statements about him have been posted on a website in the United States hosted by a third party to which the public is directed when his name is searched on the internet, using what is known as a search engine accessed through the internet domain name www.google.co.nz. The search results include reference to the defamatory material, and link to the third party website.

[3] The plaintiff says that the defendant has defamed him by publishing, in the search results, information purportedly about him taken from the offending websites and what is known as a hyperlink to the websites with the defamatory material. He seeks summary judgment against the defendant on the basis that the information is clearly defamatory and that the defendant is aware that the information and hyperlinks are being produced in the search results. The defendant appears to have removed reference to them in search results on occasion, but has failed to prevent the information and hyperlinks from being re-published.

[4] The defendant opposes the plaintiff's application, and cross applies for summary judgment itself. It says that the plaintiff has the wrong defendant, in that its ultimate parent company, Google Inc (incorporated and resident in the United States of America), owns and operates the search engine. Secondly, it says that publication by a search engine provider of results of an inquiry (in which information is generated automatically from the billions of websites on the internet) does not amount to publication.

[5] I apologise to counsel for the delay in delivery of this judgment, which is due to a combination of volume of work and the wish to give the matter particularly careful consideration in light of the significant for both parties.

[6] A suppression order is in place in respect of the name of the plaintiff. I have avoided naming the offending websites to avoid the plaintiff being identified through them.

Background

[7] The defendant is an indirect subsidiary of Google Inc, a company incorporated in the State of Delaware in the United States of America which has its primary place of business in California. Google Inc owns and operates what is known as the Google search engine, which allows the public to inquire about information on any topic, identifies websites containing information on that topic, retrieves information from that website, and reproduces extracts of that information in its search results.

[8] The Google search engine can be accessed through the New Zealand internet domain name www.google.co.nz. The domain name was registered with New Zealand Domain Name Registry Ltd on 17 February 1999, by Google Inc.

[9] The defendant was incorporated on 31 March 2006. Its two directors are resident in the United States. It has 100 shares, all owned by Google International LLC, based in California. Google Inc is the ultimate parent company.

[10] When the plaintiff's name is typed into the search inquiry box of the Google search engine, accessed through www.google.co.nz, the search results displayed on the searcher's computer screen include information extracted from the website containing the defamatory statements (referred to as "snippets" of information), and a hyperlink which will take the reader directly to the third party website. On occasions, the results have also included a hyperlink to another third party website linked to that first one.

[11] The plaintiff has asked the defendant on many occasions to block access to the offending websites. The requests have been relayed to the legal team for Google Inc in the United States. It says that it has blocked access to specific web pages, as and when the plaintiff has referred them to the pages and has correctly and

sufficiently identified them. However, it says that the web pages will not have been removed if they were not correctly identified or if they did not contain the offending content. It further says that it cannot block access to the third party web pages generally, or guarantee that information on the web page in question will not continue to appear (or will re-appear) as the information may already be on another web page or the third party may move it to another web page.

The applications and issues arising

[12] The plaintiff seeks summary judgment under each of its seven causes of action, contending that the defendant published the defamatory statements about him from February 2010 onwards. The other aspects of the causes of action, namely that the statements are untrue, have affected the plaintiff's reputation and have, or are likely to cause, pecuniary loss, have not been contested on this application. The plaintiff alleges that the defendant has acted in flagrant disregard of his rights by either removing the defamatory material then subsequently republishing it, or failing to remove it.

[13] The defendant opposes the plaintiff's application and seeks summary judgment itself (or a strikeout of the plaintiff's claim) on the same grounds. It opposes the plaintiff's application on the grounds that:

- (a) The defendant is the wrong party as:
 - (i) It does not own or control the domain name www.google.co.nz;
 - (ii) It does not operate, control or provide the search services accessible at www.google.co.nz ("Google Search Service") or any other search engine;
 - (iii) It does not have the ability to operate, control or direct the functioning of the Google Search Service or to control or

direct action in respect of blocking of URLs from the Google Search Service results pages;

(iv) It does not have access to the technology used to operate, control or provide the Google Search Service; and

(v) It therefore has no responsibility for the Google Search Service or the results of the Google Search Service or the words complained of by the plaintiff.

(b) A provider of a search engine is not responsible under the law of defamation for the words appearing in automated search results returned in response to user queries or searches.¹

(c) Alternatively, if a provider of a search engine is responsible at law for the words appearing in search results returned in response to user queries, the defendant relies on the defence of innocent dissemination in s 21 of the Defamation Act 1992 and/or the defence of neutral reportage.

[14] In its application for summary judgment, the defendant says that none of the plaintiff's claims can succeed, and the statement of claim does not disclose a reasonably arguable cause of action against the defendant as it is not the publisher of the defamatory statements for the same reasons given in its notice of opposition (save for the contention that it does not have access to the technology used to operate, control or provide the Google Search Service which it does not advance in support of its summary judgment application given that the plaintiff disputes that matter).

[15] The plaintiff opposes the defendant's application on the grounds that it is responsible for the published words (as a subsidiary of the owner and operator of the search service, Google Inc), and that it has assumed responsibility for the published

¹ *Metropolitan International Schools Ltd v Designtecnica Corp* [2009] EWHC 1765, [2011] 1 WLR 1743 (QBD).

words and is estopped by its conduct from denying that responsibility. He also opposes on the grounds that a search engine provider is responsible for words returned as search results where those words are published and there is no defence of innocent dissemination.

[16] The issues that arise on the applications therefore are, whether the claim has been brought against the correct defendant and, if so, whether the operator of an internet search engine is a publisher of the results of a search for the purposes of the law of defamation. If it is, the issue of whether there is an available defence under s 21 of the Defamation Act 1992 or under the principle of neutral reportage also arises.

Legal principles for summary judgment and strike out

[17] The legal principles that the Court applies when determining applications for summary judgment are sufficiently well-established² and sufficiently well-known that they do not need repeating here in any detail. However, the following principles have particular relevance to the present applications:

- (a) The party seeking summary judgment has to satisfy the Court of the necessary facts and legal bases to establish its claim, and the Court must be left without any real doubt or uncertainty as to the existence of an arguable defence;
- (b) The onus to show that there is no defence to a claim has been described by the Court of Appeal as the outstanding feature of r 12.2(1) because “it requires the plaintiff to establish a negative in circumstances in which, in general, the existence and nature of any defence is within the knowledge of the defendant”;³

² For a plaintiff’s application they are summarised in the decision of the Court of Appeal in *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26]. For a defendant’s application they are to be found in the decision of the Court of Appeal in *Westpac Banking Corp v M M Kembla NZ Ltd* [2001] 2 NZLR 298 (CA). One of the important differences between the two applications, that a plaintiff can obtain summary judgment on a single cause of action even where several are pleaded, whereas a defendant must show that none of the plaintiff’s causes of action can succeed, does not apply in this case.

³ *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 3.

- (c) The Court will decide questions of law where appropriate;
- (d) Summary judgment will generally be inappropriate where material facts are in dispute and need to be ascertained by the Court, and the ultimate determination depends on a judgement which can only be properly arrived at after full hearing of the evidence.⁴

[18] The Court of Appeal has stated in relation to summary judgment applications that:⁵

Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear, novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.

(citations omitted)

Where a developing point of law is involved summary judgment may also be inappropriate because the procedure should not be permitted to “stultify natural development of the law which otherwise would occur through normal trial process”.⁶

[19] The application for strikeout raises slightly different considerations. The differences are helpfully summarised in *McGechan on Procedure*.⁷ The principal difference is that in a strikeout application, the Court usually assumes that the facts pleaded are true (unless they are clearly speculative and without foundation). For strikeout to succeed, the causes of action must be so untenable they cannot possibly succeed, and the jurisdiction is to be exercised only in clear cases where the Court is satisfied it has the requisite material.⁸

⁴ *Westpac Banking Corp v M M Kembla (NZ) Ltd*, above n 2, at [62].

⁵ *Westpac Banking Corp v M M Kembla*, above n 2, at [62].

⁶ *Bank of New Zealand v Maas-Geesteranus* (1991) 4 PRNZ 689 (CA) per McGechan J.

⁷ *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR 12.2.07(1)].

⁸ *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 at 267. This need for caution was stressed in the minority judgment of the Supreme Court in *Couch v Attorney-General* [2008] 3 NZLR 725 at [33].

The internet and search engines

[20] Before going on to address the issues, it will be helpful to provide some context for them by explaining some background of the internet and search engine. This context has largely been provided by the Group Product Manager of Google Inc, Mr Daniel Dulitz, in an affidavit filed in support of the defendant's opposition and its own application.⁹ I do not understand the following to be in dispute.

[21] The internet is a global network of connected computers. This network (known as the World Wide Web, or simply the web) is believed to comprise tens of billions of publicly indexable web pages, that are hosted on individual computers or servers connected to the internet. Each web page has a unique "address" by which it is found. This address comprises of a specific string of symbols, and is known as its URL (Uniform Resource Locator). A user can reach a web page either by typing the URL into the browser's address bar, or by clicking on a hyperlink from another web page.

[22] A website will usually comprise a number of web pages, each of which has a unique URL.

[23] The content on the web changes constantly. There is no central control or cataloguing system, but the material can be located by use of search engines. A search engine is an automated information retrieval system designed to navigate the information on the Web by use of keywords. The search engines use pre-programmed algorithms to "crawl" through the contents of billions of web pages which it indexes in a database of web pages.

[24] When a search is conducted, the engine runs its automated search process on the keywords according to the pre-programmed algorithms, and produces a list of results. The results are in the form of a list of hyperlinks to web pages in order assessed by relevance. Under each link is a small excerpt or "snippet" from the web page that demonstrates that page's relevance to the search terms.

⁹ Affidavit of Daniel Wesley Dulitz sworn on 28 July 2011 at paragraphs 4 to 9.

[25] A search engine can be programmed to block a specific web page. However, if that occurs, the web page is still accessible on the internet. In addition, there is nothing to prevent the same content appearing at another URL. Search engines have no control over web page creators, who determine their content and can move that content from one web page to another. For that reason, blocking a link will not necessarily result in effective suppression of any offending material.

Is Google NZ Ltd the correct defendant?

[26] It is apparent from the defendant's evidence that Google Inc owns and operates the Google search engine, and the New Zealand domain name google.co.nz. The defendant says that it carries on business as:

... a service, assistance and advice provider in connection with marketing and sales support for web search services and advertising services.

Plaintiff's submissions

[27] Notwithstanding the ultimate ownership of the Google search engine, the plaintiff argues that the defendant is "sufficiently connected" to the publication of the defamatory material to be held liable as a publisher. He relies for this submission of the decision of this Court in *Sadiq v Baycorp (NZ) Ltd*.¹⁰

[28] In *Sadiq* the plaintiff issued defamation and negligence proceedings against two parties, arising out of allegedly defamatory statements published on a credit reporting website. The issue for determination was whether the first defendant, Baycorp (NZ) Ltd (Baycorp), published that material. The plaintiff said that another party, Baycorp Advantage Collection Services (New Zealand) Ltd (BACS) posted the defamatory material on the website. The plaintiff argued that Baycorp had the means to, and should have, removed the material from the website after it purchased BACS. Baycorp accepted that it could supply information to the website operator that would have resulted in removal of the defamatory material, if the operator had agreed to use it to amend the information on the website. The Court declined to

¹⁰ *Sadiq v Baycorp (NZ) Ltd* HC Auckland CIV-2007-404-6421, 31 March 2008.

enter summary judgment for Baycorp, holding that it was arguable that Baycorp had determined whether such defamatory statements remained on the website or were removed. The Court applied the following test for determining liability:

- (a) Did Baycorp have knowledge of the defamatory statement?
- (b) Did Baycorp have the ability to end the publication of the defamatory statement?
- (c) Was Baycorp unwilling to end that publication thus allying itself with the defamatory statement?

[29] Counsel for the plaintiff submitted that the defendant had sufficient control over www.google.co.nz to satisfy the *Sadiq* test, on the basis of a “direct correlation” between the plaintiff’s complaints to the defendant and the removal of defamatory material. Counsel referred to the evidence of the plaintiff that:

- (a) The defendant sent the original complaint to Google Australia Pty Ltd’s (Google Australia’s) legal team, which in turn sent it to “a dedicated team” at Google Inc (the Google Team), resulting in advice from the Google Team that the offending web pages had been removed and (eventually) removal of some of the defamatory material;
- (b) Subsequent complaints sent by the plaintiff or his solicitor directly to the Google Team, about further publications, were either unfruitful (in terms of removing defamatory material) or elicited no response;
- (c) Further requests sent to the defendant resulted in responses from the Google Team and removal of information from web pages and links to offending websites; and
- (d) Since this proceeding was issued against the defendant, the wider Google Group (primarily through the Google Team) appear to have made substantially greater efforts to remove the defamatory material.

[30] On the strength of the above, counsel for the plaintiff submitted that the Court should draw an inference that the defendant has been taking steps to remove the defamatory material, and can therefore be said to have the ability to end the publication.

[31] Counsel for the plaintiff also submitted that if the Court was not prepared to grant summary judgment on this basis, the plaintiff should be entitled to have discovery on the question as to whether the defendant, in fact, has the capacity to influence the content appearing on www.google.co.nz.

The defendant's submissions

[32] The defendant says that it has no responsibility for the results brought up by a search enquiry on www.google.co.nz. It relies on the evidence that it does not own, operate, control, provide or have any responsibility for the Google search service. It refers to the evidence that it does not own the New Zealand domain name, and that it is simply used to channel New Zealand users to a website specifically tailored to them.

[33] Counsel for the defendant submitted that its only role had been to forward the plaintiff's requests to the legal team at Google Australia, who in turn had forwarded them to Google Inc. Counsel submitted that this act of forwarding correspondence does not establish a sufficient connection to the removal of the information from the search results, and that the evidence was clear that the defendant had no ability to block URLs from being brought up in those results. As a consequence, counsel said that it would be impossible for the defendant to comply with an order restraining it from publishing defamatory material about the plaintiff or providing a link to that material, which is part of the relief being sought by the plaintiff. Counsel also submitted that the plaintiff's contention that it had sufficient control over the search engine was speculative, and based only upon "weak inference".¹¹

Analysis

¹¹ Relying on *Duffy v Google Inc* [2011] SADC 178.

[34] The defendant has not disputed the test for determining who was a publisher of defamatory material as set out in *Sadiq*. The issue is whether the plaintiff will be able to satisfy that test. If the facts are clear and the plaintiff's claim may be untenable as a matter of law, in which case the Court of Appeal has said that the preferable course is to strike out the claim as distinct from giving summary judgment to the defendant.¹² In either case, however, the defendant needs to show a clear answer which cannot be contradicted, and a complete defence to the plaintiff's claim, in recognition that a plaintiff's fundamental right to his or her "day in Court" is not to be denied lightly.¹³ In this case the Court needs to be clear that the claim is against the wrong party.

[35] The difficulty that the defendant faces in this case is that whether or not the defendant has influence over Google search results, sufficient to satisfy the *Sadiq* test, is a question of fact, and judgment will not be given where there are disputes of material facts. The exception is if the dispute does not pass the threshold of "sufficient prima facie plausibility", and is "inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself".¹⁴ The onus is on the defendant to provide enough evidence to satisfy the Court that the plaintiff's claim cannot succeed.¹⁵

[36] Counsel for the defendant referred me to a decision of the District Court of South Australia, *Duffy v Google Inc*,¹⁶ as supporting her submission that the plaintiff's case of a "sufficient connection" is speculative and cannot stand in the face of the direct evidence.

[37] *Duffy v Google Inc* involved a similar situation to the present case, although it came before the Court on an application by the plaintiff for interlocutory injunctive relief. The plaintiff in that case was a qualified researcher in the fields of clinical medicine and public health. Google searches of her name through

¹² *Bernard v Space 2000 Ltd* (2001) 15 PRNZ 338 (CA).

¹³ At [22].

¹⁴ *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341 per Lord Diplock. These statements were endorsed in *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12 (HC) and *Pemberton v Chappell* [1987] 1 NZLR 1 at 4 (CA).

¹⁵ *Westpac Banking Corp v M N Kembla*, above n 2, at [64].

¹⁶ *Duffy v Google Inc*, above n 8.

www.google.com.au produced search results of URL links to web pages, and snippets from those web pages containing material about her of an alleged defamatory nature. It was accepted that the material attacked the plaintiff's personal and professional probity, and suggested that she was mentally unstable.

[38] The plaintiff sought an interlocutory injunction against both Google Australia Pty Ltd and Google Inc. The application for injunctive relief against Google Australia Pty Ltd was dismissed because the Court found that there was no evidence that Google Australia had the ability to remove URL links and snippets from the Google search results. The plaintiff had relied on the fact that six of the URL links that were the subject of her claim were removed from the domain www.google.com.au after her proceeding was served on Google Australia, but before it was served on Google Inc. A subsequent search on that domain name using her name produced a list of URL links, at the bottom of which appeared the words:

In response to a legal request to Google, we have removed 6 result(s) from this page.

[39] The Court recorded the plaintiff's argument that it could be inferred from removal of the URL links prior to Google Inc being served that Google Australia had some control over their removal. The Court described that argument as "entirely speculative", and stated:¹⁷

Google Inc may have decided, as a result of earlier requests from the plaintiff, to remove the URL links without any input from Google Australia. It may be the case that Google Australia contacted Google Inc and requested the removal. Even then it does not follow that it has the legal capability to conduct such removals whether acting alone or as an accessory to Google Inc. There are, of course, other possible explanations for the removal of the [URLs] upon which the plaintiff relies.

A court will not make an injunctive order which cannot be complied with. There is no evidence before me that supports the plaintiff's assertion that Google Australia exercises some relevant legal control over Google Search and would, therefore, be able to meet the terms of the proposed orders. It is not sufficient for the plaintiff merely to assert in her statement of claim that Google Australia in some way shares control of Google search with Google Inc. The assertion has been contradicted by the contents of Mr Stewart's sworn affidavit and documents exhibited to it.

¹⁷ At [25]–[26].

(citations omitted)

[40] As with *Duffy v Google Inc*, I consider that removal of references to offending web pages (whether snippets or links) following the forwarding of correspondence by the defendant to Google Inc does not clearly point to Google NZ having a legal ability to remove URLs from searches through the New Zealand domain name. There is a distinction between the present case and *Duffy v Google Inc*, however, and the nature of the applications. In *Duffy v Google Inc* the plaintiff was required to show a prima facie case, and therefore had to show some relevant legal control over the Google search results. In the present case, the onus is on the defendant to show that there is no such factual basis. The decision in *Duffy* is understandable given that onus.

[41] In the present case, the group product manager for Google Inc, Mr Dulitz, has given the following evidence as to the operation and control of the search engine:

10. The search engine accessible at www.google.co.nz ("*Google Search Service*") is exclusively provided by, operated by, and controlled by Google Inc.

...

12. The domain www.google.co.nz is intended by Google Inc for internet users located in New Zealand and Google Inc owns and controls that domain. The ownership of domains can be publicly searched via WHOIS domain name search service accessible at the URL address whois.domaintools.com. I attach a copy of the WHOIS search report for the domain www.google.co.nz marked "B".

13. Google New Zealand Limited is not authorised to and has no ability to operate, control, or direct the operation of the *Google Search Service*.

14. Google New Zealand Limited does not have any access to the technology used to operate, control or provide the *Google Search Service*.

15. Google New Zealand Limited does not have any ability to control or direct action in respect of blocking of URLs from the *Google Search Service* results page.

16. Google New Zealand Limited has no responsibility whatsoever for the search results of which the plaintiff complains for the reasons explained above.

[42] The enterprise manager of the defendant, Mr Byron, has sworn an affidavit confirming Mr Dulitz' evidence, from the defendant's perspective.

[43] There is also consistent contemporaneous communication from the defendant and from Google Australia to the plaintiff stating that Google Inc owned, operated and controlled the Google search engine and Google search results.

[44] The defendant has the onus of showing that the plaintiff's claim cannot succeed. The evidence of Mr Dulitz and Mr Byron, together with the contemporaneous correspondence in response to the plaintiff's complaints is sufficient evidence that the operation and control of the Google search engine resides with Google Inc and not the defendant, to justify entry of judgment for the defendant, in the absence of any evidence by the plaintiff to the contrary. The plaintiff's evidence, in essence, is that requests made to the defendant were more likely to elicit a response and result in removal of material than communications direct to Google Inc's legal team. Any ability of the defendant to effect or influence removal is, necessarily, a matter of inference. In *Duffy v Google Inc* similar references were described as "weak" and "entirely speculative".

[45] In *Sadiq* the Court said that the connection needed to be liable as a publisher was that the defendant "could have prevented the continued publication of the material"¹⁸ or had "the ability to bring about [the defamatory statement's] cessation".¹⁹ Merely forwarding a request for removal to another related entity cannot be sufficient to meet this test. This must be the case even if the complaints forwarded by the defendant were more likely to result in removal of the material because Google Inc (as the alleged publisher) takes the defendant's request more seriously than the plaintiffs. Mere influence, without more, cannot be sufficient to satisfy the *Sadiq* test, and there is nothing in the other evidence to suggest anything more than that.

[46] From the time of introduction of the power to award summary judgment, the Court of Appeal has said that a robust approach should be taken to summary judgment applications.²⁰ I am satisfied by the evidence before the Court that the

¹⁸ At [49].

¹⁹ At [52].

²⁰ *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

defendant does not have the requisite control of or responsibility over Google search results, and accordingly, that the plaintiff does not have a reasonably arguable case.

[47] In the absence of any evidence pointing to such a possibility, I see no basis to exercise the Court's residual discretion not to enter summary judgment so as to allow the plaintiff to obtain discovery. In saying that, one can have sympathy with the plaintiff's position. The creator of the main website carrying the defamatory material appears to be based in the United States, and has a policy of not removing any material upon request. It would be a difficult and expensive exercise to take proceedings against that party to try to compel removal. The defamatory material has been posted on that website by an anonymous person, apparently resident here in New Zealand. It is likely to be impossible to identify that person. Unfortunately, that is an aspect of the internet. However, I take into account that Google Inc has informed the plaintiff of steps that he can take to request removal of identified URLs on an ongoing basis and that it will respond to those requests.

Is a search engine a publisher for defamation purposes?

[48] Although my finding that the plaintiff cannot succeed against the defendant determines both applications, I will turn now to address the second issue in case I am later found to be wrong on the first issue. The essence of the second issue is that even if it could be argued that the defendant is sufficiently connected to the search results to be considered a publisher of them, the law does not impose liability on search engine providers because the results are generated by an automated system, without judgement as to the content of the information that is generated. I will address first the opposing submissions.

The defendant's submissions

[49] In its opposition to the plaintiff's application for summary judgment and in support of its own strike out application, the defendant contends that the development of the law in this area ought to be consistent with the right to freedom of expression as affirmed by s 14 of the New Zealand Bill of Rights Act 1990 (NZBORA). The defendant maintains that it would be an unreasonable limit upon

that right to hold that the automatic generation of search results amounts to publication. Search engine operators are, according to the defendant, an invaluable gateway to the internet, performing a vital role in the dissemination of information. Liability as a publisher would have a “chilling” effect and would thus adversely affect users’ access to information.

[50] Counsel for the defendant submitted that this concern for the free-flow of information has lead many courts in common law jurisdictions to hold that search engine operators are not publishers, and referred to some civil jurisdictions that have explicitly granted search engines immunity from allegations of defamation, under statutory instruments.²¹ She mentioned the United Kingdom as one of the common law jurisdictions, where the leading case, *Metropolitan International Schools Ltd v Designtecnica Corp*, held that Google Inc was not a publisher of the words in question, whether before or after notification of the existence of the offending words.

[51] The decision in *Metropolitan* was based upon the premise that a passive internet intermediary cannot be a publisher at common law. A search engine, unlike an internet service provider (ISP), does not store or host the relevant information; it only automatically generates search results. Such neutral generators have no control over the formulation of search terms, the resulting snippet that appears on the user’s screen, or the words that appear on the tens of billions of web pages in existence. Therefore, search engines do not have the necessary mental element required to fix a legal person with responsibility for publication. The Court also found that:

- (a) while efforts are being made to remove a link to a web page, it cannot be said that Google Inc has acquiesced to publication of that link; and
- (b) it would not be feasible for the search engine operator to comply with an order intending to prevent the offending words appearing in a snippet due to the lack of control over search terms and the content of web pages.

²¹ European States protect search engines in implementation of Directive 2000/31/EC on electronic commerce. In the United States, broad immunity is provided to search engines as “neutral” tools, as described by *Fair Housing Council of San Fernando Valley v Roommates.com, LLC* 521 F 3d 1157 (9th Cir 2008) when applying the Federal Communications Decency Act, 47 USC §230.

[52] *Metropolitan* was approved in *Budu v British Broadcasting Corp.*²² The liability of search engines was not directly at issue in *Budu*. In that case, to circumvent the issue of the search engine's liability, the claimant successfully asserted that the British Broadcasting Corp (BBC), as the publisher of the original web page, was liable for the snippet returned in those search results. Sharp J left open the possibility of liability on the part of the search engine where search results continued to be displayed after notification of a specific URL from which the words complained of originated.²³ In relation to snippets, Sharp J said:²⁴

It might also be thought that those who use Google search engines are well aware that such a snippet is merely a fragment of a larger whole (the underlying publication); by analogy, a tiny extract torn at random from a page to which no human publisher has attached any particular significance.

[53] Counsel pointed to the decision of the Supreme Court of Canada in *Crookes v Newton*²⁵ where the importance of the free flow of information was recognised. That case held that hyperlinking to a defamatory website did not presumptively amount to publication. Rather, a hyperlink was considered akin to a footnote, communicating that something exists without communicating its content.

[54] Counsel for the defendant sought to distinguish unfavourable case law. She submitted that:

- (a) The English decision in *Davison v Habeeb*²⁶ is distinguishable on the basis that the court's finding that Google Inc was a publisher was limited to its blog services and that the services Google Inc provides as a blog host are distinct from its operation as a search engine.
- (b) The Canadian decision in *Nazerali v Mitchell*²⁷ (where the Court granted an interlocutory injunction against Google Inc and Google Canada Corporation to prevent search results linking to a particular

²² *Budu v British Broadcasting Corp* [2010] EWHC 616 (QB).

²³ At [74].

²⁴ At [75].

²⁵ *Crookes v Newton* 2011 SCC 47, [2011] 3 SCR 269.

²⁶ *Davison v Habeeb* [2011] EWHC 3031.

²⁷ *Nazerali v Mitchell* 2012 BCSC 205.

web page) was a without notice application to enjoin Google Inc and Google Canada Corporation; there was no appearance or argument on behalf of the defendants; the judgment was delivered orally and under urgency; and the court was reluctant to grant the relief sought.

(c) In the Australian decision *Dale v Veda Advantage Information Services and Solutions Ltd*,²⁸ the court held that the provider of a credit reporting database was a publisher because it had devised and promoted the way in which information was listed and invited subscribers to list and extract matters of the precise kind complained of. By contrast, a search engine is a neutral index to tens of billions of web pages; the queries that users enter are of no particular type; and the search engine simply displays results that point to where the information may be found.

(d) In the New Zealand decision of *International Telephone Link Pty Ltd v IDG Communications Ltd*²⁹ a reference to a URL in a print media article was held to be sufficient communication of the contents of the website to constitute publication. The defendant contends that the context of a print media article, which re-published and reinforced statements made on the website, distinguishes that case from the present one.

Innocent dissemination and neutral reportage

[55] In addition to her primary submission that search engine providers do not have liability in defamation as publishers for results of searches, counsel for the defendant submitted by way of further opposition to the plaintiff's application that the claim is not an appropriate subject for summary judgment because the defences of innocent dissemination and neutral reportage may be available.

²⁸ *Dale v Veda Advantage Information Services and Solutions Ltd* [2009] FCA 305.

²⁹ *International Telephone Link Pty Ltd v IDG Communications Ltd* HC Auckland CP 344/97, 20 February 1998.

[56] The defendant contends that it has a defence in innocent dissemination under s 21 of the Defamation Act 1992. Counsel referred to the view of the Law Commission that an ISP appears to fall within the definition of a “processor” and “distributor” under s 21, but recommended legislative amendment for clarity.³⁰ Counsel submitted that if an ISP does fall within the definition, it is arguable that a search engine does too. She also submitted that foreign case law indicates that an ISP is able to rely upon this defence unless it has notice of defamatory material and fails to take measures within its power to remove it.³¹ She argued that a search engine is in an analogous position, as a conduit for information, and ought also to be able to rely upon this defence.

[57] The defendant also contends that the availability of the neutral reportage defence renders summary judgment inappropriate. This defence is a form of common law qualified privilege which recognises the public interest in reporting the fact that an allegation has been made, without regard to its truth or accuracy and is available where the publisher does not subscribe to any belief in the truth of the statement and does not adopt or embellish the allegation made in the publication.³² Counsel submitted that there is no reason that this defence should be limited to traditional media and that there can be no more neutral a reporter than an automated search engine.

Plaintiff's submissions

[58] Counsel for the plaintiff, on the other hand, submitted that the approach taken by Eady J in *Metropolitan* is inappropriate and should not be followed. In support of this, he submitted that *Metropolitan* does not apply in New Zealand, that it was incorrectly decided and that it is distinguishable.

[59] The plaintiffs' claim that *Metropolitan* has no application in New Zealand relies upon the fact that *Metropolitan* extended a line of authority relating to ISP liability which has not been considered in New Zealand. Counsel referred to the

³⁰ Law Commission *Electronic Commerce Part Two* (NZLC R58, 1999).

³¹ *Godfrey v Demon Internet Ltd* [2001] QB 201 (QB); *Bunt v Tilley* [2007] 1 WLR 1243 (QB).

³² *Roberts v Gable* [2008] 2 WLR 129 (CA); *Grant v Torstar Corp* 2009 SCC 61, [2009] 3 SCR 640.

view of the Law Commission that ISPs might be liable once fixed with notice, but submitted that it would be premature to rule out liability for ISPs and search engines generally. Further, counsel argued that *Metropolitan* was decided within the context of European jurisprudence, where different considerations applied. He noted that Eady J felt his decision “is not likely to give rise to any inconsistency with the way that matters are approached in other European jurisdictions”.³³

[60] As to the submission that *Metropolitan* is incorrect, counsel said that *Metropolitan* inappropriately extended the reasoning in *Bunt v Tilley*, which was designed to cover pure conduits, such as ISPs, telephone carriers and the Royal Mail. He argued that search engines are distinguishable from ISPs because search engines *intend* to publish search results. Search engines have deliberately chosen to return “snippets” to make their product more amenable to users and thus increase revenues. Therefore, the appropriate course is to treat search engine operators as publishers, but with access to the innocent dissemination defence. He also highlighted that the Law Commission is not ready to reject liability for ISPs and, by analogy, search engines.

[61] Finally, in relation to *Metropolitan*, counsel submitted that it is distinguishable. *Metropolitan* concluded that Google Inc would not be liable, even when fixed with notice, for the publication of particular words. The plaintiff states that this is not an issue in the present case. The plaintiff does not ask that particular words be blocked but that snippets from a particular web page not be returned on a search results page. Essentially only one page must be blocked. This has been achieved with a web page of the lesser of the two offending websites, and the five other results that have been removed. Therefore, Eady J’s concerns do not apply here.

[62] Counsel invited the Court to find that New Zealand case law supports holding search engines liable. He relied on the decision in *Sadiq* where the Court recognised that a third party could be liable for defamatory comments where it knew about the existence of the defamatory statement, had the means to control that state of affairs

³³ At [114].

and was unwilling to end that state of affairs. He submitted that the defendant satisfies all elements of this test, which essentially treats a search engine as a publisher but with access to the innocent dissemination defence.

[63] Counsel also relied on *Davison* and *Nazerali*, and noted Sharpe J's comments in *Budu v British Broadcasting Corp*:³⁴

As was contemplated by Eady J in *Metropolitan* a company such as Google might at some point become liable, if the publication of a defamatory search result ... continued after notification of the specific URL from which the words complained of originated ...

Response on innocent dissemination and neutral reportage

[64] In response to the defendant's argument that it had arguable defences to the plaintiff's application in either innocent dissemination or neutral reportage, counsel submitted that neither provided an arguable defence.

[65] In relation to innocent dissemination counsel argued:

- (a) whether or not a search engine comes within the definition of processor or distributor as required by s 21 of the Defamation Act is a moot point, but the defence must fail due to the fact that the defendant and the Google Group were fixed with notice of the defamatory statement;
- (b) the defendant had notice of offending search results returned on 26 August 2010, 24 September 2010 and 1 December 2010;
- (c) the Google Group had notice of offending search results returned on 20 June 2010, 9 August 2010, 26 August 2010, 24 September 2010 and 1 December 2010;
- (d) the Google Group was generally aware of the offending website and that the Google search engine was producing defamatory snippets

³⁴ At [74].

from 16 March 2010, and it is evident that almost any snippet from the website concerning the plaintiff would be defamatory.

[66] In relation to neutral reportage, the plaintiff denies that that defence is available in New Zealand. Counsel said that the proper scope of this defence is open for debate in the United Kingdom;³⁵ for instance, there is conflicting authority as to whether the defence will only apply to reports of a dispute.³⁶ In any case, the New Zealand Court of Appeal was not convinced that the factors of the defence as stated in the United Kingdom ought to be adopted.³⁷ If those factors are not adopted, the plaintiff contends that it is difficult to see how a neutral reporting defence might be adopted.³⁸

Analysis

Summary judgment

[67] The defendant opposes the plaintiff's application and seeks summary judgment itself on the ground that it is not a publisher or, alternatively, if it is a publisher, opposes the plaintiff's application on the ground that it has defences to an action in defamation.

[68] Whether or not search engines are "publishers" is a novel issue in New Zealand. It will be apparent from the above that its resolution requires determination of complex issues of law in a proper factual context. There may be need to consider whether there is "a stamp of human intervention" (as counsel for the plaintiff puts it) in the way that the search engine programme is written, and to address public policy concerns as occurred in *Crookes v Newton*.³⁹

³⁵ Patrick Milmo and W V H Rogers *Gatley on Libel and Slander* (11th ed, Sweet and Maxwell, London, 2008) at [15.17].

³⁶ Compare *Roberts v Gable*, above n 26, at [53] and *Charman v Orion Publishing Group Ltd* [2007] EWCA CIV 972, [2008] 1 All ER 750 at [91].

³⁷ *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

³⁸ *Peters v Television New Zealand Ltd* HC Auckland CIV 2004-404-3311, 1 October 2009.

³⁹ In fn 25 above.

[69] Given the significance and complexity of the issue, as well as the fact that it concerns a developing area of the law, summary proceedings are inappropriate. It is thus unnecessary to consider the availability of defences in innocent dissemination and neutral reportage. I am satisfied that the application for summary judgment ought to be dismissed.

Strike out application

[70] The defendant has also applied to strike out the plaintiff's claim on the basis that it is not a publisher. Such applications are governed by r 15.1 of the High Court Rules. As previously mentioned, the established criteria for striking out were set out by the Court of Appeal in *Attorney-General v Prince and Gardner*,⁴⁰ and endorsed by the Supreme Court in *Couch v Attorney-General*.⁴¹

[71] In light of this being a novel point of law and the limited foreign authorities available, it is reasonably arguable that a search engine is a publisher in respect of specific URLs and words and that, given the lack of clarity surrounding the subject of the plaintiff's complaint, it is inappropriate to strike out that claim.

[72] Whilst the right to freedom of expression as protected by the NZBORA 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.⁴² To limit this definition to exclude the repetition of information where that repetition occurred without human input could

⁴⁰ *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.

⁴¹ *Couch v Attorney-General* [2008] 3 NZLR 725, [2008] NZSC 45 at [33].

⁴² *Collerton v Maclean* [1962] NZLR 1045.

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.

[74] The plaintiff's concern that removal of specific web pages and deactivation of the hyperlink appears to be an impotent response may turn out to be a matter more suited to determination by legislation.

[75] The application for strike out is dismissed on the grounds that this is a developing area of the law and that it is arguable that the defendants are publishers.

Decision

[76] For the reasons I have given, I find that the plaintiff's causes of action cannot succeed against the defendant. Accordingly, the plaintiff's application is dismissed, and summary judgment is awarded to the defendant against the plaintiff.

[77] As the successful party, the defendant is entitled to costs. As the same points were argued in respect of both applications, there will be one set of costs for both. Costs are to be fixed on a scale 2B basis. The defendant is also entitled to disbursements as fixed by the Registrar.

Associate Judge Abbott